COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Alter v. The University of British Columbia*, 2026 BCCA 253

Date: 20260610
Docket: CA49986

Between:

Noah Alter, Jarryd Jaeger, Cooper Asp and The Free Speech Club Ltd.

Appellants
(Plaintiffs)

And

**The University of British Columbia and
His Majesty the King in Right of British Columbia**

Respondents
(Defendants)

Before: The Honourable Mr. Justice Abrioux
The Honourable Justice Gomery
The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated June 4, 2024 (*Alter v. The University of British Columbia*, 2024 BCSC 961, Vancouver Docket S2210080).

Counsel for the Appellants:	G. Blackett
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Counsel for the Respondent, His Majesty the King in Right of British Columbia:	E.C. Lapper, K.C. S. Ortega K. Kotliarsky
Place and Date of Hearing:	Vancouver, British Columbia April 20, 2026
Place and Date of Judgment:	Vancouver, British Columbia June 10, 2026

Written Reasons by:
The Honourable Justice MacNaughton

Concurred in by:
The Honourable Mr. Justice Abrioux
The Honourable Justice Gomery

Summary:

The appellants appeal a chambers judge's decision striking out their amended notice of civil claim ("ANOCC") under R. 9-5(1) of the Supreme Court Civil Rules. The underlying dispute arose from the University of British Columbia's ("UBC") cancellation of a space-rental contract for an event the appellants planned to hold on campus. The ANOCC named as defendants both His Majesty the King in Right of British Columbia (the "Province") and UBC. The appellants argue that it was necessary to name the Province as a defendant in order to recover Charter damages for breach of their Charter rights. On appeal, UBC conceded for the first time that the question of whether the Charter applied to it, and whether it could be liable for Charter damages, should go to a trial on the merits.

Held: Appeal dismissed. The chambers judge did not err in striking the claim against the Province. The chambers judge's order is varied as necessary to reinstate the Charter claims against UBC, including those for Charter damages.

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Reasons for Judgment of the Honourable Justice MacNaughton:

Introduction

[1] The appellants appeal the decision of a chambers judge striking out their amended notice of civil claim ("ANOCC") as against His Majesty the King in Right of British Columbia (the "Province"). The ANOCC advanced claims against both the Province and the University of British Columbia ("UBC") as a result of UBC's cancellation of a space rental contract that the appellants alleged breached their *Charter* rights.

[2] One of the appellants, the Free Speech Club (the "Club"), entered into a contract with the respondent, UBC, to rent space for the purpose of hosting a speaker on the topic of "ANTIFA violence" (the "Speaking Event"). The three individual appellants were then UBC students, and executives of the Club.

[3] UBC's vice-president of students directed that the Speaking Event be cancelled. According to the ANOCC, the stated reason for the cancellation was "concern about the safety and security of our campus community". UBC's chief risk officer directed staff at Robson Square to return the Club's deposit and the Speaking Event was cancelled (the "Cancellation Decision").

[4] The appellants sued both UBC and the Province. The Province brought an application seeking to strike the claim as against it.

[5] The parties do not dispute that all those involved in the Cancellation Decision were UBC employees and that the Province and its employees were not directly involved in, and had no knowledge of, the Cancellation Decision.

The Claims in the ANOCC

[6] The appellants advance two sets of allegations in the ANOCC: 1) specific allegations with respect to UBC; and 2) common allegations against both UBC and the Province.

[7] The specific allegations with respect to UBC include that:

a. The Cancellation Decision breached the rental contract;

b. UBC engaged in deceptive acts and practices; and

c. UBC was unjustly enriched.

[8] The common allegations against UBC and the Province are that:

a. The *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*], applies to UBC;

b. The Cancellation Decision infringed the plaintiffs' *Charter* rights; and

c. The Province is liable in damages, under s. 24(1) of the *Charter*, flowing from UBC's *Charter*-infringing conduct.

[9] The ANOCC refers to the two ways, explained by the Supreme Court of Canada, in which an entity may

be subject to the *Charter* under s. 32(1):

a. If an entity itself is "government", either by its very nature or by virtue of the degree of governmental control exercised over it; or

b. If an entity is not government, but is implementing a specific government program or policy.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624 [*Eldridge*] at para. 44.

[10] Where an entity is found to be government under the first branch of the s. 32(1) test, then all of its activities will be subject to *Charter* scrutiny. However, if an entity is not itself government, but is found to be performing governmental activities, under the second branch of the test, then only those activities which can be said to be governmental in nature will be subject to *Charter* scrutiny: *Greater Vancouver Transportation Authority v. Canadian Federation of Students—British Columbia Component*, 2009 SCC 31 at paras. 15–16; *Eldridge* at para. 44.

[11] The ANOCC alleges that the *Charter* applies to UBC under both branches of the s. 32(1) test. Under the first branch, the appellants allege that UBC is "government" because of the Province's control over it and that UBC is "government by nature"—a special purpose municipality. Under the second branch of the s. 32(1) test, the ANOCC alleges that the *Charter* applies to UBC insofar as it delivers the specific government programs of university education and student safety.

The Province's Application to Strike

[12] The Province applied under R. 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, to strike the appellants' claims against it on the basis that the ANOCC disclosed no reasonable claim against it and, alternatively, any claim against the Province was statutorily barred by s. 3(2)(d) of the *Crown Proceeding Act*, R.S.B.C. 1996*,* c. 89 [*CPA*] (the "Strike Application").

The Strike Application

[13] On an application to strike under R. 9-5(1), a chambers judge is not required to definitively determine the merits of the cause of action pleaded. Rather, the test applied is whether, assuming the facts pleaded in the ANOCC to be true, it is plain and obvious that the claim is certain to fail: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[14] A court's approach to a R. 9-5(1) application must be generous and err on the side of permitting novel but arguable claims to proceed to trial: *Nevsun Resources v. Araya*, 2020 SCC 5 at paras. 64 and 66; and *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 17 and 21.

[15] In this case, the Province relied on four bases in support of its application for an order striking the ANOCC against it, without leave to amend:

a. The *Charter* does not apply to UBC and, as a result, the claim against the Province was bound to fail as a matter of law;

b. The ANOCC did not allege any conduct by the Province that could establish that the Province directly breached the plaintiff's *Charter* rights;

c. Even if the *Charter* applied to UBC, absent an independent claim against the Province, the plaintiffs' claim against the Province would be barred by s. 3(2)(d) of the *CPA*, which bars proceedings against the Province "for a cause of action that is enforceable against a corporation or other agency owned or controlled by the government"; and

d. Section 24(1) of the *Charter* is a remedial provision that does not provide an independent basis on which to name the Province as a defendant. Even if the *Charter* applied to UBC, the appropriate remedy would be against UBC, not the Province.

[16] In its written argument, the Province specified the paragraphs of the ANOCC that should be deleted if its Strike Application succeeded on the first basis—that the *Charter* did not apply to UBC—and the paragraphs that should be deleted if its Strike Application succeeded on one or more of the remaining three bases.

[17] The specific paragraphs that the Province said should be deleted if the Strike Application succeeded on the first basis, included paragraphs setting out the common *Charter*-based allegations against both UBC and the Province and the relief sought against both entities for those alleged *Charter* violations. If successful on its application to strike, the deletion of those paragraphs from the ANOCC would remove the *Charter*-based claim against both UBC and the Province, leaving only the claims against UBC for alleged breach of contract, deceptive acts and practices, and unjust enrichment. The *Charter*-based claims against UBC and the Province were inextricably linked because the claim against the Province was predicated on the plaintiffs' allegations that the *Charter* applies to UBC.

[18] UBC did not bring its own strike application under R. 9-5(1). Instead, it appeared at the Province's Strike Application and consented to the relief sought by the Province.

The Chambers Judge's Reasons

[19] In reasons indexed at *Alter v. The University of British Columbia*, 2024 BCSC 961 (the "Strike Reasons"), the chambers judge was satisfied the test under R. 9-5(1) had been met and granted an order striking the ANOCC as against the Province. The chambers judge concluded that each of the four bases advanced by the Province was well-founded.

Specifically, he concluded:

a. The *Charter* does not apply to UBC and, as a result, it is plain and obvious that the claim against the Province would fail as a matter of law: at paras. 12–35.

b. The ANNOC does not plead material facts that could establish a breach of the *Charter* by the Province directly: at paras. 36–42.

c. Section 24(1) of the *Charter* does not create a cause of action against the Province. If the *Charter* applied to UBC, then UBC would be liable to the plaintiffs for any *Charter* damages awarded: at paras. 43–59.

d. If the *Charter* applied to UBC, the claim for *Charter* damages would be enforceable against UBC, and s. 3(2)(d) of the *CPA* would apply to insulate the Province from liability: at paras. 60–66.

[20] The chambers judge concluded:

> [67] The application to strike the pleadings against the Province under Rule 9-5(1)(a) is allowed and the claim against the Province is struck. As the defects in the pleadings go to substantive issues rather than formal defects or the manner in which the pleadings are drafted, I would grant the motion to strike without leave to amend the notice of civil claim.

Events Following the Chambers Judge's decision

[21] The appellants filed this appeal from the order on the Strike Application and the parties made costs submissions. UBC sought its costs payable forthwith, and in any event of the cause, on the basis that, given the chambers judge's conclusion, set out in para. 5 of the Strike Reasons that "[t]he substantive claim that the *Charter* applies to the actions of UBC is not legally sustainable in light of the authorities", it was unlikely that the claim would proceed.

[22] The chambers judge awarded UBC its costs but declined to order them payable forthwith and in any event of the cause. He wrote:

> [32] …I would not draw the conclusion that the matter is unlikely to go to trial. There is a separate action for breach of contract that is unaffected by the court's ruling on the [S]trike [A]pplication, and the plaintiffs have filed an appeal and continue to pursue their action against both parties.

[23] Implicit in the chambers judge's statement that the plaintiffs' contractual claim against UBC was not affected by the ruling on the Strike Application is a conclusion that the *Charter*-based claim against UBC was so affected.

[24] In his reasons, the chambers judge did not identify the specific paragraphs of the ANOCC that were to be deleted to give effect to his conclusions.

[25] The parties disagreed about how the Strike Reasons should be reflected in the form of an order. They disagreed about whether the order should provide only that the Strike Application was allowed and the ANOCC struck as against the Province, without leave to amend, as the respondents proposed, or whether it should also identify the specific deletions from the ANOCC that the Province had identified in its submissions on the Strike Application, as the appellants proposed.

[26] To resolve their dispute about the terms of the order, pursuant to R. 13-1(11), the parties appeared before various presiders in the Supreme Court to settle it. First, they appeared before a registrar of the court who settled the order in the respondents' proposed terms—without specific reference to the struck paragraphs.

[27] Dissatisfied with the result, under R. 13-4(14), the parties sought to appear before the chambers judge directly to review the settled order. The chambers judge refused their request.

[28] The appellants then sought a judge's review of the registrar's settled order pursuant to R. 13-1(14), (the "Review Application"). The appellants attached to their Review Application a form of order that, in addition to a general term providing that the ANOCC was struck as against the Province without leave to amend, mirrored the specific ANOCC paragraphs that the Province had said should be deleted if it was successful on the Strike Application.

[29] The Review Application was dismissed by a judge in chambers. A form of order was then entered that provided, in material part, that "[t]he plaintiffs' application under R. 13-1(14) to review and amend the order settled by [the registrar] is dismissed" (the "Review Order").

[30] The Review Order was appealed to this Court. In reasons indexed at *Alter v. The University of British Columbia*, 2025 BCCA 453, the appeal was allowed, and the order of the chambers judge was settled in terms specifying the specific paragraphs in the ANOCC that were struck.

The Issue on Appeal

[31] The sole issue on this appeal is whether the chambers judge erred in striking the appellants' claim against the Province on the basis the ANOCC disclosed no reasonable cause of action against it. Despite the considerable litigation steps taken thus far, this appeal does not deal with the merits of the plaintiffs' case. The parties are still dealing with the pleadings.

The Parties Positions

The Appellants' Position

[32] The appellants raise two grounds of appeal:

a. The chambers judge erred in his application of the jurisprudence relating to s. 32 of the *Charter* in concluding that UBC is neither "government" nor is it operating a government program; and

b. The chambers judge mischaracterized their argument for *Charter* damages as advancing an independent cause of action against the Province. They say the Province's liability for *Charter* damages under s. 24(1) follows from the governmental nature of UBC, but that it is necessary to name the Province as a defendant to secure *Charter* damages.

[33] As for the first argument, the appellants submit the interrelationship between the Province and UBC has changed since the Supreme Court of Canada's decision in *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, and related cases. The appellants submit that, since *Harrison* and other cases such as this Court's decision in *BC Civil Liberties Association v. University of Victoria*, 2016 BCCA 162 [*UVic*], the Province's control over UBC has increased significantly. In the ANOCC that control is described as "routine, regular and highly detailed … through a vast regulatory scheme affecting all aspects of UBC's assets and operations (the "Control Scheme").

[34] The appellants submit the ANOCC pleads that, as a result of the Control Scheme, UBC should be regarded as "government" for *Charter* purposes under the first branch of the test from *Eldridge*. The appellants also say the ANOCC pleads that UBC is government under the second branch of *Eldridge* because UBC is delivering two different, perhaps interrelated, government programs—university education and student safety.

[35] On these bases, the appellants submit their claim that the *Charter* applies to UBC under s. 32 is not bound to fail under the test in R. 9-5(1).

[36] As for the second argument, the appellants submit, as decided by the Supreme Court of Canada in *Vancouver (City) v. Ward*, 2010 SCC 27 [*Ward*], the "state" must be the one to compensate an individual for breach of *their Charter* rights. The appellants interpret the "state" as the Crown, and, as a result, they submit the Province is properly named as a defendant in the ANOCC so that they will be liable for *Charter* damages, if proven, arising from UBC's Cancellation Decision. They also submit that the chambers judge erred in classifying *Charter* damages as being payable by UBC as a governmental entity in light of their argument that it is a private entity carrying out a government function.

[37] During their submissions on appeal, the appellants acknowledged if they are able to proceed with their *Charter* claims against UBC, and can recover *Charter* damages from UBC under s. 24(1), they do not need to proceed with a claim against the Province. However, based on their interpretation of *Ward*, they submit *Charter* damages are only available from the Province.

The Respondents' Positions

UBC's Position

[38] In its factum and during its submissions on appeal, UBC indicated that, insofar as it has an interest in this appeal, it relates to the question of whether the *Charter* applies to it. UBC submits that question should be determined after hearing the evidence at trial, so that the answer is informed by a factual matrix.

[39] While UBC disagrees with the appellants' position it is "government" due to the Control Scheme, it does not dispute the position is arguable. It concedes the ANOCC raises a question of mixed fact and law giving rise to a triable issue. UBC does not dispute that it is arguable that the *Charter* applies to it, if it is found to be delivering government programs.

[40] UBC did not take this position before the chambers judge because it did not file a response to the Province's application to strike. The appellants learned of UBC's position in its response materials on appeal.

The Province's Position

[41] The Province submits that the appellants claim against it is bound to fail for two reasons. First, the *Charter* does not apply to UBC under either branch of the s. 32 test. Second, and alternatively, if the *Charter* does apply to UBC, the appellants have not pleaded any material facts which, if proven, could establish a *Charter* breach it.

[42] Section 24(1) of the *Charter* does not create an independent cause of action against the Province. As a result, the Province submits the chambers judge was correct in concluding the appellants' claim against it is bound to fail and the appeal should be dismissed.

Standard of Review

[43] The chambers judge's decision to strike portions of the ANOCC under R. 9-5(1)(a) is reviewable on a standard of correctness on appeal.

Discussion

[44] In light of UBC's concession that the first issue (regarding the applicability of the *Charter* to UBC) raises a question of mixed fact and law that should go to trial, this appeal turns on the second issue: the liability of the Province for *Charter* damages.

[45] The chambers judge held that *Ward* does not require the federal or provincial Crown (or the "state") to pay *Charter* damages, but contemplates such awards being granted against entities other than the Crown itself: Strike Reasons at para. 45.

[46] The plaintiffs say *Ward* held only the state (or the Crown) can be liable to pay *Charter* damages, even if the *Charter* applies to UBC by operation of s. 32.

[47] I do not agree with the plaintiffs' interpretation of *Ward.* Though *Ward* did not specifically address this question, nothing said by the Supreme Court suggests that only the federal or provincial Crowns may be liable for *Charter* damages on proof of a *Charter* breach.

[48] In para. 1 of *Ward*, Chief Justice McLachlin, writing for the Court, described s. 24(1) as the section of the *Charter* that authorizes the court to grant such remedies to individuals for infringement of their *Charter* rights as it "considers appropriate and just in the circumstances".

[49] At para. 4, McLachlin C.J. explained that courts may award *Charter* damages where the claimant:

a. establishes that their *Charter* right has been breached; and

b. demonstrates that damages are a just and appropriate remedy, considering whether they would fulfill one or more of the following functions:

i. compensation;

ii. vindication of *Charter* rights; and

iii. deterrence of future breaches.

[50] Chief Justice McLachlin does not say *Charter* damages are only available against a government entity.

[51] At the third step, the state has the opportunity to assert that countervailing factors defeat the functional considerations supporting a damage award and render damages inappropriate or unjust.

[52] Courts are given broad discretion to craft a remedy for a violation of an individual's *Charter* rights. It is fettered only to the extent the remedy must be appropriate and just depending on the circumstances of the particular case. The discretion given to courts should not be reduced or cast in a "strait-jacket of judicially prescribed conditions": *Ward* at paras. 17–19.

[53] The Court held that *Charter* damages should not be awarded against the individual actors involved in the breach: at para. 22. For instance, individual police officers who breach *Charter* rights in the course of their duties should not be held liable for *Charter* damages.

[54] Although the trial judge in *Ward* awarded *Charter* damages against both the Province and the City of Vancouver, the Supreme Court only upheld the damage award against the Province (arising from the actions of corrections officers employed by the Province). It reversed the damage award against the City (arising from the actions of municipal police officers): at para. 79.

[55] The Court concluded that a declaration of the breach against the City adequately served the need for vindication and deterrence for the City's police officers' *Charter*-infringing conduct (the seizure of the claimant's car). The Court said, because the claimant did not suffer any injury from these acts, the object of compensation was not engaged and thus *Charter* damages were not required: at paras. 74–78.

[56] It follows logically that if the object of compensation had been engaged in *Ward*, the City may have been liable for *Charter* damages.

[57] Applying *Ward*, courts have awarded *Charter* damages against entities other than the Crown in cases in which the Crown was not a party. For example:

a. in *Mason v. Turner*, 2016 BCCA 58 at paras. 9, 16, this Court upheld a *Charter* damages award against the City of Nelson for the actions of a police constable; and

b. in *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255 at para. 149, the Ontario Court of Appeal ordered the Toronto Police Services Board to pay *Charter* damages for a breach of Mr. Stewart's *Charter* rights.

[58] As an alternative and perhaps narrower argument, the appellants submit the federal or p must pay damages for an entity's *Charter* breaches if that entity is subject to the *Charter* only under the second branch of the s. 32(1) test, i.e., the entity is private but is delivering a specific government activity or program.

[59] The Supreme Court has clarified that where the *Charter* applies to an entity on this second branch, then it applies to the entity's performance of that government activity or program but not to its non-governmental or private programs and activities: *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 at paras. 65–68; *Eldridge* at paras. 42–44.

[60] Put otherwise, to the extent an entity performs a government activity or program, it is considered "government" within the meaning of the *Charter*. Consequently, it is responsible as such for those acts or that program. The Court in *Eldridge* opined:

> [42] It seems clear, then, that a private entity may be subject to the *Charter* in respect of certain inherently governmental actions… [T]he *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it.

[61] This issue has been conclusively resolved in Ontario, where courts have consistently held that independently-governed Children's Aid Societies are subject to the *Charter* under the second branch of the s. 32 test, and are responsible for the damage flowing from their *Charter* breaches, while the Province is not: *C.R. v. Her Majesty the Queen in Right of Ontario*, 2019 ONSC 2734, at para. 110, aff'd *J.B. v. Ontario (Child and Youth Services)*, 2020 ONCA 198.

[62] In sum, when the Crown delegates responsibility for the delivery of a program or activity to a private entity, that entity's actions must be exercised in accordance with the *Charter* and the *Charter* is enforceable directly against them. I agree with the chambers judge's comment that it would be anomalous if UBC was bound by the *Charter* in the delivery of its programs and activities but immune from *Charter* damages: Strike Reasons at para. 53. In light of UBC's concession that there is an arguable case that the *Charter* applies to UBC under either branch of the s. 32 test, then UBC should be liable for any *Charter* damages that flow from any proven breach of the *Charter*.

[63] I see no reason why it would be necessary to include the Province as a defendant in the plaintiffs' action solely for the purpose of entitling the plaintiffs to a damage award against the Province. The chambers judge did not err in concluding that the claim against the Province is bound to fail. As a result, the claim against the Province remains struck and I would dismiss the appeal on that basis.

[64] As the trial judge's order struck out certain specific paragraphs that included allegations against UBC, I would reinstate those paragraphs. In particular, I would reinstate

the following paragraphs:

Part 1: Statement of Facts:

a. Paragraph 5, insofar as it describes the Province's assignment of a Minister to oversee the governments delivery of the program of university education;

b. Paragraph 7;

c. Paragraphs 11–14;

d. Paragraphs 16–25;

e. Paragraph 28;

f. Paragraphs 66–73;

g. Paragraph 74(c); and

h. Paragraph 82(b).

Part 2: Relief Sought

a. Paragraphs 4(a)(iii)–(v); 5(a)(iv)–(v); 6(a)(iv)–vi; and7(a)(iv)–(vi); and

b. Paragraphs 4(6); 5(b); 6(b) and 7(b).

Part 3: Legal Basis

a. Paragraphs 1(f)–(i).

Relief Sought:

a. Paragraphs 16–25.

Disposition

[65] Apart from varying the order as set out above, I would dismiss the appeal.

Costs

[66] The Province is entitled to its costs on the appeal.

[67] UBC appeared before the chambers judge and consented to the Province's application. Not all of the claims against UBC were struck but the ones that alleged it was government under either branch of the s. 32 test were. Now on appeal, UBC says that it is not disputing that those claims are arguable, i.e., not bound to fail. UBC indicated that it had changed its position after this Court's decision settling the terms of the chambers judge's

order. I find that position difficult to fathom. In my view, had UBC taken its current position earlier, this appeal might well have been unnecessary.

[68] I would award the appellants their costs as against UBC. As set out, the appellants have been successful in reviving their *Charter* claim as against UBC and, to do so, it was necessary for them to bring this appeal.

"The Honourable Justice MacNaughton"

I AGREE:

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice Gomery"