No. S-244694
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

VANCOUVER ISLAND UNIVERSITY

PLAINTIFF

AND:

SARA KISHAWI, ZENA KISHAWI, ROSE ABUDAHI, FELICITY HOCKING-STEEL, LESLEY WIMMER, SALMA FARGALAH, JOHN DOE, JANE DOE, and ALL UNKNOWN PERSONS OPERATING AS "VIU PALESTINIAN SOLIDARITY ENCAMPMENT"

DEFENDANTS

WRITTEN SUBMISSIONS OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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DATE, TIME, PLACE OF APPLICATION:	August 8-9, 2024
Time Estimate:	2 days
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PART I – INTRODUCTION

1. By order made July 31, 2024, this Court granted BCCLA leave to intervene in the Plaintiff's injunction application filed July 24, 2024 on terms including the right to file written submissions not exceeding 10 pages. This Court further ordered that interveners avoid overlap in their submissions and raise no new issues.

2. BCCLA intervenes to submit that: *Charter* values cannot bolster restrictive university policies to justify injunctive relief; and the rights to free expression and assembly should develop the common law test for injunctions.

3. BCCLA will not address the question of the *Charter*'s applicability to the Plaintiff, which is the subject of submissions from other parties and interveners.

PART II – ISSUES

4. BCCLA raises the following two issues:

   (a) What role should *Charter* values play in the Court's assessment of the injunctive relief sought?

   (b) What should be the impact of the *Charter* rights to freedom of expression and assembly under sections 2(b) and 2(c) on the applicable test for an injunction?

PART III – LAW

The role of *Charter* values

5. The Ontario Superior Court's approach to *Charter* values in the *U of T* decision should not be adopted by this Court, as it does not serve a function recognized at law.

Charter *values have restricted functions at law*

6. *Charter* values are those values that underpin each right and give it meaning. Their entrenchment in the supreme law of Canada means that the purpose of these rights is important for Canadian society as a whole and must be reflected in the decision-making process of the various branches of government.[1]

[1] *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at para. 75 [*Commission scolaire*].

7. *Charter* values have distinct and recognized functions at law, depending on the context in which they are engaged: in the development of the common law, the interpretation of statutes, the reasoning of administrative decision-makers, and the exercise of judicial discretion—including interlocutory injunctions.[2]

8. Where common law rules, which ensure the protection of property interests and contractual relationships, are inconsistent with *Charter* values, these values may be considered using a flexible balancing approach. In that balance, *Charter* values should be weighed against the principles which underlie the common law and provide guidelines for any modification to the common law the court feels is necessary. The party alleging an inconsistency between the common law and the *Charter* bears the onus of proving that the common law fails to comply with *Charter* values and that, when these values are balanced, the common law should be modified.[3] These submissions will return to this balancing exercise in the second section.

9. *Charter* values must be deployed with care. Unlike *Charter* rights, such values are not taken from a canonical text. There is no methodology to guide the degree of abstraction at which they are formulated, or to resolve competing claims of priority. Weighing values against rights is a subjective exercise that lends itself to conclusory reasoning, and this lack of clarity is an impediment to applying a structured and consistent approach to adjudicating *Charter* claims.[4]

Charter *values cannot bolster restrictive policies*

10. In *U of T*, the Ontario Superior Court applied *Charter* values in its analysis of that application for injunctive relief to remove a protest encampment at that university.[5] In particular, the Court held it was more appropriate to analyze the relief sought in light of the university's internal policies and whether they were being interpreted in a manner consistent with *Charter* values. That assessment formed part of the balance of convenience.[6]

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[2] *Commission scolaire, supra* note 1 at para. 76; *Vancouver Sun (Re)*, 2004 SCC 43 at para. 31 [*Vancouver Sun*]; *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at para. 72 [*Vancouver Aquarium*].
[3] *RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 at paras. 21-22 [*Pepsi-Cola*].
[4] *R. v. J.J.*, 2022 SCC 28, at para 387 (Rowe J., dissenting in part).
[5] *University of Toronto v. Doe et al.*, 2024 ONSC 3755 at paras. 16-17 [*U of T*],
[6] *U of T, supra* note 5 at paras. 115, 170-193.

11. This Court should refrain from deploying *Charter* values in a similar fashion as the Ontario Superior Court. Separate and apart from any issues with the evidence (or lack thereof) in relation to the content of the policies themselves, the application of *Charter* values in this manner does not fall within one of the recognized functions established in the jurisprudence: developing the common law, assisting statutory interpretation, guiding administrative decision-making, or the exercise of judicial discretion.

12. In *U of T*, the Court went beyond engaging *Charter* values in the exercise of its discretion, and held that the University's policies were "directionally consistent with *Charter* values".[7] Beyond begging the question of how university policies restricting speech are consistent with the values underlying free expression, this reasoning manifests Justice Rowe's caution above. It lacks a structured and consistent approach to adjudicating *Charter* claims, and embodies a subjective exercise at risk of conclusory reasoning.

13. A distinct regulatory framework, such as a university's policies, cannot simply be substituted for the applicable *Charter* analysis on the basis that that it is "directionally consistent" with *Charter* values.[8]

14. Further, even the Plaintiff has rejected its own reliance on the University's policies on this application. Though the University's policies are expressly incorporated into the order sought at Part 1, paragraph 3 of the Plaintiff's application, the Plaintiff has made submissions to this Court that this order is "superfluous", and would not serve to prohibit protests that contravene its policies.[9]

15. Given the Plaintiff's position that the reference to its policies in the relief sought is unnecessary and does not serve to create any prohibition, it would not be appropriate for this Court to examine those policies in relation to *Charter* values in its analysis. *Charter* values cannot transform restrictive policies into a justification for injunctive relief.

The impact of the *Charter* on the test for injunctive relief

16. The order sought by the Plaintiff engages not only private property rights at common law and under the *Trespass Act*, but is also an injunction which limits the *Charter*-protected

[7] *U of T, supra* note 5 at para.193.
[8] *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22 at paras. 91-92.
[9] Plaintiff's application response filed July 30, 2024 at paras. 43, 52.

rights to free expression and assembly, as both Defendants and other interveners submit.

17. But even in a private dispute that does not directly implicate the *Charter*, judicial discretion must be exercised in accordance with the *Charter* and its principles, as fundamental elements of the Canadian legal order. That is the case whether the discretion arises under the common law, is authorized by statute, or is based on the rules of court.[10]

18. As set out above, rules of the common law are to be scrutinized closely where their underlying principles are out of step with the values enshrined by the *Charter*. Where it is possible to change the common law rule to make it consistent with *Charter* values, without upsetting the balance between judicial and legislative action, courts should do so.[11]

19. BCCLA submits that:

    (a) The common law analysis for injunctive relief under the *RJR-MacDonald* test is consistently modified where free expression rights are directly engaged;

    (b) The common law test for an interlocutory injunction that restrains free expression should be developed to include assessments of necessity and proportionality to reflect the constitutional requirements for restricting *Charter* rights only where reasonable and demonstrably necessary in a free and democratic society; and

    (c) Alternatively, the balance of convenience must incorporate rigorous examination of the *Charter* rights and interests at stake.

Exceptions to the* RJR-Macdonald *test reflect the importance of free expression

20. The prevailing test for injunctive relief in most contexts is the three-part analysis set out in *RJR-MacDonald*, adopting the methodology applied in *American Cyanamid Co. v. Ethicon Ltd.,* [1975] AC 396 (HL).[12] But Canadian courts have consistently declined to apply this unmodified analysis where free expression rights are directly engaged.

21. The *RJR-MacDonald* test requires an applicant for an interlocutory injunction to satisfy three elements: (1) some assessment of the merits, ranging from a serious question to be tried to a strong *prima facie* case standard; (2) irreparable harm if an injunction is refused;

[10] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 [*Dagenais*] at 875; *Pepsi-Cola*, *supra* note 3 at paras. 18 and 20; *Vancouver Sun, supra* note 2.
[11] *Dagenais, supra* note 10, citing *R. v. Salituro*, [1991] 3 S.C.R. 654 at 675.
[12] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR-MacDonald*].

and (3) an assessment of the balance of convenience, to identify the party which would suffer greater harm from the granting or refusal of the injunctive relief sought, pending a decision on the merits. However, this is only a general framework, and is subject to exceptions based on the applicable context.[13]

22. According to the Supreme Court of Canada, in matters of pure speech, this test is inappropriate. The application of the irreparable harm and balance of convenience criteria grievously undermine the right to free expression enshrined in s. 2(b) of the *Charter*. Both requirements are challenging if not practically impossible for the person making the expression to satisfy because their interest in speech is unlikely to have a tangible or measurable interest other than the expression itself. For instance, prior restraint of allegedly defamatory material will only be justified in the "rarest and clearest of cases".[14]

23. Another exception is found in the context of restrictions on court openness – again, because of the central importance of free expression. Courts have held that the centrality of this principle underlies the strong presumption (albeit one that is rebuttable) in favour of court openness. This has led to the development of a distinct test for discretionary limits on court openness.

24. In *Dagenais v Canadian Broadcasting Corp.* [1994] 3 SCR 835, the Supreme Court of Canada rejected the common law rule giving judges a discretion to order publication bans on trial fairness grounds, because such bans infringe the right to freedom of expression protected by s. 2(b) of the Charter. The Court found it "necessary to reformulate the common law rule…in a manner that reflects the principles of the *Charter*", particularly freedom of expression. The new formulation required that publication bans only be ordered when (a) they are necessary to prevent trial unfairness, and (b) the salutary effects of the publication ban outweigh the deleterious effects to free expression.[15]

25. *Dagenais* was expanded in *R v Mentuck,* 2001 SCC 76, to encompass the administration of justice generally. But the necessity for injunctive relief, in the sense of there being no reasonable alternative, remained the first step of the test. The Court held that the *Dagenais* approach "incorporates the essence of s. 1 of the *Charter* and the *Oakes* test", thereby "ensuring that the judicial discretion to order publication bans is subject to no lower

[13] *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at paras. 12-13.
[14] *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 S.C.R. 626 at paras. 47, 49.
[15] *Dagenais, supra* note 10 at 878, 880.

a standard of compliance with the *Charter* than legislative enactment."[16]

26. This test was most recently reaffirmed and restated by the Supreme Court of Canada in *Sherman Estate v. Donovan,* 2021 SCC 25, where the two-stage analysis from *Dagenais/Mentuck* was expressed based on three requirements: (1) a serious risk to an important public interest; (2) necessity; and (3) proportionality. The Court again confirmed that judicial discretion must be structured to protect the open court principle, constitutionalized under the right to freedom of expression, and that the applicable analysis was developed by analogy to the *Oakes* test, which courts use to ensure that legislative limits to *Charter* rights are reasonable and demonstrably justified in a free and democratic society.[17]

27. Another area of injunction law revised by the Supreme Court of Canada because of freedom of expression is secondary picketing. The common law of secondary picketing was unsettled and inconsistent across Canada, with some jurisdictions treating it as unlawful *per se*. In *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, the court settled the law by invoking the "fundamental Canadian value" of freedom of expression. Picketing was expressive activity protected by s. 2(b), and precedents treating secondary picketing as unlawful *per se* were inconsistent with this. The common law therefore needed reform.[18]

28. The Supreme Court held that, "to be true to the values expressed in the *Charter* our statement of the common law must start with the proposition that free expression is protected unless its curtailment is justified." The restated common law of secondary picketing was founded on the principle that injunctions limiting free expression must be shown to be reasonable and demonstrably necessary in a free and democratic society.[19]

The importance of free expression and peaceful assembly rights

29. The protection of free expression is based on the fundamental values of promoting truth-seeking, fostering participation in social and political decision-making, and promoting self-fulfillment and human flourishing.[20]

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[16] *R. v. Mentuck,* 2001 SCC 76 at para. 27 [*Mentuck*].
[17] *Sherman Estate v. Donovan,* 2021 SCC 25 at paras. 38-39 [*Sherman Estate*].
[18] *Pepsi-Cola*, *supra* note 3 at paras. 18-22.
[19] *Pepsi-Cola*, *supra* note 3 at paras. 67, 36-37.
[20] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 976.

30. Freedom of expression is not, however, solely a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social, and educational institutions of western society.[21]

31. Like freedom of expression, freedom of assembly protects rights fundamental to Canada's liberal democratic society.[22] More specifically, the British Columbia Supreme Court has held that s. 2(c) serves to protect the freedom of everyone to be in, access, use, and enjoy public spaces for non-violent activities and purposes.[23]

32. Free expression is valued above all as being instrumental to democracy. The connection between freedom of expression and the political process is the linchpin of the s. 2(b) guarantee – not only because free expression allows the best policies to be chosen from a wide array of options, but also because it helps to ensure that participation in the political process is open to all. Such open participation is based on the notion that all persons are equally deserving of respect and dignity, and the state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.[24]

The* RJR-MacDonald *test should be developed to reflect* Charter *rights

33. BCCLA submits that the common law test for the injunctive relief sought in this case should reflect the critical importance of the *Charter* rights to free expression and assembly in the Canadian constitutional order and Canada's liberal democratic society.

34. This development of the common law is required because the traditional consideration of *Charter* rights at the balance of convenience stage is inadequate, as numerous and varied factors jostle for the court's attention at this stage of the analysis. In *American Cyanimid*, Lord Diplock cautioned against attempting to even list all such potential considerations, let alone suggesting the relative weight to be attached to them.[25]

35. That methodological ambiguity stands in stark contrast with the requirements imposed by the *Charter*, and represents an inconsistency which should be addressed by a development in the common law. The Supreme Court has been unambiguous – court-

[21] *RWDSU v. Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573 at 583.
[22] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para 48.
[23] *Abbotsford (City) v. Shantz*, 2015 BCSC 1909 at para 162.
[24] *R. v. Keegstra* at 763-764.
[25] *RJR-MacDonald*, *supra* note 12 at 342-343.

imposed limitations on constitutionally protected forms of expression must be exceptional, and restrictions imposed by common law must reflect the constitutional requirements:

> [37] The same applies in interpreting the common law to reflect the *Charter*. The starting point must be freedom of expression. Limitations are permitted, but only to the extent that this is shown to be reasonable and demonstrably necessary in a free and democratic society.

36. Where expression is unconnected to some other commercial purpose or activity, the Supreme Court of Canada has recognized that it is "virtually impossible" to use the second and third stages of the *RJR-MacDonald* analysis without grievously undermining the right to free expression, because the speaker will rarely have a tangible or measurable interest other than the expression itself, whereas the party seeking the injunction will almost always have such an interest.[26] The same can be said for the right to peaceful assembly.

37. As in *Pepsi-Cola*, *Dagenais*, *Mentuck*, and *Sherman Estate*, where judicial discretion to grant injunctive relief conflicts with the constitutional right to free expression, the common law analysis should also invoke *Oakes,* not only *RJR-MacDonald*. The underlying principle is that judicial discretion in such contexts should be subject to no lower a standard of compliance with the *Charter* than legislative enactment.[27]

38. This Court should adopt a framework which balances the competing interests of *Charter*-protected rights to free expression and peaceful assembly with private property rights, by incorporating the following after the first two prongs of the *RJR-MacDonald* test:

(a) The order sought is necessary, in the sense that:

  (i) there are no reasonable alternative means of relief;

  (ii) the order sought will be effective; and

  (iii) the order sought is no broader than necessary to achieve its objectives; and

(b) As a matter of proportionality, the benefits of the order outweigh its negative effects, based on:

  (i) The connection between the target(s) of the order and the defendant(s);

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[26] *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 SCR 626, at para 47.
[27] *Mentuck, supra* note 16 at para. 27; *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 at para. 45.

(ii) The costs and consequences of complying with the proposed order;

(iii) The impact to the plaintiff if an order were not granted; and

(iv) The impact on the rights protected under the *Charter*.

39. This does not represent a far-reaching change to the common law, but a natural evolution based on existing precedents.

40. The necessity requirement reflects how the *Oakes* analysis has been adapted in other contexts restricting free expression. In addition, courts already recognize that the exercise of injunction discretion must be undertaken with restraint and caution, expressed in terms no broader than necessary to restrain the specific unlawful conduct.[28]

41. The necessity requirement is also consistent with how Canadian courts have approached requests for other extraordinary relief that impacts third parties, such as *Norwich* orders.[29]

42. It is a venerable tenet of Canadian law that courts will be reluctant to adversely affect the rights of third parties by injunction: "Where the injunction sought will injuriously affect the rights of a person or body not before the court it will not ordinarily, and without special circumstances, be granted".[30] This concern is heightened where constitutional rights to free expression and peaceful assembly are engaged.

43. The proportionality analysis represents a modified, and more rigorous, version of the balance of convenience which traditionally occupies the final stage of the *RJR-MacDonald* test—one which gives due deference to the rights protected by the *Charter*.

44. In this case, the impact of the orders sought on the rights to free expression and assembly protected by the *Charter* will depend on:

(a) the scope of the order sought;

(b) the potential for capturing legitimate protest activities;

(c) the potential for a disproportionate chilling effect on legitimate expression and

[28] *Great Canadian Railtour Co v. Teamsters Local Union No 31*, 2011 BCSC 973 at para. 8; *RJR-MacDonald, supra* note 12 at 338.
[29] *GEA Group AG v. Flex-N-Gate Corporation*, 2009 ONCA 619, at paras. 70, 75-77.
[30] *Matthew v. Guardian Assurance Co.* (1918), 58 S.C.R. 47 at 61; *Ivy Lounge West Georgia Limited Partnership v. TA F&B Limited Partnership*, 2021 BCSC 997 at para. 41.

assembly in protest on the University's grounds; and

(d) the degree of connection between the protest activities sought to be restrained and core values underlying the rights to free expression and freedom of assembly.

45. Developing the common law in this way will ensure that injunctions which engage *Charter*-protected rights to free expression and assembly properly balance competing interests.

Alternatively: how* Charter *considerations apply in the balance of convenience

46. In the alternative, this Court should ensure that *Charter* rights and values are given their due consideration in the *RJR-MacDonald* analysis, under the balance of convenience stage. At a minimum, that should incorporate the impact on the *Charter* rights and values found by the Court to be engaged on these facts.

47. Traditionally, courts have preferred the *RJR-MacDonald* test over less restrictive analyses based on trespass or statutory injunctive relief where *Charter* issues are raised, and will engage *Charter* values even where *Charter* rights are not infringed.[31]

48. Echoing Lord Diplock's caution, *Charter* protections are special factors that require careful consideration in the particular circumstances of each case.[32]

49. BCCLA submits that consideration should specifically involve an assessment of those factors set out above relating to the necessity and proportionality of the injunction order sought. The Court should weigh heavily whether the rights to be restrained engage public dialogue and debate that is owed core constitutional protection in Canada's liberal democratic society.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 7th OF AUGUST, 2024.

Kyle Thompson
Counsel for BCCLA

[31] *British Columbia v. Adamson*, 2016 BCSC 584 at paras. 23-35; *Vancouver Aquarium, supra* note 2 at paras. 71-83.
[32] *RJR-MacDonald*, *supra* note 12 at 343.

LIST OF AUTHORITIES

1.	*Abbotsford (City) v. Shantz*, 2015 BCSC 1909
2.	*British Columbia v. Adamson,* 2016 BCSC 584
3.	*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 SCR 626
4.	*Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31
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17.	*RWDSU v. Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573
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