No. S-102061
Nanaimo Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT,* R.S.B.C. 1996, C. 241

BETWEEN:

SARA KISHAWI

Petitioner

AND:

VANCOUVER ISLAND UNIVERSITY

Respondent

AND:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA FEDERATION OF STUDENTS

Intervenors

Re: March 3, 2025, Decision of the Vice-President of Student Affairs to uphold the October 4, 2024, suspension of Sara Kishawi

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ARGUMENT OF THE INTERVENOR BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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Date and Time of Hearing:	September 29, 2025, 9:45 am
Time Estimate:	2 days
Place of Application:	Nanaimo BC
To be heard before:	Judge
Submissions provided by:	Karen Segal, counsel to the British Columbia Civil Liberties Association

I. OVERVIEW

1. Public education is a government program. Universities are the agent through which the government implements this program. When a university is determining the conditions of access to this public program, it must comply with the *Charter*. This includes determining whether it is appropriate to suspend or expel students (i.e. deny them access to education) or deny them a transcript or degree.

2. The *Charter* right to freedom of expression protects the right to make political statements about global events and human rights, specifically, to criticize Israel's actions in Gaza and speak out for Palestinian human rights. That right can be exercised in a manner that is inconvenient or disruptive, so long as doing so does not undermine the values of free expression.

3. Human rights advocacy is at the very core of the free expression guarantee and is crucial to the realization of the *Charter* equality guarantee. This must be considered when determining whether the *Charter* is engaged and properly balanced in this case.

4. Universities are bastions of free thought, where intellectual rigour and the exchange of ideas advance the search for truth. The long tradition of campus protests has led to many significant changes in values and in policy worldwide. It serves the interests of Canadians and of the Constitution to protect students' rights to engage in these expressive activities.

II. FACTS

5. The BCCLA relies on the facts set out in the Petitioner's argument and adds the following facts.

6. Ms. Kishawi is Palestinian Canadian. She was raised in Gaza City in Northern Gaza. She emigrated to Canada in 2011.

Affidavit #1 of Sara Kishawi affirmed April 14, 2025 ("Kishawi Affidavit 1").

7. The allegations that the investigator, Mr. Boorne, concluded were substantiated form the factual basis for VIU's decision to suspend Ms. Kishawi. Those allegations are as follows:

    a. Allegation 2(b) asserts that Ms. Kishawi refused the requests of authorized employees to leave a publicly accessible patio, after a security guard decided to close the patio. The guard closed the patio because he observed Ms. Kishawi and others on the patio holding a banner, which he believed they intended to hang. Ms. Kishawi refused to leave the patio in order to hang a banner stating, "Nakba, Ethnic Cleansing of Palestine since 1948".

    b. Allegation 3 asserts that Ms. Kishawi accessed a roof area to secure that same banner.

c. Allegation 6(i) asserts that Ms. Kishawi disrupted the learning environment of the Centre for International Education through a sit-in and chants. A photograph of this incident shows students wearing Keffiyehs – a traditional Palestinian scarf which has become a symbol of support for Palestinian rights – and affixing a sign that states "This is Palestine" to a world map. While the report does not identify what words the students chanted, there is reference to the students in this protest damaging an Israeli flag.

d. Allegation 7 asserts that Ms. Kishawi vandalised areas of the University by affixing signs or writing messages that stated, "Head of HR is racist" and "your boss is racist."

Kishawi Affidavit 1, Exhibit 1, pages 19, 26, 33, 24, 40.

8. 20-25 people participated in the incident giving rise to Allegation 6. The University only disciplined Ms. Kishawi and one other Palestinian student.

Kishawi Affidavit 1, para 24.

9. As a result of the suspension, Ms. Kishawi was not eligible to enroll in any new courses. Presumably, had Ms. Kishawi not already acquired the requisite credits to complete her degree at the time of her suspension, she would have been prevented from obtaining her degree for a period of two years.

10. Ms. Kishawi has not received her transcript

Affidavit #2 of Sara Kishawi affirmed August 26, 2025, para 2.

III. ARGUMENT

A. The *Charter* applies to university decisions that impact students' access to education

11. The *Charter* applies to non-governmental entities when those entities are implementing or acting in furtherance of a specific government programs or policies.

Eldridge v British Columbia, [1997] 3 SCR 624 at paras 36, 43.

12. To determine when a non-government actor is implementing a government program, the court must investigate the quality of the act at issue, rather than the quality of the actor. "If the act is truly "governmental" in nature -- for example, the implementation of a specific statutory scheme or a government program -- the entity performing it will be subject to review under the *Charter* in respect of that act."

Eldridge, at para 44.

i. Publicly funded university education is a government program

13. Public university education is a governmental program. Universities are the vehicle through which this program is implemented. When delivering public education, including determining whether students are eligible to receive education or receive a degree, universities are subject to the *Charter*.

14. Public education is "inherently a governmental function", rooted in the *Constitution Act, 1867* and the B.C. *University Act*. The Supreme Court of Canada confirmed this in *York,* referring to public education's "unique constitutional quality, as exemplified by s. 93 of the *Constitution Act, 1867* and by s. 23 of the *Charter*." While section 23 of the *Charter* applies only to primary and secondary schools, section 93 of the *Constitution Act* applies to education generally, including post-secondary education. The principle therefore applies equally to post-secondary education.[1]

York Region District School Board v Elementary Teachers' Federation of Ontario, 2024 SCC 22 at para 81.

15. This is further elucidated by the B.C. *University Act,* which governs publicly funded universities in British Columbia. The *Act* gives government the authority to determine which corporations may be universities and confers on those universities the exclusive authority to provide university education and confer degrees. It sets out the mandatory duties of those universities: it mandates that universities establish and maintain courses of instruction, provide instruction in all branches of knowledge, and provide a program of continuing education in all academic and cultural fields throughout British Columbia. It also establishes various rules and requirements that universities must follow. The government must also approve any new programs to be provided at a university.

University Act, RSBC 1996, c 468, ss 1, 2, 3, 47(2), 48(2), 67.

16. Through this *Act*, the government has created a program of public university education and determined how it will be implemented. The *University Act* delegates the authority and responsibility for this program to designated universities.

17. Governmental oversight is integrated into the legislative scheme. For example, section 49(1) requires universities to provide the minister with reports and information that the minister

[1] In *York,* the Court concluded that school boards are part of government and meet the first branch of the *Eldridge* test. The school board did not meet the second branch of the *Eldridge* test, because school boards are not private entities. However, when considering the second branch, the Court stated that public education is an inherently governmental function, implying that the school board may have met the second branch if it were a private entity (paras 80-82).

"considers necessary to carry out the minister's responsibilities in relation to universities". The university must also be non-sectarian and non-political. The Alberta Court of Appeal concluded in *UAlberta Pro-Life v Governors of University of Alberta* that the commitment to non-sectarianism in the relevant university legislation showed that the university has been "committed by government policy …to a broad scope of education with surveillance by the Crown." This government involvement, while not determinative, is indicative of government's intention to use universities to implement one of its policy objectives.

University Act, s 66.
UAlberta Pro-Life v Governors of University of Alberta 2020 ABCA 1, para 109.

18. VIU is a special purpose university, which implements a specific type of public education: education to certain regions. Under the *University Act,* the Lieutenant Governor in Council can specify the geographic area a special purpose university must serve and the programs it must offer. VIU is required by law to provide education to Nanaimo and other nearby regions. Providing post-secondary university education in these areas is a specific government program, which VIU implements on the government's behalf.

University Act, section 71(3).
University Act, Designation of Special Purpose Teaching Universities Regulation, BC Reg 220/2008, s 3.

19. In addition, universities may not provide university education without statutory authority. A private body exercising statutory authority relevant to a government program must do so in a *Charter* compliant manner. Institutions may not provide university education or university degrees without statutory authority. When so providing, they must comply with the *Charter.*

Eldridge at para 21.

20. The provision of educational services and courses of instruction is therefore a government program delegated to the universities through statute. Just as in the seminal case of *Eldridge,* universities "are merely the vehicles the legislature has chosen to deliver this program."

Eldridge at para 50.

ii. There is a direct connection between determining access to coursework and the government program of public education

21. This does not mean that the *Charter* applies to all decisions or actions of the University. The *Charter* applies where there is a direct and precisely-defined connection between the government program or policy and the impugned conduct. In this case, the issue is whether the *Charter* applies

to University decisions to prevent students from accessing the program of education, and possibly to deny them their degrees. This has a direct and precise a relationship to the government program in issue – it goes to the very heart of the program.

Eldridge, at para 51.

22. In *Eldridge,* the Court considered whether a hospital was required to comply with the *Charter* when providing health care services to the public. Specifically, it considered whether the hospital breached section 15 of the *Charter* by failing to provide translation services for deaf patients. The Court wrote that, for the *Charter* to apply to a private institution responsible for a government program, there must be a direct and precise connection between the impugned conduct and the government program.

23. The Court distinguished the provision of medical services from internal matters such as a mandatory retirement policy, which the Court already found in *Stoffman* was not subject to the *Charter*. The mandatory retirement policy did not reflect any government policy. In contrast, the relevant legislation before the Court in *Eldridge* required hospitals to provide the health services set out in the legislation. Therefore, while hospitals may be autonomous in their day-to-day operations, they act as agents for the government when providing the specific medical services set out in the legislation.

Eldridge, at para 49, 51.

24. Turning to the alleged breach, the Court found that there was a "direct and precisely-defined" connection between a specific government policy and the hospital's impugned conduct of failing to provide sign language translation services:

> The alleged discrimination -- the failure to provide sign language interpretation -- is intimately connected to the medical service delivery system instituted by the legislation. The provision of these services is not simply a matter of internal hospital management; it is an expression of government policy.

Eldrige, at para 50.

25. The same analysis applies to this case. The *Act* regulates who may act as a university and once that body is a university, sets out the specific requirements for that body, including providing instruction and a program of continuing education. The government oversees the programs that universities may offer and ensures that university education is provided in certain areas. Thus,

while universities may be autonomous in their day-to-day operations, they act as agents for the government when providing educational programs as set out in the legislation. In determining who can access coursework and degrees, the University is implementing a public program and must comply with the *Charter*.

26. There is therefore a "direct and . . . precisely-defined connection" between VIU's conduct denying Ms. Kishawi the right to enroll in classes and the government program of providing university education. Just as in *Eldridge,* the alleged *Charter* breach – refusing a student access to classes and because of her expressive activity – has a precise link to the program of university education instituted by the legislation. The result is that the University cannot exclude Ms. Kishawi from her course of study because of *Charter*-protected expressive activity without justification.

27. The Respondent claims that private institutions frequently suspend or expel their members. That is irrelevant. The question is whether, in suspending or expelling members, the institution is implementing a public program. Further, here, the facts are more analogous to a hospital denying services to a member of the public than a private club expelling a member.

Written Submissions of the Respondent, para 165.

28. If the *Charter* does not apply to university decision making concerning who may access educational services, a myriad of consequences would flow that would violate the basic principles of democracy. For example, a university could suspend or expel a student for raising their hand in classroom and disagreeing with a classmate or professor. A university could suspend students who become pregnant or transition their gender. It could designate certain classes for Christians only. While the decision would be subject to the B.C. *Human Rights Code* or a reasonableness review, neither provide absolute protection for human rights and freedoms. What is considered reasonable can change over time, and provincial legislation and can be repealed or changed. Only the constitution guarantees protection for these rights.

29. This outcome cannot stand in light of the case law. The government may not implement a program of public education, delegate responsibility for that program to universities, and avoid its responsibility to ensure those programs comply with the *Charter*.

Eldridge at para 51.

iii. BCCLA's proposed approach is consistent with established law

30. The Respondent notes that in other cases, courts rejected claims that universities are bound by the *Charter*. As the SCC has made clear, in the case of government programs, the court must assess the nature of the act, not the actor. Prior decisions about universities will only bind this Court if they examine the same act – that is the decision to deny a student access to the educational program. The Respondent has not relied on any such cases. In contrast, the Manitoba courts recently found that the *Charter* applied to a university's decision to expel a student.

Eldridge, at para 44.
Zaki v University of Manitoba, 2021 MBQB 178

31. The Respondent refers to *BCCLA v University of Victoria,* 2016 BCCA 162. In that case, the University withdrew approval for a pro-life student group's proposed event on campus. The students proceeded with their demonstration anyways. In response, the University revoked the group's outdoor booking privileges. The BCCLA and the students argued that the University violated the students' *Charter* right to freedom of expression and sought an order that the university's policies regulating the booking of outdoor spaces violated the *Charter*.

32. The Court considered whether, when regulating, prohibiting or imposing requirements in relation to activities and events on its property, the University was implementing a specific government program. It concluded it was not. The government had not "retained any express responsibility for the provision of a public forum for free expression on university campuses" and therefore, there was no basis upon which the Court could conclude that the regulating the use of space on campus was a government policy of program.

BCCLA at paras 32-33.

33. That case does not dispose of the issues before this Court. The program at issue here is not regulating public space. It is regulating who may access the mandatory course of instruction and when. A finding that universities must comply with the *Charter* when determining who may access education is consistent with the decision in *BCCLA*, which confirmed that universities may be subject to the *Charter* when implementing a specific government program or policy.

34. While the University may regulate the use of the campus, it may not deny students the right to participate in classes because of their *Charter*-protected speech without justification. The

University engages the *Charter* when using its statutory authority to determine access to publicly funded university education to coerce students out of engaging in expressive activity.

35. The Respondent highlights that universities are protected from political interference in their academic policies or standards for admission or graduation. The issue of independence is relevant primarily to the first branch of the *Eldridge* test, that is, whether the body is under the effective control of the government. An independent and autonomous body may still be subject to the *Charter* under the second *Eldridge* branch of implementing a government program. Indeed, police bodies and regulatory bodies enjoy broad freedoms from ministerial interference without avoiding the application of the *Charter*. The Law Society of B.C., which exists in part to ensure the independence of lawyers, must comply with the *Charter* in respect of its broad public interest mandate.

Law Society v Trinity Western University, 2018 SCC 32 at para 60.
Zaki v University of Manitoba, 2021 MBQB 187 at para 134-135.

B. Ms. Kishawi's actions constitute *Charter* protected expression

36. Ms. Kishawi was disciplined for the following actions: hanging a banner criticizing the ethnic cleansing of Palestine, securing that banner, participating in a protest for Palestinian human rights that included chanting, and writing messages asserting a specific member of the University leadership is racist. These are all messages that convey meaning, and some or all of them are political expressions, "at the very heart of the values sought to be protected by the freedom of expression guaranteed by s. 2(b) of the *Canadian Charter*".

Vancouver v Zhang, para 40 citing *Libman v Quebec,* [1997] 3 SCR 569 at para 29.

37. Further, ""expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content." The fact that Ms. Kishawi expressed herself in a disruptive manner, or in a manner that the security guard deemed unsafe, has no bearing on whether Ms. Kishawi was engaging in expressive behaviour. Indeed, the use of a large banner hanging from a roof, for example, may itself part of the meaning Ms. Kishawi intended to convey.

Irwin Toy v Quebec (Attorney General), [1989] 1 SCR 927 at page 968.

38. The Court reached a similar conclusion in *Vancouver v Zhang*, in which an individual placed a billboard and meditation hut on a city street to protest political issues in China. The B.C. Court of Appeal found that "the billboard and meditation hut were "part and parcel of the manner" in which the Falun Gong participants chose to express themselves and as deserving of protection." Similarly, Ms. Kishawi's message and her actions are expressive activity and warrant *Charter* protection.

Vancouver v Zhang, 2010 BCCA 450, at para 32.

39. The Respondent argues that the *Charter* does not apply to Ms. Kishawi's conduct because the locations in which she expressed herself are private property or are not compatible with public expression. The Respondent relies on *Montreal (City) v Quebec*, 2005 SCC 62 for the proposition that the *Charter* does not protect freedom of expression in private locations or as against private actors. Further, it asserts that there are some public locations in which the free expression right is not protected.

Written Submissions of the Respondent, para 175-181.

40. In *Montreal (City),* the Court wrote that "expressive activity should be excluded from the protective scope of section 2(b) only if its method or location clearly undermines the values that underlie the guarantee". Free expression on campus clearly is consistent with these values, indeed, free expression on a university campus is integral to the key values underlying freedom of expression as articulated by the Supreme Court of Canada: democratic discourse, truth finding and self-fulfillment. Indeed, in *UAlberta Pro-Life*, the Court wrote that the purpose of the university property is to promote learning, therefore the free exchange of ideas.

Montreal (City) at paras 68, 74.
UAlberta Pro-Life v Governors of the University of Alberta, 2020 ABCA 1 at para 148.

41. Turning to the specific areas in question, Ms. Kishawi expressed herself in the reception area of an academic building, in an open hallway, and on a rooftop patio that is usually accessible to students.

Kishawi Affidavit 1 at para 26, and Exhibit 1 page 13, 33

42. The evidence from the investigator is that the security guard closed the patio specifically to prevent Ms. Kishawi from expressing herself:

> M E (ME) reports that on Wednesday, May 15, 2024, he observed three women carrying a banner, rope and duct tape proceeding toward the rooftop patio off of the VIU cafeteria. He had previously noticed the same three hanging over the edge of building 305 to affix a flag. He surmised they were about to attempt to hang a banner off of the patio above the stairs to the breezeway area. He proceeded to the patio and asked the women not to put the banner up. They asked why not and he replied that it was against VIU policy to post banners. He also told them that he was concerned for their safety in the event that they chose to climb over the railing and onto the edge of the roof in order to hang the banner. The group advised that they were not going to hang any banners.
>
> ME states that he advised everyone present that he was closing the patio for security reasons and gave them a few minutes to vacate the premises. Another student who was working on the patio gathered her belongings and left. The group which included SK, refused to comply with his requests. ME states he told them he would not leave until they did.

Kishawi Affidavit 1 Exhibit 1 at page 13.

43. Nothing in this evidence indicates that Ms. Kishawi's actions on the patio are inconsistent with the values of freedom of expression. On the contrary, the space is public and openly accessible to students. The security guard only closed the patio to prevent Ms. Kishawi's expressive activities.

44. Similarly, Ms, Kishawi participated in a sit-in in the reception area of a student building. A photograph in the investigation report reveals couches, maps and flags in the area. Expressing oneself in a foyer in a building designed for higher learning on university campus, where students apparently gather and presumably exchange ideas, is consistent with the values of free expression. Similarly, the investigator indicated that university officials only locked the doors to the academic building to prevent more protestors from joining in the expressive demonstration.

Kishawi Affidavit 1 Exhibit 1 at page 33-34.

45. With regard to the hallway of the human resources staff, Ms. Kishawi indicated that it was not locked or closed off from the public. This was also an accessible location within a university building – expression in that location is consistent with the values of freedom of expression.

46. That these protests were disruptive or annoying does not eliminate their *Charter* protection. It is relevant under the balancing stage not under the inquiry into the right itself. In *Montreal (City),* the Court found that the city limited the section 2(b) rights of a strip club when it prevented the club

from amplifying descriptions of the club's performances onto a public street. However, that limitation was justified under section 1. Just as in that case, the disruptive nature of the protest is properly considered under section 1.

47. To the extent that the Respondent asserts that the University campus as a whole is private property and there are no *Charter* rights on that property, that argument ought to be rejected. There may not be *Charter* rights vis-à-vis purely private actors, but there are *Charter* rights as against private actors implementing a government program. The police could not arrest a person for wearing a t-shirt critical of the Prime Minister, even if they wore that t-shirt in a private home. The right is engaged vis-à-vis the actor limiting it. In this case, the actor is the university as agent of the state. The idea of "private vs public" location is not a useful frame in the circumstances of this case. The real analysis focuses on who is limiting the right- if the body limiting the right is acting on behalf of the government, the *Charter* applies.
48. In sum, Ms. Kishawi's actions are protected by the *Charter.* Her actions have expressive value as political expression. The location and form of Ms. Kishawi's expressions do not undermine the values of free expression: she engaged in these actions in openly accessible areas of a university campus – an area in which the free exchange of ideas is crucial to the location's core purpose. The University was required to balance her *Charter* rights when determining whether she could access the program of education.

C. Broad protections for human rights advocacy promote equality

49. The actions for which Ms. Kishawi was suspended are intimately related to her racial and ethnic origin. Ms. Kishawi is from Gaza. She was suspended from school for advocating for the human rights of Palestinians, specifically in Gaza, where the United Nations has concluded that Israel is committing genocide against Palestinians. This suspension engages the intersection between equality and freedom of expression.

> United Nations Human Rights Council, 60th Session, *"Legal Analysis of the conduct of Israel in Gaza pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide"* (A/HRC/60/CRP.3)

50. Freedom of expression flows from the concept of human dignity. As the Supreme Court has routinely stated, fundamental freedoms are "founded in respect for the inherent dignity and the inviolable rights of the human person." The purpose of freedom of expression is to "ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and

mind, however unpopular, distasteful or contrary to the mainstream". For oppressed or marginalized groups, opposing their own oppression and defending their human rights may be the most important "expression of the heart and mind." To limit that expression necessarily interferes with the human dignity of racialized and oppressed peoples.

R v Big M Drug Mart, [1985] 1 SCR 295, at para 94.
Ward v Quebec, 2021 SCC 43 at para 59.
Ward at para 59, citing *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927, at p 968.

51. It is fundamental to the principles of the *Charter* that everyone enjoy the rights therein without distinction. "A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms." This is also elucidated through the values enshrined in section 15 of the *Charter*. The equity principles are violated when members of oppressed groups face punishment for advocating for their own rights. Freedom of speech may mean very little to marginalized groups if they cannot utilize that freedom to advocate for their rights.

R v Big M Drug Mart, at para 94.

52. The Court must ensure that speech in support of Palestinian human rights is not unduly limited or subject to disproportionate consequences. This is a genuine risk in this case and generally. In *University of Toronto v Doe,* the Court referred to "an exponential increase in workplace and other consequences for individuals who express support for Palestinian human rights". This context ought to be considered when analysing whether the severity of the penalty the University imposed on Ms. Kishawi is proportionate to the alleged wrongdoing.

University of Toronto (Governing Council) v Doe et al, 2024 ONSC 3755, at para 73.

53. This engages equality principles: limiting expression in support of Palestinian human rights risks denying Palestinians equal enjoyment of fundamental freedoms, with the consequent denial of human dignity for Palestinians. It also risks censoring the search for truth, with possible devastating outcomes on the material lives of Palestinians currently living in dire conditions.

54. Equity principles therefore must be considered in determining the scope of protections afforded to Ms. Kishawi in this context, including whether the University properly balanced Ms. Kishawi's *Charter* rights. This Court must be attuned to the pressing imperative that the fundamental freedoms in the *Charter* be enjoyed equally by all members of society, including Palestinians.

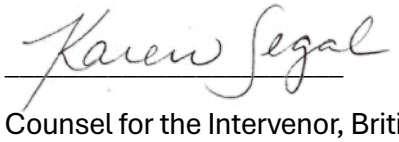
D. Conclusion

55. The University must not be entitled to revoke the right to participate in classes from students with whom the institution disagrees – to permit such an outcome would seriously undermine the program of public education that the government has created, leaving it subject to the whims of non-government administrators who are not answerable to the public nor to law. This cannot stand: the government has dictated that only universities that it has approved may provide public university education, and that they must provide it in a prescribed manner. When providing those prescribed programs, universities are agents of the government and must respect the fundamental rights of students to express their views.

PART IV: COSTS

56. Pursuant to Justice Whately's order, the BCCLA does not seek costs and requests that no costs be order against it.

All of which is respectfully submitted,



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September 19, 2025