IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vancouver Island University v. Kishawi,* 2024 BCSC 1609

Date: 20240815
Docket: S-244694
Registry: Vancouver

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

And

B'nai Brith National Organization of Canada, British Columbia Civil Liberties Association, British Columbia Federation of Students, Canadian Lawyers for International Human Rights, Centre for Free Expression, Independent Jewish Voices Canada, Jewish Faculty Network, and United Jewish People's Order, and National Council of Canadian Muslims, and Arab Canadian Lawyers Association

Intervenors

Before: The Honourable Justice Stephens

Oral Reasons for Judgment

In Chambers

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Counsel for the Intervenor Centre for Free Expression	R. Farooq
Counsel for the Intervenor National Counsel of Canadian Muslims, and the Arab Canadian Lawyers Association	N. Al-Azem D. Souraya
Counsel for the Intervenor Independent Jewish Voices Canada, Jewish Faculty Network, and United Jewish People's Order	K. Spector
Counsel for the Intervenor British Columbia Civil Liberties Association	G. Grant
No other appearances	
Place and Date of Hearing:	Vancouver, B.C. August 8-9, and 14, 2024
Place and Date of Judgment:	Vancouver, B.C. August 15, 2024

[1] **THE COURT:** On Vancouver Island University's ("VIU") Nanaimo campus, within what is called the quad, there is a portion of grassed common area (surrounded by concrete areas and stairs) in front of the university library, which is between two other buildings, including the cafeteria. This grassed space was referred to in submissions to as being in between the lower and upper quad, and it measures approximately 7 m x 18 m. In these Reasons, I will call this area, where an encampment currently is, the "Grassed Quad Area".

[2] Starting on or about May 1, 2024, an encampment of tents and tables was placed on that grassed space, and a few days later wooden pallets were erected vertically around the Grassed Quad Area (the "Encampment"), to enclose it. There is a small opening for an entrance, but there is evidence that at times in July 2024, a moveable pallet gate had been used across the opening.

[3] The Encampment is associated with a group called Palestinian Solidarity Encampment ("PSE"). The location of the Encampment of the Grassed Quad Area as at May 4, 2024 (which I am advised accurately depicts the Encampment's current location), is depicted in an overhead video which was attached as Exhibit E to the affidavit of Sara Kishawi. Attached to my oral Reasons for Judgment, as Appendix A, is a screenshot of this video with a yellow outline depicting the location of the Grassed Quad Area.

[4] VIU applies by notice of application filed July 24, 2024, for an interlocutory injunction. The injunction order sought seeks "an injunction requiring the removal of the encampment and prohibiting further encampments, overnight camping, or activity without the university's permission between 11:00 p.m. and 7:00 a.m." (plaintiff's submission at para. 3), although the injunction order sought would extend to the much larger geographic area of the entire VIU campus, not simply the smaller area of the Grassed Quad Area where the Encampment is. I will comment on this further later in my Reasons. The further revised terms of the injunction order sought by VIU on this application are attached as Appendix B to these Reasons for Judgment.

[5] In an affidavit filed in response to this application, one of the represented defendants refers to the Encampment as a "permanent occupation".

[6] VIU contends the Encampment constitutes a trespass and seeks an order to remove it on that basis, among other reasons.

[7] The Encampment has been in place since early May 2024. This application was filed on July 24, 2024, and was heard before me on August 8 and 9 and August 14, 2024. School starts again for the fall term at VIU in September, and I am advised that student orientation for the fall semester commences in less than two weeks on August 27, 2024. There is time sensitivity to this application, and I am issuing Reasons for Judgment on this application at this time.

[8] Four of the named defendants were represented by counsel at this hearing (the "Represented Defendants"). However, two other named defendants did not appear at this hearing, and there are also John and Jane Doe defendants since “the University cannot identify all of the Defendants”.

[9] In these Reasons, I will not comment, express views, or make findings about the content of the expression within or associated with the Encampment or in the VIU campus more generally, or as to the interpretation or application of VIU policies regarding student conduct. In the view I take of this application, it is unnecessary to comment on such matters in order to dispose of this application.

Background

[10] VIU is a statutory corporation continued under s. 3(3) of the *University Act*, R.S.B.C. 1996, c. 468.

[11] VIU owns and occupies two parcels of land that comprise the Nanaimo campus. I was advised at the hearing of this application that there are approximately 8,900 students enrolled at the Nanaimo campus of VIU, and approximately 1,000 Nanaimo campus staff members including faculty.

[12] VIU is a special purpose, teaching university: *University Act*, s. 47.1.

[13] Since 2019, VIU has operated at a financial deficit. Since 2023, its operationalization of a deficit mitigation plan has resulted in layoffs and closures of academic programs.

[14] Under ss. 27(2)(d) and 27(2)(t) of the *University Act*, VIU has broad power over real property of the university, including to regulate, prohibit, and impose requirements in relation to the use of real property of the university:

> 27 (1) The management, administration and control of the property, revenue, business and affairs of the university are vested in the board.
>
> (2) Without limiting subsection (1) or the general powers conferred on the board by this Act, the board has the following powers:
>
> …
>
> (d) in consultation with the senate, to maintain and keep in proper order and condition the real property of the university, to erect and maintain the buildings and structures on it that in the opinion of the board are necessary and advisable, and to make rules respecting the management, government and control of the real property, buildings and structures;
>
> …
>
> (t) to regulate, prohibit and impose requirements in relation to the use of real property, buildings, structures and personal property of the university …

[15] Commencing May 1, 2024, the Encampment was set up. It is comprised of approximately 10 smaller tents, two larger wall-less tents, and two picnic tables.

[16] The evidence is that in early May, the Encampment contained roughly 35 individuals, but more recently the number is between eight and 20, with a reduced number overnight.

[17] One of the students who affirmed an affidavit in opposition to VIU's application who attends the Encampment, including staying overnight, describes the Encampment as a "physical 24/7 presence on campus".

[18] One of the Represented Defendants describes the interior of the Encampment as follows:

> [20] The entrance to the PSE is an open entrance which leads from the concrete area into the encampment. This is on the uphill side. The rest of the encampment is surrounded by pallets…

[19] On May 2, 2024, a university security employee attended the Encampment and served the defendants with copies of a written trespass notice, stating that "overnight camping and erecting structures such as tents, shelters, or barriers without the permission of the University are not permitted".

[20] In addition to its complaint about the presence of the Encampment, VIU asserts that from early May 2024 to July 10, 2024, the defendants have engaged in what it characterizes as "an escalating series of planned disruptions and activities causing nuisance on Campus" outside the boundaries of the Encampment. VIU's assertions about such activities outside the Encampment include the following assertions:

a) a May 15, 2024, event of climbing a glass barrier on a rooftop patio and hanging a banner on the side of the building;

b) on May 23, VIU asserts that "a group of 10 to 12 masked Defendants entered into a room in the library in which the University's Board of Governors was holding a meeting, with signs, a bongo drum, and a megaphone";

c) on June 28, 2024, disrupting an exam and writing on doors with permanent marker;

d) VIU contends that on "June 29, two masked Defendants gained access to the restricted offices of the University's human resources department and vandalized wooden doors and hallways, including by writing on walls with permanent marker"; and

e) on July 10, 2024, pouring red paint over a large campus Starbucks logo.

[21] VIU further asserts that “on June 11, between 8-12 masked Defendants gained unauthorized access to the Office of the Provost, which is a restricted access area on Campus, while the Provost was meeting with other Defendants”. The Provost has deposed that while “the protestors were in that space, they were live-streaming video on social media.” An affidavit filed by VIU's Mark Egan deposes that, from his review of the live streaming of this event, he believes two of the named defendants were present during the occupation, though I make no findings of fact about this. One of the Represented Defendants contends this incident was done by protesters external to the Encampment.

[22] I add that the VIU affiant, Mark Egan, was cross-examined during this hearing. The Represented Defendants contend that his affidavit evidence as a whole is not credible as a result of certain answers given by him on that cross-examination. I disagree and find that cross-examination did not undermine Mr. Egan's credibility such that I should reject or place little weight on his evidence on this application.

[23] Returning to the chronology of events: on July 11, 2024, the CFO of VIU attended the Encampment and served the defendants by hand with a further written trespass notice. It stated, among other things, that erecting tents or other temporary shelters, camping overnight, among other things, was prohibited at the university. It stated the Encampment must be vacated and dismantled by 8:00 a.m. on Monday, July 15, 2024.

[24] Despite the trespass notices, the Encampment has not been removed and it remains occupied overnight.

[25] The CFO of VIU estimates that Encampment-related expenses will cost the university $870,000. She deposes that if the Encampment continues, “the University is in serious jeopardy of having to reduce or eliminate academic programming on campus in the upcoming fall semester, and either cancel courses or convert them to remote-learning online courses exclusively”.

Discussion

The Injunction Test

[26] The test for an interlocutory injunction in British Columbia is determined by the three-part test identified by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 (S.C.C.) [*RJR*]:

> (a) a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried;
>
> (b) it must be determined whether the applicant would suffer irreparable harm if the application were refused; and
>
> (c) an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

See *Fraser Health Authority v. Evans*, 2016 BCSC 1708 [*Evans*] at para. 48.

The Geographic Scope of the Injunction Order Sought

[27] A notable feature of VIU's injunction application is that while, as noted above, VIU does complain of activities which have occurred in areas outside the Encampment, in and on university buildings and at the Starbucks on campus – some of which it describes as acts of vandalism – the focus of the injunction order sought is not the ceasing of those types of activities that have occurred or have been asserted to have occurred beyond the boundaries of the Encampment. Instead, what VIU seeks is an order to remove outdoor structures and other items used for an encampment and to prohibit being present overnight from 11:00 p.m. to 7:00 a.m., which VIU submits is “a minimally impairing injunction that would permit continued peaceful and lawful protest” in an area covering not just the Encampment area on the Grassed Quad Area, but over the entire campus where the approximately 10,000 students and staff who could have notice of such an order could reasonably be expected to be.

[28] However, there is no evidence before me of an encampment involving the defendants, other than on the Grassed Quad Area, nor does VIU's evidence complain of conduct of the defendants from 11:00 p.m. to 7:00 a.m., other than the overnight camping in the Encampment. In addition, part of the order sought (see para. 3) would require anyone with notice of the order to remove “structures [and] tents” and “items of personal property” among other things anywhere outdoors on campus. There is evidence there are some structures not associated with the Encampment -- tents erected and picnic tables on concrete areas, for example -- outside the footprint of the Encampment that VIU does not apparently complain of, which would appear to be caught by the terms of the injunction order VIU seeks. Further, there is on-campus housing, and the library which is adjacent to the Encampment area and the Grassed Quad Area that closes at midnight which is after 11:00 p.m. One of the Represented Defendants deposes that “it is common that I see students gathering on and using the campus after 11 PM and early in the morning”, and “[l]ots of people from the community use the stairs on campus for running and training before 7:00 a.m.” and in the evening as well.

[29] The Represented Defendants objected to, and the intervenor B.C. Federation of Students raised concerns about, overbreadth of the terms of the injunction order sought by VIU and potential impact on the student body attending the campus, and the court is mindful that vague or ambiguous language should be avoided in an injunction order: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 97, per LeBel and Deschamps JJ., dissenting; *Millennium Speciality Alloys Ltd. v. Sali*, 2023 BCSC 914 at paras. 14-15.

[30] I respectfully find that VIU's request for an injunction order in the terms sought affecting anyone having knowledge of the order to, within 48 hours, remove any and all “structures, tents, encampments, barricades, fences, and items of personal property” and to prohibit "using, entering, or gathering" from 11:00 p.m. to 7:00 a.m. over the entire geographic area of VIU's Nanaimo campus, to be overbroad.

[31] However, I shall consider whether an interim injunction in similar such terms sought by VIU should be granted, but with a narrower geographic scope in respect of the Encampment area located in the Grassed Quad Area.

The Trespass Basis for an Interim Injunction

[32] VIU relies on cases that it contends establish that, in a case of trespass, the *RJR* test does not apply.

[33] This Court has stated that, in cases involving trespass to private land, the three-part test in *RJR* does not apply: *Evans* at para. 49 and *Foster v. British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development)*, 2023 BCSC 1898 at para. 25. This is because "*prima facie* a landowner, whose title is not in issue, is entitled to an injunction to restrain trespass on his land whether or not the trespass harms [them]": *Patel v. W.H. Smith (Eziot) Ltd.*, [1987] 1 W.L.R. 853 (C.A.) at 858, cited in *Evans* at para. 49.

[34] In *Marine Harvest Canada Inc. v. Morton*, 2017 BCSC 2383 at para. 82, Justice Voith, then of this Court, cited *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355 which stated:

> … where a *prima facie* case of trespass is made out, the natural remedy is an injunction. This is because an act of trespass is actionable *per se* and does not require proof of damages.

[35] Thus, once a plaintiff has established a clear title to the lands at issue, the burden of proof shifts to those seeking to occupy the lands to establish that in the circumstances they have an arguable case that their continuing possession is as of right: *Evans* at para. 52; see also *Gateway Casinos & Entertainment Ltd. v. B.C. Government and Service Employees' Union*, 2018 BCSC 1490 [*Gateway Casinos*] at paras. 22-24.

[36] However, Chief Justice Hinkson declined to apply this type of trespass injunction analysis "where *Charter* issues are raised" in *British Columbia v. Adamson*, 2016 BCSC 584 at para. 35; see also para. 25.

[37] Before me, on this application, some *Charter* issues are raised. Following the *Adamson* approach, I therefore will consider this application on the basis of the usual three-part injunction test under *RJR*.

Application of the *RJR* Test

RJR Step 1 - The Merits

Mandatory or Prohibitory Injunction Sought

[38] The Represented Defendants contend that a mandatory injunction is sought here and the higher standard of a strong *prima facie* case applies, not the less-onerous standard of serious question to be tried.

[39] I disagree. While a mandatory injunction "directs the defendant to undertake a particular course of action" (*R. v. Canadian Broadcasting Corporation*, 2018 SCC 5 [*CBC*] at paras. 15), the matter is not simply one of form but substance. *CBC* holds that the court must “look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought” and “what the practical consequences of the … injunction are likely to be”. And further, “the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something” [emphasis in original]: at para. 16.

[40] An example of a mandatory injunction is an order compelling a defendant university to take affirmative steps to do certain things to reinstate and then run a varsity football program: *Kremler v. Simon Fraser University*, 2023 BCSC 805 at para. 29. Or seeking the reinstatement of a counsellor: *Queen Elizabeth Annex (QEA) Parents' Society v. Vancouver School District*, 2023 BCSC 990 at para. 43, citing *Dupont v. The Corporation of the City of Port Coquitlam*, 2020 BCSC 1127.

[41] Here the practical consequence of the orders sought would be to remove the Encampment which was placed by the defendants on the VIU’s land and which was not removed after notices of trespass were issued. VIU did not consent to the defendants’ occupation of that land, yet the Encampment continues. In my view, the

part of the order sought requiring the removal of the Encampment is sought as part of the order to restrain the continuation of the Encampment, which is asserted to be a trespass. That, in my view, is a prohibitive, not mandatory, injunction.

[42] Since this is a prohibitory injunction application, the standard fair issue to be tried or serious issue to be tried test applies in the first branch of the *RJR* test.

Is an Extensive Review of the Merits Required in the Injunction Analysis?

[43] I also disagree with the Represented Defendants that the court should engage in an extensive review of the merits of the plaintiff's claims on the injunction application and in the application of the injunction test.

[44] Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits under the first branch of the *RJR* test. As stated at 338 of *RJR*, the first exception applies,

> … when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial.

[45] The “circumstances in which this exception will apply are rare”: *RJR* at 339. I find that this exception does not apply here.

[46] I return to the *RJR* test, starting with the first branch.

RJR Step 1 - Serious Question to be Tried

[47] The plaintiff raises a serious issue to be tried that there has been a breach of the common law of trespass.

[48] The common law tort of trespass occurs if someone enters, remains on, or places any object on land in the plaintiff's possession without lawful justification. Trespass must be voluntary and direct, as opposed to being indirect, unintended contact with the property: *University of Toronto (Governing Council) v. Doe et al.*, 2024 ONSC 3755 [*University of Toronto*] at para. 127; see also *Marine Harvest*

Canada v. Morton, 2017 BCSC 2383 at para. 55, which states the cause of action of trespass to land,

> consists of entering upon another party's property without lawful justification, or placing or erecting some material object on that property without the right to do so. Trespass is committed if a defendant does not leave the lands after being put on notice by the occupier that entry is prohibited.

[49] VIU owns the subject land and has given trespass notices advising the defendants the Encampment is not permitted. Yet the Encampment continues.

[50] A serious issue to be tried exists that the Encampment constitutes trespass at common law.

[51] I add that I find that VIU has demonstrated not merely a serious question to be tried, but a strong *prima facie* case on the merits that the defendants have entered onto and placed objects on property that belongs to VIU without any lawful justification, constituting trespass at common law: *University of Toronto* at para. 128. Even if the higher strong *prima facie* case standard is applied, VIU meets that standard.

[52] Having found a serious question to be tried on the basis of the common law of trespass, I need not consider the merits branch of the *RJR* injunction test as it relates to the causes of action in private nuisance and intentional interference with economic relations which were also asserted by VIU, and I make no comment or finding on the merits of these causes of action.

[53] Nor is it necessary for me to consider the plaintiff's additional reliance on the *Trespass Act*, R.S.B.C. 2018, c. 3. And the merit of any constitutional challenge to the *Trespass Act* need not be considered on this application (and I make no comment as to whether the notice of constitutional question served by the Represented Defendants sufficiently raised that issue to permit it to be argued on this application).

Charter Arguments

[54] In opposing this application, the Represented Defendants contend that the *Charter* applies to VIU and that VIU's action seeking to remove them from the Encampment and the injunction order it seeks, as well as the common law of trespass, are unconstitutional, in that they breach s. 2(b) and 2(c) rights of the defendants in a manner that is not justified under s. 1.

[55] These *Charter* arguments ought not be conclusively decided on this interim application. The *Charter* applicability issue and allegations of breach of the *Charter* are issues that do not present as “simple questions of law alone” that can be finally decided by a motions judge, so the exception to the general rule that a detailed consideration of the merits is not conducted on this branch of the test does not apply: *RJR* at para. 339.

[56] For the same reason, I find that the Represented Defendants' arguments that the common law of trespass should be developed in accordance with *Charter* values should not be conclusively decided on this application. I will instead consider them on the merits of this application within the *RJR* analysis and have incorporated them into my assessment of the merits of the VIU’s case and balance of convenience.

[57] VIU argued that the *Charter* arguments should go only to the balance of convenience, not to the merits branch, relying on, among other authority, *Nanaimo (City) v. Courtoreille*, 2018 BCSC 1629 at para. 121. However, I have heard arguments from the parties on this application as to whether the plaintiff has a strong *prima facie* case on the merits, and I find it appropriate to consider the *Charter* arguments in the context of the merits branch of the *RJR* test.

Charter Applicability to VIU

[58] The Represented Defendants contend the *Charter* applies to the VIU.

[59] However, I have significant doubt about the strength of the Represented Defendants' argument that the *Charter* applies to VIU.

[60] The *Charter* may apply to an organization if the organization is part of the apparatus of government or if the organization is implementing a specific government program or policy: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 1997 CanLII 327 (S.C.C.).

[61] In my view, there is not a strong argument for the application of the *Charter*, based on either branch of the *Eldridge* test.

[62] The University of Victoria has been held by our Court of Appeal to not be subject to the *Charter*: *BC Civil Liberties Association v. University of Victoria*, 2016 BCCA 162 [*UVIC*] at paras. 32-33, 41. There the Court considered s. 27 of the *University Act* in the context of considering whether the *Charter* applied.

[63] Further, this Court has also held that an assertion that the University of British Columbia is itself a government apparatus and that a specific policy was a government policy was bound to fail: see *Alter v. The University of British Columbia*, 2024 BCSC 961 at para. 35, 66. In that decision, Justice Greenwood stated that "*UVIC* is virtually on all fours with the case at bar" at para. 21. In his reasons, he also referred to s. 48(1) and s. 27(2) of the *University Act*: see paras. 26, 33.

[64] VIU is a special purpose, teaching university. However, the university is not statutorily designated to be for all purposes an agent of the government.

[65] Instead, s. 48 of the *University Act* signals independence from the minister, providing:

> 48 (1) The minister must not interfere in the exercise of powers conferred on a university, its board, senate and other constituent bodies by this Act respecting any of the following:
>
> (a) the formulation and adoption of academic policies and standards;
>
> (b) the establishment of standards for admission and graduation;
>
> (c) the selection and appointment of staff.

[66] Further, under s. 19.1, the members of the board of the university must act in the best interests of the university.

[67] In addition, I have previously referred to the provisions of s. 27(2) of the Act related to VIU's management and control of real property.

[68] I am not persuaded that VIU's designation as a special purpose, teaching university; and by reliance on excerpts from *Hansard*, certain reports referred to, VIU's annual reporting requirements, the *Designation of Special Purpose, Teaching Universities Regulation*, VIU mandate letters, and s. 47.1 of the *University Act*, that VIU's circumstances are materially distinguishable from that of *UVIC* where the Court of Appeal ruled the *Charter* was not applicable to that university.

[69] While not making a conclusive finding on the *Charter* application point, I find for the purposes of this application that the argument that the *Charter* applies to VIU is not strong and the related arguments made by the Represented Defendants do not detract from the strength of VIU's case for an interim injunction.

[70] In short, the Represented Defendants do not have a strong argument that the same result as in the *UVIC* case and *Alter,* would not also obtain in respect of VIU.

[71] Accordingly, I do not find the *Charter* arguments to detract from the strength of VIU's serious case to be tried for an interim injunction or to be a factor in the defendants' favour in the balance of convenience.

Charter Values and the Common Law

[72] The Represented Defendants also contend that the common law should evolve in accordance with *Charter* values of freedom of expression and of assembly in such a way that the plaintiff should not be found to have a strong *prima facie* case for the cause of action of trespass. They contend:

> To the extent the existing common law of trespass does not accommodate the freedoms of university students to engage in peaceful protest on their own campuses, in areas normally used for protest, without excluding other ordinary uses of that area, it is not consistent with the *Charter*. It must evolve to align with the increasing societal and legal recognition of the importance of promoting and protecting free expression, especially regarding matters of public interest.…

[73] I also have doubts about the strength of the Represented Defendants' argument that the common law of trespass should be developed in accordance with *Charter* values.

[74] I acknowledge that this Court should develop the common law incrementally in accordance with *Charter* values (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1995 CanLII 59 (S.C.C.) at paras. 85, 92) and should consider the principles underlying the guarantee of free expression set out in *Grant v. Torstar Corp.*, 2009 SCC 61 at paras. 46-47.

[75] But, in my view, while not making a conclusive finding on this point, there is not a strong argument that the common law of trespass, as applied to claims of trespass on private land, should be developed in accordance with *Charter* values in the circumstances of this case, such as to derogate from the property rights of a landowner: see *University of Toronto* at para. 245; see also *Gateway Casinos* at paras. 13-14.

[76] In summary, I find the plaintiff has a strong *prima facie* case on the merits for trespass and that *Charter* considerations do not detract from the merit of the plaintiff's case for an interim injunction based on common law trespass.

RJR Steps 2 and 3 - Irreparable Harm and Balance of Convenience

Irreparable Harm

[77] VIU contends that it has incurred substantial financial cost from the Encampment and that this constitutes irreparable harm. The Represented Defendants dispute this and contend such costs are not causally connected to the Encampment.

[78] I am satisfied, for the purposes of this application, that at least some portion of the VIU's $870,000 estimated costs, above a *de minimus* level, to have a reasonable nexus to the Encampment and would likely be incurred if an injunction is not granted (as opposed to costs associated with activities outside of the Encampment). I am unable to quantify that amount on this application. However,

there is no evidence to suggest that the defendants, individually or collectively, are financially able to pay damages of any amount to the plaintiff. Damages that cannot be recovered are a relevant consideration for the purposes of assessing irreparable harm: see *Husby Forest Products Ltd. v. Jane Doe*, 2018 BCSC 676 [*Husby Forest*] at para. 46; *Marine Harvest Canada Inc. v. Morton*, 2017 BCSC 2383 at para. 81. Even though the amount of costs attributable to the Encampment is uncertain, I find that this factor does weigh in VIU's favour, given its current financial deficit position.

[79] In addition, interference with property rights also constitutes irreparable harm: *Marine Harvest Canada Inc. v. Morton*, 2018 BCSC 1302, at para. 163. The plaintiff will suffer irreparable harm on this basis if an injunction is not granted.

[80] Further, sustained interference with a university's ability to use part of its campus constitutes strong irreparable harm: *University of Toronto* at para. 151.

[81] The Provost, also academic vice-president of VIU, has deposed that the Encampment occupies almost all the grassed common area in the front of the library and the university does not have a large quadrangle or significant open grass space near the centre of campus other than the area the Encampment is on. I find on the evidence from the Provost of VIU that before the Encampment, the grassed common area of the quad was used from time to time by students and student groups at VIU, and since the Encampment has been on the grassed upper quad, there has been very little other use of that space.

RJR Step 3 - Balance of Convenience

[82] The assessment of the balance of convenience asks which of the parties would suffer the greater harm from the granting or refusing the injunction pending a decision on the merits of the case: *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 [*Charbonneau*] at para. 37; see also *RJR* at 342.

[83] VIU has a strong case on the merits based on the common law of trespass and the defendants do not have a strong argument in defence. The strength of the

applicant's case on the merits can be a factor in the balance of convenience (see *Kremler* at paras. 56-57), and on this application weighs in VIU's favour.

[84] That the defendants have attempted to negotiate with VIU is not a consideration that militates in favour of refusing the injunction: see *A.J.B. Investments Ltd. v. Elphinstone Logging Focus*, 2016 BCSC 734 at paras. 37-38.

[85] On the side of the Defendants, an injunction order and removal of the Encampment would, to that extent, restrict their expression on and through the geographic area where the Encampment is and restrict their assembly on the lands on which the Encampment is located. I acknowledge there is a public interest in expression and of assembly, and an order to remove the Encampment and restrict access overnight there would, to that extent, on that land, restrict the defendants' expression on and through the area where the Encampment currently is and to assemble on that land.

[86] However, the Encampment has been in place since early May 2024. One of the main organizers of the Encampment, who is a Represented Defendant, has stated that their intention or desire is that it be a permanent occupation. The Represented Defendants submit that the Encampment area is not “prime real estate” for VIU and that the grassed area it occupies is only a small part of the quad in front of the library. The Represented Defendants' explicit or implicit submission that other VIU students or student clubs have other green spaces or other spaces on campus they can go or gather when at university, other than the Encampment area, functionally seeks to exert implicit control over how VIU's campus real property is used and reflects the corresponding loss of control by VIU over its campus property contrary to its private property right and its statutory right to manage and control the campus lands.

[87] In my view, where a special purpose teaching university is on a sustained basis impeded in its ability to manage and control its campus property, as it has here, the public interest suffers irreparable harm.

[88] There is a strong public interest in VIU having control over its campus property to discharge its function as a special purpose teaching university.

[89] Balancing the relevant considerations to determine which of the parties would suffer the greater harm from the granting or refusing the injunction, and factoring in the public interest which, in my view, militates in favour of VIU, I find the balance of convenience favours granting an interim injunction over the Encampment area.

[90] A sound evidentiary foundation has been provided by VIU to obtain an interim injunction, and that an interim injunction should be granted: *Charbonneau* at paras. 58-60.

[91] I was not persuaded by the Represented Defendants that considerations of international law militate in their favour such that the injunction should not be granted.

[92] In summary, I find to be justified and grant an interim injunction order over the limited geographic area where the Encampment is placed, being the Grassed Quad Area, removing the Encampment that has been there continuously since early May 2024, and a central part of campus, and to prohibit gathering in the Grassed Quad Area overnight from 11:00 p.m. to 7:00 a.m. on the Grassed Quad Area.

[93] However, I do not grant an injunction for removal of structures or other items, and for a prohibition on access from 11:00 p.m. to 7:00 a.m., over the much larger area of the entire campus generally where the approximately 10,000 students and staff of VIU could be, as was sought by VIU.

[94] Nor do I grant an interlocutory injunction for an indeterminate time period lasting until the trial of this action, noting there is, to my knowledge, no trial date scheduled. Instead, I will grant an interim injunction for a period of 150 days.

[95] My assessment of the *RJR* factors above, including the balance of convenience, has been informed by the limited scope of the injunction order that I have granted.

[96] I add that the injunction granted by these Reasons is over a limited geographic area related to the Encampment on the Grassed Quad Area, which I find to be necessary, just, and appropriate under the common law of trespass and the principles of interim injunction law. In making this order, I make no findings as to whether or to what extent the presence of the Encampment is or has been related to protest activities complained of by VIU beyond the boundaries of the Encampment.

The Undertaking as to Damages Issue

[97] VIU asks that the undertaking as to damages required for an interim injunction be dispensed with: R. 10-4(5). That subrule requires that an undertaking as to damages is required unless the court otherwise orders. I exercise my discretion to waive the undertaking as to damages for an interim injunction in the circumstances of this case, given my assessment of the strength of the plaintiff's case in the balance of convenience.

Evidentiary Objections

[98] At the commencement of this hearing, both the plaintiff and Represented Defendants objected to certain evidence of the other party. Despite these objections, I admit all of the objected-to evidence on this application.

[99] I find that the Represented Defendants' evidence objected to by VIU to be admissible, and the objections made go to weight. I further find that the exhibits to the Affidavit #2 of Melissa Crawford, objected to by VIU, to be admissible.

[100] I also find the evidence referred to in para. 30 of the notice of application objected to by the Represented Defendants to be admissible to provide context to this injunction application. Also, to the extent it was objected to in the application response, I also admit the evidence at para. 31 at page 10 of the notice of application, but for the limited purpose of demonstrating Mr. Egan's views about the university policies.

[101] I further admit Exhibits A and C to the affidavit of Izabel Kadziola which was objected to by the Represented Defendants, finding it to be reply evidence to that

aspect of the application response which opposed the granting of police enforcement terms.

Order Granted

Injunction Order Granted

[102] I order that:

[103] Paragraph 1 of the order sought is granted with an effective date of August 15, 2024, at 9:30 a.m.

[104] Paragraphs 2 to 4 of the order sought are granted, but over the geographic area where the Encampment is, which I referred to in these Reasons as the Grassed Quad Area, and subject to certain other modifications noted below.

[105] Specifically, para. 2 of the order sought is granted in the terms sought, with the modification that the order will be geographically limited to the Encampment area on the Grassed Quad Area portion of the quad depicted in Exhibit E to Sara Kishawi's affidavit, instead of the campus as a whole and as depicted in Schedule A to the order sought. The word “Campus” in the order sought will be replaced with words which will specify the geographic area of the Encampment on the Grassed Quad Area in accordance with my Reasons.

[106] Further, some of the Represented Defendants were present at this hearing in Vancouver, and will presumably need to travel to Nanaimo to remove the Encampment in accordance with this order. I accordingly find that 72 hours, not 48 hours, to instead be an appropriate amount of time to remove the tents, shelters, structures, and other items in the Encampment. Paragraph 2 shall replace the words "48 hours" with "72 hours".

[107] Paragraph 3 of the order sought is granted, but again with the modification that the order will be geographically limited to the Encampment area on the Grassed Quad Area portion of the quad depicted in Exhibit E to Sara Kishawi's affidavit instead of the campus as a whole. The words “at the Campus” shall be modified

accordingly, and Schedule A shall be modified accordingly. In addition, the words "48 hours" shall be replaced with "72 hours".

[108] Paragraph 4 of the order sought is granted, but again with a modification in paras. 4(a), (b), and (c) that the order will apply to the Encampment area on the Grassed Quad Area Portion of the quad, as depicted on Exhibit E to Sara Kishawi's affidavit, instead of the campus as a whole. The words “any outdoor location at the Campus” in para. 4(a) and the word “Campus” in para. 4(b), and in the first line of 4(c), shall be modified accordingly.

[109] Also, I am not satisfied it is necessary for all persons having knowledge of the order (other than campus housing students) to be restrained by court order from entering the Grassed Quad Area between 11:00 p.m. to 7:00 a.m., this area being located by the library which is open until midnight. Accordingly, para. 4(c) is further modified by deleting the word “entering” from the first line of para. 4(c).

[110] Paragraph 5 of the order sought seeks an order that “the defendants and other persons are free to participate in a peaceful, lawful and safe protest on Campus in accordance with the University’s policies” including, “Student Code of Conduct (Non-Academic); Disruption-Free Learning and Working Environment; Personal Harassment; and Bulletin Boards, Posters, and Flyers”. I was referred to no British Columbia case where an injunction order was granted in such terms, incorporating into compliance with the order the terms of such university policies. Further, in *University of Toronto*, the Court's order, which I was provided by counsel, in para. 10 did not appear to refer to such policies. I have not been persuaded by VIU and respectfully decline to grant para. 5 of the order sought.

[111] Paragraph 6 of the order sought, seeking police-enforcement terms, is not granted at this time. This is a request for a police enforcement order in the first instance. The Defendants include VIU students, among others, and I am not satisfied police enforcement terms are necessary at this time, noting there is no evidence that it would be unlikely that the injunction would otherwise be complied with, without enforcement terms: *Husby Forest* at paras. 57 to 59; *Aria Real Estate*

v. 1114305 B.C. Ltd (Phoenix Homes), 2024 BCSC 738 at paras. 12-13. This aspect of the relief sought in the notice of application in para. 6 of the order sought seeking police enforcement terms will be adjourned generally.

[112] Paragraph 7 of the order sought, with respect to the giving of notice of this order, is granted.

[113] Paragraph 8 of the order sought is granted, with the modification that instead of “until the trial or other disposition of this action”, it shall read, “for 150 days”.

Liberty to Return to Court to Vary Order

[114] I further order that any party or any person affected by this order has liberty to apply to vary or discharge the order I have made on 24 hours' notice.

[115] Counsel, are there any submissions on costs?

[116] CNSL M. LARSEN: VIU will not seek costs on this application.

[117] THE COURT: All right. I shall make an order that each party will bear their own costs. Yes?

[118] CNSL S. QUAIL: Thank you, Justice.

[119] THE COURT: I make an order that each party will bear their own costs.

[120] So just as final matters, are there any questions about the terms of the order that I have granted?

[121] CNSL M. LARSEN: Just a clarification that the grassed quad area that Justice is referencing, we can attach as Schedule A, this image?

[122] THE COURT: Yes.

[123] CNSL M. LARSEN: Okay.

"Stephens J."

Appendix A – Grassed Quad Area

Appendix B

Order Sought by Plaintiff on this Application

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1. The below interlocutory injunction and other orders are granted, effective August __ , 2024 at:am / pm.

2. The University, 48 hours after the issuance of this Order, be authorized by its employees, agents, contractors, or others, to remove, store, destroy or otherwise dispose of all tents, shelters, structures, barriers, fences, personal chattels, rubbish, and any other things erected, constructed, or maintained in contravention of a court order on the following University property:

   (a) Lot A, Section 1, Nanaimo District Plan EPP94852, Parcel Identifier 031028-471; and

   (b) Lot 1, Section 1, Nanaimo District Plan 12513 except that part shown as Road on Plan 78862, Parcel Identifier 004-774-116. (collectively, the "Campus")

3. The defendants and any person having knowledge of this order shall, within 48 hours after the issuance of this Order, dismantle and remove any and all structures, tents, encampments, barricades, fences, and items of personal property placed or created or imposed by them in any outdoor location at the Campus, as indicated on the map attached for illustrative purposes to this order as Schedule A, and shall permit the University to have full use and enjoyment of its lands, premises, and facilities at the Campus.

4. Effective 48 hours after the issuance of this order, the defendants and any person having knowledge of this order are restrained and enjoined from directly or indirectly, by any means whatsoever:

   (a) physically preventing, impeding, restricting or in any way physically interfering with, or counselling others to impede, restrict, or in any way physically interfere with the removal of any objects or structures including tents, shelters, structures, barriers, fences, personal chattels, or rubbish, of any kind whatsoever, from any outdoor location at the Campus;

   (b) erecting any objects or structures, including fences, tents, shelters, or barriers of any type on the Campus without the consent or authorization of the University; and

   (c) using, entering, or gathering at the Campus without the consent or authorization of the University between the hours of 11 pm and 7 am, except for persons attending at, or going to or from, residences on the Campus.

5. Provided the terms of this order are complied with, the defendants and other persons are free to participate in a peaceful, lawful and safe protest on Campus in accordance with the University's policies, including the following: Student Code of Conduct (Non-Academic); Disruption-Free Learning and Working Environment; Personal Harassment; and Bulletin Boards, Posters, and Flyers.

6. It is further ordered that:

   (a) police officers with the Royal Canadian Mounted Police, and any other police

authority having jurisdiction (collectively the **"Police"),** are hereby authorized to arrest and remove from the Campus any person who has knowledge of this Order and who the Police have reasonable and probable grounds to believe is contravening or has contravened any provision of this Order or is interfering with or obstructing, or is attempting to interfere or obstruct, any employee or agent of the University who is seeking to remove any structures, tents, shelters, objects and things owned and constructed, maintained, placed or occupied by the defendants in the Campus in accordance with this Order;

(b) the Police retain discretion as to the timing and manner of enforcement of this Order, and specifically retain discretion as to the timing and manner of arrest and removal of any person pursuant to this Order;

(c) the Police retain discretion to detain and release any person without arrest who the Police have reasonable and probable grounds to believe is contravening or has contravened any provisions of this Order, upon that person agreeing in writing to abide by this Order;

(d) any peace officer and any member of the Police who arrests or arrests and removes any person pursuant to this Order is hereby authorized to:

(i) release that person from arrest upon that person agreeing in writing to obey this Order;

(ii) release that person from arrest upon that person agreeing in writing to obey this Order and require that person to appear before this Court at such place as may be directed by this Court, on a date to be fixed by this Court;

(iii) bring that person forthwith before this Court at Vancouver, British Columbia, or such other place as may be directed by this Court;

(iv) detain that person in custody until such time as it is possible to bring that person before this Court; and/or,

(v) otherwise take steps in accordance with Part XVI of the *Criminal Code,* R.S.C. 1985, c. C-46.

7. Notice of this Order shall be given in the following manners, further to the Order of Associate Judge Robertson on July 17, 2024:

[five ways for notice to be given are then listed]

8. This Order shall remain in effect until the trial or other disposition of this action or until further order of this Court.