



Court File No. **VIC-S-S-201579**

NO.
VICTORIA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ELIZABETH ODESSA CHEEKE

PLAINTIFF

AND:

UNIVERSITY OF VICTORIA

DEFENDANT

BROUGHT UNDER THE *CLASS PROCEEDINGS ACT*, R.S.B.C. 1996 C. 50

NOTICE OF CIVIL CLAIM

This action has been started by the Plaintiffs for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a Response to Civil Claim in Form 2 in the above-named registry of this court within the time for Response to Civil Claim described below, and
- (b) serve a copy of the filed Response to Civil Claim on the Plaintiff.

If you intend to make a Counterclaim, you or your lawyer must

- (a) file a Response to Civil Claim in Form 2 and a Counterclaim in Form 3 in the above-named registry of this court within the time for Response to Civil Claim described below, and
- (b) serve a copy of the filed Response to Civil Claim and counterclaim on the Plaintiff and on any new parties named in the Counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the Response to Civil Claim within the time for Response to Civil Claim described below.

TIME FOR RESPONSE TO CIVIL CLAIM

A Response to Civil Claim must be filed and served on the Plaintiffs,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed Notice of Civil Claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed Notice of Civil Claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed Notice of Civil Claim was served on you, or
- (d) if the time for Response to Civil Claim has been set by Order of the court, within that time.

CLAIM OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

1. The Plaintiff, Elizabeth Odessa Cheeke (the "Plaintiff"), is a student and resides in the District of Central Saanich, in the Province of British Columbia.
2. The Plaintiff brings this action pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, chapter 50 (the "CPA").
3. The Defendant, the University of Victoria (the "University"), is a university incorporated pursuant to the *University Act*, R.S.B.C. 1996, c. 468 and operates a campus on and around 3800 Finnerty Road, in the City of Victoria, in the Province of British Columbia (the "Campus").
4. The University issues parking permits on the Campus.
5. The Plaintiff brings this action on her own behalf and on behalf of all faculty, staff, students, and visitors who, prior to 4:30 p.m. on March 13, 2020, purchased a permit from the University which was meant to be effective during any and all times between March 16, 2020 and August 31, 2020.

6. In the alternative, the Plaintiff brings this action on her own behalf and on behalf of all faculty, staff, and students who, prior to 4:30 p.m. on March 13, 2020, purchased a Permit from the University which was meant to be effective during any and all times between March 16, 2020 and August 31, 2020.

The University Parking Permits

7. On or about September 1, 2017, the University of Victoria Board of Governors implemented regulations governing the parking of motor vehicles on the Campus (the "Regulations"). The Regulations govern, *inter alia*, appeals, enforcement, parking areas, parking permit classifications, citations and penalties.
8. Section 25 of the Regulations define "permit" as follows:

Permit and parking permit means a card or other form as may be issued by Campus Security Services to indicate that the prescribed parking fee has been paid, or parking is permitted. Permit and permit parking also include the use of virtual parking permits. Virtual Permits use the vehicle licence plate number to allow the registered vehicle to be parked on the grounds of the University, as set out in this Regulation.
9. Section 44.01 of the Regulations allows the University to issue the Permits on an hourly, daily, weekly, monthly, term, semester, or annual basis. Annual permits are issued from September 1 to August 31.
10. Prior to March 13, 2020, faculty, staff, students, and visitors to the Campus contracted with the University for the provision of parking permits which were meant to be effective during any and all times between March 16, 2020 and August 31, 2020 (the "Class Members" and the "Permit Contracts").
11. The Regulations constituted express terms of the Permit Contracts.
12. It was an express term of the Permit Contracts that the University would provide parking facilities to the Class Members during the period for which their permits were effective.

13. It was an implied term of the Permit Contracts that the University covenanted to keep the buildings on the Campus open and continue providing in-person classes and services as indicated in the University of Victoria Calendar 2019-2020, so that the parking stalls on the Campus would be reasonably required for the purpose of storing the Class Members' vehicles while the Class Members attended the Campus (the "Parking Requirement Term").
14. It was an implied term of the Permit Contracts that the University would exercise their duties under the Permit Contracts in good faith (the "Good Faith Term").

The Campus Closure

15. On March 11, 2020, the World Health Organization declared that a coronavirus outbreak constituted a pandemic (the "Pandemic").
16. Between March 13, 2020, and April 28, 2020, in response to the Pandemic, the University made the following announcements and implemented the following measures that effectively closed the Campus from the period starting on March 16, 2020 and continuing to the present:
 - a. on March 13, 2020, the President and Vice-Chancellor of the University, Jamie Cassels, announced that the University's Provost was recommending the University transition from face-to-face to alternative modes of instruction on March 16, 2020;
 - b. the University has not provided students with in-person course instruction since on or around March 16, 2020;
 - c. the University has closed most buildings on the Campus since on or around March 16, 2020;
 - d. on March 18, 2020, the University announced that it was no longer offering students several in-person services;
 - e. on March 20, 2020, President and Vice-Chancellor Jamie Cassels

announced that the University's steps to address the Pandemic included "moving away from face-to-face classes, ... facilitating remote working and helping students in campus residences to return to their homes elsewhere";

- f. on March 26, 2020, the Provost of the University, Valerie S. Kuehne, announced that the University was working to move summer session course offerings online;
- g. On March 30, 2020, the University Chancellor Selagh Rogers and President and Vice-Chancellor Jamie Cassels announced that it was postponing convocation ceremonies previously scheduled for June 8, 2020 to June 12, 2020;
- h. On or around mid-to-late-March, 2020, the University updated its website to announce that all teaching and most services are now delivered remotely and that most of the University buildings are closed;
- i. On April 8, 2020, the University announced that all teaching and most of the University's services were now delivered remotely;
- j. On April 28, 2020, President and Vice-Chancellor Jamie Cassels announced that the University has moved all summer course offerings online.

(collectively, the "Campus Closure").

- 17. On or around March 20, 2020, the University announced that it temporarily suspended pay parking for those that pay to park on a daily or hourly basis.
- 18. On or around March 20, 2020, the University announced on its website that it would not issue partial refunds for the Permit Contracts.

The Cheeke Contract

- 19. On or around September 4, 2019, the Plaintiff purchased an annual parking permit from the University and thereby entered into a Permit Contract with the University (the "Cheeke Contract").

20. It was an express term of the Cheeke Contract that the University would provide parking facilities on the Campus from September 1, 2019 to August 31, 2020.

Damages

21. The Plaintiff and the Class Members have suffered loss, damage, and expense in the sum of all amounts paid in consideration for the Parking Permits which would cover the duration of the Campus Closure, on a prorated basis (the "Prorated Payments").

Part 2: RELIEF SOUGHT

1. The Plaintiff claims on her own behalf and on behalf of all of the Class Members:
 - (a) an order certifying this proceeding as a class proceeding and appointing the Plaintiff as representative for the Class Members;
 - (b) a declaration that the University and the Class Members are discharged from their duties imposed by the Permit Contracts by reason of the doctrine of frustration and that the *Frustrated Contract Act*, R.S.B.C. 1996, chapter 166 (the "*Frustrated Contract Act*") applies to the Permit Contracts;
 - (c) in the alternative to sub-paragraph (b) above, an order finding that the University breached the Permit Contracts by effecting the Campus Closure and refusing to issue the Prorated Amounts to the Plaintiff and Class Members as refunds;
 - (d) restitution by the University to the Plaintiff and the Class Members, pursuant to the *FCA*, of the Prorated Payments;
 - (e) in the alternative to sub-paragraph (d) above, damages covering the Prorated Payments paid by the Plaintiff and the Class Members in relation the Permit Contracts during the Campus Closure;
 - (f) general and special damages for breach of contract;
 - (g) costs of this action;
 - (h) the costs of administering and distributing a damage award;

- (i) interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996 c. 79; and
- (j) such further relief as may be just and necessary in the circumstances.

Part 3: LEGAL BASIS

1. The Plaintiff pleads and relies on the *Class Proceedings Act*.

Frustration of Contract

2. The Plaintiff claims against the University under the doctrine of frustration of contract and in accordance with the *Frustrated Contract Act*.
3. The Pandemic constitutes a frustrating event that so significantly changed the nature of the University and the Class Members' rights and obligations from what they could have reasonably contemplated when executing the Permit Contracts, that it would be unjust to hold them to the Permit Contracts' literal stipulations.
4. The Pandemic and the resultant Campus Closure were not foreseeable at the time the University and the Class Members entered into the Permit Contracts.
5. The Pandemic is the fault of neither the University nor the Class Members.
6. The Campus Closure constituted a default in a substantial term of the Permit Contracts, namely, the Parking Requirement Term, which is more than a mere delay or interruption.

Breach of Contract

7. In the alternative, if the Permit Contracts were not frustrated, the Parking Requirement term is an implied term of the Permit Contracts and the University breached that term by effecting the Campus Closure.

8. In the further alternative, if the Permit Contracts were not frustrated, the Good Faith Term was an implied term of the Permit Contracts and the University breached that term by refusing to provide partial refunds for the Class Members' parking permits.
9. The Plaintiff and the Class Members claim against the University for breach of contract due to the University, having regard exclusively to its own interests and contrary to the interests of the Plaintiff and Class Members, breaching the Parking Requirement Term and the Good Faith Term of the Contract by effecting the Campus Closure and refusing to provide partial refunds in relation to the Class Members' permits.
10. As a result of the University's breach of contract, the Plaintiff and all other Class Members have suffered, or will suffer, damages in relation to the Prorated Payments.

Unjust Enrichment

11. The University was enriched by the Class Members through the receipt of the Pro-Rated Amounts.
12. The Plaintiff and the Class Members suffered a corresponding deprivation by making the Prorated Payments for periods during which parking on the Campus is no longer required or practical.

13. Because the University effected the Campus Closure, there is no juristic reason for its enrichment.

Plaintiff's address for service: c/o Mitchell Selly, MacIsaac and Company,
115-19 Dallas Road, Victoria, BC V8V 5A6

Fax number address for service (if any): 1-250-380-7272

E-mail address for service (if any): n/a

Place of trial: Victoria, British Columbia

The address of the registry is: Ministry of Attorney General, Court Registry,
P.O. Box 9248, Stn. Prov. Govt., 2nd Floor, 850 Burdett Avenue, Victoria, British
Columbia, V8W 9J2.

Dated: April 29, 2020


Signature of MITCHELL D. SELLY
 lawyer for filing party

Rule 7-1(1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

- (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.

APPENDIX**Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

Frustration of parking permit contract between University and class action members, with claims for restitution.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

Part 4: ENACTMENT BEING RELIED ON:

1. *Class Proceedings Act*, R.S.B.C., 1996, c. 50.
2. *Frustrated Contract Act*, R.S.B.C. 1996 c. 166; and,
3. *Court Order Interest Act*, R.S.B.C. 1996 c. 79.