



No. S-236918  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Between:

CHERYL WEEKS, ANJA BERGLER, HELEN IRVINE,  
CARY RYAN, LAUREN PHILLIPS, and ANN-SUE PIPER

Plaintiffs

And

THE CITY OF ABBOTSFORD, THE DISTRICT OF CENTRAL SAANICH, THE CITY OF DELTA, THE DISTRICT MUNICIPALITY OF ESQUIMALT, THE CITY OF NELSON, THE CITY OF NEW WESTMINSTER, THE DISTRICT MUNICIPALITY OF OAK BAY, THE CITY OF PORT MOODY, THE DISTRICT MUNICIPALITY OF SAANICH, THE CITY OF SURREY, THE CITY OF VANCOUVER, THE CITY OF VICTORIA, THE DISTRICT MUNICIPALITY OF WEST VANCOUVER, THE OFFICE OF THE POLICE COMPLAINT COMMISSIONER OF BRITISH COLUMBIA, HIS MAJESTY THE KING IN RIGHT OF BRITISH COLUMBIA, THE ATTORNEY GENERAL OF BRITISH COLUMBIA, THE MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL OF BRITISH COLUMBIA

Defendants

**RESPONSE TO CIVIL CLAIM**

**Filed by:** the Police Complaint Commissioner of British Columbia (the "PCC")

**Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS**

**Division 1 — Defendant's Response to Facts**

1. The facts alleged in **paragraphs 2 and 28-30** of Part 1 of the notice of civil claim are admitted.
2. The facts alleged in **paragraphs 1, 3-4, 27, 50, and 56** of Part 1 of the notice of civil claim are denied.
3. The facts alleged in **paragraphs 5-26, 31-49, and 51-55** of Part 1 of the notice of civil claim are outside the knowledge of the PCC.

## Division 2 — Defendant's Version of Facts

1. Except as admitted in this response, the PCC denies every allegation in the notice of civil claim.

### The PCC and the *Police Act*

2. The PCC is an independent officer of the Legislature appointed under section 47 of the *Police Act*, RSBC 1996, c. 367 (the “*Act*”). The PCC provides civilian oversight to the investigatory and disciplinary processes under the *Act* to maintain public confidence in matters relating to police discipline.

3. The PCC is generally responsible for overseeing and monitoring complaints, investigations and the administration of discipline and proceedings under Part 11 of the *Act* – Misconduct, Complaints, Investigations, Discipline and Proceedings and ensuring that the purposes of that Part are achieved (s. 177(1)).

4. The PCC does not conduct investigations or decide misconduct allegations on their merits. Rather, the PCC performs a gatekeeping role to ensure such allegations are dealt with appropriately in the public interest and in accordance with the *Act*.

5. The PCC does not have authority to engage in broad, system-wide investigations under the *Act*.

6. The investigation and disciplinary processes are limited to considering allegations of misconduct against a specific member or members (or former member(s)) of a municipal police department. The investigations consider whether a member (or former member) has engaged in misconduct as defined in section 77 of the *Act*.

7. Section 78 provides that a person may make a complaint about a member’s conduct to the PCC. Section 82 requires the PCC to then determine whether a complaint is admissible. If a complaint is found admissible, the PCC must give written notification to the complainant and, unless section 83(2)(c) applies, the chief constable of the municipal police department where the member is employed (s. 83(2)). The chief constable must

then notify the member who is the subject of the complaint and specify the nature of the complaint and the name of the complainant (ss. 83(3) and (4)).

8. Section 93 of the *Act* authorizes the PCC to order an investigation if, at any time, information comes to his or her attention concerning the conduct of a member which, if substantiated, would constitute misconduct as defined by the *Act*. The PCC may exercise this power regardless of whether a complaint is made.

9. Depending on whether an investigation is commenced under section 82 or 93, there may be distinct parties involved. A “complainant”<sup>1</sup> under the *Act* is granted limited procedural rights, such as disclosure and notification. Individuals who may be directly affected by an investigation under section 93 are not granted similar rights.

10. Investigations under the *Act* are performed by “investigating officers”<sup>2</sup> who are officers employed by municipal police departments. Such investigating officers are not employees or agents of the PCC.

11. Sections 98 to 110 of the *Act* govern investigations and set out various timelines for reporting, investigation powers, members’ duties to cooperate, the taking of and use of statements, and the contents of a “final investigation report” (or FIR).

12. If the PCC is of the view that an external investigation is necessary in the public interest the PCC is empowered to, at any time, order an external investigation and appoint an external police force to undertake the investigation (ss. 92(1) and 93(1)(b)(ii)).

13. Section 98(5) of the *Act* requires an FIR to contain: (a) a brief account of the investigative steps taken; (b) a complete summary of the relevant evidence; (c) a list of all witnesses interviewed by the investigating officer; (d) a list of all records relating to the investigation; and (e) the investigating officer’s assessment of the evidence and analysis of the facts.

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<sup>1</sup> This is a defined term in section 76(1) of the *Act*.

<sup>2</sup> This is a defined term in section 76(1) of the *Act*.

14. Once complete, the FIR is provided to an appointed discipline authority. The term “discipline authority” is defined in section 76(1) as including, *inter alia*, a chief constable of the municipal police department with which the member is employed, unless section 117(9), 134, or 135(1) applies and an external discipline authority is appointed.

15. Within 10 business days after receiving the FIR, the discipline authority must review the report and any appendices, provide the report and those appendices to the member or former member, and notify the complainant, if any, the member or former member, the PCC and the investigating officer of any steps to be taken (s. 112(1)).

16. The notification is required to include certain information, such as whether the alleged misconduct appears to be substantiated and the range of disciplinary measures being considered by the discipline authority (s. 112(2)).

17. The discipline authority must provide the complainant with a copy of the FIR but not its appendices (s. 112(1)(b)). The discipline authority may sever from the FIR any portions of that report that must or may be exempted from disclosure by the head of a public body under Division 2 of Part 2 of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 (FIPPA).

18. If on review of the FIR, the discipline authority considers that the conduct of the member appears to constitute misconduct, the discipline authority must convene a discipline proceeding in respect of the matter, unless the matter is resolved at a prehearing conference pursuant to section 120(16) (s. 112(3)). If the discipline authority considers the conduct to be unsubstantiated, the discipline authority must provide a decision in accordance with section 112(1)(c) (s. 112(4)).

19. Section 117 of the *Act* gives the PCC the authority to order a review of a discipline authority’s decision under section 112 by a retired judge where the PCC “considers that there is a reasonable basis to believe that the decision [of the discipline authority] is incorrect”. If an appointment of a retired judge is made, the PCC must inform, among others, the complainant, if any, and the member of the review (s. 117(5)).

20. Within 10 business days of receiving the relevant reports, a retired judge appointed by the PCC must review the materials and make his or her own decision on the matter (s. 117(1)). The retired judge must then notify the complainant, if any, the member, the PCC, and the investigating officer of the next applicable steps to be taken (s. 117(7)).

21. Again, the notification must comply with the *Act* and advise of certain information, including whether the retired judge has found that the evidence referenced in the reports “appears sufficient to substantiate the allegation and require the taking of disciplinary or corrective measures” (s. 117(8)(d)). If the retired judge concludes the evidence does appear to substantiate the allegations, that retired judge becomes the discipline authority and must convene a discipline proceeding unless the matter is resolved at a prehearing conference pursuant to section 120(16) (s. 117(9)).

22. The PCC has only limited authority in relation to municipal police departments. Under Division 5 – Process Respecting Department Service and Policy Complaints, the PCC may review investigations regarding policy and service matters internal to municipal police departments, such as the inadequacy or inappropriateness of a municipal police department’s training programs, standing orders or policies, or internal procedures, and make recommendations (ss. 168 to 173).

23. Division 6 – Internal Discipline Matters covers those issues which are defined as matters concerning the conduct or deportment of a member that: (a) is not the subject of an admissible complaint or an investigation under Division 3; and (b) does not directly involve or affect the public.

24. The PCC cannot direct the actions of municipal police boards or departments on issues of policies and service to the public, or internal discipline, staffing or employment matters.

25. The PCC also has no authority to direct the provincial government, the Minister of Public Safety and Solicitor General or the Director of Police Services.

26. Investigations and discipline proceedings conducted under the *Act* must be kept confidential. Section 51.01(5) of the *Act* requires the PCC and all those who assist him to maintain the confidentiality of any information learned through the course of their duties.

27. Section 95 of the *Act* prohibits the PCC from disclosing that an investigation has been (or may be) initiated under Part 11 or any information relating to an investigation initiated under Part 11 unless an exception is provided for in the *Act* or he or she considers such a disclosure to be in the public interest.

28. There are only limited exceptions in the *Act* that allow for disclosure of information. For example, section 93(9) of the *Act* allows the PCC to provide information respecting an investigation commenced under that section to any persons who, in the PCC's opinion, have "a direct interest in the matter".

29. Section 182 of the *Act* contains a FIPPA override clause. Except as provided by the *Act*, FIPPA does not apply to, among other records, records of complaints concerning the conduct of a member submitted under Part 11.

### **Division 3 — Additional Facts**

30. N/A

### **Part 2: RESPONSE TO RELIEF SOUGHT**

1. The PCC consents to the granting of the relief sought in **none** of the paragraphs of Part 2 of the notice of civil claim.

2. The PCC opposes the granting of the relief sought in **all** of the paragraphs of Part 2 of the notice of civil claim.

3. The PCC takes no position on the granting of the relief sought in **none** of the paragraphs of Part 2 of the notice of civil claim.

### **Part 3: LEGAL BASIS**

#### The class action should not be certified as against the PCC

1. The representative plaintiffs' claim should not be certified as against the PCC. The claim against the PCC does not meet the requirements of sections 4(1)(a) and (c) of the *Class Proceedings Act*, RSBC 1996, c. 50, because the claim does not disclose a reasonable cause of action against the PCC, his employees, or agents and the allegations which reference the PCC's impugned conduct cannot give rise to common issues.
2. The only relief specifically sought against the PCC is a "declaration" the PCC "failed to fulfil or breached [his] common law or statutory duties to protect the privacy of the [representative plaintiffs and proposed class] from violations, including, but not limited to, violations which facilitated or exacerbated [the gendered discrimination]" (para. 60).
3. The only material facts which explicitly reference the conduct of the PCC (paras. 50(e), (f) and j)) are examples of specific investigations or actions taken under the *Act* where each unique set of circumstances must be considered by virtue of the *Privacy Act*, RSBC 1996, 373. The analysis of claims under section 1 of the *Privacy Act* is "highly contextual": *Ari v. Insurance Corp of British Columbia*, 2023 BCCA 331 at para. 104.
4. The representative plaintiffs' breach of privacy claims, discussed further below, are not suitable for class proceedings as the necessary contextual factors cannot be established on a class-wide basis: *Chow v. Facebook, Inc.*, 2022 BCSC 137 at paras. 79-93. Each alleged privacy breach would need to be considered independently to allow the PCC a fair and thorough adjudication.
5. The remainder of the representative plaintiffs' notice of civil claim does not contain any material facts which could give rise to a reasonable cause of action as against the PCC on any other basis. As such, it does not meet the requirements of section 4(1) of the *Class Proceedings Act*.

### Breach of privacy claims

6. The PCC pleads and relies on section 51.03 of the *Act* which provides the PCC and other protected individuals with statutory immunity from any action seeking damages. Section 51.03 of the *Act* provides a complete defence to this action.

7. At all material times, the PCC, his employees, and agents acted lawfully and in good faith in accordance with their statutory authority under the *Act*. None of the PCC, his employees, or agents violated the privacy of the representative plaintiffs or any members of the proposed class while fulfilling their duties or exercising their powers under the *Act* as alleged or at all.

8. The PCC is not vicariously liable for the actions of any investigating officer or other person employed by a municipal police department.

9. Any disclosure of the representative plaintiffs' or proposed class members' personal information or information of a private or confidential nature was disclosed in accordance with the *Act*, the *Privacy Act*, and any other applicable enactment.

10. The PCC did not owe the representative plaintiffs or the proposed class members a "common law duty" to protect their privacy while fulfilling his statutory duties or exercising his powers under the *Act*. There is no tort of invasion of privacy yet recognized in British Columbia: *Ari v. Insurance Corp of British Columbia*, 2023 BCCA 331.

11. In the alternative, if the PCC violated the privacy of the representative plaintiffs or proposed class members, which is denied, then the breach of privacy did not facilitate or exacerbate the alleged gendered discrimination.

12. The PCC further denies that he, his employees, or agents have caused or contributed to the representative plaintiffs' or proposed class members' damage, psychiatric or otherwise, as alleged or at all.

13. Given the PCC is not liable to the representative plaintiffs or proposed class members and that he did not cause the representative plaintiffs or proposed class



members any injury, loss or damage, he is not liable for any health care costs and pleads the provisions of the *Health Care Costs Recovery Act*, RSBC 2008, c. 27.

14. Given the PCC is not liable to the proposed class members and that he did not cause the proposed class members any injury, loss or damage, he cannot be liable under the *Family Compensation Act*, RSBC 1996, c. 126.

#### Harassment and conspiracy claims

15. There is no freestanding tort of harassment recognized in British Columbia: *Anderson v. Double M Construction Ltd (cob Owl's Nest RV Resort)*, 2021 BCSC 1473 at paras. 59-62; *Simpson v. Rebel News Network Ltd.*, 2022 BCSC 1160 at para. 55.

16. In the alternative, the PCC denies that he, his employees, or agents harassed the representative plaintiffs or proposed class members as alleged or at all. There are no material facts pled which could support a claim that the PCC, his employees, or agents have engaged in any “outrageous” conduct with the intention of, or with reckless regard to, causing the representative plaintiffs’ or proposed class members’ emotional distress.

17. The representative plaintiffs have not properly pled a claim of “conspiracy” as between the PCC and any other named defendant and any such claim should be summarily dismissed.

#### No breach of section 15 of the Charter

18. Section 51.03 of the *Act* is a complete defence to the representative plaintiffs’ claims under the *Charter*: *Ernst v. Alberta Energy Regulator*, 2017 SCC 1.

19. In any event, there are no material facts pled in the notice of civil claim which could establish a breach of section 15 of the *Charter* on the part of the PCC, his employees, or agents. Regardless, the PCC denies breaching the representative plaintiffs’ or proposed class members’ section 15 *Charter* rights by discriminating against them on the basis of sex, as alleged or at all.

20. A monetary remedy pursuant to section 24(1) of the *Charter* is not appropriate and just as no violation of the representative plaintiffs' or proposed class members' *Charter* rights on the part of the PCC, his employees, or agents has been established: *Vancouver (City) v. Ward*, 2010 SCC 27.

Limitation period

21. The PCC relies on the *Limitation Act*, SBC 2012, c. 13. All or part of the representative plaintiffs' and proposed class members' claims are barred due to the passage of time.

**Defendant's address for service:**

Lovett Westmacott  
12 – 2544 Dunlevy Street  
Victoria, BC V8R 5Z2

Name of defendant's lawyer: Deborah K. Lovett, K.C. and Alandra K. Harlinton

Fax number address for service (if any): N/A

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Date: November 6, 2023



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Signature of Deborah K. Lovett, K.C.  
Alandra K. Harlinton  
Counsel for the defendant,  
the Police Complaint Commissioner  
of British Columbia

*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.*