

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, and THE
MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL OF BRITISH COLUMBIA

DEFENDANTS

Brought under the *Class Proceedings Act*, RSBC 1996, c 50

RESPONSE TO CIVIL CLAIM

Filed by: Defendant City of Vancouver ("Vancouver")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Vancouver’s Response to Facts

Admissions

1. The fact alleged in paragraph 5 of the Notice of Civil Claim that the Plaintiff Cheryl Weeks ("Weeks") was a Vancouver police constable from 2007 to 2023 is admitted.

2. The fact alleged in paragraph 6 of the Notice of Civil Claim that the Plaintiff Anja Bergler ("Bergler") has been a Vancouver police constable since August 30, 2001, and remains in that position as of the date of this pleading, is admitted.

Denials

3. Unless expressly admitted in this Response to Civil Claim, Vancouver denies all allegations set forth in the Notice of Civil Claim, regardless of whether such allegations constitute fact or law.
4. The facts alleged in paragraphs 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 of the Notice of Civil Claim are denied as such facts do not correctly reflect the legal relationship set out in the *Police Act*, RSBC 1996, c 367 ("*Police Act*") between a municipal police constable and the municipality in which they serve.
5. The facts alleged in paragraph 51 of the Notice of Civil Claim are denied as such facts do not correctly reflect the statutory responsibilities of a municipality set out in the *Police Act*.
6. The facts alleged in paragraphs 26 and 52 of the Notice of Civil Claim are denied as there are one or more facts in each of those paragraphs which do not correctly reflect the legal framework set out in the *Police Act*.
7. The facts alleged in paragraphs 3, 4, 11, 12, 32, 33, 34, 35, 36, 37, 48, 49, 50, 53, 54, 55 and 56 of the Notice of Civil Claim are outside the knowledge of Vancouver, but are denied given that one or more facts in each of those paragraphs pertain to the central dispute in this action.

Outside the Knowledge / No Admission or Denial

8. Paragraphs 1 and 2 of the Notice of Civil Claim are not facts material to this action and can neither be admitted nor denied.
9. To the extent there are facts alleged in paragraphs 7, 8, 9, 10, 27, 28, 29, 30, 31, 38, 39, 40, 41, 42, 43, 44, 45, 46 and 47 of the Notice of Civil Claim, such facts are outside Vancouver's knowledge and immaterial to the claims of Weeks and Bergler (together, "WB Plaintiffs") against Vancouver and will neither be admitted nor denied.

Division 2 – Vancouver's Version of Facts

Generally

1. Vancouver is a municipal corporation continued by the *Vancouver Charter*, SBC 1953, c 55 ("*Vancouver Charter*"), with a municipal hall at 453 West 12th Avenue, Vancouver, British Columbia.
2. Vancouver has no independent knowledge of the facts set out in the Notice of Civil Claim concerning any of the torts alleged to have been perpetrated against the WB Plaintiffs.
3. At no time prior to commencing this action did Weeks, as required by section 294(2) of the *Vancouver Charter*, provide written notice to Vancouver of the matters described in the Notice of Civil Claim.
4. While Bergler provided written notice to Vancouver on October 10, 2023 about the matters described in paragraph 36 of the Notice of Civil Claim, such notice did not sufficiently comply with the requirements prescribed by section 294(2) of the *Vancouver Charter*.

Legal Relationship

5. The *Police Act* establishes the legal framework for the creation, governance and operation of municipal police departments in British Columbia and provides the basis of the relationship amongst the municipality, municipal police board and the police department.
6. In accordance with the legal framework set out in the *Police Act*:
 - a. A municipality with a population of more than 5000 persons must provide policing and law enforcement in that municipality by one of three means:
 - i. establishing a police board;
 - ii. contracting with the provincial police force; or
 - iii. entering into agreements with other municipalities for a joint provision of policing services;
 - b. Vancouver elected to provide policing and law enforcement within its jurisdiction by establishing the Vancouver Police Board in 1974;
 - c. Since the establishment of the Vancouver Police Board in 1974, Vancouver's only role in respect of policing and law enforcement is to bear the expenses necessary to maintain law and order within its jurisdiction;
 - d. The Vancouver Police Board performs the following main governance functions:
 - i. serves as the employer for every Vancouver police constable, including the chief constable;

- ii. sets policy and direction for the Vancouver Police Department and, in consultation with the Chief Constable of the Vancouver Police Department, sets out the Vancouver Police Department's priorities, goals and objectives;
 - iii. oversees the finances of the Vancouver Police Department; and
 - iv. acts as the discipline authority for the Vancouver Police Department;
- e. The Chief Constable of the Vancouver Police Department has, under the direction of the Vancouver Police Board, general supervision and command over the department;
- f. Vancouver is not the employer for the WB Plaintiffs, nor is it the employer for any other Vancouver police constable;
- g. Vancouver is jointly and severally liable, pursuant to section 20(1) of the *Police Act*, for torts committed by Vancouver police constables in the performance of their duties; and
- h. The Vancouver Police Board and its board members, pursuant to section 20(2) of the *Police Act*, are not legally liable for torts committed by Vancouver police constables in the performance of their duties.

Collective Agreement

- 7. Weeks served as a Vancouver police constable from 2007 to 2023.
- 8. Bergler has been serving as a Vancouver police constable since August 30, 2001 and remains in that position as of the date this Response to Civil Claim was filed.

9. At all material times, the employment terms and conditions for the WB Plaintiffs were defined in a series of seven collective agreements between the Vancouver Police Board and the Vancouver Police Union. These agreements were in effect from 2000 to 2023 and were periodically renewed and replaced throughout that time frame (together, "Collective Agreement").
10. At all material times, the WB Plaintiffs were:
 - a. members of the Vancouver Police Union, a trade union certified as the exclusive bargaining agent for the WB Plaintiffs pursuant to the *Labour Relations Code*, RSBC 1996, c 244 ("*Labour Relations Code*");
 - b. persons bound by the Collective Agreement; and
 - c. legally obligated to comply with the terms and conditions of the Collective Agreement.
11. The Collective Agreement incorporated the following two provisions related to workplace equity, both of which have remained intact and unchanged during the time frame material to the WB Plaintiffs:
 - a. Article 20 which stipulates the Vancouver Police Board's commitment to initiatives designed to ensure equal access of its employees for employment and career advancement, with a focus on helping women and others to secure employment and career advancement within the Vancouver Police Department:

20. EMPLOYMENT EQUITY

While the Employer and the Union are committed to maintaining the highest possible standards for the recruitment of new members, they also support employment

equity programs (promoting equality of access to employment and advancement) which will assist visible minorities, persons with disabilities, First Nations peoples, and women in gaining entry into employment and which will provide equality of opportunity for advancement. It is understood that this section shall not supercede any other provision of this Agreement.

- b. Article 25 which prohibits any form of discrimination or coercion exercised or practiced against any employee:

25. NO DISCRIMINATION

The Employer and the Union agree that there shall be no discrimination or coercion exercised or practiced with respect to any employee by reason of legal activity in the Union.

12. The Collective Agreement also provided for a mandatory grievance procedure requiring that any disputes concerning the interpretation, application or operation of the Collective Agreement, or any alleged violation of its terms, be resolved through the following procedure:

14. GRIEVANCE PROCEDURE

14.1 Other Disputes

Any dispute as the same is defined in the *Labour Relations Code* with respect to any matter not covered by the terms of this Agreement shall, during the term of this Agreement, be the subject of collective bargaining between the parties hereto, it being understood that the bargaining representatives of the Union may meet in the first instance with the Chief Constable.

14.2 Grievances

Any differences concerning the dismissal, discipline, or suspension of a member, including issues concerning the expungement of records from a member's service record of

discipline, or the interpretation, application or operation of this Agreement or concerning any alleged violation of this Agreement shall be finally and conclusively settled without stoppage of work in the following manner:

- (a) The grievance shall be stated in writing and submitted to the Chief Constable or representative. Should the Chief Constable or representative be unable to settle the matter within 7 days after receipt of the grievance, the Chief Constable or representative shall submit the grievance to the Employer.
- (b) The Employer and the aggrieved member, the Grievance Committee of the Union and/or the Bargaining Representatives of the Union shall meet within 14 days after receipt of the grievance from the Chief Constable and make every effort to settle the grievance.

13. In the event the grievance procedure did not result in a settlement, the following provision in the Collective Agreement, mandated by section 84 of the *Labour Relations Code*, facilitated the final and conclusive settlement of all persons bound by the agreement:

14.2 Grievances

...

- (c) Should no settlement be reached under Section 14.2(b) within 10 days, or within such further period as may be mutually agreed upon, the grievance shall be submitted to a Board of Arbitration composed of a single arbitrator to be chosen by the parties. In the event either party wants a three (3) member Board of Arbitration each party shall choose one member of the Board and the third, who shall be Chair, will be chosen by the other two. The findings of such Board of Arbitration shall be final and binding upon both parties.

Workplace Standards, Guidelines and Policies

14. At all material times and in accordance with the provisions of the *Workers Compensation Act*, RSBC 2019, c 1 ("*Workers Compensation Act*"), the Vancouver Police Board had in place, standards, guidelines and policies governing employee conduct in the workplace ("*Workplace Policies*").
15. The Workplace Policies were filed with the Director of Police Services, as required by the *Police Act*, and included, *inter alia*, the following provisions:
 - a. policy declarations stating that discrimination, harassment and bullying are neither accepted nor tolerated;
 - b. procedures for employees to report incidents or complaints of discrimination, harassment and bullying, including how, when and to whom the employee should report such incidents or complaints; and
 - c. procedures and timing for the Vancouver Police Department to conduct investigations into discrimination, harassment and bullying.
16. At all material times, the Workplace Policies were in accordance with and met the applicable standard of care.

Division 3 – Additional Facts

1. The Notice of Civil Claim fails to allege facts which, if true, would establish that this court has jurisdiction over Vancouver in relation to the claims made against it by the WB Plaintiffs.

2. On February 14, 2024, Vancouver filed a Jurisdictional Response in Form 108 challenging the jurisdiction of this court in respect of the claims made by the WB Plaintiffs against Vancouver in these proceedings.
3. By filing this Response to Civil Claim:
 - a. Vancouver does not submit to the jurisdiction of this court and expressly denies that this court has jurisdiction over Vancouver in relation to the claims made against it by the WB Plaintiffs; and
 - b. Vancouver does not admit and expressly denies that the claims of the WB Plaintiffs constitute a valid cause of action or are otherwise appropriate for class certification.

Part 2: RESPONSE TO RELIEF SOUGHT

1. Vancouver does not consent to the granting of the relief sought in Part 2 of the Notice of Civil Claim.
2. Vancouver opposes the granting of the relief sought in Part 2 of the Notice of Civil Claim.

Part 3: LEGAL BASIS

No Jurisdiction

1. The WB Plaintiffs have characterized their claims against Vancouver as involving gender-based and/or sexual orientation-based discrimination, harassment and bullying perpetrated against them by other Vancouver police constables in their work environment (together, "WB Discrimination Claims").

2. The substance or essential character of the WB Discrimination Claims, as alleged by the WB Plaintiffs in this action, concern disputes inextricably related to their employment as Vancouver police constables and, which arise expressly or inferentially from the (a) interpretation, application or operation of the Collective Agreement; and/or (b) alleged violations of Articles 20 and 25 of the Collective Agreement.
3. Given that the substance or essential character of the WB Discrimination Claims arise from the Collective Agreement, the resolution of these claims, as prescribed by the *Labour Relations Code*, are:
 - a. subject to the mandatory grievance and arbitration procedures set out in the Collective Agreement; and
 - b. exclusively within the jurisdiction of the arbitration board, established in accordance with the terms of the Collective Agreement.
4. The WB Plaintiffs are not, however, without remedy or precluded from effective redress with respect to the WB Discrimination Claims as section 89 of the *Labour Relations Code*, authorizes the arbitration board remedial authority to provide a final and conclusive settlement of all disputes arising under a collective agreement and may, without limitation:
 - a. award monetary damages for an injury or loss suffered by any person as a result of the contravention of a collective agreement; and
 - b. interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement, including the *Human Rights Code*, RSBC 1996, c 210 ("*Human Rights Code*").

Barred by Operation of Workers Compensation Act

5. As plead in paragraphs 11, 32, 33, 34, 35, 36, 48, 49 and 50 of the Notice of Civil Claim, the wrongful acts and/or omissions claimed to have been perpetrated against the WB Plaintiffs by other Vancouver police constables occurred while the WB Plaintiffs were, *inter alia*:
 - a. employed in their capacity as Vancouver police constables;
 - b. under the supervision or management of other Vancouver police constables;
 - c. working on municipal premises "integrated" into the Vancouver Police Department's work environment; and
 - d. using Vancouver Police Department property and resources to perform their jobs.

6. If the claims plead by the WB Plaintiffs are true, then at all material times:
 - a. the WB Plaintiffs were acting within the course and scope of their employment and were "*workers*" within the meaning of the *Workers Compensation Act*;
 - b. the persons alleged by the WB Plaintiffs to have perpetrated wrongful acts and/or omissions against them were acting within the course and scope of their employment and were "*workers*" within the meaning of the *Workers Compensation Act*;
 - c. Vancouver and the Vancouver Police Board were "*employers*" engaged in an industry within the meaning of the *Workers Compensation Act*;

and accordingly, the cause of action of the WB Plaintiffs against Vancouver is barred by section 127 of the *Workers Compensation Act*.

Barred by Operation of Vancouver Charter

7. The claims of the WB Plaintiffs against Vancouver are barred, in whole or in part, pursuant to section 294(2) of the *Vancouver Charter*, for the failure of the WB Plaintiffs to provide the written notice prescribed in that legislation.

Barred by Operation of Limitation Act

8. The claims of the WB Plaintiffs against Vancouver are barred, in whole or in part, pursuant to section 6 of the *Limitation Act*, SBC 2012, c 13, as these claims are brought by the WB Plaintiffs outside the time frame prescribed in that legislation..

No Duty of Care / No Breach of Duty of Care

9. As a matter of law, Vancouver does not owe the WB Plaintiffs a duty of care at common law, by statute, by contract, or otherwise, with respect to any of the claims alleged in the Notice of Civil Claim.
10. The legal relationship between Vancouver and the WB Plaintiffs, as set out in Division 2 of this Response to Civil Claim, is not one founded on a relationship for which Vancouver can be directly liable to the WB Plaintiffs.
11. Further and in the alternative, Vancouver denies that any person for whom it would be responsible or legally liable, breached any duty of care to the WB Plaintiffs.

Alleged Breach of Contract

12. The WB Plaintiffs have failed to set out the material facts essential to properly plead a cause of action for breach of contract against Vancouver and, on that basis, this claim should be struck against Vancouver.

Alleged Breach of Privacy

13. The WB Plaintiffs have failed to set out the material facts essential to properly plead a cause of action against Vancouver and have failed to plead sections 1 and 3(2) of the *Privacy Act*, RSBC 1996, c 373 and, on that basis, this claim should be struck against Vancouver.

Alleged Breach of Fiduciary Duty

14. The WB Plaintiffs have failed to set out the material facts essential to properly plead a cause of action against Vancouver for breach of fiduciary duty and, on that basis, this claim should be struck against Vancouver.

Alleged Intentional Infliction of Mental Suffering

15. The WB Plaintiffs have failed to set out the material facts essential to properly plead a cause of action against Vancouver for the intentional infliction of mental suffering and, on that basis, this claim should be struck against Vancouver.
16. Further and in the alternative, if the WB Plaintiffs suffered from any injury, loss, damage or expense in connection with mental suffering, such injury, loss, damage or expense was not caused or contributed to by any person for whom Vancouver would be responsible or legally liable.

Alleged Harassment

17. There is no recognized tort of harassment in British Columbia.
18. Further and in the alternative, the WB Plaintiffs have failed to set out the material facts essential to properly plead a cause of action against Vancouver for harassment and, on that basis, this claim should be struck against Vancouver.
19. Further and in the alternative, any such claim for harassment falls outside the jurisdiction of this court and must be pursued in accordance with the provisions of the *Labour Relations Code* and/or the *Human Rights Code*.

Alleged Civil Conspiracy

20. The WB Plaintiffs have failed to set out the material facts essential to properly plead a cause of action against Vancouver for conspiracy, and on that basis, this claim should be struck against Vancouver.

Family Compensation Act

21. The WB Plaintiffs have failed to set out the material facts essential to properly plead a cause of action against Vancouver pursuant to the *Family Compensation Act*, RSBC 1996, c 126 ("*Family Compensation Act*"), and on that basis, this claim should be struck against Vancouver.

Alleged Infringement of Charter

22. If there is an infringement of the WB Plaintiffs' rights guaranteed by the *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11* ("*Charter*"), such breach is saved by section 1 of the *Charter*.

23. Further and in the alternative, Vancouver lacks statutory authorization for, and did not participate in, any of the wrongful acts and/or omissions alleged to infringe upon the *Charter* rights of the WB Plaintiffs.
24. Should the WB Plaintiffs succeed in establishing an infringement of their *Charter* rights, damages under section 24(1) of the *Charter* would not constitute an appropriate and just remedy against Vancouver due to:
 - a. the fact that a claim for damages under section 24(1) of the *Charter* does not comprise a tort claim for which Vancouver could be held legally liable under the *Police Act*, or otherwise; and/or
 - b. considerations of good governance; and/or
 - c. the availability of adequate alternative remedies available to the WB Plaintiffs on the merits in accordance with law; and/or
 - d. such other countervailing considerations and/or other legal basis as Vancouver may advise.

No Loss or Damage Available

25. If the WB Plaintiffs sustained the injury, loss, damage or expense as alleged in the Notice of Civil Claim, or at all (together, "Damage"), the Damage was not caused or contributed to by any wrongful act and/or omission of Vancouver, but was caused or contributed to by wrongful acts and/or omissions of the WB Plaintiffs themselves and/or other persons or entities for which Vancouver is not responsible or legally liable.

26. Further and in the alternative, if the WB Plaintiffs sustained the Damage alleged in the Notice of Civil Claim, or at all:
 - a. the WB Plaintiffs have failed or refused to take any, or any reasonable, steps to mitigate the Damage by not taking reasonable and appropriate measures to reduce the Damage, including failing to follow medical or other advice;
 - b. the wrongful acts and/or omissions alleged against Vancouver in the Notice of Civil Claim by the WB Plaintiffs were not the proximate cause of the Damage; and
 - c. the Damage is attributable to the WB Plaintiffs' previous or subsequent injuries, traumas, congenital defects, medical conditions or unrelated events for which Vancouver is not responsible or legally liable.
27. Further and in the alternative, the Notice of Civil Claim discloses no legal foundation by which to impose special, aggravated, exemplary or punitive damages against Vancouver.
28. Further and in the alternative, damages under the *Family Compensation Act* are restricted to pecuniary loss and loss of benefits sustained by a spouse, parent or child of the deceased. It is a matter of law that aggravated and punitive damages are not available against Vancouver in actions brought under the *Family Compensation Act*.
29. In relation to the claim of the WB Plaintiffs for recovery of health care costs pursuant to the *Health Care Costs Recovery Act, SBC 2008, c 27 ("HCCRA")*, Vancouver states that:

- a. the WB Plaintiffs have not received health care services as defined in the *HCCRA*;
- b. the government of British Columbia has not made payments for health care services on behalf of the WB Plaintiffs under the *HCCRA*;
- c. the WB Plaintiffs are not “beneficiaries” for the purpose of the *HCCRA*;
- d. Vancouver is not a “wrongdoer” for the purpose of the *HCCRA*, and is, therefore, not legally liable for any past or future health care costs of the WB Plaintiffs; and
- e. the amounts claimed by the WB Plaintiffs, by virtue of the *HCCRA*, are costs that would have arisen in any event, and therefore Vancouver is not legally liable for such costs.

Abuse of Process

30. If the WB Plaintiffs have commenced a similar action in the Human Rights Tribunal as admitted in paragraph 73 of the Notice of Civil Claim, or in any other forum, or have advanced grievances under the Collective Agreement, it is contended that this action represents an abuse of process and should accordingly, be dismissed.

Statutory Enactments

31. In support of the legal basis set out in Part 3 of this Response to Civil Claim, Vancouver pleads and relies on the following enactments, including amended or previous versions of such enactments in effect at any material time:
 - a. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11;

- b. *Class Proceedings Act*, RSBC 1996, c 50;
- c. *Family Compensation Act*, RSBC 1996, c 126;
- d. *Health Care Costs Recovery Act*, SBC 2008, c 27;
- e. *Human Rights Code*, RSBC 1996, c 210;
- f. *Labour Relations Code*, RSBC 1996, c 244;
- g. *Negligence Act*, RSBC 1996 c 333;
- h. *Police Act*, RSBC 1996, c 367;
- i. *Privacy Act*, RSBC 1996, c 373;
- j. *Vancouver Charter*, SBC 1953, c 55;
- k. *Workers Compensation Act*, RSBC 2019, c 1; and
- l. such further authorities or enactments as Vancouver may advise.

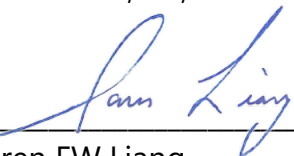
WHEREFORE the Defendant City of Vancouver seeks an order that this action against it be dismissed with costs.

Address for Service for Defendant City of Vancouver

Karen FW Liang
City of Vancouver -Legal Services
Suite 300 - 575 West 8th Avenue
Vancouver, BC V5Z 0C4

Fax number address for service: 604-873-7445
Place of trial: Vancouver, BC
The address of the registry is: 800 Smithe Street
Vancouver, BC, V6Z 2E1

Date: February 14, 2024



Karen FW Liang
Lawyer for Defendant City of Vancouver

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.