

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

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

Plaintiffs

And:

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

Defendants

Brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

RESPONSE TO AMENDED NOTICE OF CIVIL CLAIM

Filed by: City of Victoria (“Victoria”) and Township of Esquimalt (“Esquimalt”)

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendant’s Response to Facts

1. None of the facts alleged in Part 1 of the Amended Notice of Civil Claim (“ANOCC”) are admitted.
2. The facts alleged in paragraphs 1-4, ~~17~~ 16, 24, 26-29, 32-34 35-37, 48-49 51-52, and 54-56 54-59, of Part 1 of the ANOCC are denied.

3. The facts alleged in paragraphs ~~5-16~~ 15, 17-23, 18-25, 27-31 ~~30-34, 35-47~~ 38-50 and ~~50~~ 53 of Part 1 of the ANOCC are outside the knowledge of Victoria and Esquimalt.
4. To the extent that facts are alleged in Parts 2 and 3 of the ANOCC, those facts are denied.

Division 2 – Defendant’s Version of Facts

5. Victoria and Esquimalt (correctly named “Township of Esquimalt”) are municipalities incorporated pursuant to the provisions of the *Local Government Act*, R.S.B.C. 2015, c. 1 (“LGA”).
6. Pursuant to s. 15 of the *Police Act*, R.S.B.C. 1996, c. 367, Victoria and Esquimalt are obliged to pay the expenses necessary to provide policing and law enforcement services in the City of Victoria and the Township of Esquimalt.
7. Section 3(2) of the *Police Act* now authorizes each municipality with a population of more than 5,000 persons to establish and maintain an independent municipal police department, subject to the approval of the Minister.
8. Victoria and Esquimalt provide policing and law enforcement services through a single municipal police department, the Victoria Police Department (“VicPD”). The origins of the VicPD date back to 1858. The VicPD was amalgamated with the former Esquimalt Police Department in 2003. The VicPD is independent from Victoria and Esquimalt, and from any other police department or government agency.
9. Pursuant to Part 5 of the *Police Act*, the VicPD was established and is governed by the Victoria and Esquimalt Police Board (“VicPB”). The VicPB was not appointed by Victoria and Esquimalt, and is independent from Victoria and Esquimalt and from the VicPD, and from any other police department or government agency. The VicPB is not an agent of Victoria or Esquimalt. The Chief Constable of the VicPD is responsible for general supervision and command of the VicPD, under the direction of the VicPB.
10. Victoria and Esquimalt are not the employers of the municipal constables who are members of the VicPD. VicPD’s members are employed by the VicPB, either pursuant to the terms of collective agreements negotiated on their behalf by the Victoria Police Union (“VicPU”), or, in the case of certain senior police officers, individual contracts.
11. Victoria and Esquimalt are not responsible at common law for the actions or omissions any member of the VicPD, but admits that it is statutorily jointly and severally liable, pursuant to s. 20 of the *Police Act*, for any torts committed in the performance of their duties by any VicPD members or other employees of the VicPB. The VicPB is not legally responsible, at common law or by statute, for any torts committed by VicPD members or its employees or by the VicPB.

12. Victoria and Esquimalt admit that the plaintiff Lauren Phillips (“Phillips”) was a member of the VicPD, employee of the VicPB, and member of the VicPU from 2015 to 2017, but say that the ANOCC does not allege any facts that identify any torts or acts of discrimination, harassment, or bullying committed by any member of the VicPD or any other employee of the VicPB against her.
13. Victoria and Esquimalt have no independent knowledge of the torts allegedly committed against any proposed representative plaintiffs or proposed class members.
14. The ANOCC alleges no facts that:
 - a) constitute a cause of action of any kind against Victoria and Esquimalt;
 - b) support a finding that a class of plaintiffs exists;
 - c) support a finding that the plaintiffs are proper representatives of any such class of plaintiffs that would include members or former members of the VicPD; or, in the alternative, that any such class of plaintiffs includes members or former members of the VicPD; and
 - d) justify a certification of a class proceeding against Victoria and Esquimalt, as required by, *inter alia*, s. 4 of the *Class Proceedings Act*.
15. Victoria and Esquimalt deny that they owed a duty of care at common law, under contract, under statute, or otherwise, to the proposed representative plaintiffs or any proposed class members.
16. Alternatively, Victoria and Esquimalt deny that they breached any such duty, as alleged or at all, and put the proposed representative plaintiffs and proposed class members to the strict proof thereof.
17. In response to the whole of the ANOCC and in specific response to paragraphs 1, 34 37 and 48 51 to 53 56 of Part 1, Victoria and Esquimalt deny that any proposed representative plaintiff or proposed class member, including any current or former members of the VicPD, has suffered any discrimination, harassment, or bullying, as alleged or at all. Victoria and Esquimalt further deny the existence of a “systemic culture of gender and sexual orientation-based harassment and discrimination” in the VicPD.
18. Alternatively, Victoria and Esquimalt deny that they, or any of their staff, employees, agents, or others for whom they are responsible, were complicit in any such discrimination, harassment or bullying or any such culture, as alleged or at all.
19. The ANOCC pleads no material facts in support of a breach of privacy claim by any proposed representative plaintiff or any proposed class members against Victoria and Esquimalt. Victoria and Esquimalt deny that any such breach occurred. Further, a breach of privacy claim is not suitable for determination in a class action.

20. None of the proposed representative plaintiffs or any proposed class members have suffered any injury, loss, damage, or expense (collectively, "Damage"), as alleged or at all.
21. If any of the proposed representative plaintiffs or any proposed class members have suffered Damage, such Damage was not caused or contributed to by any act, omission, negligence, fault, or breach of duty of Victoria and Esquimalt, but was caused or contributed to by the acts, omissions, negligence, fault or breach of duty of:
 - a) other proposed representative plaintiffs or proposed class members;
 - b) other defendants; or
 - c) other parties currently unknown to Victoria and Esquimalt and for which Victoria and Esquimalt are not responsible or liable.
22. If any of the proposed representative plaintiffs or proposed class members suffered Damage, such Damage is attributable to previous or subsequent injuries, conditions, congenital defects, or events.
23. If any proposed representative plaintiffs or proposed class members suffered Damage, they failed to follow medical or other advice, or failed to return to work or education as soon as reasonably practicable, and have generally failed to mitigate their Damage.
24. Further, the ANOCC discloses no basis for the claims for special, aggravated, exemplary, or punitive damages. Victoria and Esquimalt deny that any such basis exists.
25. Alternatively, if there is a basis for the claims of punitive damages, Victoria and Esquimalt are not liable for punitive damages in the absence of reprehensible conduct directly attributable to Victoria and Esquimalt.
26. Further, none of the proposed representative plaintiffs or proposed class members can benefit from double recovery. Any Damages awarded in respect of claims made in the ANOCC must be reduced by the amounts any of them have received or are or were entitled to receive from other sources or through other means.

Division 3 – Additional Facts

Collective agreements

27. The essential character of the dispute in this action arises from the interpretation, application, operation, or alleged violation of a collective agreement.
28. Such disputes fall within the exclusive jurisdiction of a labour arbitration board because at all material times:
 - a) any putative VicPD class members were members of the VicPU;

- b) the VicPU was certified as the exclusive bargaining agent to represent members of the VicPU, including any putative VicPD class members, pursuant to the *Labour Relations Code*, R.S.B.C. 1996, c. 244 (“LRC”).
- c) the VicPB and the VicPU entered into collective agreements that were renewed or replaced from time to time (collectively, “Collective Agreements”), that set out the terms and conditions of employment that apply to members of the VicPU. The employment of any putative VicPD class members was governed by and subject to the collective agreements.
- d) by their express terms, or by operation of s. 84(3) of the LRC, the Collective Agreements provided for the final and conclusive resolution of all disputes arising from the interpretation, application, operation, or alleged violation of the Collective Agreements, including a dispute as to whether a matter is arbitrable; and
- e) pursuant to s. 89 of the LRC, an arbitration board had the authority to provide a final and conclusive settlement of a dispute arising under the Collective Agreements.

Worker and employer status

29. At all material times:

- a) the proposed representative plaintiffs and proposed class members were “workers” within the meaning of s. 1 of the *Workers Compensation Act*, R.S.B.C. 2019, c. 1 (“WCA”);
- b) any non-plaintiff VicPD members were also “workers”;
- c) the VicPB was an “employer” within the same provision;
- d) Victoria and Esquimalt were each an “employer engaged in an industry” within the same provision;
- e) the action or conduct of either the employer or another worker, that caused any alleged breach of a duty of care, or any other cause of action pleaded in the ANOC, arose out of and in the course of employment within the scope of the WCA compensation provisions; and
- f) the determination of the statuses asserted in sub-paragraphs (a)-(e) above is within the exclusive jurisdiction of the Workers Compensation Appeals Tribunal, pursuant to ss. 308 and 311 of the WCA.

Limitation periods

30. The NOCC was filed on October 11, 2023. Victoria and Esquimalt received no written notice of a potential or actual claim from any proposed representative plaintiff or proposed class member as required by s. 736 of the *Local Government Act* or the applicable provisions of its predecessor statutes.
31. Any claims discovered within the meaning of ss. 6 and 8 of the *Limitation Act* occurred long before October 2021.

Part 2: RESPONSE TO RELIEF SOUGHT

32. Victoria and Esquimalt oppose all of the relief sought against it in paras. ~~57-59~~ 60-62 of Part 2 of the ANOCC.
33. Victoria and Esquimalt seek a dismissal of all claims against it, with costs payable to Victoria and Esquimalt.

Part 3: LEGAL BASIS

34. The ANOCC discloses no factual or legal basis for any of the claims against Victoria and Esquimalt, and the entire ANOCC is frivolous, scandalous, vexatious, and an abuse of process.

Jurisdiction

35. The Court has no jurisdiction over the action because of the facts and legislative facts set out in para. 28 above.
36. Further, or in the alternative, the claims of discrimination, harassment, or bullying based on gender and sexual orientation, or both, fall within the jurisdiction of the British Columbia Human Rights Tribunal (“HRT”) pursuant to the *Human Rights Code*, R.S.B.C. 1996, c. 210 (“HRC”).
37. This court should decline jurisdiction over all claims of discrimination, harassment, or bullying in favour of the HRT, which has specialized expertise and a specialized process and is thus is the more appropriate forum.

Statutory bars

38. All claims made by the proposed representative plaintiffs and proposed class members are statute-barred pursuant to:
 - a) section 127 of the *WCA*;
 - b) section 6 of the *Limitation Act*; and
 - c) sections 735 and 736 and of the *LGA*.

No breach of “contractual duties”

39. There is no breach of “contractual duties” because of the facts and legislative facts set out in para. 10 above. There is, and was, no contract between Victoria and Esquimalt and any proposed representative plaintiff or proposed class member. The VicPB has not breached any contractual duties.

No duty of care or breach of duty of care

40. Victoria and Esquimalt deny that they owed a duty of care to the proposed representative plaintiffs or proposed class members, as alleged or at all.
41. Alternatively, if Victoria and Esquimalt owed a duty of care to any proposed representative plaintiffs or proposed class members by statute, common law or otherwise, as alleged or at all, Victoria and Esquimalt acted at all material times in accordance with the standard of care expected of a reasonably prudent municipal government, and in accordance with all policies, statutory requirements, and common law duties.
42. In the further alternative, if either or both of Victoria and Esquimalt breached any duty of care owed to Piper or any proposed representative plaintiff or proposed class member, that breach did not cause any Damage.
43. Alternatively, if Victoria and Esquimalt owed a duty of care to any proposed representative plaintiff or proposed class member, and breached the applicable standard of care, such breaches were not systemic or common to all members of the proposed class.

No Charter breach

44. Victoria and Esquimalt deny that the rights of any proposed representative plaintiffs or proposed class members, as guaranteed by the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) were breached by Victoria and Esquimalt, as alleged, or at all.
45. Alternatively, if any Charter rights were breached, any such breach is saved by section 1 of the *Charter*.
46. Alternatively, if there was any such *Charter* breach not saved by section 1, Victoria and Esquimalt deny that monetary relief pursuant to s. 24(1) of the *Charter* is payable by Victoria and Esquimalt.
47. Alternatively, if there has been an unjustified breach of *Charter* rights, a damage award under s. 24(1) of the *Charter* is not a just and appropriate remedy.
48. Further, the proposed representative plaintiffs and proposed class members are not entitled to *Charter* damages that would be duplicative of any award of damages premised upon other compensatory claims.

49. In the further alternative, Victoria and Esquimalt are not statutorily liable for *Charter* breaches arising from the conduct of VicPD members.

No breach of fiduciary duty

50. Victoria and Esquimalt deny that either or both of them were in a fiduciary relationship with, or owed a fiduciary duty to, any proposed representative plaintiff or proposed class member.

51. Alternatively, if either or both of Victoria and Esquimalt owed any fiduciary duty to any proposed representative plaintiff or proposed class member, Victoria and Esquimalt did not breach any such duty, as alleged or at all.

No tort of harassment; no intentional infliction of mental suffering

52. There is no recognized tort of harassment in British Columbia.

53. Further, if the proposed representative plaintiffs or proposed class members were subjected to harassment or intentional infliction of mental suffering in the context of their employment, as alleged or at all, any such claim falls within the jurisdiction of the HRT and must be pursued in accordance with the *HRC* or the *WCA*.

54. The ANOCC pleads no material facts that could support a claim of harassment or intentional infliction of mental suffering against Victoria and Esquimalt.

55. Further, or in the alternative:

a) Victoria and Esquimalt did not engage in any conduct that could constitute harassment or discrimination on the basis of gender or sexual orientation; and

b) Victoria and Esquimalt did not and could not have knowledge of individual acts that could constitute harassment, intentional infliction of mental suffering, or discrimination on the basis of gender or sexual orientation, because of the independence of Victoria and Esquimalt from VicPB and VicPD as pleaded at paras. 7-9 above.

No breach of privacy

56. The proposed representative plaintiffs and proposed class members have failed to plead any material facts that could support a claim against Victoria and Esquimalt for breach of privacy.

57. Alternatively, Victoria and Esquimalt deny that they breached the *Privacy Act*, R.S.B.C. 1996, c. 373, as alleged or at all.

58. Alternatively, if Victoria and Esquimalt breached the *Privacy Act*, the plaintiffs and putative members of any proposed class suffered no Damage as a result.

No conspiracy

59. The ANOCC pleads no material facts that could support either predominant purpose or unlawful means conspiracy. To the extent that para. 97 100 purports to plead material facts in support, those facts are incomprehensible.
60. For greater clarity, Victoria and Esquimalt each and jointly deny that:
- a) they acted by agreement or concerted action with any of the other defendants;
 - b) with the predominant purpose of causing injury or harm to the proposed representative plaintiffs or proposed class members; and
 - c) if any such conduct and purpose existed, it caused actual Damage to the proposed representative plaintiffs or proposed class members.
61. For greater clarity, Victoria and Esquimalt each and jointly that:
- a) they acted by agreement or concerted action with any of the other defendants;
 - b) such conduct was unlawful and was directed towards the proposed representative plaintiffs or proposed class members; and
 - c) they knew or ought to have known that any of their conduct or actions would cause actual Damage to the proposed representative plaintiffs or proposed class members.

Family Compensation Act does not apply

62. The ANOCC discloses no cause of action against Victoria and Esquimalt pursuant to the *Family Compensation Act*, R.S.B.C. 1996, c. 126.
63. No family compensation claim is available to any representative plaintiff or any proposed class member.

Damages

64. Victoria and Esquimalt rely on paras. 20-26 above. Further, Victoria and Esquimalt state that:
- a) the proposed representative plaintiffs and proposed class members have not received health care services as defined in the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 (“HCCRA”) and the government of British Columbia has not made payments for health care services on behalf of the Plaintiffs and/or proposed class of plaintiffs under the HCCRA;
 - b) the proposed representative plaintiffs and proposed class members are not “beneficiaries” for the purpose of the HCCRA;

- c) Victoria and Esquimalt are not a “wrongdoers” for the purpose of the HCCRA, and therefore they is not liable for any past or future health care costs of the Plaintiffs and/or putative members of any proposed class; and
- d) the amounts being claimed by virtue of the HCCRA, are costs that would have arisen in any event, and therefore Victoria and Esquimalt are not liable for same.

Not suitable for class certification

- 65. The claims of the proposed representative plaintiffs and proposed representative class members are not suitable for certification because neither the proposed claims nor the proposed class meet the conditions for certification set out in s. 4 of the CPA.
- 66. Specifically, the pleadings do not disclose a cause of action against Victoria and Esquimalt. There are no common issues or questions of fact between any proposed representative plaintiffs and proposed class members. The assessment of every aspect of all of the claims for each of the proposed representative plaintiffs and proposed class members, will require a fact-specific assessment that is highly individualized. Therefore, a class proceeding would not provide for a fair and efficient resolution of the claims. A class proceeding would create unnecessary difficulties for the orderly litigation of those claims.

Enactments

- 67. Victoria and Esquimalt plead and rely upon the following statutes, including amended or previous versions 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*, R.S.B.C. 1996, c. 50;
 - c) *Family Compensation Act*, R.S.B.C. 1996, c. 126;
 - d) *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27;
 - e) *Human Rights Code*, R.S.B.C. 1996, c. 210;
 - f) *Labour Relations Code*, R.S.B.C. 1996, c. 244;
 - g) *Limitation Act*, S.B.C. 2012, c. 12;
 - h) *Local Government Act*, R.S.B.C. 2015, c. 1;
 - i) *Negligence Act*, R.S.B.C. 1996, c. 333;
 - j) *Police Act*, R.S.B.C. 1996, c. 367;
 - k) *Privacy Act*, R.S.B.C. 1996, c. 373; and
 - l) *Workers Compensation Act*, R.S.B.C. 2019, c. 1; and

Address for service:

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**Attention: David G. Butcher, K.C. and
Anila Srivastava**

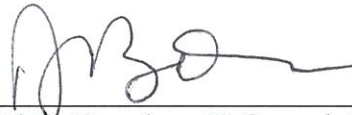
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Dated: ~~February 14~~ September 5, 2024



**David G. Butcher, K.C. and Anila
Srivastava**, lawyers for the Defendant
Victoria and Esquimalt

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.