

Original Response to Civil Claim filed on February 14, 2024.
Amended pursuant to the Order made by Justice Elwood on July 29, 2024.

No. S236918
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

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, NEW WESTMINSTER POLICE BOARD,
OAK BAY POLICE BOARD, PORT MOODY POLICE BOARD, SAANICH POLICE
BOARD, SURREY POLICE BOARD, VANCOUVER POLICE BOARD, WEST
VANCOUVER POLICE BOARD, BRITISH COLUMBIA POLICE COMPLAINT
COMMISSIONER, 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 under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

AMENDED RESPONSE TO AMENDED NOTICE OF CIVIL CLAIM

Filed by: The Defendants, City of Delta and Delta Police Board (together, the “**Defendants**”
or “**Delta**”)

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1- Defendants’ Response to Facts

1. The facts alleged in none of the paragraphs of Part 1 of the Amended Notice of Civil Claim (“**NOCC**”) are admitted.

2. The facts alleged in paragraphs 1-4, 7, 11-37, 34, 41-44, 51-59 ~~48-49, 51-56~~ of Part 1 of the NOCC are denied.
3. The facts alleged in paragraphs 5-6, 8-10, 38-40, 45-50 ~~35-47~~, 50 of Part 1 of the NOCC are outside the knowledge of the Defendants.
4. Unless specifically admitted, the Defendants ~~denies~~ each and every allegation in the NOCC. For greater certainty, the facts alleged in the NOCC, the existence of which are outside the knowledge of the Defendants, as set out in paragraph 3 above, are denied.

Division 2 - Defendant's Version of Facts

- ~~5. In response to the NOCC as a whole, the Defendant's legal name is City of Delta.~~
5. In response to paragraph 26 of the NOCC, the City of Delta is governed by the *Local Government Act*, R.S.B.C. 2015, c. 1 ("*LGA*") and the *Community Charter*, S.B.C. 2003, c. 26.
6. In response to paragraph 15 of Part 1 of the NOCC, the City of Delta is not the employer of the officers of ~~the~~ its municipal police department ~~force in Delta~~.
7. In further response to paragraphs 15, 26, 27-29 and 35-37 ~~32-34~~ of Part 1 of the NOCC, and the NOCC as a whole, the statutory requirements of a municipality to establish a municipal police department are set out in the *Police Act*, R.S.B.C. 1996, c. 367 ("*Police Act*").
8. Pursuant to s. 26 of the *Police Act*, the Delta Police Board is the employer of the chief constable and every constable and employee of the Delta Police Department ("DPD"). All sworn constables, with certain limited exceptions, who are senior officers and management, are subject to the terms of a collective agreement as defined in the *Labour Relations Code*, R.S.B.C. 1996, c. 244 ("*Code*").
9. The Delta Police Board is an employer within the meaning of the *Workers Compensation Act*, R.S.B.C. 2019, c. 1 ("*WCA*") and the *Code*.
10. In further response to paragraphs 15, 26, 27-29 and 35-37 ~~32-34~~ of Part 1 of the NOCC, the City of Delta's liability for a tort that is committed by any of its municipal constables, special municipal constables, designated constables, enforcement officers, bylaw enforcement officers or employees of its municipal police board is governed by ss. 20 and 21 of the *Police Act*. The Delta Police Board is not liable for any alleged or established tortious conduct committed by any of its municipal constables, special municipal constables, designated constables, enforcement officers, bylaw enforcement officers or employees in the performance of their duties pursuant to s. 20(2) of the *Police Act*.

11. In response to paragraphs 38-41, 48- 49 and 53 of Part 1 of the NOCC, and the NOCC as a whole, the Defendants denyies all of the alleged acts or omissions pleaded.
12. At all material times, ~~Delta~~ the Defendants had in place protocols, policies, systems, procedures and standards that were reasonable and proper in accordance with the applicable standard of care.
13. In response to paragraph 7 of Part 1 of the NOCC, the proposed representative plaintiff Helen Irvine (“**Ms. Irvine**”) was at all material times a worker within the meaning of the *WCA* and an employee within the meaning of the *Code*.
14. In further response to paragraph 7 of Part 1 of the NOCC, Ms. Irvine was hired by the Delta Police Board on March 10, 2014, resigned as of April 13, 2022 and remained at constable rank throughout her employment.
15. In response to paragraphs 41-44 of Part 1 of the NOCC, in or around September 2017, Ms. Irvine disclosed to management at the DPD that she had experienced bullying, harassment and sexual harassment. The DPD carried out an investigation of the conduct, which resulted in disciplinary action (the “**Investigation**”). The DPD informed the Office of the Police Complaint Commissioner (“**OPCC**”) of the Investigation. The OPCC conducted a review of the Investigation and agreed with the DPD’s response and final dispositions of the Investigation. Further, the OPCC determined that there were no outstanding matters relating to the Investigation and concluded that the DPD’s response to the allegations made by Ms. Irvine had been “exemplary”.
16. In further response to paragraphs 41-44 of Part 1 of the NOCC, in or around March 2018, Ms. Irvine applied for wage loss benefits from WorkSafeBC, and in or around October 2018, WorkSafeBC approved Ms. Irvine for compensation pursuant to s. 5.1 of the *WCA*.

Division 3 - Additional Facts

17. At all material times, Ms. Irvine was a member of the Delta Police Association (the “**Association**”).
18. At all material times, the Association, or its predecessor, in the exercise of its authority as the exclusive bargaining agent for the police officers of the ~~DPD Delta Police Department~~, subject to certain limited exceptions, has entered into successive collective agreements with the Delta Police Board governing the terms and conditions of employment for all employees, including Ms. Irvine (the “**Collective Agreements**”).
19. At all material times, the Collective Agreements between the Association or its predecessor and the Delta Police Board have included and continue to include:

- (a) an arbitration clause as required by s. 84 of the *Code*;
- (b) the arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute in accordance with s. 89 of the *Code*;
- (c) the decision of the arbitration board is binding in accordance with s. 95 of the *Code*; and
- (d) the decision of the arbitration board is final and conclusive in accordance with s. 101 of the *Code*.

20. Section 89(g) of the *Code* empowers the arbitration board under the Collective Agreements to interpret the Collective Agreements in a manner consistent with the *Human Rights Code*, R.S.B.C. 1996, c. 210 ("*Human Rights Code*") and imports the substantive rights of the *Human Rights Code* into the Collective Agreements. An alleged violation of the *Human Rights Code* constitutes a violation of the Collective Agreements and falls within the arbitration board's jurisdiction.
21. The City of Delta has not received a written notice of a potential or actual claim from any proposed representative plaintiff or class member as required by s. 736 of the *LGA*.

Part 2: RESPONSE TO RELIEF SOUGHT

22. The Defendants consents to the granting of the relief sought in paragraphs NIL of Part 2 of the NOCC.
23. The Defendants opposes the granting of the relief sought in paragraphs ALL of Part 2 of the NOCC.
24. The Defendants takes no position on the granting of the relief sought in paragraphs NIL of Part 2 of the NOCC.

Part 3: LEGAL BASIS

25. The Defendants ~~Delta~~ denies each and every allegation in the NOCC.
26. The NOCC does not allege any facts that could constitute a cause of action against the Defendants ~~Delta~~.

A. No Jurisdiction – the Collective Agreements and the *Human Rights Code*

27. In answer to the whole of the NOCC, or portions thereof, the Court is without jurisdiction or, in the alternative, should decline jurisdiction, with respect to the proposed class members' claims by reason of:

- (a) the mandatory arbitration provisions created by the *Code* and the Collective Agreements; and
- (b) the concurrent jurisdiction of the BC Human Rights Tribunal.

28. The essential character of the proposed class members' claims falls within the exclusive jurisdiction of the grievance procedure set out in the Collective Agreements, which jurisdiction is shared with the BC Human Rights Tribunal.

B. Section 127 of the *Workers Compensation Act* is a bar to the NOCC

29. In answer to the whole of the NOCC, the purported class claims are for relief for personal injury and are barred by s. 127 of the *WCA* and the provisions of the *WCA* are in lieu of any right of action which the proposed class members have against the Defendants.

C. Negligence - No Duty of Care

30. The Defendants denyies they it owes a duty of care to the proposed representative plaintiffs and the proposed class members as alleged or at all.

31. In the alternative, if the Defendants Delta owes a duty of care to the proposed representative plaintiffs and the proposed class members, they it did not breach such duty. At all material times, the City of Delta and the Delta Police Board acted in accordance with the standard of care expected of a municipality authority and a municipal police board, and in accordance with all policies, statutory requirements, and common law duties. The City of Delta's, and its liability is limited by the provisions of the *Police Act*.

32. If the Defendants Delta owed a duty of care to the proposed representative plaintiffs and the proposed class members, and breached the applicable standard of care, which is denied, then any such breaches did not cause or contribute to any injury, damage or loss to the proposed representative plaintiffs and the proposed class members.

33. If the Defendants Delta owed a duty of care to the proposed representative plaintiffs and the proposed class members, and breached the applicable standard of care, which is denied, such breaches were not systemic or common to all members of the proposed class.

D. No Tort of Harassment

34. The alleged cause of action, the tort of harassment, is not recognized in British Columbia.

35. The BC Human Rights Tribunal enjoys jurisdiction over claims of gender-based discrimination, which jurisdiction is shared with the arbitration board under the Collective Agreements.

36. The proposed representative plaintiffs have commenced the very same proceeding before the BC Human Rights Tribunal (Case No. CS-010774).
37. This Court does not have jurisdiction over the Defendants in respect of any claim in discrimination, harassment or sexual harassment.
38. In the alternative, if this Court exercises jurisdiction, the NOCC has failed to plead the necessary elements for a new tort of harassment.
39. In the further alternative, if the Court exercises jurisdiction, the Defendants denyies that they ~~it~~ engaged in any conduct toward the representative plaintiffs or the proposed class members that constitutes harassment, gender discrimination or sexual harassment, as alleged or otherwise. If there were aAny such breaches, which is denied, they were individual in nature, and were not systemic or common to all members of the proposed class.

E. Intentional Infliction of Mental Suffering

40. The NOCC has failed to plead material facts to support a claim for intentional infliction of mental suffering by the proposed representative plaintiffs and the proposed class members.
41. In any event, the Defendants denyies that they ~~it~~, without legal justification or otherwise, engaged in any flagrant or outrageous conduct, calculated to produce harm, or that resulted in a visible or provable illness, to the proposed representative plaintiffs and the proposed class members.

F. No Fiduciary Duty Owed

42. The Defendants denyies they ~~it~~ owes a fiduciary duty to the proposed representative plaintiffs and the proposed class members, as alleged or at all.
43. There is no lawful basis pleaded setting out why the Defendants, a municipality and a municipal police board, should forsake their ~~its~~ own interests and those of the public they ~~it~~ serve and oblige themselves ~~itself~~ to act solely in the interests of the proposed representative plaintiffs and proposed class members.
44. The NOCC makes a bald pleading of breach of fiduciary duty without particularizing the basis for such a claim.
45. In the alternative, if the Defendants Delta owes the proposed representative plaintiffs and the proposed class members a fiduciary duty, which is denied, there was no breach of such a duty. At all material times, the Defendants Delta acted reasonably, in good faith and in the interests of the community they ~~it~~ serves.

G. Civil Conspiracy

46. The Defendants says that the NOCC does not plead the material facts necessary to allege the Defendants engaged in predominant purpose conspiracy or unlawful means conspiracy.
47. In any event, the Defendants did not commit predominant purpose conspiracy and denyies that:
- (a) they ~~it~~ acted by agreement or concerted action with any of the other defendants;
 - (b) such conduct was for the predominant purpose of causing injury or harm to the proposed representative plaintiffs and proposed class members; and
 - (c) that such action caused actual injury, damage or loss to the proposed representative plaintiffs and proposed class members.
48. Further, the Defendants did not commit unlawful means conspiracy and denyies that:
- (a) they ~~it~~ acted by agreement or concerted action with any of the other defendants;
 - (b) such conduct was unlawful and directed towards the proposed representative plaintiffs and proposed class members;
 - (c) they ~~it~~ knew, should, or ought to have known that any of their ~~its~~ conduct or actions would cause actual injury, damage or loss to the proposed representative plaintiffs and proposed class members; and
 - (d) that such action caused actual damage or loss to the proposed representative plaintiffs and proposed class members.

H. No *Charter* Breaches

49. The Defendants denyies that any rights of the proposed representative plaintiffs and the proposed class members under 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* (the "*Charter*") have been violated.
50. In the alternative, any infringement of the proposed representative plaintiffs and the proposed class members' rights under the *Charter* is a result of individual circumstances and is not systemic or common to the proposed representative plaintiffs and the proposed class members.
51. In the further alternative, any infringement of the proposed representative plaintiffs and the proposed class members' rights under the *Charter* is justified under s. 1 of the *Charter*.

52. In the further alternative, if there has been an unjustified infringement of the proposed representative plaintiffs and the proposed class members' rights under the *Charter*, which is denied, then a damage award under s. 24(1) of the *Charter* is not a just and appropriate remedy.

I. Damages

53. The Defendants ~~Delta~~ denyies that the proposed representative plaintiffs and the proposed class members have suffered injury, loss or damage, as alleged or at all.

54. In the alternative, and in further answer to the whole of the NOCC, if the proposed representative plaintiffs and the proposed class members have suffered any injury, loss or damage, which is denied, the actions of the proposed class members or others contributed to that loss and any liability is subject to apportionment under the *Negligence Act*, R.S.B.C. 1996, c. 333.

55. In the further alternative, if the proposed representative plaintiffs and proposed class members have suffered any injury, loss or damage, which is denied, they have failed to take all reasonable steps to mitigate their losses.

56. In relation to the Plaintiffs' claim for recovery of health care costs pursuant to the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 ("*HCCRA*"), the Defendants ~~Delta~~ denyies that:

- (a) the proposed representative plaintiffs and the proposed class members have received health care services as defined in the *HCCRA*;
- (b) British Columbia has made payments for health care services on behalf of the proposed representative plaintiffs and the proposed class members under the *HCCRA*;
- (c) the proposed representative plaintiffs and the proposed class members are "beneficiaries" for the purpose of the *HCCRA*; and
- (d) the Defendants do not come within the meaning of it is a "wrongdoer" for the purpose of the *HCCRA*.

J. Family Compensation Act

57. The Defendants denyies any liability under the *Family Compensation Act*, R.S.B.C. 1996, c. 126 ("*FCA*"), and says the claim pursuant to the *FCA* has not been properly brought by the proposed representative plaintiffs.

K. No Breach of *Privacy Act* Claim

58. The NOCC does not plead any material facts for a claim against the Defendants Delta for breach of the *Privacy Act*, R.S.B.C. 1996, c. 373.

L. The Proposed Claims are Barred by the Passage of Time

59. The proposed representative plaintiffs and the proposed class members' claims are barred due to the passage of time. Any matter complained of occurred, came into existence, or was discovered more than two years before filing the NOCC and is statute barred pursuant to s. 6(1) of the *Limitation Act*, S.B.C. 2012, c. 13 (the "*Limitation Act*") and s. 735 of the *LGA*.
60. Further, the proposed class members and proposed representative plaintiffs have failed to deliver on the City of Delta the requisite notice pursuant to s. 736 of the *LGA*.
61. The Defendants relyies on the *Limitation Act*, and to the extent applicable, the former *Limitation Act*, R.S.B.C. 1996, c. 266.

M. No Basis for Class Proceeding under *Class Proceedings Act*

62. The claims of the proposed representative plaintiffs and the proposed class members do not in any event meet the conditions for certification under the *Class Proceedings Act*.
63. The Defendants Delta denyies that an order certifying this action as a class proceeding pursuant to s. 4 of the *Class Proceedings Act* is appropriate.

N. The Relationship between the City of Delta and the Delta Police Board is governed by the *Police Act*

64. The Defendants deny that the Delta Police Board is an agent of the City of Delta. The Defendants further deny that the City of Delta could be vicariously liable for any tortious conduct of the Delta Police Board.
65. The relationship between the Delta Police Board and the City of Delta is governed by the *Police Act*. The legislative purpose of those provisions is to establish a police board that is independent of the municipality.

O. General

66. The Defendants plead and relyies-on:
- (a) *Negligence Act*, R.S.B.C. 1996, c. 333;

- (b) *Police Act*, R.S.B.C. 1996, c. 367;
- (c) *Privacy Act*, R.S.B.C. 1996, c. 373;
- (d) *Family Compensation Act*, R.S.B.C. 1996, c. 126;
- (e) *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;
- (f) *Human Rights Code*, R.S.B.C. 1996, c. 210;
- (g) *Workers Compensation Act*, R.S.B.C. 2019, c. 1;
- (h) *Labour Relations Code*, R.S.B.C. 1996, c. 244;
- (i) *Local Government Act*, R.S.B.C. 2015, c. 1;
- (j) *Limitation Act*, S.B.C. 2012, c. 13;
- (k) *Limitation Act*, R.S.B.C. 1996, c. 266; and
- (l) *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27.
- (m) *Community Charter*, S.B.C. 2003, c. 26.

67. For all of the reasons set out above, the claims against the Defendants should be struck and dismissed and costs awarded to the Defendants pursuant to s. 37(2) of the *Class Proceedings Act*.

Defendants' address for service:

Hunter Litigation Chambers
2100 - 1040 West Georgia Street
Vancouver, BC V6E 4H1


Fax number address for service:

604 647 4554

E-mail address for service:

wsmart@litigationchambers.com
rrobb@litigationchambers.com

Dated: September 9, 2024



Counsel for City of Delta and Delta Police Board
William B. Smart, K.C. / Rebecca J. Robb
Hunter Litigation Chambers Law Corporation