

CANADA / JUDGMENT

Weeks v. Abbotsford (City)

2025 BCSC 661

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 661 Weeks v. Abbotsford (City)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Weeks v. Abbotsford (City),

2025 BCSC 661

Date: 20250409

Docket: S236918

Registry: Vancouver

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, New Westminster 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, Minister of Public Safety and Solicitor General

Defendants

Brought under the Class Proceedings Act, R.S.B.C. 1996, c 50.

Before: The Honourable Justice Elwood

Reasons for Judgment

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I. INTRODUCTION

- [1] This is a proposed class action. The plaintiffs are current or former female police officers who allege that they were subjected to gender or sexual orientation-based discrimination, harassment, and bullying by officers and management of municipal police forces in British Columbia. They seek to represent a class comprised of all of the employees of the police forces who are female or present as women.
- [2] One of the defendants is the Police Complaint Commissioner of British Columbia (the "Commissioner"). The Commissioner is an independent officer of the Legislature appointed under s. 47 of the Police Act, R.S.B.C. 1996, c. 367 [Act]. The Commissioner provides civilian oversight to the investigatory and disciplinary processes under the Act.
- [3] The Commissioner applies with leave of the court prior to the certification hearing for an order pursuant to Rule 9-5(1)(a) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 striking out all of the claims against him (I will use the male pronoun because the current Commissioner uses male pronouns, and to avoid confusion with the plaintiffs).
- [4] The Commissioner relies on s. 51.03 of the Act, which provides personal liability protection in civil proceedings. Subsection (2) of s. 51.03 provides that "no legal proceeding for damages lies or may be commenced or maintained" against certain "protected individuals," including the Commissioner, while subsection (3) provides that subsection (2) does not apply to a protected individual "in relation to anything done or omitted in bad faith".
- [5] The Commissioner argues that the plaintiffs have failed to plead material facts on which a court could find that the Commissioner acted in bad faith and, as a result, it is plain and obvious that the claims against the Commissioner are barred by the statutory immunity in s. 51.03 of the Act and should be struck out.
- [6] The plaintiffs contend that it is not plain and obvious the qualified immunity in s. 51.03 applies. First, they argue that s. 51.03 does not apply to the declaratory relief they seek against the Commissioner. Second, they argue that bad faith is inherent in the causes of action they allege against the Commissioner: conspiracy, harassment, and breach of privacy.
- [7] For the reasons that follow, I have concluded that the claims against the Commissioner must be struck out, but the plaintiffs should be given an opportunity to amend their claims.

II. BACKGROUND

A. The Amended Notice of Civil Claim

- [8] The amended notice of civil claim names 13 municipalities, the Province of British Columbia, the Attorney General, the Minister of Public Safety and the Commissioner as defendants.
- [9] The Commissioner is the only defendant who made submissions on this application. None of my analysis in these reasons for judgment should be taken as a comment on the sufficiency of any of the claims against those other defendants.
- [10] Part 1, Statement of Facts, includes the following allegations:
37. While working with the Municipal Police Department[s], the Representative Plaintiffs and other Class Members were each subjected to systemic and persistent gender-based harassment and discrimination by Municipal Police Department Officers and Management. All of this behaviour has had the effect of demeaning the Representative Plaintiffs and other Class Members and limiting their careers.
38. While working with the VPD, Ms. Weeks was subject to harassing behaviours including receiving an email from a fellow Officer containing an explicit video (unrelated to any police investigation) involving a woman engaged in a sexual act with a horse. Ms. Weeks was routinely "fined" for minor (or perceived) infractions which included demeaning domestic tasks like waiting on other Officers and stocking a cooler with alcoholic beverages. Ms. Weeks complained to sergeants and others in VPD management about the gender-based harassment that she was experiencing, but these complaints were never addressed and led to retaliatory abuse, often including being publicly identified as not being a "team player".
39. While working with the VPD, Ms. Bergler was subject to unwanted sexual comments in the workplace. From on or about August 11 to August 23, 2023 a framed wall poster (the "Poster") appeared in the VPD Forensic Identification Unit (the "FIU") classroom that is a parody of an official poster. The Poster contains 20 Officer portrait photographs, including Ms. Bergler's and at least 7 Class Members. The photographs are either official photographs of members in dress uniform or Ceremonial uniform; and at least one of them has been photoshopped, as the member does not have an official photograph on file. The tag line below the title is "swabbing penises for over 100 years". Although male FIU Officers will, under certain circumstances, obtain penile swabs from sexual assault suspects, female FIU Officers do not.
51. At all material times in each Municipal Police Department in which they worked, the Representative Plaintiffs and other Class Members were treated differently than their male colleagues, particulars of which include but are not limited to:

- a. sexually explicit comments were frequently made to, or about, the Representative Plaintiffs and other Class Members by Municipal Police Department Officers and Management;
 - b. comments dismissing the Representative Plaintiffs and other Class Members' ability to carry out the tasks and duties of their jobs were frequently made by Municipal Police Department Officers and Management;
 - c. The Representative Plaintiffs and other Class Members were subjected to unwanted physical and sexual touching by Municipal Police Department Officers and Management;
 - d. Class Members were subjected to demeaning comments about sexual orientation and lesbian relationships, which were frequently made to, or about, them by Municipal Police Department Officers and Management;
52. Due to the systemic culture of gender and sexual orientation-based harassment and discrimination in the Municipal Police Departments, the Representative Plaintiffs and other Class Members were ostracized, belittled, and humiliated and their career advancement prospects limited.
53. Each of the following sub-paragraphs are systemic and gendered forms of Gendered Discrimination (as defined below).
- a. While working with the VPD, Ms. Weeks was a victim, among other things, of a sexual assault perpetrated by another VPD officer, "RB". Ms. Weeks reported the assault to another police authority, who arrested RB. While RB was in custody, the VPD arranged for RB to be visited by other VPD Officers, provided RB legal representation, and otherwise interfered with, and injected the VPD into, a criminal proceeding the VPD was not involved in.
 - e. RB's assault was referred to the Commissioner for investigation (the "Assault Investigation"). The Commissioner referred the investigation back to VPD (i.e., RB's own department) for investigation.
 - i. The VPD breached Ms. Weeks' privacy by disclosing information about her assault, which was not publicly known, to her colleagues and other Officers, including to police departments in other jurisdictions in Canada. VPD disclosed this information in a reckless and intentional manner intending to harass and intimidate Ms. Weeks.
 - j. Ms. Weeks reported the breach of her privacy to her superiors (the "Privacy Complaint"), who referred the complaint to the Commissioner for investigation. The Commissioner referred the investigation to the APD who found there was no "discreditable conduct" in accordance with the relevant Respectful Workplace Policy. The VPD was not required to refer the Privacy Complaint to the Commissioner but conspired with the Commissioner and/or APD to harass and intimidate Ms. Weeks. In so investigating, APD interviewed approximately 20 VPD officers, further breaching Ms. Weeks privacy, and retaliating against Ms. Weeks for reporting the harassment.

58. The Municipal Police Defendants, the Crown, the Attorney General, [the Commissioner]* and the Minister of Public Safety breached the Representative Plaintiffs and other Class Members' right to be free from discrimination on the basis of sex, pursuant to section 15 of the Canadian Charter of Rights and Freedoms by, among other things:
- c. failing to properly investigate allegations of gender and sexual orientation-based harassment and discrimination in the workplace in a thorough, timely, and impartial manner, or at all;

*The plaintiffs propose to amend para. 58 to add the Commissioner.

[11] Part 2, Relief Sought, includes the following:

60. The Representative Plaintiffs claim, on their own behalf and on behalf of the Class Members, against all the Defendants for:
- e. a declaration that the Defendants infringed the Representative Plaintiffs' and Class Members' rights and freedoms guaranteed by section 15 of the Canadian Charter of Rights and Freedoms
 - f. general damages ;
 - g. damages for loss of income ;
 - h. special damages ;
 - i. aggravated damages;
 - j. exemplary and punitive damages;
 - k. damages pursuant to the Charter, section 24(1);
63. The Representative Plaintiffs claim, on their own behalf and on behalf of the Class Members against the Defendant the Commissioner for: a declaration that the Commissioner [failed to must] * fulfil [or breached] * its common law or statutory duties to protect the privacy of the Plaintiffs and other Class Members from violations, including, but not limited to, violations which facilitated or exacerbated Gendered Discrimination.

* The plaintiffs propose to amend para. 63 as indicated.

[12] Part 3, Legal Basis, alleges breach of s. 15 of 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], breach of privacy, harassment, and civil conspiracy against all of the defendants, including the Commissioner (paras. 85-86, 91-100). It also alleges negligence and breach of fiduciary duty against the municipalities, and intentional infliction of mental suffering against the municipalities, the Province the Attorney General and the Minister (paras. 78-84, 87-90).

B. The Commissioner and the Police Act

- [13] To properly understand the allegations against the Commissioner, it is necessary to situate him within the Act.
- [14] The Commissioner oversees and monitors complaints, investigations and the administration of discipline and proceedings under Part 11 of the Act - Misconduct, Complaints, Investigations, Discipline and Proceedings, and ensures that the purposes of that Part are achieved (s. 177(1)).
- [15] Under Part 11 of the Act, the Commissioner performs an independent gatekeeping role to ensure misconduct allegations are dealt with appropriately in the public interest and in accordance with the Act. Neither he nor his office conduct misconduct investigations or decide allegations on their merits. Rather, investigations under the Act are performed by "investigating officers", and decisions may be made by "discipline authorities", or retired judges who the Commissioner appoints.
- [16] The investigation and disciplinary processes are designed to consider allegations of misconduct against a specific member or members (or former member(s)) of a municipal police department. Such investigations and any resulting disciplinary proceedings consider whether a member (or former member) has engaged in misconduct as defined in s. 77 of the Act.
- [17] "Misconduct" as defined in s. 77(2) includes a "public trust offence" which is an offence under an enactment of Canada, a conviction in respect of which would likely, among other things, discredit the reputation of the municipal police department with which the member is employed. Section 77(3) includes conduct which constitutes a "disciplinary breach of public trust" such as "abuse of authority", "corrupt practice", "discreditable conduct", and "improper disclosure of information".
- [18] Section 78 provides that a person may make a complaint about a member's conduct to the Commissioner. Section 82 requires the Commissioner to then determine whether a complaint is admissible. If a complaint is found admissible, the Commissioner must give written notification to the complainant and, unless s. 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)).
- [19] Section 93 of the Act authorizes the Commissioner to order an investigation if, at any time, information comes to his attention concerning the conduct of a member which, if substantiated, would constitute misconduct as defined by the Act. The Commissioner may exercise this power regardless of whether a complaint is made.

- [20] Investigations carried out under the Act are presumptively conducted by the municipal police department of which the member under investigation is a part (ss. 90 and 93). However, if the Commissioner is of the view that an external investigation is necessary in the public interest, the Commissioner 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)).
- [21] Sections 96-110 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).
- [22] The Commissioner has a limited role in investigations under the Act. Section 96 allows the Commissioner to observe an investigation, if it is in the public interest to do so. He may also provide advice to the investigating officer or the discipline authority in respect of further investigative steps (s. 97(1)(c)). Section 97(2) also permits the Commissioner, in consultation with the investigating officer and the discipline authority, to direct that further investigative steps be taken (s. 97(1)(d) and 97(2)).
- [23] When an investigation is concluded, s. 98(5) of the Act requires a FIR to be submitted which must 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. Once complete, the FIR is provided to an appointed discipline authority.
- [24] The discipline authority then reviews the report and any appendices, provides the report and those appendices to the member or former member, and notifies the complainant, if any, the member or former member, the Commissioner and the investigating officer of any steps to be taken (s. 112(1)). 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)).
- [25] If, on review of the FIR, the discipline authority considers that the conduct of the member or former 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 s. 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 s. 112(1)(c) (s. 112(4)).
- [26] The Act then provides for a series of escalating reviews, including reviews conducted by retired judges, reviews on the record and public hearings (e.g., s. 117). The Commissioner performs a supervisory function over those decision-making processes and may, depending on the matter, have some involvement through counsel.

- [27] Investigations and discipline proceedings conducted under the Act must be kept confidential. Section 51.01(5) requires the Commissioner and all those who assist him as well as investigating officers to maintain the confidentiality of any information learned through the course of their duties.
- [28] Section 95 further prohibits the Commissioner 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 considers such a disclosure to be in the public interest. There are only limited exceptions in the Act that allow for disclosure of information. For example, s. 93(9) of the Act allows the Commissioner to provide information respecting an investigation commenced under that section to any persons who, in the Commissioner's opinion, have "a direct interest in the matter".
- [29] The Commissioner is unable to give and cannot be compelled to give evidence in a proceeding unless permitted by the Act (s. 51.03). Other sections of the Act prohibit the use of certain documents which arise in the investigation or disciplinary processes in litigation (ss. 102 and 131).

C. The Plaintiffs' Claims Against the Commissioner

- [30] With this statutory framework in mind, it is worth repeating the only express references to the Commissioner in Part 1 of the amended notice of civil claim:
53. Each of the following sub-paragraphs are systemic and gendered forms of Gendered Discrimination (as defined below):
- e. RB's assault was referred to the Commissioner for investigation (the "Assault Investigation"). The Commissioner referred the investigation back to the [Vancouver Police Department] (i.e., RB's own department) for investigation;
 - j. Ms. Weeks reported the breach of her privacy to her superiors (the "Privacy Complaint"), who referred the complaint to the Commissioner for investigation. The Commissioner referred the investigation to the [Abbotsford Police Department] who found there was no "discreditable conduct" in accordance with the relevant Respectful Workplace Policy. The VPD was not required to refer the Privacy Complaint to the Commissioner but conspired with the Commissioner and/or APD to harass and intimidate Ms. Weeks. In so investigating, APD interviewed approximately 20 VPD officers, further breaching Ms. Weeks' privacy, and retaliating against Ms. Weeks for reporting the harassment.

[Emphasis added]

- [31] Read in the context of related paragraphs, the allegation in para. 53(e) is that the Commissioner directed the Vancouver Police Department ("VPD") to investigate an alleged assault of Ms. Weeks by another VPD officer.

- [32] Read in context of related paragraphs, the allegation in para. 53(j) is that the VPD breached Ms. Week's privacy by disclosing information about the assault, the Commissioner directed the Abbotsford Police Department ("APD") to investigate the alleged breach of Ms. Weeks' privacy, and the VPD then conspired with the Commissioner and/or the APD to harass and intimidate Ms. Weeks.
- [33] The alleged referrals to the VPD and the APD appear to have been exercises of the Commissioner's powers under s. 93(1)(b)(i) and (ii), respectively. Section 93(1)(b) provides that:

Independent power to order investigation, whether or not complaint made

93 (1) Regardless of whether a complaint is made or registered under section 78, if at any time information comes to the attention of the police complaint commissioner concerning the conduct of a person who, at the time of the conduct, was a member of a municipal police department and that conduct would, if substantiated, constitute misconduct, the police complaint commissioner may

- (b) direct that the investigation into the matter be conducted under this Division by any of the following as investigating officer:
 - (i) a constable of the municipal police department who has no connection with the matter and whose rank is equivalent to or higher than the rank of the member or former member whose conduct is the subject of the investigation;
 - (ii) a constable of an external police force who is appointed for the purpose of this section by a chief constable, a chief officer or the commissioner, as the case may be, of the external police force

- [34] There are no other overt acts alleged against the Commissioner in the amended notice of civil claim.

D. The Statutory Immunity Provision

- [35] Section 51.03(2) and (3) of the Act provide as follows:

Personal liability protection and non-compellability in civil proceedings

51.03

- (2) Subject to subsection (3), no legal proceeding for damages lies or may be commenced or maintained against a protected individual because of anything done or omitted
 - (a) in the exercise or intended exercise of a power under this Act, or
 - (b) in the performance or intended performance of a duty under this Act.
- (3) Subsection (2) does not apply to a protected individual in relation to anything done or omitted in bad faith.

- [36] The term "protected individual" in s. 51.03 means an individual who is or was any of the following: (a) the Commissioner; (b) a deputy police complaint commissioner or an employee appointed under s. 51(1) of the Act; (c) a person retained by the Commissioner under s. 51(3) of the Act; and (d) an individual designated by the Commissioner under s. 51(5) of the Act. There is no dispute that the Commissioner is a "protected individual".

III. ANALYSIS

A. The Test on an Application to Strike

- [37] On an application under R. 9-5(1)(a), the question is whether it is plain and obvious the pleading discloses no reasonable claim. The application proceeds on the basis the facts pleaded are true, unless they are manifestly incapable of being proven. The approach is generous; if an amendment can salvage an otherwise questionable claim, the Court should permit the plaintiff an opportunity to amend: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at paras. 17, 21-22; *Krist v. British Columbia*, 2017 BCCA 78, at paras. 22-23; *Berthin v. Berthin*, 2016 BCSC 2235, at paras. 13-15.
- [38] Rule 9-5(1)(a) is concerned primarily with whether a notice of civil claim properly advances a cause of action. The structure for this inquiry was set out by the Court of Appeal in *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 [FORCOMP]:
- [25] For a cause of action to be properly advanced, the elements of the cause of action must be set out, the material facts that ground those various elements of the cause of action must be concisely stated, and the relief that is sought must be available for the specific cause of action advanced.
- [39] In *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362, the Court of Appeal emphasized that the function of pleadings is to clearly define the issues of fact and law to be determined by the court. The objective is not to tell a story or provide a narrative of events, but rather to state the material facts--the essential elements to formulate a claim or defence--as succinctly as possible: paras. 44-48.
- [40] A notice of civil claim must include the material facts necessary to establish each cause of action advanced. As explained by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44:
54. A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 1915 CanLII 514 (ON CA), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. In this case, for example, the existence of an employment contract is a material fact common to both the ESA proceeding and to the appellant's wrongful dismissal claim in court.

- [41] In short, "[t]he pleading must tell the defendant who, when, where, how and what gave rise to liability": *Mancuso v. Canada (Minister of National Health and Welfare)*, 2015 FCA 227 at para. 19, referred to with approval in *Kindylides v. Does*, 2020 BCCA 330 at para. 34.

B. Pleadings in Complex Litigation

- [42] In *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366, the Court of Appeal recognized that in complex cases it is not uncommon for pleadings to be amended several times, or for pleadings to be supplemented by particulars to further articulate, refine, and define the issues. This is, Justice Harris observed, largely a reflection of the reality of complexity of major, complicated, multiparty litigation, spanning a lengthy time. Complex litigation therefore requires a "degree of flexibility" and a "functional approach" to the rules of pleadings:
- [38] The role of pleadings in such cases remains important, but some degree of flexibility is required in the application of the general rules governing pleadings to respond to the felt necessities of the case. The rules of pleadings are servants, and not masters, in attempting to foster fair and efficient adjudication of disputes.
- [39] In short, the principles governing pleadings have to be applied functionally in the context of the case, in order to foster the interests of justice and what is fair and convenient between the parties. There is, therefore, a significant degree of discretion vested in a case management judge to identify whether pleadings are sufficient to promote their purpose in the context of the particular case, and to control their evolution as the litigation unfolds.
- [43] A functional approach to pleadings in complex cases recognizes that plaintiffs in these kinds of cases may not know the specifics of the conduct they allege at the early stages of an action before discovery. A claim that is somewhat general in nature and does not give the precise details of the when, where or how of the alleged misconduct may nonetheless fulfill the foundational purposes of pleadings, so long as it discloses the case against the defendant, permits responsive pleading and identifies the scope of relevance and parameters of discovery (*Valeant*, at paras. 62-63).
- [44] That said, plaintiffs in complex cases must still plead the material facts that are essential to give rise to a complete cause of action (*Valeant*, at paras. 35-36). Plaintiffs are not entitled to rely on the possibility that new facts may turn up as the case progresses. This was established by the Supreme Court of Canada in *Imperial Tobacco* (itself a complex case) at para. 22:

[22] It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[Emphasis added.]

C. Statutory Immunity Provisions

[45] In *Walkom v. Law Society of British Columbia*, 2019 BCCA 391, the Court of Appeal confirmed that a claim should be struck out under R. 9-5(1)(a) if it is plain and obvious that a statutory immunity applies in light of the facts pleaded: para. 19, citing *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 at paras. 19 (per Cromwell J.), 67 (per Abella J.) and 149 (per McLachlin C.J.).

[46] *Walkom* concerned primarily s. 86(1) of the Legal Profession Act, S.B.C. 1998, c. 9, which provides:

Protection against actions

86 (1) No action for damages lies against a person, for anything done or not done in good faith while acting or purporting to act on behalf of the society or the foundation under this Act.

[47] Justice Fisher noted that s. 86 provides that there is no action for damages in the circumstances set out. This language showed that the immunity did not function as a defence, such as a limitation defence. Rather, the immunity barred liability up front--provided the qualifiers did not apply (*Walkom*, at para. 31).

[48] Justice Fisher found that the plaintiff's claim in *Walkom* of negligence against the Law Society for admitting a lawyer to the bar and failing to adequately monitor him once licenced ought to have been struck out because the plaintiff did not plead the material facts necessary to avoid the statutory immunity:

[33] It is my opinion that Mr. Walkom had to plead that the Law Society failed to act in good faith, supported by material facts, in order to avoid the application of the s. 86 immunity. He did not do so.

[57] Therefore, it is my view that the absence of a pleading of a lack of good faith in the Notice of Civil Claim is fatal to Mr. Walkom's claim in negligence against the Law Society. Section 86 of the Legal Profession Act protects the Law Society from liability for acts or omissions performed in good faith in the exercise of its statutory functions

- [49] Section 51.03 of the Act on which the Commissioner relies in this case is similar although not identical to s. 86 of the Legal Profession Act. Subsection (2) of s. 51.03 provides that "no legal proceeding for damages lies or may be commenced" in the circumstances set out. Subsection (3) qualifies that immunity by providing that it does not apply to "anything done or omitted in bad faith."
- [50] In my view, the law is clear: the plaintiffs were required to plead that the Commissioner acted in bad faith, supported by material facts, in order to avoid the application of the s. 51.03 immunity.
- [51] First, however, it is necessary to address the plaintiff's submission that the s. 51.03 immunity only applies to claims in damages and does not apply to the declarations they seek in paras. 60(e) and 63 of the amended notice of civil claim.

D. Does the Immunity Apply to the Declaratory Relief?

[52] I will repeat s. 51.03(2) here for ease of reference:

- (2) Subject to subsection (3), no legal proceeding for damages lies or may be commenced or maintained against a protected individual because of anything done or omitted

[Emphasis added].

- [53] The plaintiffs argue that "a legal proceeding for damages" means a claim of monetary damages, and does not encompass declaratory relief.
- [54] Section 51.03(2) must be interpreted using Elmer Driedger's "modern approach" to statutory interpretation, as adopted by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21:

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Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

- [55] A "legal proceeding for damages" is not the same thing as a claim of monetary damages within a notice of civil claim. The words of subsection (2) suggest that this immunity applies to a legal proceeding as a whole, not individual claims.
- [56] The context of the provision shows that the Legislature intended to provide robust liability protection for the protected individuals. The qualified immunity in subsection (2) is paired with non-compellability in subsections (4) and (6). The non-compellability provisions stipulate that a "protected individual", and "anyone acting for or under the direction of the protected individual" must not give evidence and is not compellable in legal proceedings:

51.03 (4) A protected individual and anyone acting for or under the direction of the protected individual must not give, or be compelled to give, evidence in court or in any other proceedings in respect of any records or information obtained in the exercise of powers or performance of duties under this Act.

(5) Despite subsection (4), a protected individual or anyone acting for or under the direction of the protected individual may give, or be compelled to give, evidence in any of the following:

- (a) a prosecution for perjury in respect of sworn testimony;
 - (b) a prosecution for an offence under this Act;
 - (c) an application for judicial review of a decision made under this Act.
- (6) Subsections (4) and (5) apply also in respect of evidence of the existence of an investigation under Part 11, a mediation or other means of informal resolution under Part 11 or any proceeding conducted under Part 11.

[Emphasis added].

[56] Notably, one of the exceptions to the non-compellability provisions is an application for judicial review of a decision made under the Act.

32. Justice Cromwell explained the rationales underlying common law and statutory immunities for quasi-judicial and regulatory decision-makers in *Ernst*:

[51] First, immunity from civil claims permits decision-makers to fairly and effectively make decisions by ensuring freedom from interference, which is necessary for their independence and impartiality: [citations omitted]. Second, immunity protects the capacity of these decision-making institutions to fulfill their functions without the distraction of time-consuming litigation.

[57] In *Ernst*, the three sets of justices who authored reasons in the Supreme Court of Canada all agreed that it was plain and obvious s. 43 of the Energy Resources Conservation Act, R.S.A. 2000, c. E-10 barred a claim in damages for an alleged breach of the plaintiff's right to freedom of expression under s. 2(b) of the Charter.

[58] *Ernst* concerned an ostensibly absolute immunity clause ("No action may be brought against the Board "). However, the rationales for the immunity set out by Cromwell J. above speak to the Legislature's intent in the present case to provide effective, albeit qualified, immunity to individuals legislatively entrusted with important public functions.

[59] The Commissioner's unique role under the Act reinforces this legislative intent. The Commissioner's role is to oversee and monitor complaints, investigations and discipline in the public interest. Statutory immunity protects his capacity to fulfill this public mandate without the distraction of time-consuming litigation.

- [60] In *Ernst*, Cromwell J. found that the availability of judicial review as an alternate remedy weighed against a narrower interpretation of the immunity clause that would allow Charter damages claims against the Board. Judicial review of the Board's decisions and directives, Cromwell J. found, had the potential to provide prompt vindication of Charter rights and effective modification of the Board's conduct: paras. 33-37.
- [61] A similar observation is apt in this case. Judicial review is available as an alternate remedy to promote accountability, transparency and reasonableness in the Commissioner's decision-making, as well as vindication of Charter rights where appropriate. The availability of judicial review weighs against allowing expansive civil litigation against the Commissioner.
- [62] The plaintiffs note that the Legislature provided more absolute liability protection to other individuals under the Act. For example, s. 4.05(2) of the Act provides the following immunity to members of specialized policing and law enforcement:
- (2) No action lies and no proceedings may be brought against a protected person, and a protected person is not liable for any loss or damages suffered by any person, in respect of anything done or omitted to be done by a protected person in relation to the provision of specialized support services by a protected person.
- [63] In my view, the existence of different immunity protection for differently-situated individuals is not inconsistent with an interpretation of the qualified immunity for the Commissioner in s. 51.03 that gives full effect to its protective purposes, while preserving a right of judicial review and exceptional claims for acts or omissions in bad faith.
- [64] In my view, the proper contextual interpretation of s. 51.03(2) is that a "legal proceeding for damages" means a civil action as distinct from judicial review.
- [65] Section 51.03(2) would not bar a proceeding for a declaration in relation to the exercise, refusal to exercise, or purported exercise, of a statutory power as provided for under s. 2(2) (b) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. This form of proceeding would normally be commenced by way of petition, but could be converted to an action in appropriate circumstances.
- [66] Section 51.03(2) may also allow an action for a declaratory judgment in the nature of *Dyson v. Attorney General*, [1911] 1 K.B. 410. A declaratory judgment is a determination of rights without consequential relief. Declaratory judgments are available in appropriate circumstances to review administrative actions. The Supreme Court has set out the requirements, stating that a declaratory judgment may be appropriate where: "(a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought" *S.A. v. Metro Vancouver Housing Corp*, 2019 SCC 4 at para. 60.

- [67] However, declaratory judgments should not be used to establish that past conduct was wrong. A court may find that a defendant breached a legal obligation; but that finding alone does not constitute a declaration: *Regional District of East Kootenay v. Augustine*, 2017 BCSC 322 at paras. 56-60.
- [68] The Legislature's intent would be easily frustrated if plaintiffs facing an application to strike based on the s. 51.03 immunity could simply withdraw their claims in damages and proceed to discoveries and trial on declarations of tortious conduct or past Charter violations by the Commissioner.
- [69] I will repeat the relevant parts of para. 60(e) and para. 63 of the amended notice of civil claim:
60. The Representative Plaintiffs claim, on their own behalf and on behalf of the Class Members, against all the Defendants for:
- e. a declaration that the Defendants infringed the Representative Plaintiffs' and Class Members' rights and freedoms guaranteed by section 15 of the Canadian Charter of Rights and Freedoms
 - f. general damages ;
 - g. damages for loss of income ;
 - h. special damages ;
 - i. aggravated damages;
 - j. exemplary and punitive damages;
 - k. damages pursuant to the Charter, section 24(1);
63. The Representative Plaintiffs claim, on their own behalf and on behalf of the Class Members against the Defendant the Commissioner for: a declaration that the Commissioner [failed to must] fulfil [or breached] its common law or statutory duties to protect the privacy of the Plaintiffs and other Class Members from violations, including, but not limited to, violations which facilitated or exacerbated Gendered Discrimination.
- [Emphasis added].
- [70] The declaration sought in para. 60(e) is integral to and inseparable from the Charter damages claim in para. 60(k). It is not a declaration of existing Charter rights that is sought, but rather a finding that the plaintiffs' s. 15 rights were infringed as a basis for their claim to damages as a remedy under s. 24(1).
- [71] In my view, therefore, the declaration sought in para. 60(e) falls within the protection of s. 51.03 and cannot proceed unless the plaintiffs plead that the Commissioner acted in bad faith, supported by material facts.

- [72] The declaration sought in para. 63 is unclear. The proposed amendments only add to that lack of clarity. On one hand, the plaintiffs appear to seek a forward-looking declaration that the Commission must fulfil unspecified common law or statutory duties to protect their privacy. On the other hand, they appear to seek a declaration that the Commissioner failed to protect their privacy in relation to the past Gendered Discrimination by other defendants (set out in para. 54).
- [73] Paragraph 63 in its current form does not adequately plead a declaratory judgment outside the protection of s. 51.03. It does not set out an existing issue between the plaintiffs and the Commissioner concerning the interests of the parties. It does not identify the existing rights to be declared. As drafted, it seems to simply seek a finding of fact based on the allegation in para. 53(j) that the Commissioner mishandled Ms. Weeks' privacy complaint against the VPD.
- [74] In my view, therefore, the declaration sought in para. 63 also falls within the protection of s. 51.03 and cannot proceed unless the plaintiffs plead that the Commissioner acted in bad faith, supported by material facts.

E. Do the Claims Fall Within the Qualification for Bad Faith?

- [75] The plaintiffs acknowledge that the amended notice of civil claim does not expressly allege that the Commissioner did or omitted to do anything in bad faith. Instead, they argue that the claims in conspiracy, breach of privacy, and harassment "each individually, and/or together, inherently include an allegation that the Commissioner was acting in bad faith". In any event, the plaintiffs submit, the pleading can easily be amended to include an express allegation of bad faith against the Commissioner.
- [76] Merely pleading intentional torts or a bare allegation that the Commissioner acted in bad faith is not sufficient to overcome the s. 51.03 immunity. Conspiracy, breach of privacy, legally actionable harassment and bad faith are all legal conclusions, for which material facts must be pleaded in support: R. 3-7(9); Workers' Compensation Board v. Sort, 2022 BCCA 318 at paras. 167-169.
- [77] As discussed, the law is clear: the plaintiffs must support an allegation of bad faith with material facts in order to avoid the application of the s. 51.03 immunity: Walkom at para. 33.
- [78] Justice Cromwell explained the reason for this in Ernst:
- [57] Immunity is easily frustrated where the mere pleading of an allegation of bad faith or punitive conduct in a statement of claim can call into question a decision-maker's conduct: Gonzalez, at para. 53

- [79] The amended notice of civil claim alleges serious misconduct against other defendants, including sexual violence, discrimination, bullying, harassment and intimidation. Some of the facts alleged, if proven, may be evidence of bad faith by other defendants. However, contrary to the able submissions of plaintiffs' counsel, bad faith by the Commissioner, an independent officer of the Legislature, cannot be inferred from "the context of the plaintiff's claim of systemic discrimination".
- [80] In response to the Commissioner's application, the plaintiffs raised s. 177.01 of the Act, which provides:

Power of police complaint commissioner to investigate systemic issues

177.01 (1) In addition to any other powers and duties under this Part or Part 9 [Office of the Police Complaint Commissioner], the police complaint commissioner may, if the police complaint commissioner considers it necessary in the public interest, investigate a matter that the police complaint commissioner reasonably believes is

- (a) a systemic cause of or contributor to complaints, or
- (b) a systemic problem associated with investigations or the administration of discipline or proceedings under this Part.

[Emphasis added].

- [81] Section 177.01 of the Act was passed in April 2024 and brought into force on July 16, 2024. Prior to the amendments, during the time period relevant to the plaintiffs' allegations, the Commissioner did not have the authority to commence systemic investigations. More importantly, s. 177.01 does not absolve the plaintiffs of the requirement to support an allegation of bad faith with material facts.
- [82] Even complex, multi-party claims involving claims of systemic discrimination require the material facts that are essential to give rise to a complete cause of action--in this case, a basis in fact to avoid the s. 51.03 immunity.
- [83] The only facts pleaded in Part 1 of the amended notice of civil claim that implicate the Commissioner are the facts alleged in para. 53(a) and (e). As discussed:
- a) Paragraph 53(e) alleges that the Commissioner directed the VPD to investigate an alleged assault of Ms. Weeks by another VPD officer.
 - b) Paragraph 53(j) alleges that the VPD breached Ms. Week's privacy by disclosing information about the assault, the Commissioner directed the APD to investigate the alleged breach of Ms. Weeks's privacy, and the VPD then conspired with the Commissioner and/or the APD to harass and intimidate Ms. Weeks.

- [84] It is difficult to conceive how the allegation in para. 53(e) could give rise to a finding that the Commissioner acted in bad faith. The plaintiffs seem to suggest that referring an investigation to the police department in which the alleged perpetrator worked is by definition an act of bad faith. However, it was clearly within the Commissioner's discretion under s. 93(1)(b)(i) to refer the investigation to the VPD, as long as the Commissioner directed that the investigation be conducted by a constable who had no connection with the matter and whose rank was equivalent to or higher than the rank of the alleged perpetrator.
- [85] Something more would be needed before bad faith could be found against the Commissioner based on the facts alleged in para. 53(e).
- [86] Paragraph 53(j) appears to have three parts: a breach of privacy by the VPD; a referral of the investigation of the privacy breach to the APD; and a conspiracy to harass and intimidate Ms. Weeks.
- [87] An allegation that the VPD wilfully and without a claim of right violated the privacy of Ms. Weeks could, if proven, give rise to liability on the part of the City of Vancouver under the Privacy Act, R.S.B.C. 1996, c. 373. It could not give rise to a finding of bad faith against the Commissioner.
- [88] Again, it is difficult to conceive how a referral to the APD could give rise to a finding that the Commissioner acted in bad faith. It was clearly within the Commissioner's discretion under s. 93(1)(b)(ii) to refer the investigation of the privacy breach to the APD. Something more would be needed before bad faith could be found against the Commissioner.
- [89] The alleged conspiracy to harass and intimidate Ms. Weeks could conceivably form the basis of a finding of bad faith conduct by the Commissioner. However, the alleged conspiracy is not adequately pleaded for that purpose.
- [90] In *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1993), 96 B.C.L.R. (2d) 156 (C.A.), the Court of Appeal identified the material facts that must be proved to establish a civil conspiracy, at para. 5:
1. an agreement between two or more persons;
 2. concerted action taken pursuant to the agreement;
 3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
 - (ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
 4. actual damage suffered by the plaintiff.
- [91] The Court of Appeal endorsed the following passage from *Bullen, Leake & Jacob's Precedents of Pleadings*, 13th ed. (1990), at pp. 221-22, at para. 8:

The statement of claim should describe who the several parties to the conspiracy are and their relationship with each other. It should allege the conspiracy between the defendants giving the best particulars it can of the dates when or dates between which the unlawful conspiracy was entered into or continued, and the intent to injure. It should state precisely the objects and means of the alleged conspiracy to injure and the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of the conspiracy, and lastly, the injury and damage occasioned to the plaintiff.

- [92] The Court concluded that: "pleadings alleging conspiracy must be as specific as possible" (para. 9).
- [93] The only pleading in this case is that the VPD conspired with the Commissioner and/or the APD to harass and intimidate Ms. Weeks. The pleading does not state the objects or means of the alleged conspiracy. It does not state the overt acts which are alleged to have been done by each of the alleged conspirators in furtherance of the conspiracy. It does not state the injury or damage to Ms. Weeks specifically as a result of the alleged conspiracy.
- [94] Most importantly, the pleading does not identify overt acts by the Commissioner that could overcome the s. 51.03 immunity. The current pleading begs many questions. Is it alleged that the Commissioner harassed Ms. Weeks? Is it alleged that he intimidated her? Is it alleged that he aided or abetted harassment and intimidation by the VPD? Is it alleged that he referred the investigation to the APD with the intent of injuring her? Is it alleged that he disclosed information about the assault or the investigation with the intent of injuring her?
- [95] These are not particulars of a properly pleaded claim; they are hypothetical examples of material facts that are missing from an incomplete pleading.
- [96] As stated in *Imperial Tobacco*, the plaintiffs may not be in a position to prove the alleged conspiracy, but they must plead the material facts. A plaintiff in the position of Ms. Weeks should be able to assess whether the handling of her complaint suggests bad faith by the Commissioner. In the absence of a pleading of the material facts, any discovery on the alleged conspiracy would have no proper focus. More importantly, the claim against the Commissioner would have no reasonable prospect of success: *Walkom*, para. 37.
- [97] The request for a declaration and Charter damages against the Commissioner in paras. 60(e) and (k)--on grounds that all of the defendants violated the plaintiffs' rights under s. 15 of the Charter--stands untethered from any material facts implicating the Commissioner.
- [98] To establish a breach of s. 15 of the Charter, the plaintiffs must meet a two-part test:
- a) State action that draws a distinction based on enumerated or analogous grounds, on its face or in its impact; and
 - b) The state action imposed burdens or denied benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

Chung v. British Columbia (Minister of Health), 2023 BCCA 294 at para. 73, leave ref'd [2023] SCCA No 403, citing Fraser v. Canada (Attorney General), 2020 SCC 28 at para. 27 and R. v. Sharma, 2022 SCC 39 at para. 28.

[99] Material facts to meet this test are not pleaded against the Commissioner. More importantly for the present purposes, an allegation of a Charter breach is not in-and-of-itself an allegation of bad faith that can overcome qualified immunity: Stein v. British Columbia (Human Rights Tribunal), 2020 BCSC 1431 at para. 25.

[100] The request for a declaration in para. 63--that the Commissioner failed to protect the plaintiffs' privacy in relation to the Gendered Discrimination--also stands untethered to any material facts except para. 53(j) which, for the reasons discussed above, does not adequately plead supporting material facts to overcome the s. 51.03 immunity.

[101] The remaining claims in damages are not supported by any material facts implicating the Commissioner's conduct.

[102] Assuming the statutory tort in s. 1 of the Privacy Act includes bad faith as an element, the amended notice of civil claim does not set out a claim against the Commissioner. As discussed, the only material facts alleged by the plaintiffs are that the Commissioner directed the APD to investigate the alleged breach of Ms. Weeks's privacy by the VPD. There is no allegation that the Commissioner wilfully and without a claim of right violated the privacy of Ms. Weeks.

[103] Assuming "harassment" is a cause of action in British Columbia, the amended notice of civil claim does not allege the essential elements of that novel tort against the Commissioner. The cases relied upon by the plaintiffs suggest the tort of harassment is, at core, intended to address "outrageous conduct" committed with the intention of causing or reckless disregard for causing "severe or extreme emotional distress": Mainland Sawmills Ltd. et al. v. IWA - Canada et al., 2006 BCSC 1195 at para. 17. No such allegations are levelled against the Commissioner.

[104] In short, the plaintiffs do not plead that the Commissioner acted in bad faith, supported by material facts, as required to avoid the application of the s. 51.03 immunity. Accordingly, their claims against the Commissioner must be struck out.

F. Should the Plaintiffs Be Allowed to Amend the Claims?

[105] The Commissioner argues that it is plain and obvious the plaintiffs cannot possibly amend their claims to raise a proper cause of action against him. He argues that the combined effect of the immunity in s. 51.03 and the nature of the existing pleading demonstrates there is no reasonable claim capable of being pled by the plaintiffs. He notes that the plaintiffs refused to respond to a demand for particulars of the material facts supporting their claims.

- [106] In my view, the amended notice of civil claim gestures toward at least two potentially viable claims by the plaintiffs:
- a) An action for a declaratory judgment in the nature of *Dyson v. Attorney General* which would not be subject to the s. 51.03 immunity;
 - b) A civil conspiracy which would fall within the qualification for bad faith, provided that material facts were pleaded in support.
- [107] Neither of these claims is properly pleaded in the existing amended notice of civil claim; however, I am of the view that properly pleaded causes of action might conceivably be advanced. Accordingly, the plaintiffs ought to be given an opportunity to amend their claims.
- [108] The Commissioner further argues that the non-compellability and prohibitions on giving evidence set out in s. 51.03(4) and (6), discussed above, render the plaintiffs' claims incapable of proof. He argues that any claim except a proceeding expressly exempted by subsection (5) - that is, a prosecution for perjury, a prosecution for an offence under the Act or an application for judicial review--is doomed to fail and should therefore be struck out, citing *Forget v. Sutherland*, 2000 CanLII 5761 (ONCA) at paras. 10-11.
- [109] I agree with plaintiffs' counsel that the fact the Commissioner may not be compellable on certain matters and may not be able to disclose certain documents or give evidence of certain facts should not be considered on an application under R. 9-5(1)(a).
- [110] Facts pleaded by the plaintiffs are presumed to be true unless they are manifestly incapable of proof. I am not persuaded that every conceivable claim against the Commissioner is manifestly incapable of proof by reason of s. 51.03(4) and (6). Those provisions may need to be addressed at a later stage of these proceedings; but they are not a complete bar to any and all potential claims against the Commissioner.
- [111] For these reasons, the plaintiffs will have leave to amend the claims against the Commissioner in response to these reasons for judgment. For clarity, the plaintiffs are not limited to the two potential claims set out above, so long as they engage in a meaningful way with the need to amend their pleadings.

IV. CONCLUSION

- [112] The claims against the Commissioner in the amended notice of civil claim are struck out.
- [113] The plaintiffs may amend the claims against the Commissioner within 45 days of the date of these reasons or by such other deadline as counsel may agree.
- [114] The Commissioner will have leave to apply to strike out any amended claims prior to the certification application.

[115] The Commissioner did not seek costs of this application. Accordingly, there will be no order of costs on this application.

"Elwood J."

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