IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Ribeiro v. Vancouver (City of) et al.,***
2005 BCSC 395

Date: 20050318
Docket: C992466
Registry: Vancouver

Between:

Jose Augusto Ribeiro

Plaintiff

And

The City of Vancouver, Police Sergeant Lacon, Police Sergeant Boutin, Police Constable Dimock, Police Constable Bezanson, Police Constable Gibson, Police Constable Chu, Police Constable Stewart, Police Constable Scally, Police Constable Jackson, Police Constable Alfred, Police Inspector Greer and Police Acting Staff Sergeant S. Miller

Defendants

Before: The Honourable Madam Justice Kirkpatrick

(In Chambers)

Reasons for Judgment

Counsel for the Plaintiff:	F.G. Potts C.D. Martin
Counsel for the Defendants:	B. Parkin T. Zworski
Counsel for the Vancouver Police Board:	G.K. Macintosh, Q.C. D. McWhinnie, Articled Student
Date and Place of Hearing:	February 8 and 9, 2005 Vancouver, B.C.

[1] There are two applications before the court. The first is brought by the defendant, the City of Vancouver (the "City"), pursuant to Rule 19(24)(a) to strike out portions of the statement of claim and of the reply to the amended statement of defence. The second is brought by the plaintiff pursuant to Rule 15(5) to add the Vancouver Police Board (the "Board") as a defendant. The plaintiff concedes that if the court is persuaded that the impugned portions of the statement of claim do not disclose an independent cause of action against either the City or the Board, and that the Board enjoys statutory immunity, then I need not address the plaintiff's Rule 15(5) application.

[2] The trial of Mr. Ribeiro's action is set to be heard before a jury for 30 days commencing September 19, 2005. It is especially important that only proper pleadings and evidence be put before the jury.

FACTUAL BACKGROUND

[3] This lawsuit, in its simplest terms, arose out of two incidents involving Mr. Ribeiro and members of the

Vancouver Police Department ("VPD" or the "police"). Mr. Ribeiro owns a home in the City. He suffers from a mental illness.

[4] The factual background, as disclosed by the statement of claim, is as follows.

[5] On December 15, 1998, a community mental health worker asked the police to accompany the worker and two medical doctors to Mr. Ribeiro's home so that they could assess Mr. Ribeiro under the provisions of the ***Mental Health Act***, R.S.B.C. 1996, c. 288.

[6] Mr. Ribeiro alleges that the police knew or ought to have known that he was fearful of the police and was paranoid about chemical agents and damage to his property. He alleges that the police owed a duty to appreciate that they were dealing with mental illness and not criminal activity, and should have referred the matter to the police unit trained to deal with such matters. That unit is called "Car 87." It consists of a police constable, a mental health worker, and a psychiatric nurse. Car 87 had had previous recent dealings with Mr. Ribeiro.

[7] Mr. Ribeiro alleges that on December 15 the police found his home unoccupied but nevertheless entered it without a warrant, searched the home, including his locked bedroom, and seized and disposed of certain of his property.

[8] On December 17, 1998, the community health worker again requested police assistance to accompany the worker and two medical doctors to Mr. Ribeiro's home to perform a ***Mental Health Act*** assessment. Mr. Ribeiro alleges that the police again failed in their duty to avail themselves of mental health resources. He further alleges that the police overreacted in bringing at least 20 police officers to his home, including the emergency response team armed with sniper rifles, fully automatic MP5 weapons, two Arwen 37 guns, bullet-proof vests, tear gas canisters, gas masks, a hooligan tool, a battering ram, and a loud hailer. As well, a separate police dog unit and approximately 15 additional general duty police officers were present at Mr. Ribeiro's home.

[9] Mr. Ribeiro says that the police unlawfully entered his home, ordered his elderly mother and others out of the home, and cut off water and electrical services. Mr. Ribeiro retreated to his bedroom and refused to surrender into police custody. The police fired an Arwen round through his bedroom door. They broke his bedroom window. They utilized the battering ram on his bedroom door. Mr. Ribeiro then retreated to his *en suite* bathroom. The police fired more Arwen rounds through the bathroom door. About five minutes later, the police fired gas-tipped rounds and then OC gas into the bedroom, rendering the home uninhabitable. Mr. Ribeiro left the bathroom. The police fired Arwen and machine gun rounds at him. Mr. Ribeiro was struck by three rounds from an MP5 machine gun.

RULE 19(24)(a) APPLICATION

[10] The Supreme Court of Canada defined the test to be applied under Rule 19(24) in ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959 at ¶ 33:

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[11] In this action, Mr. Ribeiro advances four distinct claims. The first three may be summarized as follows:

(a) the unlawful entry and seizure of the plaintiff's property by members of the VPD on December 15, 1998;

(b) the unlawful entry and shooting of the plaintiff by members of the VPD on December 17, 1998; and

(c) the failure of the defendants to properly investigate the incident of December 17, 1998, which led to criminal charges being laid against the plaintiff.

[12] The City does not seek relief under Rule 19(24) in respect of those portions of the statement of claim. Indeed, the City submits that if Mr. Ribeiro can prove those allegations, then the City is vicariously liable.

[13] However, the City argues that paragraphs 55 to 66 of the statement of claim should be struck because the City did not owe an independent private law duty of care to Mr. Ribeiro. Mr. Ribeiro has said that, if he succeeds in his motion to add the Board as a defendant, he will amend his statement of claim to allege the claim set out in paragraphs 55 to 66 against the Board as well. The Board, like the City, argues that it does not owe an independent private law duty of care to Mr. Ribeiro and further that the Board is not a legal entity which can be sued.

[14] Paragraphs 55 to 66 of the statement of claim read as follows:

> 55. The Plaintiff pleads and relies upon the provisions of the Police Act, and particularly Section 15 thereof, and says that the City is legally obliged to provide proper policing services to all citizens of Vancouver, and to provide adequate equipment and supplies for the provision of such proper policing services.
>
> 56. Further, the Plaintiff says that at all material times, the City knew or ought to have known that in a metropolitan city the size of the City of Vancouver, that policing services would have to be provided to citizens suffering mental health problems including, but not restricted to, sufferers of paranoid schizophrenia and/or other mental health problems of a delusional nature, which mental health problems could, and would, involve violent behavior.
>
> 57. The Plaintiff further says that at all material times, the City knew or ought to have known that due to such mental health problems, citizens suffering from such afflictions would come into contact with the VPD and/or the ERT, and at such times, could or would pose a danger to themselves or others.
>
> 58. The Plaintiff says that in such circumstances the City owed a duty of care to such citizens, and to the Plaintiff, to ensure:
>
> (a) that the VPD and the ERT had proper policies in place to effectively and safely deal with such citizens;
>
> (b) that the selection criteria for appointment to the ERT disqualified any person who lacked the capacity and maturity required to exercise sound judgment in high stress situations; and that no person with a history of disciplinary complaints and/or infractions, and/or bad judgment was so employed;
>
> (c) that continued employment with the ERT was contingent upon an ongoing record of reasonable responses in high stress situations and a demonstrated capacity to refrain from the use of lethal force save in circumstances where it was clearly required;
>
> (d) that proper and adequate training was available to members of the VPD and the ERT as to how best to deal with citizens suffering from mental illness;
>
> (e) that insofar as the VPD was called upon, in the course of its duties, to deal with delusional and/or potentially violent citizens, that the responding officers and, in particular, the ERT:
>
> (i) had the necessary training to appreciate that procedures for dealing with violent criminal individuals were not suitable or appropriate for dealing with mentally ill citizens;
>
> (ii) were provided with ongoing access to trained professionals skilled in dealing with mentally ill citizens;
>
> (iii) were provided with, and trained in the use of available non-lethal resources for the application of force in respect of such persons;
>
> (iv) had clear and cogent written guidelines as to the appropriate chain of command and refrained from the gradual escalation of violence in such situations, and/or refrained from the use of other police tactics suitable for individuals not suffering from any form

of mental illness, but wholly unsuitable for dealing with mentally ill persons.

59. The Plaintiff says, and the fact is, that generally, and in respect of this case, the City, contrary to the provisions of the Police Act, and negligently:

(a) had no, or inadequate, procedures in place for the selection and retention of ERT personnel;

(b) had no, or alternatively inadequate, policies and procedures in place requiring the VPD and the ERT to effectively and safely deal with mentally ill and/or delusional citizens;

(c) provided no, or alternatively inadequate, training to members of the VPD and/or the ERT in respect of dealing with violent and/or delusional mentally ill persons;

(d) failed to ensure that members of the ERT required to deal with delusional or potentially violent mentally ill persons:

(i) distinguished between violent criminals and mentally ill persons;

(ii) had access to trained professionals skilled in dealing with mentally ill persons;

(iii) were provided with and trained in the use of available non-lethal resources for the application of force in such circumstances;

(iv) were properly trained in techniques suitable for dealing with mentally ill persons and trained not to use the incremental application of force in any such circumstance, save for the protection of the public, members of the ERT, and/or the citizen;

(v) had no, or alternatively inadequate written procedures for the sharing of information between the VPD and the Vancouver Richmond Health Board in respect of apprehensions pursuant to Section 28 of the Mental Health Act;

(vi) had no, or alternatively inadequate policies and procedures in place requiring Car 87 or like Unit intervention in all situations involving VPD interaction with mentally ill persons;

(vii) provided inadequate funding to make Car 87 services available on a twenty-four (24) hour basis and/or to provide such additional Car 87 Units as were reasonably required in a metropolitan area the size of the City of Vancouver.

60. The Plaintiff says that the City's said negligence and breaches of the Police Act caused or materially contributed to his losses and damage as aforesaid, and the Plaintiff seeks damages from the City by reason thereof.

61. Further, the Plaintiff says that both prior to and subsequent to the Incident, the City was and is well aware that the VPD's existing policies and procedures for the selection and retention of ERT personnel, and the policies, procedures, and equipment utilized by the ERT in respect of dealing with violent and/or delusional mentally ill persons were non-existent, or alternatively defective and inadequate and dangerous, in that in the years preceding the Incident, and subsequent to it, members of the VPD and ERT have shot and killed, and grievously wounded, numerous other mentally ill citizens in circumstances similar to the Incident, the full particulars of which being presently unknown to the Plaintiff but including:

(a) the death of Charles Albert Wilson on or about October 8, 1996, who was shot and killed by the Defendant, Sgt. Lacon, in company of the Defendant, Constable Dimock;

(b) the death of Thomas Alcorn, who was shot and killed on or about December 3, 1997 by a member of the VPD;

(c) the death of Sai Ming Wai, who was shot and killed on or about December 14, 1999, outside the mental care facility where he resided, by a member of the VPD;

(d) the wounding, on or about April 2000, by a Constable D. Gibson of the VPD, of a Mr. Fernandez; which latter individual suffered from mental illness.

62. Further, the Plaintiff says that the City and the VPD and in particular, the ERT, have been repeatedly warned that their existing equipment and training, and their policies and procedures, in respect of dealing with mentally ill persons, were and are wholly defective, inadequate, and dangerous in that there have been Coroner's Inquests recommending changes, substantial media comment and news coverage to that effect, and representations to the City and the VPD from various mental health lobby groups that the existing practices were unsafe and that change was and is required, which recommendations, media comment, and representations have been wholly ignored, or alternatively, not adequately implemented or addressed by the City.

63. The Plaintiff says that the full particulars of such Coroner's Recommendations, media coverage, and warnings and representations from mental health groups, are not presently known to him, but include:

(a) media coverage and comment in respect of the deaths and injury of the individuals identified in paragraph 61 herein;

(b) Coroner's Recommendations in respect of the deaths of Charles Albert Wilson, Thomas Alcorn, and Sai Ming Wai;

(c) Warnings and Recommendations from the Coast Foundation, the Patient Empowerment Society, the Canadian Mental Health Society, and the Provincial Mental Health Advocate.

64. The Plaintiff says that had the City taken any reasonable steps to heed such warnings and/or implement such changes as were recommended, his home would not have been invaded and damaged, he would not have been shot and injured, and he would not have faced criminal charges but instead would have received medical treatment, and the Plaintiff says that he has suffered damage and loss thereby.

65. Further, or in the alternative, the Plaintiff says that given the number of deaths and woundings of mentally ill persons by members of the VPD and/or ERT, and given the aforesaid warnings and recommendations, the City had a duty to properly monitor and control the selection and retention of ERT personnel and to thereafter properly monitor and control the members of the VPD and ERT and, that in breach of such duty, the City has refused and/or neglected and/or failed to do so and the Plaintiff has suffered loss and damage thereby.

66. The Plaintiff says further, that in such circumstances, the City's ongoing failure to provide adequate resources and training and to implement reasonable policies and procedures in respect of selection and retention of ERT personnel and in respect of VPD and ERT interaction with mentally ill persons, and failure to properly monitor and control the VPD and ERT, is grossly negligent, scandalous, callous, high handed, arbitrary, and arrogant, and deserving of punishment and censure and the Plaintiff seeks aggravated, exemplary and punitive damages as against the City thereby.

[15] The essential gravamen of the impugned portions of the statement of claim is that the City's police services generally, and the training of its police officers specifically, were inadequate to deal with persons, like Mr. Ribeiro, who suffer from mental illness.

ISSUE

[16] The principal issue to be decided is whether it is plain and obvious that the City and/or the Board do not owe to Mr. Ribeiro a private law duty of care to provide proper policing services in dealing with mentally ill persons. A secondary issue is whether the Board is a legal entity capable of being sued.

LEGAL FRAMEWORK

[17] Two recent decisions of the Supreme Court of Canada are of particular assistance in the analysis of the legal issue before the court: ***Cooper v. Hobart***, [2001] 3 S.C.R. 537; and ***Odhavji Estate v. Woodhouse***, [2003] 3 S.C.R. 263.

[18] In ***Odhavji***, the estate and family sued the police officers involved in the fatal shooting of Mr. Odhavji. The police officers did not comply with the requests of the Special Investigation Unit that was investigating the fatal shooting. Under the relevant section of the Ontario ***Police Services Act***, R.S.O. 1990, c. P. 15, the members of

the force are under an obligation to cooperate with such investigations. Under another section, the chief of police is required to ensure that members of the force carry out their duties in accordance with the provisions of the Act.

[19] The ***Odhavji*** action claimed misfeasance in public office against the police officers and the chief of police, and claimed negligence against the chief of police, the police board, and the Province.

[20] The Supreme Court of Canada allowed the actions in misfeasance in public office against the police officers and the chief of police and the action in negligence against the chief to proceed. However, it held that the actions in negligence against the police board and the Province should be struck from the statement of claim.

[21] The Court held at ¶ 64-66:

> 64. The first factor that I consider is the lack of a close causal connection between the alleged misconduct and the complained of harm. As discussed earlier, the fact that a chief of police is in a direct supervisory relationship with members of the force gives rise to a certain propinquity between the Chief and the Odhavjis; the close connection between the Chief's inadequate supervision and the officers' subsequent failure to cooperate with the SIU establishes a nexus between the Chief and the individuals who are injured as a consequence of the officers' misconduct. The Board, however, is much further in the background than the Chief. Unlike the Chief, the Board does not directly involve itself in the day-to-day conduct of police officers, but, rather, implements general policy and monitors the performance of the various chiefs of police. The Board does not supervise members of the force, but, rather, supervises the Chief (who, in turn, supervises members of the force). This lack of involvement in the day-to-day conduct of the police force weakens substantially the nexus between the Board and members of the public injured as a consequence of police misconduct.
>
> 65. A second factor that distinguishes the Board from the Chief is the absence of a statutory obligation to ensure that members of the police force cooperate with the SIU. As discussed earlier, the express duties of the Chief include ensuring that members of the force comply with s. 113(9) of the *Police Services Act*. Under s. 31(1), the Board is responsible for the provision of adequate and effective police services, but is not under an express obligation to ensure that members of the force carry out their duties in accordance with the *Police Services Act*. The absence of such an obligation is consistent with the general tenor of s. 31(1), which provides the Board with a broad degree of discretion to determine the policies and procedures that are necessary to provide adequate and effective police services. A few enumerated exceptions aside, the Board is free to determine what objectives to pursue, and what policies to enact in pursuit of those objectives.
>
> 66. It is possible, I concede, that circumstances might arise in which the Board is required to address a particular problem in order to discharge its statutory obligation to provide adequate and effective police services. If there was evidence, for example, of a widespread problem in respect of the excessive use of force in the detention of visible minorities, the Board arguably is under a positive obligation to combat racism and the resultant use of excessive force. But as a general matter, courts should be loath to interfere with the Board's broad discretion to determine what objectives and priorities to pursue, or what policies to enact in pursuit of those objectives. Suffice it to say, the Board's decision not to enact additional policies or training procedures in respect of s. 113(9) does not constitute a breach of its obligation to provide "adequate and effective" police services.

[22] The Supreme Court of Canada helpfully summarized the approach to be taken in analyzing whether a duty of care should be imposed at ¶ 30 of the ***Cooper*** decision:

> In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there

> are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.

STATUTORY FRAMEWORK

[23] It is necessary to review certain sections of the ***Police Act***, R.S.B.C. 1996, c. 367 (the "***Act***") to understand the statutory duties and functions of the City and the Board under the ***Act***.

[24] Section 23(1) provides for the establishment of municipal police boards. It reads:

> 23 (1) Subject to the minister's approval, the council of a municipality required to provide policing and law enforcement under section 15 may provide policing and law enforcement by means of a municipal police department governed by a municipal police board consisting of
>
> (a) the mayor of the council,
>
> (b) one person appointed by the council, and
>
> (c) not more than 5 persons appointed, after consultation with the director, by the Lieutenant Governor in Council.

[25] Section 3(1) provides that the government must provide policing and law enforcement services. Under s. 3(2), a municipality with a population of more than 5,000 persons must provide policing and law enforcement in accordance with the ***Act*** and the regulations by one of three means. The City chose the first option, namely the establishment of a municipal police department.

[26] The duties of the City are defined in s. 15(1) of the ***Act***:

> 15 (1) Subject to this section, a municipality with a population of more than 5 000 persons must bear the expenses necessary to generally maintain law and order in the municipality and must provide, in accordance with this Act and the regulations,
>
> (a) policing and law enforcement in the municipality with a police force or police department of sufficient numbers
>
> (i) to adequately enforce municipal bylaws, the criminal law and the laws of British Columbia, and
>
> (ii) to maintain law and order in the municipality,
>
> (b) adequate accommodation, equipment and supplies for
>
> (i) the operations of and use by the police force or police department required under paragraph (a), and
>
> (ii) the detention of persons required to be held in police custody other than on behalf of the government, and
>
> (c) the care and custody of persons held in a place of detention required under paragraph (b) (ii).

Section 481 of the ***Vancouver Charter***, S.B.C. 1953, c. 55, repeats the duties prescribed in s. 15(1) of the ***Act***.

[27] Sections 20(1)(a) and 20(2) of the ***Act*** set out the liability of the City and the Board for torts committed by its police officers:

> 20 (1) Subject to an agreement under section 18 (1) or 23 (2),
>
> (a) a municipality is jointly and severally liable 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, if any, if the tort is committed in the performance of that person's duties, and
>
> …

> (2) If it is alleged or established that any municipal constable, special municipal constable, designated constable, enforcement officer, bylaw enforcement officer or employee referred to in subsection (1) has committed a tort in the performance of his or her duties, the respective board and any members of that board are not liable for the claim.

[28] Sections 21(1) and (2) protect police officers and "any other person appointed" under the ***Act*** from personal liability in tort:

> 21 (1) In this section, **"police officer"** means a person holding an appointment as a constable under this Act.
>
> (2) No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.

[29] Section 21(4) confirms that the City is vicariously liable for torts committed by police officers "or any other person referred to" in s. 21(2).

[30] Sections 26(1) and (2) provide that the Board must establish a police department and appoint a chief constable:

> 26 (1) A municipal police board must establish a municipal police department and appoint a chief constable and other constables and employees the municipal police board considers necessary to provide policing and law enforcement in the municipality.
>
> (2) The duties and functions of a municipal police department are, under the direction of the municipal police board, to
>
> (a) enforce, in the municipality, municipal bylaws, the criminal law and the laws of British Columbia,
>
> (b) generally maintain law and order in the municipality, and
>
> (c) prevent crime.

[31] Section 26(4) provides that the Board "must determine the priorities, goals and objectives" of the police department in consultation with the chief constable. Under s. 26(5):

> (5) The chief constable must report to the municipal police board each year on the implementation of programs and strategies to achieve the priorities, goals and objectives.

[32] Section 27 states that the Board must prepare and submit to City Council for its approval a provisional budget for the following year.

[33] Section 28(1) provides:

> 28 (1) A municipal police board must make rules consistent with this Act and the regulations respecting the following:
>
> (a) the standards, guidelines and policies for the administration of the municipal police department;
>
> (b) the prevention of neglect and abuse by its municipal constables;
>
> (c) the efficient discharge of duties and functions by the municipal police department and the municipal constables.

[34] The duties and functions of the chief constable and the police department are defined in s. 34:

> 34 (1) The chief constable of a municipal police department has, under the direction of the municipal police board, general supervision and command over the municipal police department and must perform the other functions and duties assigned to the chief constable under the regulations or under any Act.

(2) The municipal police department, under the chief constable's direction, must perform the duties and functions respecting the preservation of peace, the prevention of crime and offences against the law and the administration of justice assigned to it or generally to peace officers by the chief constable, under the regulations or under any Act.

[35] The scheme of the ***Act***, as revealed by the foregoing sections and as it applies to the City, appears to be this:

- The City elected to establish a municipal police department.
- The City must bear the expense of maintaining law and order in the City (*i.e.*, the expenses of the police department).
- The City also elected to provide policing and law enforcement by means of a police department governed by the Board.
- The Board was required to establish a police department and appoint a chief constable.
- The Board determines the "priorities, goals and objectives" of the police department.
- The chief constable has general supervision and command of the police department. He must perform the functions and duties assigned to him under the regulations or any Act.
- The police department must perform the duties and functions assigned by the chief constable.

[36] In addition to the scheme outlined above, there appears to be an overall supervisory function that rests with the Director of Police Services, on behalf of 'the minister' under Part 8 of the ***Act***. The minister is not identified in the ***Act*** itself. However, in ***Roy v. Canada (Attorney General)***, 2005 BCCA 88, Southin J.A. held, at ¶ 5, that the minister is the Attorney General as the minister "charged" with the administration of the ***Police Act***.

[37] The functions of the Director are wide-ranging, including under s. 40(1)(e):

(e) to make recommendations to the minister on

(i) the minimum standards for the selection and training of officers or classes of officers,

(ii) the use of force by officers or classes of officers, including, without limitation, their training and retraining in the use of force, and

(iii) any other matter related to policing and law enforcement;

[38] This review of the statutory scheme indicates that once the Board is established, the City's duty is to pay the expenses of the police department. Once the Board has established the police department, the Board's duty is to determine the priorities, goals and objectives of the police department. Those obligations clearly fall within the realm of policy. The chief constable is charged with general supervision and command of the police department. Although not explicitly stated in the ***Act***, s. 34(1) and (2) clearly contemplate that the police department will, under the direction of the chief constable, execute the policies established by the Board. Those tasks are clearly operational in nature.

[39] It is obvious from Mr. Ribeiro's pleading that exception is taken to the training, or lack thereof, of VPD officers. The only reference to training that I have located in the ***Act*** is in Part 8, which sets out the functions of the Director of Police Services.

ANALYSIS FRAMEWORK

[40] Following the ***Anns*** [***Anns v. Merton London Borough Council***, [1978] A.C. 728 (H.L.)] analysis, as refined by the Supreme Court of Canada in ***Cooper***, it is necessary to ask:

(a) was the harm that occurred to Mr. Ribeiro a reasonably foreseeable consequence of the acts or omissions of the City or the Board?; and

(b) is there sufficient proximity between Mr. Ribeiro on the one hand and the City and the Board on the other, that it would be not unjust or unfair to recognize a duty of care here?

[41] In other words, at this first stage of the ***Anns*** analysis, Mr. Ribeiro must show that the circumstances disclose both reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. At this stage, the analysis is focused on factors arising from the relationship between the parties, including questions of policy. ***Cooper*** and the companion case of ***Edwards v. Law Society of Upper Canada***, [2001] 3 S.C.R. 562 state that the starting point is to determine whether the circumstances fall into an established or analogous category of cases where proximity has been found to exist. If they do not, then the question becomes whether it is appropriate to recognize a new duty of care in the circumstances. In cases like the one at bar, where there is a governing statute, the factors giving rise to proximity must be grounded in the statute.

[42] If I find in Mr. Ribeiro's favour under (a) and (b), then foreseeability and proximity will have been established and a *prima facie* duty of care arises. I must then go on to ask:

> (c) are there residual policy considerations outside the relationship between Mr. Ribeiro and the City and Board that may negative the imposition of a duty of care?

[43] At this second stage of the ***Anns*** test, and where, as here, one of the parties is a public body, it is appropriate to consider whether the acts or omissions complained of are properly viewed as an exercise of the body's policy-making function for which the courts have held there can be no liability in tort: ***Kamloops (City) v. Neilsen,*** [1984] 2 S.C.R. 2. As Cory J. noted at ¶ 18 of ***Just v. British Columbia***, [1989] 2 S.C.R. 1228:

> True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However the implementation of those decisions may well be subject to claims in tort.

(See ***Cooper*** at ¶ 30, 38 and 41-43; and ***Edwards*** at ¶ 9-10.)

APPLICATION OF THE *ANNS* TEST

[44] Mr. Ribeiro submits that he, as a mentally ill person, was in a relationship of sufficient proximity with the City and the Board that they owed him a duty to act reasonably to avoid harm to him at the hands of the police. Mr. Ribeiro says that the City and Board were aware that the existing policies and procedures for dealing with mentally ill citizens were either non-existent or ineffective. He says that, in the result, there were shootings and deaths of emotionally and mentally disturbed citizens. Mr. Ribeiro asserts that the root cause of his claim was the failure by the City and/or the Board to provide proper training for VPD officers.

[45] In this regard, Mr. Ribeiro relies on the decision in ***Baiden v. Vancouver (City) Police Department*** (2003), 18 B.C.L.R. (4th) 161 (S.C.), in which the court dismissed the City's application under Rule 19(24) to strike the statement of claim. The Board did not appear on the motion. That may have been because the statement of claim in ***Baiden*** does not allege wrongdoing by the Board. ***Baiden*** concerned a claim for wrongful trespass, negligent injury, and failure to follow guidelines made against the police.

[46] Although there are obvious similarities between ***Baiden*** and the case at bar, it is apparent from the decision in ***Baiden*** that the arguments and authorities presented on this application were not argued in ***Baiden***. Consequently, the court did not conduct an ***Anns*** analysis and did not consider whether the City and the Board were in sufficient proximity to Mr. Baiden to justify a finding of an independent duty of care owed to him. I therefore conclude that I am not bound to follow ***Baiden***: ***Re Hansard Spruce Mills Ltd.***, [1954] 4 D.L.R. 590 (B.C.S.C.).

[47] The City and the Board both argue that there is insufficient proximity between them and Mr. Ribeiro to establish a *prima facie* duty of care.

The City

[48] It is certainly arguable that it was reasonably foreseeable that if the City failed to fulfill its obligations under the ***Act***, then Mr. Ribeiro could be harmed. However, that reasonable foreseeability must be accompanied by something more. There must also be proximity.

[49] There can be no question that the City's sole statutory duty in relation to policing matters, after providing for the establishment of a police force, is to bear the expenses generally necessary to maintain law and order in the City. As the City notes, that duty is owed to the public as a whole and not to any one individual. Indeed, the protection of individual members of the public is not one of the purposes of the ***Act***. Policing, as one of the myriad of the City's funding obligations, must be balanced with the City's other obligations. Decisions made by the City

involving the balancing of objectives is consistent with public rather than private law duties. There is no indication that the City is in a relationship with Mr. Ribeiro that is any different than that which exists between the City and any of its citizens.

[50] There is no indication that Mr. Ribeiro's claim against the City falls into an established or analogous category of cases where a duty of care has been imposed. The question is whether it is appropriate to recognize a new duty of care in these circumstances. As noted above, the factors giving rise to such a duty must be grounded in statute. Here, the statute provides only that the City shall be responsible for funding the police department.

[51] In ***R. v. Schedel*** (2003), 184 B.C.A.C. 166, Southin J.A. stated at ¶ 98 that criticism of a search policy established by the VPD "is properly directed to the Police Board." After reviewing the relevant sections of the ***Act***, she concluded at ¶ 100 that "By virtue of these provisions, the responsibility for all polices of the City of Vancouver Police Force rests squarely on the Police Board of this City." This finding confirms that the obligations of the City under the statutory scheme are quite limited, which in turn supports the conclusion that the requisite degree of proximity in respect of the City has not been established in this case.

[52] On the first stage of the ***Anns*** test there is an obvious absence of the required proximity between Mr. Ribeiro and the City. The nature of the relationship between Mr. Ribeiro and the City, and the City's limited role under the statutory policing scheme, indicate that it would not be just to impose a duty of care in these circumstances. Even if Mr. Ribeiro were able to satisfy the first part of the ***Anns*** test and establish a *prima facie* duty of care, I would nevertheless find that such a duty of care is negated by residual policy considerations.

[53] As I have noted, the City's obligations under the ***Act*** are limited to electing the mode by which police services will be provided and providing the funding necessary to provide those services. It does so through resolutions that are legislative acts: ***Birch Builders Ltd. v. Esquimalt (Township)*** (1990), 90 D.L.R. (4th) 665 (B.C.C.A.). The decisions concerning the police budget are part of the City's overall allocation of monetary resources and require a balancing of many objectives.

[54] As the court noted in ***Kimpton v. Canada (Attorney General)*** (2002), 9 B.C.L.R. (4th) 139 (S.C.), aff'd (2004), 23 B.C.L.R. (4th) 249 (C.A.), at ¶ 63:

> To the extent that the Province negligently governs, the voting public may impose a political consequence at an election. As stated in *A.O. Farms*, however, "Government when it legislates, even wrongly, incompetently, stupidly or misguidedly is not liable in damages."

[55] The City's obligations amount to policy decisions that do not give rise to an independent private law duty of care. Furthermore, as the City argues, if the City owed a private law duty of care for failure to provide adequate resources for policing mentally ill persons, a similar duty would be owed to other groups likely to be affected by the allocation of police resources. Such indeterminate liability would negate a *prima facie* duty of care.

[56] In effect, Mr. Ribeiro is asking the court to find that the City owed special duties to a certain class of persons, namely the mentally ill. This is plainly not the duty imposed on the City by the statute, which is owed to the general public as a whole and is a public not private law duty. It would be inappropriate to read certain duties owed to certain classes of persons into the statutory scheme.

The Board

[57] The Board argues that the relationship between it and Mr. Ribeiro does not fall into a recognized category of proximity such as those set out in ***Cooper*** at ¶ 36.

[58] Mr. Ribeiro says that his claim is analogous to the circumstances in ***Just***, where the Supreme Court of Canada held that governmental authorities who have undertaken a policy of road maintenance are held to owe a duty to execute the maintenance in a non-negligent manner. As noted above, the scheme under the ***Act*** makes the Board responsible for setting policies for the VPD. It is therefore arguable, for example, that the Board owed a duty of care to ensure that the Board develop adequate policies for the policing of the City's citizens.

[59] However, as was the case with the City, Mr. Ribeiro must establish sufficient proximity between himself and the Board before a *prima facie* duty of care will be imposed. It is clear from the ***Act*** that the Board's function is to determine the "priorities, goals and objectives" of the police department. That is classically a policy function. The execution of the policies are, under s. 34(2) of the ***Act***, left to the chief constable. As was the case in ***Odhavji***, the

Board is "much further in the background than the chief." There is nothing in the ***Act*** to suggest that the Board is involved in the supervision of the day-to-day conduct of the police officers. As in ***Odhavji***, the Board supervises the chief constable who, in turn, supervises the members of the police force.

[60] Mr. Ribeiro emphasized his pleading that the City and/or the Board have historically failed to provide adequate resources and training to the police to properly deal with mentally ill persons. Mr. Ribeiro relies on the *dicta* in ***Odhavji*** at ¶ 66:

> It is possible, I concede, that circumstances might arise in which the Board is required to address a particular problem in order to discharge its statutory obligation to provide adequate and effective police services. If there was evidence, for example, of a widespread problem in respect of the excessive use of force in the detention of visible minorities, the Board arguably is under a positive obligation to combat racism and the resultant use of excessive force.

Mr. Ribeiro thus asserts that in pleading other instances of excessive force against other mentally ill persons, and in not confining the claim to Mr. Ribeiro, a positive obligation arises for the Board to properly deal with mentally ill persons and to avoid the use of excessive force.

[61] I note, however, that the Court in ***Odhavji*** concluded its remarks in ¶ 66 with the following passage:

> But as a general matter, courts should be loath to interfere with the Board's broad discretion to determine what objectives and priorities to pursue, or what policies to enact in pursuit of those objectives. Suffice it to say, the Board's decision not to enact additional policies or training procedures in respect of s. 113(9) does not constitute a breach of its obligation to provide "adequate and effective" police services.

[62] The unique problem posed by mentally ill persons is that they are not a "visible" minority. They may behave in a manner that is unusual, but that behaviour may not necessarily categorize them as mentally ill. Mr. Ribeiro has pleaded that members of the VPD have, in the past, wounded or killed citizens who suffer from mental illness and has provided a list of specific incidents. But again, the duties owed by the Board under the statutory scheme are owed to the general public as a whole, not to a particular class of persons, and are inherently public and political in nature. The statute imposes an obligation to provide policing services and it would not be appropriate to 'read in' other specific duties. I therefore do not accept that the situation that the Supreme Court suggested might arise in ***Odhavji*** arises in the case at bar so as to impose a positive private law obligation on the Board. In effect, Mr. Ribeiro is attempting to litigate a social policy issue by means of a tort claim. The law is clear that the issues raised by Mr. Ribeiro in his independent tort claims against the City and the Board are more appropriately dealt with in the political and legislative context, rather than in the courts.

[63] In these circumstances, I conclude that the Board, whose primary function is to determine the policies of the police department and govern the police department, is not in a relationship of sufficient proximity with Mr. Ribeiro to justify imposing a *prima facie* duty of care. I find that the first part of the ***Anns*** test has not been met with respect to the Board.

[64] As with the City, even if there were a *prima facie* duty of care established, I find that it would be negatived by residual policy considerations. The Board's decisions relating to the nature of mental health policies and the amount of funding and resources allocated to such matters are clearly within the realm of policy and not subject to interference by the court.

[65] The City and the Board both emphasize that under the ***Act*** there is a clear right and opportunity for aggrieved persons such as Mr. Ribeiro to sue for alleged torts. The City is liable for such torts. Mr. Ribeiro, if he establishes his claim, is guaranteed payment of any judgment awarded to him.

[66] Mr. Ribeiro nevertheless argues that his claim may not be fully recoverable unless those responsible for the training of police officers are defendants in the action. Mr. Ribeiro posits the proposition that if the police were trained to shoot mentally ill persons and the person or body responsible for such arguably negligent training is not before the court, then Mr. Ribeiro is without a remedy.

[67] The City is obviously not responsible for training police officers under the ***Act***. Nor is the Board. Mr. Ribeiro argues that some body is responsible for making the decisions that ground his claim. He submits that the importance of determining who that body is arises from his claim for punitive damages. Mr. Ribeiro argues that if

the police were trained to shoot mentally ill persons, then individual police officers would not likely be found liable for punitive damages. He thus argues that there is a need to identify and potentially hold liable the person or body who trained the police in an arguably negligent manner. That person or body might be liable for punitive damages as a mechanism of punishing and deterring similar negligent conduct.

[68] I am not persuaded that Mr. Ribeiro will be deprived of his claim to punitive damages if the person or body responsible for training the VPD is not a party. The City is liable for the torts of police officers. Punitive damages may be imposed vicariously or against an employer "if a managerial agent of the employer has acted recklessly in engaging or retaining the employee with the resultant foreseeable danger of harm of the type which occurred here": ***R.(G.B.) v. Hollett*** (1996), 139 D.L.R. (4th) 260 (N.S.C.A.) at 320; leave to appeal refused, [1996] S.C.C.A. No. 541.

[69] However, based on the pleadings as they currently stand, Mr. Ribeiro does not allege that individual defendant police officers were negligently trained or supervised. Rather, he claims that the entire police department was negligently trained and supervised. That pleading raises the claims in ¶ 55 to 66 of the statement of claim from the operational level to the policy level. As such, it is outside the ambit of the court's ability to interfere.

[70] Mr. Ribeiro also placed some emphasis on the decisions in ***Mah v. Vancouver*** (2000), 4 C.P.C. (5th) 232 (B.C.S.C.) and ***Doern v. Phillips (Public Trustee of)*** (1994), 2 B.C.L.R. (3d) 349 (S.C.). Those decisions do not assist Mr. Ribeiro. In ***Mah***, the claim arose out of the allegedly negligent conduct of a city employee. In the case at bar, the police officers are not employees of the City. In ***Doern***, there was no allegation of an independent tort committed by the City. The liability of the City was by virtue of s. 20 of the ***Act*** for the negligent conduct of the police officers involved in a police chase.

[71] I must also address the issue of whether the City and/or the Board enjoy immunity from independent tort claims made against them. As noted above, the Court of Appeal in ***Schedel*** held that the City was not responsible for policy decisions. Rather, the responsibility was in the exclusive purview of the Board. The immunity of the Board, in turn, was addressed in the decision in ***Frimpong v. Gillespie***, [1999] B.C.J. No. 524 (S.C.) (QL). Master Barber held that members of the Board are protected from personal liability by virtue of s. 21(2) of the ***Act***. At ¶ 10-11, the court reasoned:

> 10. The Board is comprised of individuals who could be sued in their own name as members of the Board unless they were excluded from personal liability. While section 8(5) of the Ontario Act provided for an exclusion of liability under contract in 1980, there was no comparable section to section 21(2) of the *Police Act* of British Columbia mentioned above. In British Columbia members of the Vancouver Police Board are protected from personal liability by section 21(2) of the *Police Act*.
>
> 11. Question still remains though whether or not the Vancouver Police Board, *qua* Board, could be sued in its own name. As there is no comparable section to section 8(5) of the Ontario Act in British Columbia, and as it cannot be shown that the Board is *qu*a, the Board is a juridical entity, the argument of the plaintiff fails. If I am wrong in that regard, then as the Board is appointed pursuant to section 23, I think that the Board would be included under section 21(2) and thus protected from liability.

The Board relied on this decision in support of its argument that the Board was not a juridical entity and could therefore not be sued in its own name.

[72] While it is clear that the learned Master was correct in concluding that s. 21(2) of the ***Act*** protected individual members of the Board from liability in their individual capacities, the conclusion that the Board *qua* Board was not a juridical entity and could therefore not be sued in its own name has been criticized: see P. Ceyssens, *Legal Aspects of Policing*, looseleaf ed. (Earlscourt Legal Press, Inc., 1994) at p. 4-18.

[73] In ***London (Township) Board of Commissioners of Police v. Western Freight Lines*** (1962), 34 D.L.R. (2d) 689 (Ont. C.A.), the Court noted that the police board was a statutory entity and that "the right to sue and the liability to be sued may be conferred by statute upon such an entity either expressly or by implication." While the ***Act*** contains no express provision on this point (unlike the statutes of some other provinces), it would seem that by implication the Board must be a juridical entity capable both of suing and being sued.

[74] I am bolstered in this conclusion by the number of cases in which various police boards have been sued,

most notably in the context of police officers bringing claims against the Board (as the employer) for wrongful dismissal: see, for example, ***Deighton v. Vancouver (City) Police Board*** (1986), 15 C.C.E.L. 215 (B.C.S.C.); ***Carpenter v. Vancouver (City) Police Board*** (1986), 34 D.L.R. (4th) 50 (B.C.C.A.); and ***Rossmo v. Vancouver (City) Police Board*** (2003), 190 B.C.A.C. 121. Police boards have also been parties to applications for judicial review: see, for example, ***Port Moody, District 43, Police Services Union v. Port Moody (District) Police Board*** (1991), 54 B.C.L.R. (2d) 27 (B.C.C.A.); and ***Reid v. Vancouver (City)*** (2003), 6 Admin. L.R. (4th) 224 (B.C.S.C.), 2003 BCSC 1348.

[75] I am therefore not persuaded that the Board cannot be sued in its own name. Notwithstanding this conclusion, it is clear that the statutory scheme established by s. 20 of the ***Act*** contemplates that the City, not the Board, will be vicariously liable for the tortious acts of individual officers, and so in that sense the Board is immunized from liability: see ***Price v. Vancouver (City)***, [1977] B.C.J. No. 653 (S.C.) (QL).

[76] During the course of his submissions, counsel for Mr. Ribeiro stated that he was unaware of any case similar in circumstances to the case at bar in which the chief constable had been named as a party. He later learned of the existence of ***Jacobsen v. Vancouver (City)***, [1986] B.C.J. No. 2290 (S.C.) (QL). By agreement between counsel, Mr. Ribeiro, the City and the Board submitted further brief argument in respect of the ***Jacobsen*** decision.

[77] In ***Jacobsen***, the chief constable and the Board applied pursuant to Rule 19(24) for an order that the writ and statement of claim be struck out against them as disclosing no reasonable cause of action. Counsel for the plaintiff conceded that s. 54(2) of the ***Police Act***, R.S.B.C. 1979, c. 331 (now s. 20(1)) gives the Board and its members immunity and that the action could not be maintained against the Board. The issue before the court was whether the chief constable was subject to a claim for damages resulting from an alleged assault on the plaintiff by members of the police department. Proudfoot J. (as she then was) concluded that the statement of claim pleaded that the chief constable was vicariously liable for the actions of the police officers. Proudfoot J. noted that s. 54(1) of the ***Act*** (as it stood at the time) made the City, not the chief constable, liable for tortious actions or negligent conduct of police officers in the performance of their duties.

[78] Proudfoot J. also rejected the plaintiff's allegation that the chief constable was liable in negligence "because of the training and control [of officers] or lack of these elements." She concluded that the Police Commission (as it was then constituted) was responsible for the selection and training of police officers, not the chief constable.

[79] It is plain from a reading of the ***Jacobsen*** decision that the City did not seek to have the claim against it struck. As the City submits, the claim against the City was one based on liability under what is now s. 20(1) of the ***Act***. There was no allegation in ***Jacobsen*** of an independent wrong committed by the City.

[80] I accept the City's submission as correct. The ***Jacobsen*** decision does not assist Mr. Ribeiro in his opposition to the Rule 19(24)(a) application.

[81] Lastly, Mr. Ribeiro submits that the ***Jacobsen*** decision would preclude him from joining the chief constable in this action for alleged negligence in the training and supervision of members of the police department. Mr. Ribeiro says that in the result there would be a complete absence of accountability.

[82] However, that submission ignores the fact that the City is jointly and severally liable and vicariously liable for torts committed by members of the police department in the course of their duties. In such circumstances, it cannot be fairly said that Mr. Ribeiro is faced with a complete absence of accountability.

[83] In the result, I conclude that Mr. Ribeiro cannot establish a *prima facie* duty of care owed to him by the City or the Board. I therefore grant the City's application to strike ¶ 55 to 66 of the statement of claim and ¶ 2 of the reply to the amended statement of defence.

[84] I further conclude that, although the Board is an entity subject to being sued, the proposed pleading in respect of the Board does not disclose a cause of action.

[85] As I understand the submissions of counsel, given this result, it is not necessary to address the plaintiff's application under Rule 15(5).

"P.A. Kirkpatrick, J."
The Honourable Madam Justice P.A. Kirkpatrick