



No. S135590
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

NOMI DAVIS, AS REPRESENTATIVE PLAINTIFF

PLAINTIFF

AND:

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

DEFENDANT

AMENDED NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

[continued...]

Claim of the Plaintiff

Part 1: STATEMENT OF FACTS

A. Parties

1. The Representative Plaintiff, Nomi Davis (“the Residential Plaintiff”), is an individual residing at 334 Cusheon Lake Road (“the Property”) on Salt Spring Island, in the Province of British Columbia.
- 1.1 The Representative Plaintiff, Jessica Klein (“the Commercial Plaintiff”) is an individual and proprietor of Homestead Certified Organic Farm with a business premises at 4855 MacKinnon Road, Peachland (“the Premises”).
2. The Residential Plaintiff brings this action pursuant to the *Class Proceedings Act*, RSBC 1996, c 50. She claims on her own behalf and on behalf of a residential class of individuals as defined herein.
- 2.2 The Commercial Plaintiff brings this action pursuant to the *Class Proceedings Act*, RSBC 1996, c 50. She claims on her own behalf and on behalf of a commercial class of persons as defined herein.
- 2.3 The Residential Plaintiff and the Commercial Plaintiff are herein referred to collectively as “the Plaintiffs”.
3. The Defendant, British Columbia Hydro and Power Authority (“BC Hydro”), is a Crown corporation and agent of the Crown operating under the *Hydro and Power Authority Act* R.S.B.C. 1996, c. 212.

B. The impugned conduct

4. The Defendant operates a utility whereby the Defendant generates, distributes and sells electrical power to residential, commercial and other customers throughout British Columbia.
5. The Defendant enjoys a monopoly over the area in which it sells electrical power to residential and commercial customers (“the Monopoly”).
6. The Defendant operates a meter at the residence or commercial premises of each customer and each Plaintiff for the purpose of measuring customer power consumption.
7. At the domestic dwelling of each of its residential customers (and at the commercial premises of each of its commercial customers), the Defendant has installed and/or sought to install a microwave radiofrequency-emitting, communication transmitter (“the Microwave Device”) for the purpose of

transmitting customer power consumption data from each meter to the Defendant's network.

8. The Microwave Device emits microwave radiation at a frequency range of 902 Megahertz (MHz) to 928 MHz ("the Emissions").
9. The World Health Organization's *International Agency for Research on Cancer* has classified the Emissions as a class 2B possible human carcinogen.
10. There is consensus in the scientific community as to the fact that exposure to the Emissions causes biological effects; however there is division in the scientific community as to whether those biological effects are adverse to human health.
11. Where the Microwave Device is installed at a domestic dwelling, it operates on a constant and continuous basis and causes domestic residents of that dwelling to be exposed to the Emissions on a constant and continuous basis for an indefinite duration.
- 11.1 Where the Microwave Device is installed at commercial premises, it operates on a constant and continuous basis and causes attendees of those premises, including proprietors and workers, to be exposed to the Emissions on a constant and continuous basis for an indefinite duration.

C. Contract

i. Residential Contract

12. The power supply relationship between the Defendant and the Residential Plaintiff is a relationship governed by an adhesion contract ("the Residential Contract") which includes terms allowing the Defendant to access the Residential Plaintiff's Property for the purpose of reading, repairing or replacing the meter.
13. The Residential Plaintiff has exclusive occupancy and possession of the Property and has, at all material times, allowed the Defendant to access the Property for the purpose of reading, repairing or replacing the meter.
14. The installation and operation of the Microwave Device is an act that exceeds the scope of the Defendant's right to access the Residential Plaintiff's Property for the purpose of reading, repairing or replacing the meter. By installing the Microwave Device, the Defendant has added a communication device to the meter that is not necessary to the functionality of the meter as required by law and yet has material implications on the rights of the Residential Plaintiff.

ii. Commercial Contract

- 14.1 The power supply relationship between the Defendant and the Commercial Plaintiff is a relationship governed by an adhesion contract (“the Commercial Contract”), which includes terms allowing the Defendant to access the Commercial Plaintiff’s Premises for the purpose of reading, repairing or replacing the meter.
- 14.2 The Commercial Plaintiff has exclusive occupancy and possession of the Premises and has, at all material times, allowed the Defendant to access the Premises for the purpose of reading, repairing or replacing the meter.
- 14.3 The installation and operation of the Microwave Device is an act that exceeds the scope of the Defendant’s right to access the Commercial Plaintiff’s Premises for the purpose of reading, repairing or replacing the meter. By installing the Microwave Device, the Defendant has added a communication device to the meter that is not necessary to the functionality of the meter as required by law and yet has material implications on the rights of the Commercial Plaintiff.

ii. Microwave Device is not necessary

- 15. The Microwave Device is not necessary to the Defendant’s ability to read, repair or replace its meters. The Defendant has available to it alternative methods to measure and collect electrical consumption data without the use of the Microwave Device.

D. The refusal (Residential)

- 16. At the material time, the Residential Plaintiff clearly communicated to the Defendant that she refused to allow the Defendant to install or operate the Microwave Device at her Property and/or enter her Property for the purpose of installing the Microwave Device.
- 17. The Defendant, at all material times, knew or ought to have known of the Residential Plaintiff’s position as set out in the preceding paragraph.
- 18. On or about August 22, 2012, the Defendant or the Defendant’s agent entered and accessed the Property for the purpose of installing the Microwave Device and did so install the Microwave Device by embedding it in a replacement electrical meter.
- 19. The Microwave Device is attached to the electrical infrastructure of the Residential Plaintiff’s residence and cannot be removed by the Residential Plaintiff.
- 20. The Residential Plaintiff has requested that the Defendant remove the Microwave

Device from her Property.

21. The Defendant refuses to remove the Microwave Device from the Residential Plaintiff's Property notwithstanding the Residential Plaintiff's request for removal.
22. The Microwave Device is operating continuously so as to expose the Residential Plaintiff and her resident family members to the Emissions.
23. The Microwave Device attached to the home of the Residential Plaintiff is transmitting consumption data pertaining to the Residential Plaintiff's Property as well as consumption data pertaining to other BC Hydro customers. As such, the Residential Plaintiff's Property is being used to host infrastructure that forms a part of a wireless communication network for the operational and commercial benefit of the Defendant.
24. The Residential Plaintiff has not consented to, and does not accept, the continued operation of the Microwave Device at the Property.
25. The Defendant uses the threat of cutting off electrical supply to compel the Residential Plaintiff to accept the continued operation of the Microwave Device at the Property.
26. Without any contractual or statutory right, the Defendant has used its Monopoly status to coercively and deceptively impose the Microwave Device on the Residential Plaintiff against her express wishes.
27. The installation and operation of the Microwave Device on the Residential Plaintiff's Property has caused her emotional distress.
28. The installation and operation of the Microwave Device on the Residential Plaintiff's Property has interfered with the quiet enjoyment of her Property, the particulars of which are as follows. The Residential Plaintiff uses her Property to host yoga and meditation retreats including a spiritual practice of attunement to resonant states of consciousness. The installation and operation of the Microwave Device and the presence of the Emissions in the Residential Plaintiff's domestic environment has interfered with that practice. The presence of a device with bio-effects on the Residential Plaintiff's Property has disrupted the integrity of the space as a sanctuary for meditation, peace of mind and resonant attunement.

D.2 The refusal (Commercial)

- 28.1 At the material time, the Commercial Plaintiff clearly communicated to the Defendant that she refused to allow the Defendant to install or operate the Microwave Device at her Premises and/or enter her Premises for the purpose of installing the Microwave Device.

- 28.2 The Defendant, at all material times, knew or ought to have known of the Commercial Plaintiff's position as set out in the preceding paragraph.
- 28.3 Notwithstanding the Commercial Plaintiff's express refusal, the Defendant has sent correspondence to all commercial customers, including the Commercial Plaintiff, advising of:
- a) the imminent installation of the Microwave Device at their respective premises; and
 - b) the levying of a fee against any commercial customer that obstructs or interferes with the installation of the Microwave Device.

D.3 The Direct Communication

i. BC Hydro Communication

- 28.4 Subsequent to the filing and service of the NOCC, the Defendant corresponded directly with putative Class members ("the Direct Communication").
- 28.5 The Direct Communication commenced in or about September of 2013 and has continued to mid-November of 2013.
- 28.6 The Direct Communication occurred by way of three separate mail-outs.
- 28.7 In or about mid-November of 2013, the Defendant telephoned recipients of the Direct Communication to remind those recipients of the deadline of December 1, 2013, stipulated in the Direct Communication.

ii. Overlapping Issues

- 28.8 The Direct Communication was sent by BC Hydro to those of its customers who, to date, have successfully resisted the installation of a Microwave Device at their respective residential properties and are thereby putative Class members amongst others.
- 28.9 The Direct Communication invites (or coerces) these customers to make a "choice" between:
- a) the installation of the Microwave Device; and
 - b) the continuous payment of a fee for the right to be free from a Microwave Device.

("the Choice")

- 28.10 Those who decline to exercise their “choice” by December 1, 2013, will, according to the Direct Communication, be charged the monthly fee by default.
- 28.11 In the Direct Communication, BC Hydro explicitly informs that, where a customer fails to pay such fees, his or her account “will enter arrears and...will be subject to service disconnection.”
- 28.12 The Direct Communication invites (or coerces) putative Class members to take a position on the very issues that are raised by the Action.
- 28.13 In particular, the Direct Communication seeks to obtain the written agreement and surrender of putative Class members to the very conduct that is impugned by way of the Action.
- 28.14 The Direct Communication includes a response form by which customers may exercise their “choice” by return mail, fax or email to BC Hydro.
- 28.15 The exercise of either “choice” by a putative Class member would arguably:
- a) amount to a concession on the very matters that are at issue in the Action; and
 - b) disqualify the individual from membership in the Class, the definition of which is premised on a refusal to consent to the Microwave Device.
- 28.16 Under the coercive threat of imposing that which the Action seeks to enjoin, the Direct Communication has sought to bring putative Class members to capitulate to the Impugned Conduct and disqualify themselves from Class membership.

iii. Information withheld

- 28.17 The Direct Communication does not inform putative Class members of:
- a) the pending class Action;
 - b) the name and contact details of Class counsel; or
 - c) the propriety of seeking independent legal advice in relation to the exercise of “meter choices” as invited by the Direct Communication.
- 28.18 No other communication promulgated by BC Hydro to its customers informs putative Class members of the above-referenced information.

iv. No notice to the plaintiff

28.19 The Direct Communication occurred without notice to the Plaintiff or Class counsel.

E. The Residential Class

29. The Representative Residential Plaintiff claims on her own behalf and on behalf of a class of persons (“the Residential Class”) who meet all of the following criteria:

- a. The Residential Class member is an adult individual resident of British Columbia.
- b. The Residential Class member resides or seeks to reside at a residential property over which he or she has occupancy and possession by way of legal right (“the Subject Property”).
- c. At the material time, the Defendant supplied power (or had been asked to supply power) to the Subject Property pursuant to a utility-customer relationship between the Defendant and the Residential Class member or his/her proxy.
- d. The Residential Class member, by way of explicit communication, has indicated to the Defendant that he/she opposes and/or does not consent to the installation and/or operation of the Microwave Device at the Subject Property (“the Notice of Refusal”).
- e. One or more of the following has occurred:
 - i. Notwithstanding the Notice of Refusal, the Defendant proceeded to install and operate the Microwave Device at the Subject Property;
 - ii. Notwithstanding the Notice of Refusal, the Defendant has failed to terminate the operation of the Microwave Device at the Subject Property;
 - iii. Notwithstanding the Notice of Refusal, the ~~Plaintiff~~ Residential Class member has received information from the Defendant setting out the Defendant’s intention to install the Microwave Device at the Subject Property;
 - iv. The Defendant has declined to supply power to the Subject Property as a consequence of the Residential Class member’s refusal to allow the installation of the Microwave Device at the Subject Property; or

- v. The Defendant has indicated its intention to decline to supply power to the Subject Property as a consequence of the Residential Class member's refusal to allow the installation of the Microwave Device at the Subject Property;
- vi. The Defendant has communicated with the Residential Class member by way of the Direct Communication or has otherwise exacted fees or has sought to exact fees from the Residential Class member in connection with his/her:
 - a. refusal to provide his/her agreement to the Microwave Device; or
 - b. election of a meter devoid of the Microwave Device; or
- vii. After having issued the Notice of Refusal, the Residential Class member responded to the Direct Communication (or some similar communication by BC Hydro), by:
 - a. acceding to the installation of the Microwave Device; or
 - b. acceding to the payment of a fee in exchange for the Defendant's agreement to refrain from installing the Microwave Device.

E.1 The Commercial Class

29.1 The Representative Commercial Plaintiff claims on her own behalf and on behalf of a class of persons ("the Commercial Class") who meet all of the following criteria:

- a. The Commercial Class member is designated as a commercial customer by the Defendant;
- b. The Commercial Class member carries out all or part of its business at a commercial premises over which it has occupancy and possession by way of legal right ("the Subject Premises");
- c. At the material time, the Defendant supplied power (or had been asked to supply power) to the Subject Premises pursuant to a utility-customer relationship between the Defendant and the Commercial Class member or its proxy;
- d. The Commercial Class member, by way of explicit communication, has indicated to the Defendant that it opposes and/or does not consent to the

installation and/or operation of the Microwave Device at the Subject Premises (“the Notice of Refusal”); and

- e. One of the following has occurred:
- i. Notwithstanding the Notice of Refusal, the Defendant proceeded to install and operate the Microwave Device at the Subject Premises;
 - ii. Notwithstanding the Notice of Refusal, the Defendant has failed to terminate the operation of the Microwave Device at the Subject Premises;
 - iii. Notwithstanding the Notice of Refusal, the Commercial Class member has received information from the Defendant setting out the Defendant’s intention to install the Microwave Device at the Subject Premises;
 - iv. The Defendant has declined to supply power to the Subject Premises as a consequence of the Commercial Class member’s refusal to allow the installation of the Microwave Device at the Subject Premises;
 - v. The Defendant has indicated its intention to decline to supply power to the Subject Premises as a consequence of the Commercial Class member’s refusal to allow the installation of the Microwave Device at the Subject Premises; or
 - vi. The Defendant has exacted fees, sought to exact fees or threatened to exact fees from the Commercial Class member in connection with the latter’s refusal to allow (or obstruction of) the installation of the Microwave Device at the Subject Premises.

Part 2: RELIEF SOUGHT

30. On her own behalf and on behalf of the respective members of ~~the~~ each Class, ~~the~~ each Plaintiff seeks the following relief:

- a. Certification of this action pursuant to the *Class Proceedings Act*, RSBC 1996, chapter 50 with respect to each of the Residential Class and the Commercial Class;
- b. An order in the nature of a permanent injunction:
 - i. requiring the Defendant to remove, without condition, the Microwave Device from the Subject Property/Premises or cease the

operation of the Microwave Device at the Subject Property/Premises;

- ii. restraining the Defendant from installing / operating the Microwave Device at the Subject Property/Premises without the Class member's consent; and
- iii. restraining the Defendant from declining to supply power to the Subject Property/Premises in relation to the removal of the Microwave Device or the Class member's refusal to consent to the installation of the Microwave Device.
- iv. restraining the Defendant from exacting payment from the ~~Plaintiff~~ Class member in exchange for the Defendant's agreement to:
 - a. remove the Microwave Device;
 - b. refrain from installing the Microwave Device; and/or
 - c. supply power in the absence of the installation/operation of the Microwave Device.
- c. General damages for intrusion against seclusion, trespass and nuisance in an amount to be determined by the Court;
- d. Exemplary and/or punitive damages relating to the Defendant's unlawful leveraging of its Monopoly powers against the rights of the Plaintiffs and Class members;
- e. Costs of this action; and
- f. Such further and other relief as counsel may request and this Honourable Court deem just.
- g. An order rescinding any agreement provided by any Class member in response to the Direct Communication or any substantially similar communication; and
- h. An order for damages, in the aggregate, payable to the Plaintiffs and any other Class members in an amount equal to the fees collected by the Defendant in connection with any Class member's:
 - i. refusal to provide his/her agreement to a Microwave Device;
 - ii. obstruction of the installation of a Microwave Device; or
 - iii. election of a meter devoid of the Microwave Device.

Part 3: LEGAL BASIS

A. Rights and Freedoms

i. Residential

31. The Residential Plaintiff enjoys a common law right of autonomy and privacy at her domestic place of residence; a right of control over environmental exposures generated from her home; a right to be free from interference in that regard.
32. The Residential Plaintiff claims a right of free choice as to whether a Microwave Device is hosted on her Property so as to continuously expose her and her family in residence to the Emissions.
33. The Residential Plaintiff claims a right to be free from physical intrusion into the private space of her domestic environment.

ii. Commercial

- 33.1 The Commercial Plaintiff enjoys a common law right of autonomy and privacy at her Commercial Premises; a right of control over environmental exposures generated from her Commercial Premises; a right to be free from interference in that regard.
- 33.2 The Commercial Plaintiff claims a right of free choice as to whether a Microwave Device is hosted on her Commercial Premises so as to continuously expose her, her co-proprietors, her workers and her customers/clients to the Emissions.
- 33.3 The Commercial Plaintiff claims a right to be free from physical intrusion into the private and/or autonomous space of her Commercial Premises.

B. Causes of Action

34. By entering (or threatening to enter) the Property/Premises and leaving behind a continuously emitting Microwave Device, against the express will of the Plaintiffs, the Defendant has intentionally intruded, physically, upon the seclusion and/or private and autonomous space of the Plaintiffs. The Plaintiffs pleads the tort of *intrusion against seclusion* as that tort includes physical intrusions into private places. Further and in the alternative the Plaintiffs pleads the application of the *Privacy Act* [RSBC 1996] ch. 373.
35. Against the Plaintiffs' explicit objections, the Defendant has entered (or has threatened to enter) onto the Plaintiffs' Property/Premises and left behind, affixed to the electrical infrastructure, a continuously emitting Microwave Device that physically affects the Plaintiffs. The Plaintiffs ~~are~~ is incapable of removing the Device and the Defendant has wrongfully refused to remove it. By conducting itself as such, the Defendant commits the tort of *trespass* and the ongoing

presence and operation of the Microwave Device constitutes a continuing trespass.

36. The Defendant has caused, or will cause, an emission of microwave radiofrequency radiation to flow, for an indefinite duration, from the Plaintiffs' Property/Premises in a manner which constantly and continuously exposes the premises of her domestic/commercial dwelling and its inhabitants to the Emissions and their physical effect. By conducting itself as such, the Defendant interferes with the Plaintiffs' quiet enjoyment of her Property/Premises and commits the tort of *nuisance*.

C. Contract

37. The Plaintiffs ~~and her resident family~~ are contractually entitled to the Defendant's continued supply of electrical power free from interference with their rights to privacy and autonomy.
38. The Defendant is not contractually entitled to insist on the installation and operation of the Microwave Device as a condition of the ongoing supply of electrical power to the Plaintiffs' Property/Premises.
39. The Contract does not entitle the Defendant to install or operate the Microwave Device at the Property/Premises or otherwise effect the transmission of microwave radiofrequency emissions at or from the Property/Premises.
40. The Contract does not entitle the Defendant to use the Plaintiffs' Property/Premises to host infrastructure that forms a part of a wireless communication network for the operational and commercial benefit of the Defendant.
41. The installation / operation of the Microwave Device is not necessary to the enjoyment or fulfillment of the Defendant's rights or obligations under the Contract.
- 41.1 Any legislation, government action or administrative determination made subsequent to the filing of this Action is a violation of section 8 of the *Canadian Charter of Rights and Freedoms* [Schedule B to the *Constitution Act*, 1982] to the extent that the legislation, government action or administrative determination purports to modify the Contract so as to:
 - a) nullify the Plaintiffs' entitlement to the Defendant's continued supply of electrical power free from interference with their rights to privacy and autonomy;

- b) entitle the Defendant to insist on the installation and operation of the Microwave Device as a condition of the ongoing supply of electrical power to the Plaintiffs' Property/Premises;
- c) entitle the Defendant to install or operate the Microwave Device at the Property/Premises or otherwise effect the transmission of microwave radiofrequency emissions at or from the Property/Premises; or
- d) entitle the Defendant to use the Plaintiffs' Property/Premises to host infrastructure that forms a part of a wireless communication network for the operational and commercial benefit of the Defendant.

D. Legislation

- 42. The Province has not adopted any standards in British Columbia for the regulation of the Emissions and no Federal licensing requirements are applicable to the Emissions.
- 43. The Defendant is not required or authorized by any statute to install the Microwave Device at the Plaintiffs' Property/Premises. The Defendant has available to it alternative methods to measure and collect electrical consumption data in compliance with the *Clean Energy Act* [SBC 2010] Chapter 22 without the use of the Microwave Device.
- 44. Alternatively, to the extent that the Defendant is required or authorized by any statute to install the Microwave Device at the Plaintiffs' Property/Premises, then that statute violates the quasi-constitutional right to privacy as it arises by way of section 8 of the *Canadian Charter of Rights and Freedoms* [Schedule B to the *Constitution Act, 1982*].

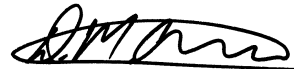
Plaintiffs' address for service:

c/o David M. Aaron, Barrister & Solicitor, 208 - 507 Baker Street Nelson, BC
V1L 4J2 Tel: 250.551.6840 Fax: 866.685.7376 Email: david@legalmind.ca

Place of trial: Vancouver, British Columbia

The address of the registry is: 800 Smithe Street, Vancouver, BC V6Z 2E1

Dated: ~~July 25, 2013~~ January 6, 2014



David M. Aaron
Counsel for the Plaintiffs

Appendix

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

A representative claim in tort for intrusion upon seclusion, trespass and nuisance;

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A dispute concerning:

☒ a matter not listed here

Part 3: THIS CLAIM INVOLVES:

☒ a class action

☒ constitutional law

Part 4:

Hydro and Power Authority Act R.S.B.C. 1996, c. 212.

Canadian Charter of Rights and Freedoms [Schedule B to the Constitution Act, 1982]

Clean Energy Act [SBC 2010] Chapter 22