

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Reynolds v. Deep Water Recovery Ltd.*,
2023 BCSC 600

Date: 20230417
Docket: S224947
Registry: Vancouver

Between:

Mary Reynolds

Plaintiff

And

**Deep Water Recovery Ltd., Mark Jurisich,
John Doe #1, John Doe #2, John Doe #3 and John Doe #4**

Defendants

Before: The Honourable Justice Ahmad

Reasons for Judgment

Counsel for the Plaintiff:

J.B. Gratl

Counsel for the Defendants Deep Water
Recovery Ltd. and Mark Jurisich:

M.G. Swanson
S. Péloquin

Place and Dates of Hearing:

Vancouver, B.C.
September 13, 2022
October 6, 2022

Place and Date of Judgment:

Vancouver, B.C.
April 17, 2023

Table of Contents

I.	INTRODUCTION	3
II.	BACKGROUND.....	3
1.	Factual background and evidence	3
2.	Litigation background	4
III.	LEGAL FRAMEWORK.....	6
1.	General framework.....	6
2.	The “threshold” burden.....	8
3.	Procedural framework	9
IV.	POSITIONS OF THE PARTIES.....	9
V.	ISSUES.....	11
VI.	DISCUSSION AND ANALYSIS.....	12
1.	Do the procedural requirements of the <i>PPPA</i> or the <i>Rules</i> allow DWR to make the DWR Application?	12
2.	Has Ms. Reynolds met the threshold burden set out in s. 4(1) of the <i>PPPA</i> ?	17
VII.	CONCLUSION AND COSTS.....	17

I. Introduction

[1] The defendant, Deep Water Recovery (“DWR”), conducts its business operations, including a barge loading facility, a storage and works yard and warehouse facility, a waterfront freight handling facility, and marine vessel services, from property located in Baynes Sound on the eastern shore of Vancouver Island, near Union Bay, British Columbia. It is alleged that, more recently, DWR began a shipbreaking operation as well.

[2] The defendant, Mark Jurisich, is a director and operations manager of DWR.

[3] The plaintiff, Mary Reynolds, is a retiree who resides in Union Bay. She is among those who are critical of and have voiced concern about the ecological impact of DWR’s activities on Baynes Sound.

[4] The facts giving rise to both the underlying action and this application arise out of Ms. Reynolds’ conduct at DWR’s Baynes Sound property and DWR’s and Mr. Jurisich’s response to that conduct. The issues involve the balancing of the parties’ competing interests: DWR’s right to take legal action in respect of what it alleges are its property and privacy rights, and the public’s interest in protecting Ms. Reynolds’ right to express her criticism of DWR’s operations. That balancing engages the provisions of the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 [PPPA], legislation that is intended to protect public participation in matters of public interest.

[5] On this application, DWR seeks a declaration that the *PPPA* does not apply in the circumstances and, accordingly, does not preclude DWR from continuing its legal action against Ms. Reynolds.

II. Background

1. Factual background and evidence

[6] As noted, Ms. Reynolds alleges that commencing in 2021, DWR began operating a shipbreaking operation from the Baynes Sound property that

involves the physical disassembly of boats and barges and the disposal and recycling of the residual materials.

[7] DWR's operations and, in particular, its shipbreaking operations, are a matter of public controversy and are the subject of criticism and opposition from various individuals and groups in the Union Bay area, including the K'ómoks First Nation and an informal group of local residents known as the Concerned Citizens of Baynes Sound. As noted, Ms. Reynolds is among those who have voiced their concern about the ecological impact of DWR's activities on Baynes Sound.

[8] Since approximately November 2021, Ms. Reynolds has taken photographs and video recordings of DWR's shipbreaking operation using a drone. She has posted many of the videos recorded by the drone to an online blog that she operates. Her videos, and stills of her videos, have also been published by news media outlets in conjunction with their reports about DWR's shipbreaking operations.

[9] Ms. Reynolds deposes that in June 2022, Mr. Jurisich robbed Ms. Reynolds of her drone in the presence of another man. She deposes that when Mr. Jurisich returned the drone to her home a few days later, "in the dark of the night", it was damaged such that it was then inoperable.

[10] Ms. Reynolds also complains of other conduct by Mr. Jurisich, including blocking her parked vehicle with his parked vehicle, chasing her into her vehicle and then partially entering her vehicle through an open window, and following her to her residence and watching and besetting her residence with two other men.

[11] Mr. Jurisich denies those allegations.

2. Litigation background

[12] On June 20, 2022, Ms. Reynolds commenced a civil action against DWR, Mr. Jurisich, and the John Doe defendants for the alleged conduct described

above, claiming against them for conversion by theft, conversion by damaging property, harassment, assault, and intimidation.

[13] On July 13, 2022, DWR and Mr. Jurisich (together, the “DWR defendants”) filed a response to civil claim in which they deny all of the allegations made in Ms. Reynolds’ notice of civil claim. In the alternative, they plead that if they did “engage in conduct amounting to assault, intimidation, and/or theft of the drone... Mr. Jurisich and DWR were provoked by [Ms. Reynolds]”. They allege the provocation consisted of “the conduct of [Ms. Reynolds] in repeatedly flying the drone in an illegal, unsafe, and disruptive manner over the Property (thereby trespassing, causing a nuisance, and invading the DWR Defendants’ privacy)”. The response to civil claim sets out the particulars of the alleged trespass, nuisance, and invasion of privacy.

[14] On July 13, 2022, DWR also commenced a counterclaim against Ms. Reynolds in which it repeated the allegations of trespass, nuisance, invasion of privacy, and the illegal operation of a drone.

[15] On August 8, 2022, Ms. Reynolds filed a notice of application (the “*PPPA* Dismissal Application”) seeking to dismiss the counterclaim as limiting her expression on a matter of public interest pursuant to s. 4 of the *PPPA*. She filed three affidavits in support of that application.

[16] On August 16, 2022, DWR filed an application response to the *PPPA* Dismissal Application, together with three supporting affidavits. To date, DWR has not provided dates to allow for the cross-examination on those affidavits. Accordingly, Ms. Reynolds has not been able to cross-examine DWR’s affiants. Mr. Jurisich did not file an affidavit in the application response.

[17] On August 17, 2022, Ms. Reynolds filed a second application (the “Scheduling Application”) seeking orders regarding the conduct of the *PPPA* Dismissal Application, including: (a) orders to ensure that the *PPPA* Dismissal Application is scheduled and “heard on an expedited basis or as soon as

practicable”; (b) various procedural orders, including for the scheduling of cross-examinations in the *PPPA* Dismissal Application; and (c) an order allowing for the examination of Mr. Jurisich under oath.

[18] On August 24, 2022, the DWR defendants filed an application response in which they opposed all of the orders sought in the Scheduling Application on the basis that, among other things, there is no merit to the *PPPA* Dismissal Application.

[19] On August 30, 2022, DWR filed the present application (“DWR’s Application”) seeking a declaration that the *PPPA* does not apply to the counterclaim. DWR argues that Ms. Reynolds has not met the statutory “threshold burden” required to allow her to proceed with the *PPPA* Dismissal Application.

[20] On September 7, 2022, Ms. Reynolds filed an application response opposing DWR’s Application.

[21] Both DWR’s Application and the Scheduling Application were scheduled to be heard when these matters came before me on September 13, 2022. Given the time constraints, I proceeded only with DWR’s Application. The Scheduling Application was adjourned generally, pending the outcome of this application.

[22] By memorandum to counsel dated April 4, 2023, I advised the parties that I dismissed DWR’s Application, with reasons for judgment to follow.

[23] These are my reasons for dismissing DWR’s Application for a declaration that the *PPPA* does not apply to the counterclaim.

III. Legal Framework

1. General framework

[24] The *PPPA*, which came into force in March 2019, is aimed at “strategic lawsuits brought by the wealthy and powerful to shut down public criticism”. It was described by the Attorney General at the time as “intended to protect an essential value of our democracy, which is public participation in the debates of the issues of

the day”: *Neufeld v. Hansman*, 2021 BCCA 222 at para. 3 [*Neufeld BCCA*], leave to appeal allowed [2022] S.C.C.A. No. 39796.

[25] With that principle in mind, s. 4 of the *PPPA* empowers the court to prevent a plaintiff from proceeding with an otherwise valid cause of action if the court is satisfied that the public interest in protecting the defendant’s expression outweighs the public interest in allowing the plaintiff to proceed: *Neufeld BCCA* at para. 5, citing *Galloway v. A.B.*, 2020 BCCA 106 at para. 55 [*Galloway*], leave to appeal ref’d [2020] S.C.C.A. No. 39203.

[26] Section 4 provides:

- 4** (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that
- (a) the proceeding arises from an expression made by the applicant, and
 - (b) the expression relates to a matter of public interest.
- (2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that
- (a) there are grounds to believe that
 - (i) the proceeding has substantial merit, and
 - (ii) the applicant has no valid defence in the proceeding,
 - (b) the harm likely to have been or to be suffered by the respondent as a result of the applicant’s expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

[27] Sections 4(1) and 4(2) of the *Act* are almost identical in wording to ss. 137.1(3) and 137.1(4) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 [*Ontario Act*]. Accordingly, decisions regarding those sections of the *Ontario Act* may assist in interpreting and applying the *PPPA*’s provisions: *Neufeld v. Hansman*, 2019 BCSC 2028 at paras. 45–47 [*Neufeld BCSC*], rev’d on other grounds in *Neufeld BCCA*.

[28] Two such cases are the Supreme Court of Canada decisions *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 [*Pointes*], and

Bent v. Platnick, 2020 SCC 23 [Bent], which provide binding guidance on how dismissal applications under s. 4 of the *PPPA* are to be adjudicated: *Todsen v. Morse*, 2022 BCSC 1341 at para. 28, citing *Neufeld BCCA* at para. 7.

2. The “threshold” burden

[29] In *Neufeld BCCA*, the Court of Appeal explains the four-step analysis required for dismissal applications made pursuant to s. 4 of the *PPPA*, as set out in *Pointes* and *Bent*:

[7] ... the Supreme Court confirmed there are four steps to the analysis. First, the defendant has the burden of establishing that the proceeding against them arises from an expression that relates to a matter of public interest. Once the defendant establishes that point, the burden shifts to the plaintiff for the next three steps. The plaintiff faces dismissal of their action unless they satisfy the motion judge of the following: first, that there are grounds to believe the action has substantial merit; second, that there are grounds to believe the defendant has no valid defence to the action; and third, that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the defendant’s expression. The Supreme Court in *Pointes* described the last step as the core of the analysis, allowing the court to scrutinize “what is really going on” in the particular case before them and to open-endedly engage with the overarching public interest implications that the statute, and anti-SLAPP legislation generally, seeks to address.

[Added emphasis.]

[30] This preliminary application engages only the first step of that analysis as set out in s. 4(1) of the *PPPA*, which is described at para. 21 of *Pointes* as a “threshold burden” with a two-part test:

Fundamentally, this is a two-part analysis. The burden is on the moving party to show that (i) the proceeding arises from an expression made by the moving party and that (ii) the expression relates to a matter of public interest. This is a threshold burden, which means that it is necessary for the moving party to meet this burden in order to even proceed to s. 137.1(4) [the equivalent of s. 4(2) of the *PPPA*] for the ultimate determination of whether the proceeding should be dismissed.

[Added emphasis.]

[31] “Expression” is defined in s. 1 of the *PPPA* as “any communication, whether it is made verbally or non-verbally, publicly or privately, and whether it is directed or not directed at a person or entity”.

3. Procedural framework

[32] Section 9 of the *PPPA* sets out the procedure for dismissal applications made under s. 4:

- 9** (1) Subject to this Act, an application for a dismissal order under section 4 must be made in accordance with the Supreme Court Civil Rules.
- (2) An application for a dismissal order under section 4 may be made at any time after the proceeding has commenced.
- (3) An application for a dismissal order under section 4 must be heard as soon as practicable.
- (4) Subject to subsections (5) and (6) of this section, on an application for a dismissal order under section 4, evidence must be given by affidavit.
- (5) An applicant or respondent may, before the hearing of the application,
- (a) call, out of court before an official reporter, the witness who swore or affirmed the affidavit for cross-examination on the witness's affidavit, and
- (b) cross-examine the witness on the witness's affidavit, provided that
- (i) the total period of cross-examination of all applicants in the proceeding does not exceed 7 hours in duration, and
- (ii) the total period of cross-examination of all respondents in the proceeding does not exceed 7 hours in duration.
- (6) The court may extend the period permitted for cross-examination under subsection (5) if the court considers it necessary in the interests of justice.

[Added emphasis.]

[33] Pursuant to s. 5 of the *PPPA*, with the exception of an injunction application, “if an applicant serves on a respondent an application for a dismissal order under section 4, no party may take further steps in the proceeding until the application, including any appeals, has been finally resolved”. This generally bars further steps in the main claim or petition, but not those within the *PPPA* process, such as orders for production of documents for the *PPPA* application hearing: *Galloway* at paras. 50-51.

IV. Positions of the Parties

[34] To be clear, the present application is not the application brought by Ms. Reynolds to dismiss DWR's counterclaim against her under s. 4 of the *PPPA*.

Although DWR has filed a response to that *PPPA* Dismissal Application, that application has not yet been scheduled or heard.

[35] On this separately filed application for declaratory relief, DWR argues that until Ms. Reynolds meets the threshold burden set out in s. 4(1) of the *PPPA*, she cannot make the application to dismiss contemplated by s. 4(2) and her entitlement to the procedural steps contemplated under s. 9 of *PPPA* are not invoked.

[36] DWR argues that Ms. Reynolds does not meet the threshold burden. Specifically, DWR argues that its counterclaim is grounded in trespass, nuisance, and invasion of privacy, none of which arise from Ms. Reynolds' expression.

[37] Relying on the inherent jurisdiction of the Court, DWR argues that the administration of justice demands that the threshold issue be determined before the hearing of the *PPPA* Dismissal Application or any other related procedural steps, "in order to ensure fairness, expediency, and the interests of justice" as required by Rule 1-3 of the *Supreme Court Civil Rules*.

[38] Ms. Reynolds opposes the DWR Application on both procedural and substantive grounds. Procedurally, she argues that there is no mechanism in either the procedural provisions set out in s. 9 of the *PPPA* or the *Rules* that would allow DWR to make an application at this stage in the proceedings, or to obtain the declaration it seeks. At the very least, she argues that pursuant to s. 9(5) of the *PPPA*, she is entitled to cross-examination on DWR's affidavits as a right, a process that she has been denied.

[39] On the substantive argument, Ms. Reynolds notes that, on its face, the counterclaim expressly references her "expression", that is the dissemination and publication of the drone footage. She argues that this reference in the pleadings contradicts DWR's position. In addition, she argues that the evidence also discloses that DWR's conduct throughout is consistent with its attempt to limit her from disclosing images of its shipbreaking activities, an expression she says is in the public interest.

[40] For the purposes of this application, there was no dispute that:

- a) Ms. Reynolds' dissemination and the publication of the drone footage of DWR's shipbreaking operations constitutes an "expression" as contemplated by the *PPPA*; and
- b) the community and media interest in DWR's shipbreaking operations, and the controversy surrounding those operations, establish that the expression relates to a matter of "public interest" as contemplated in *Pointes* at paras. 26–30.

[41] Accordingly, the sole issue to be determined on the substantive issue, that is, whether Ms. Reynolds meets the threshold burden, is whether DWR's counterclaim "arises from an expression" made by Ms. Reynolds.

V. Issues

[42] The issues to be determined on this application are:

- a) Do the procedural requirements of the *PPPA*, the *Rules*, or any other legal principle allow DWR to make the DWR Application for declaratory relief at this stage of the proceedings, or at all, especially in the absence of cross-examination as provided in s. 9?; and
- b) If yes, has Ms. Reynolds met the threshold burden set out in s. 4(1) of the *PPPA*? In particular, has Ms. Reynolds shown that DWR's counterclaim "arises from an expression" she made?

[43] Before turning to the consideration of those issues, I pause to note that the parties did not make any submissions regarding the significance, if any, of the prohibition in s. 5 of the *PPPA* from "tak[ing] further steps in the proceeding until the [s. 4] application, including any appeals, has been finally resolved". Having heard no argument on that issue, I have not considered the impact of s. 5 on DWR's Application.

VI. Discussion and Analysis

1. Do the procedural requirements of the *PPPA* or the *Rules* allow DWR to make the DWR Application?

[44] DWR brings its application for declaratory relief on the sole basis that Ms. Reynolds has not met the threshold burden set out in s. 4(1), without any reference to the s. 4(2) analysis. It submits that threshold issue can be decided on the basis of a “few uncontested facts” set out in the pleadings, the requisite elements of the causes of action comprising the counterclaim, and “without the need for hearing any evidence”. As noted, the parties have not conducted any cross-examinations.

[45] Two pre-suppositions are central to DWR’s Application:

- a) the s. 4(1) analysis can be determined in isolation from the s. 4(2) analysis; and
- b) the procedural rights and obligations set out in s. 9 of the *PPPA*, including the right to cross-examination, do not apply to the s. 4(1) analysis.

[46] Notably, counsel did not refer to any case law in which a *PPPA* dismissal application was determined in the manner it proposes to do or otherwise pre-emptively determined by way of declaratory relief. All of the authorities relied on by counsel approached the s. 4 process through a fulsome hearing of the dismissal application in which the court analyzes the application under both s. 4(1) and s. 4(2)

[47] The preliminary issue to be determined on the DWR Application is whether there is any authority, either in the *PPPA*, the *Rules*, or otherwise that authorizes proceeding in the manner sought by DWR.

Does s. 9 of the PPPA, the Rules, or other authority allow for the bifurcated determination of the issues set out in s. 4?

[48] I set out the two-step analysis required for dismissal applications pursuant to s. 4 of the *PPPA* above. For convenience, in summary, s. 4 provides that the analysis consists of two steps:

- a) the determination of whether the applicant (in this case Ms. Reynolds) has met the threshold burden set out in s. 4(1);
- b) the determination of whether the responding party (in this case DWR) has met the burden to show that the elements under s. 4(2) have been met: *PPPA*, s. 4; *Pointes* at para. 18.

[49] The second step of the analysis cannot proceed unless the applicant satisfies the court that the threshold burden set out in s. 4(1) has been met: *Pointes* at para. 21.

[50] Notwithstanding the two-step analysis required to obtain a dismissal order, there is no express provision in the *PPPA* that authorizes the bifurcation or the separate hearing and determination of the issues in the manner contemplated by DWR.

[51] To the contrary, under s. 1 of the *PPPA*, “dismissal order” is defined to mean “an order under section 4 dismissing a proceeding”. [Added emphasis.] Nothing in s. 1 expressly provides that an order may be obtained in respect of either s. 4(1) or s. 4(2) separately. It contemplates one application for a determination of both steps comprising s. 4.

[52] More generally, s. 9 of the *PPPA* sets out a code for the procedure for applications made under s. 4. That section does not provide for an application that would effectively result in the dismissal of an application under s. 4 on the basis of s. 4(1) alone. Under Rule 9-6(3)(a), a party against whom a claim has been made may allege that the claiming party’s originating pleading does not raise a cause of action against it. That Rule does not allow an answering party to make the same allegation in respect of an application.

[53] In the absence of any express statutory authority for the declaratory relief it seeks, DWR relies on the inherent jurisdiction of the Court, arguing that granting the DWR Application is necessary in order to “ensure fairness, expediency, and the interests of justice”.

[54] In my view, the application for declaratory relief prior to the hearing of the *PPPA* Dismissal Application does not achieve those goals.

[55] First, separating the determination of the threshold burden under s. 4(1) from the determination of the broader merits under s. 4(2) adds a hearing, and possibly an application for leave to appeal and an appeal, before the dismissal application under s. 4 can even be heard. Those steps could add several months, and likely much longer, to the time in which the s. 4 dismissal application can be heard and determined.

[56] In fact, as regrettably demonstrated in this case, DWR's Application has already significantly delayed the hearing of the *PPPA* Dismissal Application. The *PPPA* Dismissal Application was filed in August 2022. The hearing of that application would have definitively determined whether Ms. Reynolds has met the threshold burden. As it is, the issue remains undetermined. Again, as evidenced by this case, proceeding with DWR's Application first has resulted in the antithesis of expediency.

[57] Moreover, s. 9(3) of the *PPPA* requires that a s. 4 dismissal application "must be heard as soon as practicable". To the extent that a respondent to a s. 4 dismissal application seeks expediency, it can rely on that section to compel an applicant to proceed with its s. 4 application.

[58] In my view, the possible delay that can result (and, in this case, has resulted) by proceeding with the application contemplated by DWR compromises the expediency mandated by s. 9(3) of the *PPPA*.

[59] Secondly, as the Supreme Court of Canada has observed: "Freedom of expression is a fundamental right and value; the ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy democracy by generating fruitful public discourse and corresponding public participation in civil society.": *Pointes* at para. 1.

[60] An important consideration in assessing “fairness” and the “interests of justice” is the fact that the *PPPA* was enacted to protect that freedom of expression, that is, to function as a “mechanism to screen out lawsuits that unduly limit expression on matters of public interest”: *Pointes* at paras. 16 and 62. The importance of that objective is highlighted by the fact that a plaintiff can be prevented from proceeding even with a valid claim, “as long as the public interest in protecting the defendant’s expression outweighs the public interest in allowing the plaintiff to proceed”: *Neufeld BCCA* at para. 5.

[61] It is only the final step of the s. 4(2) assessment, however, that provides the court with the ability to assess “what is really going on” in any particular case, so as to balance those interests: *Pointes* at para. 81. Determining the threshold issue in isolation from the s. 4(2) analysis would deprive the court of the opportunity to do so.

[62] In effect, by making the application in the manner it does, DWR seeks to quash Ms. Reynolds’ right to engage in the mechanism that was designed to protect her expression from suppression prior to the full hearing of her application on its merits, and as I discuss below, in the absence of the full evidence available to her as contemplated by the *PPPA*. In my view, doing so defeats the very purpose for which the *PPPA* was enacted. That is neither “fair” nor in the “interests of justice”.

[63] For the above reasons, I find that there is no basis on which to bifurcate the determination of the s. 4 steps as contemplated by DWR.

Does s. 9 of the PPPA or the Rules allow for the summary determination of s. 4(1) without cross-examination?

[64] In any event, there is nothing under s. 9 of the *PPPA*, the *Rules*, or otherwise that authorizes the Court to determine a *PPPA* dismissal on the basis of the pleadings alone without the need for hearing any evidence or without any cross-examination, as DWR seeks to do.

[65] The procedural rights and obligations, including the right to cross-examination, conferred under s. 9 of the *PPPA*, apply to an “application for a

dismissal order under section 4". Accordingly, DWR's position can only succeed if an "application for a dismissal order under section 4" does not include a determination of the s. 4(1) threshold burden.

[66] That is not what is contemplated by the *PPPA*.

[67] First, on its face, the requirement that "evidence must be given by affidavit" and the right of a party to conduct cross-examinations under ss. 9(4) and (5), apply to "an application for a dismissal order under section 4" [added emphasis]. Section 9 does not exclude s. 4(1) from these stated procedural rights and requirements nor does s. 9 limit these procedural rights to only s. 4(2).

[68] Second, to succeed on a dismissal application, both stages of s. 4 must be satisfied. The argument that "an application for a dismissal order" does not include s. 4(1) ignores the dual nature of the requirements under s. 4.

[69] Indeed, if satisfied that the threshold burden under s. 4(1) has been met, the court must make a dismissal order unless the responding party meets the burden of showing the s. 4(2) factors apply: *PPPA*, s. 4(2) [added emphasis]. In other words, once the threshold burden has been met, the dismissal order is presumptively granted if the responding party fails to meet their burden on the second stage as described in s. 4(2). The position that s. 4(1) does not form part of the dismissal application is at odds with that presumption.

[70] In my view, the *PPPA*'s express language does not support DWR's position that the s. 4(1) analysis can be conducted without the benefit of the procedural rights and obligations imposed by s. 9.

[71] It is also significant that a successful dismissal application under s. 4 is not dependent on the validity (or invalidity) of the underlying action. To the contrary, as noted above, a dismissal application under s. 4 of the *PPPA* "can prevent a plaintiff with an otherwise valid cause of action from proceeding with their suit so long as the public interest in protecting the defendant's expression outweighs the public interest in allowing the plaintiff to proceed": *Neufeld BCCA* at para. 5 (emphasis in original).

[72] For that reason, it would be improper to base a decision regarding Ms. Reynolds' possible remedy under s. 4 solely, or even primarily, on the pleadings, or by analyzing requisite elements of the causes of action comprising the counterclaim, as DWR suggests. Doing so would prematurely deprive Ms. Reynolds of a remedy that may be available to her, regardless of the validity of the underlying cause of action.

[73] For the above reasons, if DWR is entitled to bring the application for declaratory relief on the basis of s. 4(1) alone (and I have concluded that it is not), I conclude that it cannot do so on a summary basis or deprive Ms. Reynolds of the cross-examination and other procedural rights conferred by s. 9 of the *PPPA*.

Summary

[74] For the reasons set out above, I conclude that DWR's Application is contrary to the express provisions of the *PPPA* and is contrary to the legislative intent as well as the objects of the *PPPA* as set out in the case law. There is no authority to grant the declaration as sought.

2. Has Ms. Reynolds met the threshold burden set out in s. 4(1) of the *PPPA*?

[75] Given my conclusion that the DWR Application has been improperly brought, there is no basis on which to engage in the analysis of the merits of the application.

VII. Conclusion and Costs

[76] For the reasons set out above, DWR's present application for a declaration that the *PPPA* does not apply to the counterclaim is dismissed.

[77] By earlier memorandum to counsel, I had contemplated that costs of this application would be determined at the conclusion of the action. However, given the relationship between this application and the *PPPA* Dismissal Application, on further

consideration, it is more appropriate that the handling of costs of this application be determined at the conclusion of the *PPPA* Dismissal Application. I make that order.

“Ahmad J.”