No. S-224947
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

APPLICATION RESPONSE

APPLICATION RESPONSE OF the Defendants, Deep Water Recovery Ltd. ("**Deep Water Recovery**") and Mark Jurisich.

THIS IS A RESPONSE TO the Notice of Application of the Plaintiff, Mary Reynolds, filed on August 17, 2022.

PART 1: ORDERS CONSENTED TO

Deep Water Recovery and Mark Jurisich consent to the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application: NIL.

PART 2: ORDERS OPPOSED

Deep Water Recovery and Mark Jurisich oppose the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application: ALL.

PART 3: ORDERS UPON WHICH NO POSITION IS TAKEN

Deep Water Recovery and Mark Jurisich take no position on the granting of the orders set out in the following paragraphs of Part 1 of the Notice of Application: NIL.

PART 4: FACTUAL BASIS

I. Introduction

1. The Applicant, Ms. Reynolds, is improperly attempting to dismiss Deep Water Recovery's Counterclaim under the *Protection of Public Participation Act*, SBC 2019, c 3 (the "***Act***") (the "**PPPA Application**") (often referred to as anti-Strategic Litigation Against Public Participation, or 'anti-SLAPP' applications). The Applicant has fundamentally misunderstood Deep Water Recovery's Counterclaim as well as the purpose and application of the *Act*.

2. The *Act* does not apply to the Counterclaim. Deep Water Recovery's Counterclaim does not arise from or target the Applicant's expressive rights, communications, or words, as required by the *Act*. Deep Water Recovery's Counterclaim is in trespass, nuisance, and invasion of privacy. It focuses on Deep Water Recovery's property and privacy rights.

3. There is no merit to the PPPA Application. The Applicant has brought a frivolous anti-SLAPP application to forestall Deep Water Recovery's ability to seek judgment on issues of the Applicant's trespass, nuisance, and invasion of privacy.

4. The Applicant now brings an additional application to address various procedural issues relating to her PPPA Application (the "**Procedural Application**"). The Procedural Application is unnecessary given that the PPPA Application is improperly brought in the first place.

5. To the extent that the PPPA Application could have merit, which is not admitted but is denied, the threshold issue of whether the *Act* applies to the Counterclaim ought to be determined first. That being the case, the Procedural Application is premature.

II. Background

6. The Applicant, Ms. Reynolds, is the Plaintiff in an action she commenced against Deep Water Recovery and others (the "**Reynolds Action**").

7. The Applicant commenced the Reynolds Action in the Vancouver Registry of the Supreme Court of British Columbia on June 20, 2022.

8. Deep Water Recovery is one of the defendants in the Reynolds Action. Mark Jurisich is also one of the defendants in the Reynolds Action. He is a director of Deep Water Recovery.

9. Deep Water Recovery filed a Counterclaim against the Applicant on July 13, 2022.

10. The Counterclaim against the Applicant is in trespass, nuisance, and invasion of privacy. The Counterclaim does not target the Applicant's, or others', expressive rights. Mr. Jurisich is not a party to the Counterclaim or the PPPA Application.

11. Deep Water Recovery operates from lands located at 5084 Island Highway South, Union Bay, British Columbia (the "**Property**"). It is the tenant at the Property.

12. Deep Water Recovery's operations at the Property include a barge loading facility, a storage and works yard and warehousing facility, a waterfront freight handling facility, and marine vessel services.

13. Starting in or around February 2022, the Applicant has engaged in ongoing acts of trespass and nuisance by repeatedly flying a drone into the Property's airspace.

14. The Applicant has operated a drone in a manner that causes substantial and real danger to Deep Water Recovery and its employees because, among other things, the Applicant operates a drone in close proximity to Deep Water Recovery and its employees while they are working with and/or around heavy equipment and on top of barges, thereby causing distractions and safety risks.

15. In the course of operating the drone, the Applicant has also conducted surveillance and has recorded Deep Water Recovery's activities, operations, and employees on private property, without a claim of right or permission.

16. The Applicant does not deny flying a drone into the airspace of the Property and recording Deep Water Recovery. The Applicant has admitted to flying a drone in or around the Property and recording Deep Water Recovery's operations and employees. By extension, the Applicant admits to underlying facts in the causes of action in trespass, nuisance, and invasion of privacy, which comprise the Counterclaim.

PPPA Application, Part 2, at para. 4; Part 3, at paras. 5, 7, 12, 18
See, *e.g.*, Affidavit #1 of Mary Reynolds, at paras. 13, 17, 19, 42, 44, 49

III. Procedural History of the Applicant's Unfounded PPPA Application

17. On August 8, 2022, Deep Water Recovery received the Applicant's PPPA Application, in which she seeks an order dismissing Deep Water Recovery's Counterclaim against her, pursuant to the extraordinary procedure established by the *Act*.

18. In the PPPA Application, the Applicant also sought a vague order that the hearing of the PPPA Application be expedited, without more. The Applicant set the matter down for hearing unilaterally on August 22, 2022. The Applicant did not canvass the availability of counsel prior to doing so.

19. On August 9, 2022, counsel for Deep Water Recovery wrote to counsel for the Applicant requesting an adjournment of the PPPA Application on the basis that counsel for Deep Water Recovery is not available on August 22, 2022, the hearing date unilaterally set by the Applicant. Counsel for Deep Water Recovery proposed reasonable alternative hearing dates, namely September 13 and 15, 2022.

20. On August 10, 2022, counsel for the Applicant denied Deep Water Recovery's reasonable request for an adjournment.

21. On that same day, counsel for Deep Water Recovery responded to counsel for the Applicant. Given the Applicant's unreasonable refusal to agree to an adjournment of the PPPA Application, Deep Water Recovery intended to proceed with an application for an adjournment, on short notice.

22. Despite ongoing correspondence between counsel in the days that followed, the Applicant continued to refuse to accede to any of Deep Water Recovery's reasonable requests for an adjournment.

23. As a result, on August 16, 2022, counsel for Deep Water Recovery sought and obtained an order that Deep Water Recovery was entitled to bring its adjournment application on short notice. The date set for hearing of Deep Water Recovery's adjournment application was August 18, 2022.

24. On that same day, the Applicant sought an order on short notice that a procedural hearing be heard on August 18, 2022, concurrently with the hearing of Deep Water Recovery's adjournment application. The Applicant's short notice application was dismissed.

25. On August 17, 2022, the day before the hearing of the adjournment application, the Applicant filed a Requisition adjourning the August 22, 2022, hearing to September 13, 2022, one of the alternative dates provided by counsel for Deep Water Recovery on August 9, 2022. The Applicant also filed this Procedural Application.

PART 5: LEGAL BASIS

IV. The Threshold Issue of the Application of the *Act* to the Counterclaim Ought to be Determined Before Any Further Steps Are Taken in Respect of the PPPA Application

26. Section 4(1)(a) of the *Act* requires the Applicant to establish that the underlying proceeding arises from an expression made by her. It is clear on its face that the *Act* does not apply to the Counterclaim.

27. The Applicant seeks to improperly use the extraordinary procedure established by the *Act* in respect of a proceeding which clearly does not fall within the ambit of the legislation. The Applicant's threshold burden of establishing that the proceeding arises from an expression made by her ought to be determined first, before any further procedural steps relevant to later stages of the analysis under s. 4 of the *Act* are taken.

28. Deep Water Recovery intends to bring its own application, to be heard on the same date as the Procedural Hearing, seeking an order that the threshold issue of whether the Applicant has established that the proceeding arises out of an expression, pursuant to s. 4(1)(a) of the *Act*, be determined on a preliminary basis.

V. There Is No Basis to Order that the Hearing of the PPPA Application be "Expedited"

29. The Applicant seeks an order that the hearing of her PPPA Application be expedited. It is not clear what the Applicant specifically seeks in this respect. In any event, there is no basis to seek that the application be "expedited," whatever that may mean.

30. While s. 9(3) of the *Act* provides that an application for a dismissal order under s. 4 must be heard "as soon as practicable", the legislature did not intend for applications under s. 4 to be heard on an urgent basis. Rather, the phrase "as soon as practicable," is meant to take into account the circumstances, including factors such as the availability of counsel and the registry. "[A]s soon as practicable" means without unreasonable delay. It does not mean "immediately" or "as soon as possible."

The *Act*, s. 9(1), 9(3)
***Hobbs v. Warner*, 2020 BCSC 1180, at paras. 95 to 105**

31. The *Act* does not prescribe an "expedited" procedure. It does not prescribe any timelines for the hearing of the application for dismissal, nor does it prescribe any timeframe for the completion of any procedures leading up to the dismissal hearing. That is intentional.

32. The Attorney General of British Columbia, David Eby, provided clarity on the topic of time periods for hearing dismissal applications under the *Act* and explained:

> This is where we actually had an opportunity to learn from Ontario. I understand that in Ontario's act, they have a 60-day timeline. One of the challenges that they've had is that they can't hold to that.
>
> What we wanted to avoid was having our registry staff in the courts, or others, be deemed to be violating an act because they're not ensuring that it comes within 60 days, or opening up the opportunity for someone to say: "This whole thing should be dismissed because it didn't come forward within 60 days." To avoid that, the phrase "as soon as practicable" was used, rather than a fixed timeline.
>
> ...
>
> We wanted to preserve the intent of the Ontario act in keeping the timelines tight, but we wanted to learn from the Ontario act, as well, and not put our registry staff in a situation where they may be scheduling something that's

> essentially in breach of the act. So this is what we hope is the happy medium around communicating that we want it to come on quickly and providing the tools to ensure that it can come on quickly, but also recognizing that this is a big province with a lot of diverse registry capacities and also that counsel sometimes have difficulty linking up calendars to get things heard in a certain amount of time.
>
> [Emphasis added]

British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 4th Sess., No. 217 (March 7, 2019) at 7610 (Hon. David Eby)

33. It is clear that the legislature did not intend for the *Act* and, in particular, s. 9(3), to be used to impose fixed and/or strict timelines which do not take into account the capacity of the registry and/or the availability of counsel.

34. Finally, it is not clear what effect an order that the PPPA Application "be heard on an expedited basis or as soon as practicable" would have. The *Act* already prescribes that an application for a dismissal order under s. 4 must be heard "as soon as practicable". It is not necessary, nor is it appropriate, to seek an order from the court merely confirming something already prescribed by legislation.

35. There is no basis or need for this Court to pronounce a standalone and/or declaratory order that the hearing of the PPPA Application be "expedited."

VI. The Procedural Schedule Sought by the Applicant Is Not Appropriate

36. As set out above, the order sought by the Applicant to set a schedule for various procedural steps for the PPPA Application is unnecessary and/or premature. Deep Water Recovery's position is that the PPPA Application is frivolous and an improper attempt to extend the application of the *Act* to a proceeding which does not target expressive activities. The issue of whether the *Act* applies to the Counterclaim, *i.e.*, whether the Applicant can meet the threshold burden of establishing that the proceeding arises out of an expression made by her, ought to be determined on a preliminary basis.

37. Further, cross-examination on affidavit is not appropriate in the circumstances, and the Applicant's requests in relation to the conduct of cross-examinations are unreasonable. Deep Water Recovery tendered two affidavits in support of its response to the PPPA Application. The Applicant has requested to cross-examine both of the affiants on those affidavits.

See Affidavit #2 of Rupi Sidhu, Exhibit D and Exhibit S

38. The Applicant has not sought an order for the cross-examination of those witnesses. She has provided no basis upon which cross-examination of those witnesses would be appropriate and has identified no factual disputes on key issues relating to the PPPA Application.

See *Lang v. Neufeld*, 2022 BCSC 130, at para. 127

39. The Applicant has gone so far as to request to cross-examine a legal assistant who has put correspondence and matters of public record into evidence. This is highly unusual and unreasonable. There is no basis to cross-examine a legal assistant in the circumstances.

See Affidavit #2 of Rupi Sidhu, Exhibit D
See Affidavit #1 of Duncan McIntyre

40. Alternatively, and in any event, the schedule proposed by the Applicant is not realistic, taking into account the availability of witnesses, counsel, and court reporters, as well as the capacity of the registry, among other things.

41. For example, the Applicant seeks an order that all cross-examinations on affidavit be completed by October 14, 2022. The Applicant also seeks to have any ancillary applications arising out of affidavits or cross-examinations filed and served by October 21, 2022, and then seeks to have all written argument and affidavits filed and served by October 28, 2022 (the Applicant) and November 4, 2022 (Deep Water Recovery). If there are any outstanding disputes in respect of the affidavits or cross-examinations (to the extent cross-examinations on affidavit are even appropriate), it is not appropriate to file applications without evidence, and it is not realistic to have transcripts within the timeline contemplated by the Applicant.

42. While the order sought by the Applicant contemplates that the parties may vary the proposed timelines by consent, there is a concern that the Applicant's lack of cooperation so far in the proceeding suggests that it is improbable that she will agree to any reasonable variations to the timeline.

43. That being the case, and in the event that Deep Water Recovery's preliminary application is not determined prior to the Procedural Application, Deep Water Recovery proposes the following reasonable alternative dates for the completion of procedural steps:

(a) The parties shall provide the availability of material affiants for cross-examination by September 23, 2022;

(b) Cross-examinations on affidavits are to be completed by October 21, 2022;

(c) The parties are to file and serve any ancillary applications complete with excerpts and exhibits arising from cross-examinations by November 4, 2022;

(d) The applicant (Plaintiff) is to file and serve written argument no later than the date that is four (4) weeks before the date set for hearing of the PPPA Application; and

(e) The application respondent (Deep Water Recovery) is to file and serve its written argument no later than the date that is two (2) weeks before the date set for hearing of the PPPA Application.

VII. There Is No Basis to Order the Examination of Mr. Jurisich

44. The *Act* specifically prescribes how evidence will be adduced in the context of a dismissal application. Section 9(4) provides that on an application for dismissal order, evidence must be given by way of affidavit. The scope of examination under the *Act* is limited. The *Act* does not permit the examination of non-affiants.

The *Act*, ss. 9(4), 9(5)

45. To the extent cross-examination is appropriate, which is denied, a dismissal application contemplates limited cross-examination on the affidavits sworn or affirmed.

***1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, at paras. 38, 52**
The *Act*, s. 9(5)

46. The *Act* does not permit the examination of someone who has not made an affidavit.

47. Further, and to the extent that the Applicant applies to examine Mr. Jurisich as a party or witness pursuant to Rule 22-1(4)(b) of the *Supreme Court Civil Rules*, that is a further step in the proceeding and is prohibited under s. 5 of the *Act*.

The *Act*, s. 5

48. The Applicant appears to seek to examine Mr. Jurisich on matters relating to *her* claims in the Reynolds Action. That is improper. The evidence and allegations referenced by the Applicant in her Procedural Application are not relevant to the issues engaged in the Counterclaim or the PPPA Application.

See Procedural Application, Part 3, at para. 10

49. Even if Mr. Jurisich had sworn or affirmed an affidavit in the context of the PPPA Application, which he has not, and if cross-examination was appropriate under the *Act*, which is denied, the scope of his cross-examination on affidavit would be limited to *his affidavit*. Matters

relating to the Applicant's claims against Mr. Jurisich in the Reynolds Action are outside the scope permitted by the *Act*.

50. The Applicant's attempt to examine Mr. Jurisich is inconsistent with the clear wording of the *Act*. Mr. Jurisich is not a party to the Counterclaim or the PPPA Application. He did not swear or affirm an affidavit in the PPPA Application. There is no basis to order the examination of Mr. Jurisich.

VIII. The Proceeding Should Not Be Transferred from Vancouver to Victoria

A. No Party May Take Further Steps in the Proceeding

51. Section 5 of the *Act* prescribes that once an applicant has served on a respondent an application for a dismissal order under s. 4, no party may take further steps in the proceeding until the application, including any appeals, has been finally resolved. There are no exceptions to this prohibition, nor is the court granted any discretion to grant relief from its consequences. In essence, the litigation is put on hold until the application is resolved.

The *Act*, ss. 4-5
***United Soils Management Ltd. v. Katie Mohammed*, 2017 ONSC 904, at para. 16**
***Hobbs v. Warner*, 2020 BCSC 1180, at para. 89**

52. Taking steps in the *application for dismissal* under the *Act* must be distinguished from taking further steps in the *proceeding*. While the former is permitted, the latter is not.

***United Soils Management Ltd. v. Katie Mohammed*, 2017 ONSC 904, at para. 20**

53. The filing of a Notice of Application seeking an order that the *proceeding* be transferred from Vancouver to Victoria does not relate to the PPPA Application. Rather, it is a *step in the proceeding*, and is prohibited by s. 5 of the *Act*.

B. Alternatively, the Great Preponderance of Convenience Does Not Favour Changing the Venue to Victoria

54. Rule 23-1(13) of the *Supreme Court Civil Rules* allows for the court to order that a case be transferred from the registry in which it is being conducted to any other registry for any or all purposes.

55. The Applicant must establish that (a) the interests of justice or (b) the great or considerable preponderance of convenience favour a transfer.

***Hamilton v. Mainland Machinery Ltd.*, 2016 BCSC 141, at para. 61**
***Cooper v. Lynch*, 2009 BCSC 1317, at paras. 10-11**

56. Where the witnesses reside will usually have little bearing on whether it is appropriate to move a proceeding. That is so because generally witnesses are not required and rarely attend pre-trial or interlocutory applications.

***Cooper v. Lynch*, 2009 BCSC 1317, at para. 11**

57. The Applicant, Ms. Reynolds, is the Plaintiff in the Reynolds Action. She is seeking to transfer the proceeding she has commenced from her jurisdiction of first choice to another.

58. The Applicant has not established that the great or considerable preponderance of convenience supports a change of registry for all purposes. The Applicant selected Vancouver as the venue. Counsel for all parties are based in Vancouver. None of the parties, or witnesses, are based in Victoria. Travel to Victoria will not only be inconvenient, but more expensive for both parties.

59. Alternatively, if this Court orders that the proceeding be transferred from the Vancouver registry to the Victoria registry, all interlocutory applications should be heard in Vancouver. It would be neither practical, nor efficient, to have both counsel travel from Vancouver to Victoria for interlocutory applications.

PART 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Duncan McIntyre, made August 15, 2022;
2. Affidavit #1 of Rupi Sidhu, made August 15, 2022;
3. Affidavit #2 of Rupi Sidhu, made August 24, 2022; and
4. Such further and other material as this Honourable Court may permit.

The application respondent estimates that the application will take 2 hours.

The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Date: August 24, 2022

Signature of

☐ application respondents

☑ lawyer for application respondents,

FOR: Matthew G Swanson
mswanson@blg.com
604-632-3474

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Vancouver Registry

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Between:

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Plaintiff

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Defendants

APPLICATION RESPONSE

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