

Vancouver

16-Aug-22

REGISTRY

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 Defendant, Deep Water Recovery Ltd. ("Deep Water Recovery")

THIS IS A RESPONSE TO the Notice of Application of the Plaintiff, Mary Reynolds, filed on August 8, 2022.

PART 1: ORDERS CONSENTED TO

Deep Water Recovery consents 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 opposes 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 takes 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 has fundamentally misunderstood Deep Water Recovery's Counterclaim as well as the purpose and application of the *Protection of Public Participation Act*, SBC 2019, c 3 (the "*Act*"). Deep Water Recovery's Counterclaim does not arise from or target the Applicant's expressive rights, communications, or words.

2. 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. The Applicant has not filed a Response to Counterclaim, and the time for her to do so expired before she filed her Notice of Application.

4. The Applicant improperly seeks to dismiss Deep Water Recovery's Counterclaim in order to continue to engage in her unlawful acts. By implication, she asks this Court to approve of her unlawful activities.

5. There is no merit to the application brought by the Applicant. The application ought to be dismissed.

II. Background

6. The Applicant is the Plaintiff in the Action, and the Defendant by way of Counterclaim.

7. Deep Water Recovery is one of the Defendants in the Action. It is the Plaintiff by way of Counterclaim.

8. 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.

9. 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.

10. Starting in or around February 2022, the Applicant has engaged in ongoing acts of trespass and nuisance. In or around late June or early July 2022, the Applicant has increased the frequency of her wrongful conduct including, but not limited to, by repeatedly flying a drone into the Property's airspace.

11. 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.

12. 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.

13. 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.

Applicant's Notice of 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. The Counterclaim Does Not Target the Applicant's Expressive Rights

14. Deep Water Recovery's Counterclaim was filed on July 13, 2022. It was served on July 14, 2022.

15. The Counterclaim arises from the Applicant's wrongful conduct, comprised of continuing acts of trespass, nuisance, and invasion of privacy, at Deep Water Recovery's Property.

16. The Counterclaim does not target the Applicant's, or others', expressive rights.

17. In any event, the Counterclaim has not had the effect of intimidating or deterring the Applicant, as alleged or at all. Since being served with Deep Water Recovery's Counterclaim, the Applicant has continued to exercise her expressive rights in relation to Deep Water Recovery and its operations including, but not limited to, authoring and publishing over 20 blog posts about Deep Water Recovery and speaking to the press.

Affidavit #1 of Duncan McIntyre, Exhibits A and B

PART 5: LEGAL BASIS

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

18. The Applicant seeks a preliminary order that the hearing of her application be expedited. It is not clear what the Applicant specifically seeks in this respect.

19. In any event, there is no basis in fact or law to seek that the application be "expedited," whatever that may practically mean. 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

20. There is no basis or need to order that the hearing be “expedited.”

V. **The Protection of Public Participation Act Has No Application to the Underlying Proceeding**

21. The purpose of the *Act* is the protection of expression on matters of public interest. It is aimed at litigation that unduly limits such expression, and arises in the context of changes to defamation laws in various common law jurisdictions. As the Attorney General of British Columbia, David Eby, stated when introducing the legislation in the Legislative Assembly:

What the bill proposes to do is strike a balance between a couple of values. One is the value of protecting an individual’s reputation or a company’s reputation. The other is the value of a robust and rigorous debate that the courts have described as freewheeling, that can be heated, that can result in intemperate comments. But that’s part of public debate, and it shouldn’t be met with threats of litigation to stop people from talking about the issues of the day. Those are the values that this bill is aimed at addressing.

British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)* [BC Hansard],
41st Parl., 4th Sess., No. 197 (13 February 2019) at 6974 (Hon. David Eby)
BC Hansard, 41st Parl., 4th Sess., No. 198 (14 February 2019) at 7019 (Hon. David Eby)
BC Hansard, 41st Parl., 4th Sess., No. 199 (14 February 2019) at 7031 (Hon. David Eby)

22. Section 4 of the *Act* creates a pre-trial procedure that allows a defendant to bring an application to summarily dismiss a claim arising out of an expression of public interest.

23. The underlying proceeding does not arise from, nor does it relate to, any expression whatsoever. Rather, the underlying proceeding is in trespass, nuisance, and invasion of privacy. The purpose of the underlying proceeding is to protect Deep Water Recovery’s property and privacy interests.

24. The Applicant’s dismissal application is a troubling and transparent attempt to improperly stretch the application of the *Act* beyond the legislature’s intention. The *Act* should not, and cannot, be applied to claims which do not arise from expression. Tortious acts and conduct should

not be shielded from liability on the misguided premise that information gathered through the tortious acts and conduct was used in expressive activity. That is not the activity the *Act* was designed to protect. But that is what the Applicant is improperly asking the court to do on this Application.

VI. The Applicant Has Not Met the Threshold Requirements for Dismissal Under the Act

A. The Counterclaim Does Not Arise From An Expression Made by the Applicant

25. The onus is on the Applicant to show that (i) the proceeding arises from an expression made by her 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 Applicant to meet this burden in order to even proceed to the ultimate determination of whether the proceeding should be dismissed.

1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22, at para. 21
Neufeld v. Hansman, 2021 BCCA 222, at para. 7

26. The term “expression” is defined in s. 1 of the *Act* 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.”

27. The proper approach to determining when a proceeding “arises from” an expression requires an analysis of whether the expression is somehow causally related to the proceeding. By definition, “arises from” requires an element of causality.

1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22, at para. 24
Mizzi v. Cavanagh, 2021 ONSC 1594, at paras. 91-97

28. The Applicant fundamentally mischaracterizes the underlying proceeding. The Applicant claims to have engaged in “expressive activities” and “allegedly defamatory expression” relating to matters in the public interest, but Deep Water Recovery has not pleaded a defamation claim.

29. As is clear on the face of the Counterclaim, Deep Water Recovery’s claim is in trespass, nuisance, and invasion of privacy.

(i) Trespass

30. Trespass to land is “the act of entering upon land, in the possession of another, or placing or throwing or erecting some material object thereon without the legal right to do so.” The elements of the common law tort of trespass are: (1) the intrusion on land must be direct; (2) the interference with land must be intentional or negligent; and (3) the defendant’s interference with

the land must be physical. Trespass is actionable without proof of damage.

Ward v. Cariboo Regional District, 2021 BCSC 1495, at paras. 50-51
OSD Howe Street Vancouver Leaseholds Inc. v. FS Property Inc., 2020 BCSC 1066, at para. 21
Maxwell Properties Ltd. v. Mosaik Property Management Ltd., 2017 NSCA 76, at para. 26

31. Trespass includes temporary invasions into a property's airspace.

OSD Howe Street Vancouver Leaseholds Inc. v. FS Property Inc., 2020 BCSC 1066
Maxwell Properties Ltd. v. Mosaik Property Management Ltd., 2017 NSCA 76

(ii) Nuisance

32. Deep Water Recovery also advances a claim for nuisance. Nuisance is committed when there is a substantial and unreasonable interference with an occupier's use and enjoyment of their land. A plaintiff must prove that the defendant has committed: (1) a substantial, non-trivial interference with their use and enjoyment of the property; and (2) that the interference was unreasonable.

Lewis N. Klar, Allen M. Linden & Earl A. Cherniak, *Remedies in Tort*
(Toronto: Thomson Reuters, 2022), at §20:8
Kirk v. Executive Flight Centre Fuel Services Ltd., 2019 BCCA 111, at para. 77

(iii) Invasion of Privacy

33. Finally, Deep Water Recovery claims invasion of privacy, which is a statutory tort established by s. 1 of the *Privacy Act*, RSBC 1996, c. 373:

Violation of privacy actionable

1 (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

(3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

(4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass. [Emphasis added.]

34. The essential elements of the tort of invasion of privacy are that: (1) a person; (2) willfully; and (3) without a claim of right; (4) violated the privacy of another.

Chow v Facebook, Inc., 2022 BCSC 137, at para. 49

(iv) The Claims Advanced do Not Require and/or Involve Expression

35. Claims in trespass, nuisance, and invasion of privacy do not require and/or involve expression or communication. None of the causes of action raised by Deep Water Recovery in the Counterclaim engage the Applicant's expressive rights or any communications made by the Applicant about Deep Water Recovery or its operations.

36. The fact that the Applicant admits sharing drone footage of Deep Water Recovery and its operations, and that such drone footage has been published, is unconnected to the gravamen of Deep Water Recovery's complaint. Deep Water Recovery's Counterclaim in trespass, nuisance, and invasion of privacy arises as a result of the Applicant's wrongful conduct, regardless of any expression by the Applicant.

37. The Applicant has not satisfied the prerequisites of s. 4(1) of the *Act*. Accordingly, it is neither necessary nor proper to consider the criteria in s. 4(2), which are only applicable if the Applicant satisfies the threshold criteria in s. 4(1).

Mizzi v. Cavanagh, 2021 ONSC 1594, at para. 101

38. The Applicant's application to dismiss the Counterclaim under s. 4 of the *Act* ought to be denied.

VII. The Application to Dismiss Should Not Be Granted

39. Even if the underlying proceeding arises from an expression that relates to a matter of public interest, which it does not for the reasons set out above, the Application should not be granted.

A. Deep Water Recovery's Proceeding Has Substantial Merit

40. In determining whether there exist "grounds to believe", the court must be acutely aware of the limited record, the timing of the motion in the litigation process, and the potential of future evidence arising. The standard of "grounds to believe" is less than proof on a balance of probabilities. Deep Water Recovery would only need to show that it has a real prospect of success, not a strong likelihood of success.

Hobbs v. Warner, 2021 BCCA 290, at para. 12
1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22, at paras. 36, 39-40, 49, 51

41. When assessing the merit of the claim, the court should engage in only limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring

a deep dive into the evidence to a later stage, where judicial powers of inquiry are broader and pleadings more fully developed.

1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22, at para. 52

42. As the tenant of the Property, Deep Water Recovery has the right to the use and enjoyment of its land without unreasonable interference by the conduct of another.

43. The Applicant has no right of use or entry in respect of the Property.

44. The Applicant admits to intentionally flying a drone above and around the Property and recording Deep Water Recovery's operations and employees.

Applicant's Notice of 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

45. The Applicant has, through her conduct, wrongfully and without lawful excuse directly interfered with Deep Water Recovery's use, occupation and enjoyment of the Property, thereby committing the tort of trespass.

46. The Applicant's conduct in repeatedly flying a drone above the Property without lawful excuse constitutes and unreasonable, non-trivial, and substantial interference with Deep Water Recovery's use and enjoyment of the Property, and has interrupted and interfered with Deep Water Recovery's activities and operations, thereby committing the tort of nuisance.

47. The Applicant has willfully conducted surveillance and recorded Deep Water Recovery's business activities, operations, and employees on private property, without a claim of right or permission. This was not reasonable in the circumstances, having regard to the lawful interests of Deep Water Recovery, and the Applicant has thereby infringed upon the privacy of Deep Water Recovery, in violation of s. 1 of the *Privacy Act*.

B. The Applicant Has No Valid Defence in the Proceeding

48. The burden under s. 4(2)(a)(ii) is first on an applicant to put into play the defences it intends to present. Once the defences are put into play, the burden shifts back to the respondent to show that none of those defences are valid.

1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22, at paras. 56-57

49. The Applicant has failed to discharge her initial burden to put into play the defences she intends to present. The Applicant has yet to respond to the Counterclaim, and has pleaded no defences to Deep Water Recovery's claims in the underlying proceeding.

50. The Applicant references no defences to Deep Water Recovery's claims of trespass and nuisance.

51. Rather, the Applicant has admitted underlying acts comprising the trespass, nuisance, and invasion of privacy claims. The Applicant admits to flying a drone above and around the Property and recording Deep Water Recovery's operations and employees.

52. The only defence referenced by the Applicant is in her application materials, in respect of the claim of invasion of privacy. The Applicant references s. 2(2)(a) of the *Privacy Act* and claims that it provides that a publication of a matter is not a violation of privacy if the matter was of public interest or was fair comment on a matter of public interest.

Applicant's Notice of Application, Part 3, at para. 16

53. That is not what s. 2(2)(a) of the *Privacy Act* says. The Applicant appears to want to rely on s. 2(3)(a). As set out above, Deep Water Recovery's claim in invasion of privacy is grounded in the Applicant's surveillance and recording of Deep Water Recovery's business activities, operations, and employees on private property. It is not grounded in any publication.

54. In any event, s. 2(4) prescribes that subsection (3), on which the Applicant appears to rely, "does not extend to any other act or conduct by which the matter published was obtained if that other act or conduct was itself a violation of privacy." This precludes the Applicant from relying on s. 2(3) to defend the publication of information collected through acts which, in and of themselves, are invasions of privacy.

VIII. The Public Interest in Continuing the Proceeding Outweighs the Public Interest in Protecting the Applicant's Conduct

55. As noted above, Deep Water Recovery's Counterclaim is about trespass, nuisance, and invasion of privacy. The public's interest in continuing the Counterclaim far outweighs any public interest, if any, in protecting the Applicant's violations of a landholder's property and privacy rights.

56. This is not a case where a company is bringing a claim to strategically silence the other party from expressing themselves on a matter of public debate. Deep Water Recovery merely seeks redress from the Applicant's wrongful intrusions onto and into its Property, and invasions of its privacy.

57. The Applicant's inappropriate attempt to apply s. 4 of the *Act* to a proceeding, which clearly does not arise from an expression, is an abuse of the court's time and process, and should be dismissed.

PART 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Terrance Robert Martin Ruttan, made August 15, 2022;
2. Affidavit #1 of Duncan McIntyre, made August 15, 2022;
3. Such further and other material as this Honourable Court may permit.

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

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

Date: August 15, 2022



Signature of _____

☐ application respondent

☒ lawyer for application respondent,

Matthew G Swanson

mswanson@blg.com

604-632-3474

No. S-224947
Vancouver Registry

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Defendants

APPLICATION RESPONSE

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