No. S-224947
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MARY REYNOLDS

PLAINTIFF

AND:

DEEPWATER RECOVERY LTD., MARK JURISICH, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3 and JOHN DOE #4

DEFENDANTS

APPLICATION RESPONSE

Application response of: the Plaintiff, Mary Reynolds (the "application respondent").

THIS IS A RESPONSE TO the notice of application of the Defendant, Deep Water Recovery Ltd., filed August 30, 2022.

Part 1: ORDERS CONSENTED TO

The application respondent 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

The application respondent opposes the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: **ALL**

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the orders set out in the following paragraphs of the notice of application: **NIL**

Part 4: FACTUAL BASIS

OVERVIEW

1. The applicant, Deep Water Recovery Ltd. ("DWR") seeks to circumvent the *Protection of Public Participation Act* ("*PPPA*") application process initiated by the Plaintiff Ms. Reynolds by severing the issues and seeking a summary determination that Ms. Reynolds's *PPPA* Application does not "arise from expression" pursuant to s.4. DWR's application must fail for the following reasons:

    a) The *PPPA* Application is made under s.4 of the PPPA, which must be adjudicated on affidavit evidence that is subject to a right of cross-examination under s.9 of the *PPPA*. DWR's proposal is for a summary dismissal without evidence based on pleadings, which is contrary to the express provisions of the *PPPA*;

    b) DWR's application for summary dismissal of the *PPPA* Application misstates the text of DWR's Counterclaim against Ms. Reynolds. The Counterclaim expressly and repeatedly alleges that Ms. Reynolds committed a *Privacy Act* tort by "publishing and sharing" and "disseminating" video to other people. DWR's application for summary dismissal is predicated on the unpersuasive notion that publishing, sharing and dissemination of video is not expressive activity;

    c) DWR's application for summary dismissal of the *PPPA* Application is predicated on a narrow interpretation of the phrase "arise from expression" under s.4 of the *PPPA* that is bereft of support from existing case law and is inconsistent with existing authority;

    d) DWR's application for summary dismissal of the *PPPA* Application is predicated on misstatement of the common law dealing with nuisance and trespass in relation to "airspace"; and

e) DWR's proposal for a pre-hearing into whether the *PPPA* hearing should occur promotes unnecessary procedural complexity and is inconsistent with the legislative requirement under s.9(4) of the *PPPA* that the main *PPPA* Application should be heard as soon as practicable.

2. DWR's application to summarily dismiss the *PPPA* application is best understood as a response to Ms. Reynolds' application to expedite the *PPPA* hearing and set a schedule for pre-hearing cross-examination and exchange of written argument.

BACKGROUND

3. The Plaintiff, Ms. Reynolds, filed a Notice of Civil Claim on June 20, 2022, against DWR and one of its Directors, Mark Jurisich, and John Does who are employees of DWR. The Notice of Civil Claim alleges that Mr. Jurisich and DWR robbed her of her drone, blocked her car, followed her home, and menaced and intimidated her in her home in response to her capturing drone footage of DWR's shipbreaking operations. Ms. Reynolds filed compelling video evidence of the defendants' misconduct.

Affidavit of Mary Reynolds affirmed August 6, 2022

4. On July 13, 2022, the defendants DWR and Mr. Jurisich filed a joint Response to Civil Claim, which includes a manifestly false denial of the misconduct captured on video. The Response to Civil Claim alleges at paragraphs 16 and 17 that the Plaintiff "published and shared these [drone] recordings publicly and to third parties with malice" and alleges that the Plaintiff engaged in "unauthorized... dissemination of the recordings of [DWR's] business activities...". The allegation of "dissemination" is repeated at paragraph 34 of the Response to Civil Claim.

5. On July 13, 2022, the defendant DWR filed a Counterclaim alleging that the Plaintiff's operation of a drone and dissemination of the drone footage is a nuisance, trespass and *Privacy Act* tort. The Counterclaim at paragraph 2

incorporates by reference the factual allegations made in the Response to Civil Claim at paragraphs 5 to 24, which includes the allegations of "publication", "sharing" and "dissemination".

6. On August 8, 2022, the Plaintiff filed an application pursuant to s.4 of the *PPPA* to dismiss DWR's Counterclaim. The Plaintiff aimed to seek an order on August 22, 2022, to expedite the hearing of the *PPPA* application and schedule cross-examinations on affidavits, but counsel for DWR stated that he was unavailable and junior counsel was unable speak to scheduling issues.

7. On August 16, 2022, DWR filed an Application Response in the *PPPA* application, with supporting affidavits of Duncan McIntyre and Terrance Ruttan. Counsel for DWR, since August 16, 2022, has refused to schedule dates for cross-examination of either Mr. McIntyre of Mr. Ruttan.

8. On August 17, 2022, Ms. Reynolds filed a separate Notice of Application to compel DWR to provide dates for cross-examination and to schedule the hearing and pre-hearing steps in the *PPPA* application (the "Scheduling Application").

9. On August 30, 2022, DWR filed a Notice of Application for a declaration that the *PPPA* does not apply to the Counterclaim, and an Application Response to the Scheduling Application that generally resists setting a schedule in the *PPPA* Application.

Part 5: LEGAL BASIS

DWR's Application is Contrary to the PPPA and the Supreme Court Civil Rules

1. DWR's application is contrary to the *PPPA*. The *PPPA* provides for a hearing on affidavit evidence under s.4 and for a right of cross-examination on affidavits under s.9 of the *PPPA*, as follows:

> 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.

2. Section 9(4) of the *PPPA* provides that on an application under s.4, "evidence must be given by affidavit". Under s.9(5)(b) of *PPPA*, either the applicant or respondent may cross-examine affiants as of right.

3. DWR proposes at paragraph 27 of its Notice of Application to have its application heard on the basis of facts set out in the pleadings, without hearing any evidence. This is contrary to the express requirements established by the legislature under ss.9(4) and 9(5) of the *PPPA*. This flaw by itself is fatal to DWR's application.

4. Apart from the statutory imperative, regard to evidence and cross-examination is a practical necessity on this *PPPA* Application. DWR incorrectly asserts that that evidence is unnecessary because there are no contradictions or facts in issue. In reality, the affidavits filed on the *PPPA* Application are contradictory on material issues. Ms. Reynolds denies flying her drone at low altitude and says

that she typically sets her drone to fly at 84 meters above ground level, she denies setting foot into DWR's shipbreaking yard and she denies ever interfering with DWR's operations, its property or its employees. She has the drone footage to support these assertions. In contrast, DWR filed an affidavit of Terrance Ruttan that deposes that the drone is "almost constantly operating" at 25 to 100 feet away from him and is creating safety issues. Mr. Jurisich has not filed an affidavit. Cross-examination is necessary to resolve these contradictions.

5. Furthermore, DWR's application is not supported by the Supreme Court Civil Rules. DWR seeks declaratory relief that would effectively serve to summarily dismiss Ms. Reynold's *PPPA* Application. No rule or legal authority is cited to support the existence of this procedural vehicle for dismissing applications. Ms. Reynolds respectfully submits that this Court should refrain from exercising its inherent jurisdiction to derail or sidestep a specific process enacted by legislation. The facts of this matter do not support such exceptional relief or departure from the plain meaning of an enactment.

DWR's Counterclaim Expressly Alleges Dissemination and Publication

6. DWR's Counterclaim alleges that the Plaintiff has engaged in dissemination and publication of drone footage. The Counterclaim pleads at paragraph 5 that "The Plaintiff has willfully.... recorded [DWR's] business activities ... and disseminated the images and recordings collected to third parties...". Furthermore, the Counterclaim incorporates by reference allegations of publication and dissemination from paragraphs 16 and 17 of DWR's Response to Civil Claim. DWR's assertion that its Counterclaim has nothing to do with expression is flatly contradicted by the text of the Counterclaim.

7. This flaw by itself is fatal to DWR's application.

DWR's Interpretation of "Arises from Expression" is Unpersuasive and Narrow and Inconsistent with the Authorities

8. Even if DWR's Counterclaim did not expressly allege dissemination and publication, it is plain and obvious that DWR's Counterclaim "arises from expression". That is because DWR's Counterclaim targets information-gathering activity that is inextricably bound up with expression.

9. Firstly, Ms. Reynolds deposes and pleads that she is gathering drone footage for the purpose of expression or sharing that drone footage. Secondly, the Plaintiff's drone footage of DWR's shipbreaking operations has in fact been shared by Ms. Reynolds and published by many media outlets. Thirdly, the information conveyed by the drone footage has been published by news reporters in a manner that calls DWR's and Mr. Jurisich's credibility into question. Fourthly, the drone footage depicts DWR's shipbreaking operations in a way that cannot be reconciled with DWR's statements concerning the nature of its own business operations.

10. Although proof of intention to suppress expression is <u>not</u> required under the *PPPA*, compelling affidavit evidence shows that DWR has a history of using or threatening litigation to suppress expression about its operations. Affidavits filed by the Plaintiff show that DWR targeted a number of its critics with letters from its legal counsel threatening to sue its critics in defamation. Moreover, DWR's claim that this suit is aimed solely at trespass and nuisance is contradicted by the fact that DWR only sent the Plaintiff a demand that she cease trespassing after the Plaintiff filed and served her Notice of Civil Claim. Put together with DWR's express pleading alleging "dissemination", "publication" and "sharing" of drone footage, DWR's Counterclaim appears to be directly aimed at expression in a quite deliberate and calculated fashion. But, as Ms. Reynolds notes, proof of intention is unnecessary, in her submission, to a finding that a claim "arises from expression".

11. Furthermore, the case law strongly supports the proposition that the right to free expression extends constitutional protection to information-gathering activities

that integrate an expressive component. Famously, the open courtroom principle is supported by the right to free expression under s.2(b) of the *Charter* because gathering information inside the courtroom is integral to subsequent expression or publication of what happened in the courtroom. Similarly, access to documents in the possession of government is afforded protection by the s.2(b) right to free expression because access to the documents enables expression.

> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII) at paras.30-36

12. DWR's argument that the phrase "arises from expression" does not include claims brought in nuisance, privacy or trespass is patently without merit. The leading case from the Supreme Court of Canada, *Pointes Protection*, concerns an action based on a breach of a confidentiality agreement. *Pointes Protection* states explicitly at paragraph 24 that many types of proceedings can be considered to "arise from expression":

> [24] Second, what does "arises from" require? By definition, "arises from" implies an element of causality. In other words, if a proceeding "arises from" an expression, this must mean that the expression is somehow causally related to the proceeding.[1] What is crucial is that many different types of proceedings can arise from an expression, and the legislative background of s. 137.1 indicates that a broad and liberal interpretation is warranted at the s. 137.1(3) stage of the framework. This means that proceedings arising from an expression are not limited to those *directly* concerned with expression, such as defamation suits. A good example of a type of proceeding that is not a defamation suit, but that nonetheless arises from an expression and falls within the ambit of s. 137.1(3), is the underlying proceeding here, which is a breach of contract claim premised on an expression made by the defendant (this is explored in further detail in Part IV of these reasons). Indeed, the APR explicitly discouraged the use of the term "SLAPP" in the final legislation in order to avoid narrowly confining the s. 137.1 procedure (para. 22), and the legislature obliged.
>
> *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para.24

13. The *Subway* case from the Ontario Court of Appeal is another classic example of a non-defamation case struck as a claim that "arose from expression". In that case, Subway sued Trent University for negligent testing of the meat content of

Subway's sandwich meat for use in a CBC Marketplace broadcast. The Ontario Court of Appeal found as follows, in the footsteps of *Pointes Protection*:

> [38] I agree with Trent that the motion judge erred in reaching the conclusion that the claim in negligence did not arise from an expression that related to a matter of public interest. It was an error of law to view s.137.1 as aimed at a limited category of torts like defamation. It was also an error of law not to appreciate the centrality of expression to this negligence claim.
>
> *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 25 (CanLII) at paras.31-38. The text of the Ontario statutes, which mirrors the *PPPA*, is set out at para.30.

14. It is plain that gathering drone footage is causally related to or has a nexus to its dissemination. But for the gathering of the footage, the images could not be disseminated. Suppression of the gathering is suppression of the expression. DWR's assertion that the causes of action in nuisance, trespass and privacy do not involve expression or "arise from expression" is wrong in fact and law. These errors of fact and law are fatal by themselves to DWR's application.

15. DWR's application is ultimately predicated on an interpretation of "arises from expression" that is unduly narrow in scope and application and enjoys no support from the authorities.

DWR Glosses Lightly Over Law dealing with Airspace and Privacy

16. DWR's application fails to adequately state the law dealing with airspace, both in nuisance and in trespass. The common law protects airspace only to a height which is in reasonable use by the property holder. The cases cited by the Plaintiff bear out this general principle. The Plaintiff is not aware of any authority for the proposition that a drone hovering at 50 or 84 meters above ground level constitutes a nuisance or a trespass. DWR's assertion that the Plaintiff admits conduct that constitutes nuisance or trespass is flatly false.

> *Ward v. Cariboo Regional District*, 2021 BCSC 1495
>
> *OSED Howe Street Vancouver Leaseholds Inc. FS Property Inc.*, 2020 BCSC 1066

Maxwell Properties Ltd. v. Mosaik Property Management Ltd., 2017 NSCA 76

17. Similarly, DWR relies on the statutory tort in s.1 of the *Privacy Act*, R.S.B.C. 1996, c.373, without reference to any cases that find corporations to have a privacy interest in respect of industrial activity that poses a risk to sensitive waterways and ecology. DWR cites no cases that are in any way similar.

18. The torts alleged by DWR are, taken by themselves, threadbare to a fault. They hardly constitute proof by their very nature that the Counterclaim does not "arise from expression".

DWR's Application is Likely to Cause Additional Complexity and Delay

19. DWR's proposed procedure is inefficient, unnecessary and likely to contribute to delay. DWR's Notice of Application is 11 pages in length, while its application response on the *PPPA* Application is also 11 pages in length (of which approximately 8 pages deal with essentially the same arguments). It is clear from the foregoing discussion that the application of the phrase "arises from expression" engages facts and evidence, and cross-examination on affidavits would be necessary in any event. The clearest path is the one set by the legislature: the application to dismiss the Counterclaim should be heard as soon as practicable, pursuant to s.9(3) of the *PPPA*.

Conclusion

20. DWR's application should be dismissed. DWR's application is inconsistent with ss.4, 9(4) and 9(5) of the *PPPA*, it has no support from the Supreme Court Civil Rules, the application ignores the text of DWR's own Counterclaim alleging "dissemination of footage" as a basis for the privacy tort, ignores the compelling factual nexus between the Counterclaim and the publication of the drone footage and the information gathered by drone video, is inconsistent with the case law dealing with the meaning and application of the phrase "arises from expression", inadequately states the law dealing with airspace nuisance and trespass and corporate privacy, and is likely to contribute unnecessarily to delay.

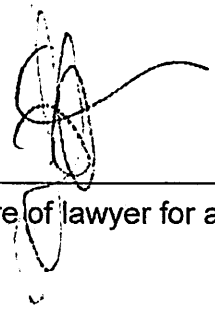
Part 6: MATERIAL TO BE RELIED ON

1. Notice of Civil Claim filed June 20, 2022;
2. Response to Civil Claim filed July 13, 2022;
3. Counterclaim filed July 13, 2022;
4. Notice of Application filed August 8, 2022;
5. Application Response filed August 16, 2022;
6. Notice of Application filed August 17, 2022;
7. Application Response filed August 30, 2022;
8. Notice of Application filed August 30, 2022;
9. Affidavit #1 of Mary Reynolds affirmed August 6, 2022;
10. Affidavit #1 of Ray Rewcastle affirmed August 6, 2022;
11. Affidavit #1 of Robert Kerr affirmed August 6, 2022;
12. Affidavit #1 of Terrance Ruttan affirmed August 15, 2022;
13. Affidavit #1 of Duncan McIntyre affirmed August 15, 2022; and
14. Such further and other material as this Court may allow.

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: September 7, 2022



Signature of lawyer for application respondent
Jason Gratl