IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Reynolds v. Deep Water Recovery Ltd. ,* 2024 BCSC 570

Date: 20240408
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 Morley

Reasons for Judgment

Counsel for the Plaintiff Mary Reynolds:	J. B. Gratl T. Rauch-Davis
Counsel for the Defendants Deep Water Recovery Ltd. and Mark Jurisich:	M. G. Swanson S. M. Gallagher
Place and Dates of Hearing:	Vancouver, B.C. October 25 - 27, 2023 January 19, 2024
Place and Date of Judgment:	Vancouver, B.C. April 8, 2024

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I. INTRODUCTION

[1] The purpose of the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 (the "*PPPA*") is to protect expression on matters of public interest from being excessively chilled by the threat of litigation arising out of that expression. But what happens when the alleged harms that are the basis of a lawsuit include *both* expression on matters of public interest *and* physical conduct that is not expressive?

[2] Mary Reynolds brings this application under s. 4 of the *PPPA* to dismiss Deep Water Recovery Ltd. ("DWR")'s counterclaim alleging she engaged in the torts of trespass, nuisance and violation of privacy under s. 1 of the *Privacy Act*, R.S.B.C. 1996, c. 373 in the use of a drone and in the taking of video footage with it and in the dissemination of that footage (the "Counterclaim").

[3] DWR operates marine vessel services in Union Bay, Vancouver Island characterized by its opponents as "shipbreaking". Ms. Reynolds, the applicant, is one of those opponents. She purchased the drone that is the centre of these proceedings to engage in video photography of nature. For several months in late 2021 and early 2022, she used the drone to film DWR's operations to expose what she considers to be environmentally destructive practices.

[4] When the drone's activities came to the attention of the employees and directors of the company, they responded negatively. DWR says the flights were intrusive and constituted a safety hazard for distracted employees working with heavy machinery and high up on derelict ships. In legal terms, DWR alleges that the drone's flights *trespassed* into their property (including the airspace), were a *nuisance* impeding the reasonable use of the property and that the images taken and disseminated to other activists, and then to the media, are violations of its *privacy*. DWR seeks declaratory and injunctive relief and compensatory and punitive damages.

[5] Ms. Reynolds brought the original underlying civil action against DWR, one of its principals, Mark Jurisich, and four unknown employees as John Doe defendants. Mr. Jurisich is a director and operations manager of DWR. He is also its majority

shareholder. Ms. Reynolds alleges that on June 11, 2022, Mr. Jurisich confronted her aggressively in the Union Bay Community Hall parking lot and took her drone without her consent. She says he returned it to her home sometime after 10 p.m. three days later, with its memory card tampered with. On June 15, she says there was another aggressive physical confrontation. She sues for conversion/trespass to goods in relation to her drone and for harassment, assault and intimidation. In conjunction with its and Mr. Jurisich's response to Ms. Reynolds' civil claim, DWR filed the Counterclaim.

[6] Under s. 4 of the *PPPA*, a person against whom a "proceeding" has been brought may apply for a dismissal order on the basis that the proceeding "arises from" an "expression" made by the applicant and the expression relates to a "matter of public interest". Ms. Reynolds says the Counterclaim, taken as a whole, meets the requirements of the *PPPA* for a dismissal order because she engaged in filming DWR's operations in order to contribute to the public debate about their environmental impact. DWR responds that the basis of the Counterclaim is not expression at all, but physical and non-communicative activity by Ms. Reynolds and her drone, and therefore the *PPPA* does not apply.

[7] For reasons discussed in greater detail below, I take a more fine-grained approach than either party. *Aspects* of DWR's Counterclaim — those involving the dissemination of images and video and its request for punitive damages — arise from Ms. Reynolds' expression relating to the alleged environmental impact of DWR's operations, an undoubted matter of public interest. *Other* aspects of the Counterclaim — those involving the physical flight of the drone and the act of surveillance itself — do not. In my view, this case is an appropriate one for "pruning" under the approach laid out by the Court of Appeal in *Rooney v. Galloway*, 2024 BCCA 8 [*Rooney*].

[8] While much of the Counterclaim turns on the physical activities of the drone and whatever surveillance it may have engaged in, the Counterclaim also refers to the "dissemination" of videos taken by the drone and a "malicious campaign against

Deep Water Recovery" conducted in "coordination with others". It says the alleged trespass, nuisance and invasion of privacy were "calculated to disrupt, interfere with, and ultimately shut down Deep Water Recovery's business activities and operations", which can only be a reference to her posting of footage from the drone on her blog and YouTube and its use by activists and journalists. These material facts, and the request for punitive damages as a remedy, arise from expressions by Ms. Reynolds that relate to a matter of public interest. With respect to these aspects of the Counterclaim, DWR cannot meet its onus under s. 4(2) of the *PPPA* to resist a dismissal order and therefore one should be granted. I set out at the end the specific paragraphs of the Counterclaim that should be struck.

[9] On the other hand, I do not think I have jurisdiction under the *PPPA* to dismiss the rest of the Counterclaim. Flying a drone on, over or around the property of other persons and filming them is not itself communication and therefore not "expression" as the *PPPA* defines it. The law of what people are allowed to do with their drones in the vicinity of other people's property is undeveloped and the Counterclaim raises reasonable issues in this regard. Whether those issues amount to a successful lawsuit is for another judge on another occasion.

II. FACTUAL BACKGROUND

[10] The *PPPA* requires me to ask what a proceeding "arises from". There are two senses in which this question could be answered. The first is *causal/historical*: what set of events led to the decision to file the proceeding? The second is *content/analytical*: what set of events, legal theories and remedies *make up* the proceeding? Before turning to the content/analytical discussion of the Counterclaim itself, I will therefore first discuss the events that led up to DWR's decision to file it. In my view, this history demonstrates that the Counterclaim arose *both* from expressions in matters of public interest *and* from physical acts and acts of surveillance.

[11] My comments, conclusions and findings in this discussion are expressed solely in the context of this application under the *PPPA*. They are based on the

record before me, which was not provided to determine substantive issues of liability. Nothing I say, therefore, can or should be taken as prejudging the ultimate merits of the claims or defences, which would have to be adjudicated after a trial on the merits. I will sometimes explicitly use qualifiers such as “alleged” or “it is claimed that…”, but where I do not, they should be understood.

The Controversy Over “Shipbreaking”

[12] DWR’s operations are located at 5084 Island Highway South in Union Bay (the “Property”). The Property borders on Baynes Sound, the body of water between Denman Island and Vancouver Island. DWR is the tenant under a lease of the Property: the landlord is a related legally-distinct company.

[13] DWR describes its operations as including a barge loading facility, a storage and works yard and warehousing facility, a waterfront freight handling facility and marine vessel services. Its most controversial activity is the physical disassembly of boats and barges and the disposal and recycling of the residual materials, which its critics refer to as “shipbreaking”. A more neutral term might be vessel recycling and disposal. According to Ms. Reynolds’ Notice of Civil Claim, these activities began in 2021.

[14] There is no real doubt that DWR’s operations are a matter of public interest, similar to the subdivision development at issue in the Supreme Court of Canada’s leading case on the Ontario equivalent of the *PPPA, 1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 [*Pointes Protection*]. The record contains numerous media stories on DWR’s operations and concerns about their environmental impact.

[15] For example, an informal group of citizens called Concerned Citizens of Baynes Sound (“CCOBS”) was assembled to oppose DWR’s activities. It incorporated itself as a society in July 2021 and set up a Facebook group. Its members have sent letters to federal, provincial and local government officials asking them to investigate and intervene against DWR’s operations.

[16] Public concern has continued. On December 16, 2021, the K'ómoks First Nation released a press release stating its opposition to DWR's "shipbreaking" operations. On April 14, 2022, the Comox Valley Regional District brought a civil action against DWR seeking declaratory and injunction relief against its operations. This litigation has not been resolved.

[17] It is not appropriate or necessary for me to try to assess the merits of these concerns. I find that they are prominent in the public discourse in the Comox Valley and possibly more broadly and therefore that expression that relates to these concerns is expression that relates to a matter of public interest.

Ms. Reynolds Uses a Drone to Film DWR's Operations

[18] Ms. Reynolds, a retired resident of Union Bay, publishes an online blog, which she uses to distribute her nature photography, publish posts about her pets and other personal items, and to set out her opinions on municipal affairs, local development projects and "other issues of public interest". She characterizes her perspective as "valu[ing] nature, living things [and] honesty in human beings" and says she is "quite prepared to criticize people who fail to discharge their duties in public office or harm the interests I find to be of value".

[19] In April 2021, Ms. Reynolds purchased a DJI Mini 2 drone with a high-resolution camera to engage in nature videography. This drone weights less than 250 grams, which is a threshold for a number of aviation regulations. It has a 10-kilometre transmission range.

[20] On September 16, 2021, Ms. Reynolds began using her drone to take video recordings of DWR's operations. She created 299 videos between that date and April 18, 2023. She posted many of the videos to her blog and YouTube.

[21] According to Ms. Reynolds's evidence, some of the media reports about DWR's activities include footage from her drone. DWR disputed that there was sufficient evidence of this before me. While it would have been better if Ms. Reynolds had particularized the images that were used in media reports, I

accept the truth of her statement for the purposes of this application. I rely on Ms. Reynolds' statement for this conclusion, but I was given no reason to doubt her credibility. Ms. Reynolds was not cross-examined. A number of the images appear to be taken from an aerial perspective consistent with a drone and they resemble the imagery I have seen in the proceeding. I find, on a balance of probabilities, that some visual images of DWR's operations used as part of the reporting on the controversy did come from Ms. Reynolds' footage.

[22] Ms. Reynolds controls her drone either from the property of a friend who lives near the entrance gate to the Property, or from nearby public parks or parking lots within the transmission range of the drone.

[23] According to Ms. Reynolds, she "almost always" sets her drone to fly 50 metres or more above ground level and generally aims for 84 metres above ground level. She concedes that on one occasion, she flew above the DWR property at a height of 10 metres above ground level. She says she did this because it was a Saturday and she thought no one was working. When somebody – presumably, DWR employees – started throwing rocks at the drone, she increased the altitude to her preferred 84 metres.

[24] According to the evidence of DWR's employees, they first noticed the drone in early April 2022. It flew over and around the property on which DWR's operations take place. Terrence Ruttan, the yard manager, estimates that the drone flies about 25 to 100 feet above his work space. He deposes that he determined that the drone was Ms. Reynolds' a few weeks after he first noticed it by coming across videos of DWR's operations on her blog in late April 2022. Since that time, he says it flies over the property on an almost daily basis.

[25] Mr. Ruttan says the drone causes him stress and agitation at work because he feels under "almost constant surveillance". He deposes that this creates a safety risk because his work with and around heavy equipment and using a blowtorch requires focus on safety at all times.

[26] From a partial review of the videos, I cannot come to any definite conclusions about how high the drone was generally flown. I would need the assistance of either the drone's metadata or expert evidence. Ms. Reynolds filmed DWR's operations both from overhead (i.e., in the airspace of the Property) and from above the foreshore or ocean. When the drone is over the foreshore or ocean, it is generally flown at lower altitude, supporting Ms. Reynolds' claim that she tried to fly the drone at a higher altitude when over the Property. I find that she generally made an attempt to fly at a higher altitude when over the Property, but at least on one occasion flew much lower at around 10 metres above the ground.

[27] I also find, since it is undisputed, that the presence of the drone was distracting and unsettling for employees of DWR.

[28] It is common ground that Ms. Reynolds has not sought or obtained the consent of DWR or its landlord to operate above the Property.

DWR's Threats of Litigation to Other Parties

[29] Ms. Reynolds points to DWR's attempts, pre-dating the litigation with her, to threaten critics with legal action. On May 26, 2022, counsel for DWR sent a "cease and desist" letter to counsel for CCOBS, entitled "Defamatory Comments Made By Concerned Citizens of Baynes Sound". The letter demanded retraction of what it characterized as defamatory statements on CCOBS' Facebook page. It referred to Ms. Reynolds' blog as a place where these statements were republished. The letter demanded that anyone who republished CCOBS' statements "immediately cease and desist", implicitly including Ms. Reynolds.

[30] The letter gives CCOBS until noon on May 31, 2022 to take down the material it complained of and to retract CCOBS' comments or it would "take all necessary steps to protect Deep Water's interests and prevent further harmful conduct, which would include, but would not be limited to, pursuing injunctive relief and commencing legal proceedings against the CCOBS seeking general, aggravated, punitive and special damages".

[31] Although the “cease and desist” letter to CCOBS does not refer to the video footage from Ms. Reynolds’ drone, I find, for the purposes of this application, that some of the information published by CCOBS and asserted to be defamatory by DWR probably came from Ms. Reynolds’ drone footage. There is specific reference to a “photo” illustrating what CCOBS characterizes as carving up of ships on the foreshore in violation of the foreshore lease. It is plausible that the “photo” is a still from Ms. Reynolds’ videos. In any event, I find that Ms. Reynolds’ videos were a probable source of CCOBS’ information.

[32] Counsel for CCOBS responded to the “cease and desist” letter on May 30, stating that CCOBS would not remove the material or retract it, and that if DWR chose to pursue legal action, CCOBS would “exercise the remedies available, including Anti-SLAPP remedies”, a reference to the *PPPA*.

[33] DWR decided not to pursue litigation against CCOBS.

The Basis of Ms. Reynolds’ Claim Against DWR and Mr. Jurisich

[34] The first incident giving rise to Ms. Reynolds’ own action occurred on June 11, 2022. Ms. Reynolds pleads that while she was standing beside her vehicle in the Union Bay Community Hall parking lot, flying her drone, Mr. Jurisich arrived as a passenger in a vehicle driven by another person, jumped out of the vehicle and came towards her “with a highly aggressive and angry demeanor”. She claims that he used his greater height, size and his gender and younger age to physically dominate her and back her up against her vehicle. According to Ms. Reynolds’ pleading, when the drone was approximately five feet off the ground, Mr. Jurisich grabbed it, yelled angrily at her, and then went back into the vehicle. Ms. Reynolds pleads that Mr. Jurisich and the unknown driver were acting within the scope of their employment with DWR.

[35] DWR did not put in evidence of its or Mr. Jurisich’s version of the events. This is perfectly appropriate in this application and I do not make any findings about what actually happened. However, since DWR’s motivations are relevant, I am prepared

to find that Mr. Jurisich, on behalf of DWR, was angered by Ms. Reynolds' activities with the drone.

[36] According to Ms. Reynolds' pleadings, Mr. Jurisich drove up to Ms. Reynolds' residence shortly after 10 p.m. on June 14 and deposited the drone on her front porch. She claims that he or other DWR employees had removed the memory card for the drone and damaged the drone. I am prepared to infer that part of what angered Mr. Jurisich (and therefore was a source of motivation for DWR) was the fact that video footage was taken from the drone.

[37] Ms. Reynolds pleads that the next afternoon, June 15, Mr. Jurisich again confronted her at the Union Bay Community Hall parking lot. She pleads that he parked a white pickup truck directly in front of her vehicle, preventing her from moving. She further claims that he then confronted her physically in an angry and aggressive way and pushed his head into her car window and started yelling at her. Finally, she claims he made a false police report about her and followed her home with other DWR employees with the intent of intimidating her.

[38] These alleged events became the basis of the Notice of Civil Claim in this action, filed on June 20, 2022. The legal basis of the claim is in conversion against the drone, for "harassment, assault and intimidation" and of "unlawful confinement" for the alleged conduct of Mr. Jurisich and an unnamed employee of DWR for the alleged events of June 14. There is also a claim of "harassment, assault and intimidation" for the alleged visit to Ms. Reynolds' home where the drone was allegedly returned.

[39] The Notice of Civil Claim claims general, special, aggravated and punitive damages. It also asks for an interim, interlocutory and permanent injunctions to prevent Mr. Jurisich, the unnamed "John Doe" defendants and any other employee of DWR from approaching within 100 feet of Ms. Reynolds or her residence.

DWR Files a Response to Civil Claim and the Counterclaim

[40] On July 13, 2022, DWR and Mr. Jurisich filed a Response to Civil Claim and DWR, on its own, filed the Counterclaim that is the subject matter of this application, thus bringing the "pre-history" of the Counterclaim to an end.

[41] In a direct sense, the Counterclaim was a response to the Notice of Civil Claim: it was tit for tat. In response to allegations of conversion of chattels and intimidation, DWR made allegations of its own. To be sure, both pleadings occur in a broader context, part of which was a public campaign about DWR's activities that DWR seems to have felt was unfair and certainly resisted. But they also occur in a context of clashes of claims about physical boundaries. I find that the filing of the Counterclaim was motivated by all of these events, including Ms. Reynolds' use of the drone, the surveillance of DWR's operations by the drone, Ms. Reynolds apparent presence as among DWR's critics and Ms. Reynolds' decision to sue DWR and Mr. Jurisich.

III. ANALYSIS OF THE CONTENT OF DWR'S COUNTERCLAIM

[42] Having reviewed the facts that might shed a light on the motivation for filing the Counterclaim, I turn now to its content. As with the motivation, I find that the content of the Counterclaim has both expressive and non-expressive aspects.

[43] Like any claim, the Counterclaim includes remedies sought, alleged material facts on the basis of which they are sought and legal theories according to which proof of these material facts would constitute a reason for the granting of the remedies. In my view, the remedies, alleged facts and legal theories can be subdivided into three sub-claims, one having to do with the alleged violation of DWR's property rights as the lessee of the Property, one having to do with alleged surveillance of DWR and its employees, and one having to do with the communication by Ms. Reynolds of the content of her videos to other activists, the public and the media. All three of the sub-components have their own alleged facts, legal theories and remedies.

The Material Facts as Pleaded in the Counterclaim

[44] For practical purposes, the material facts that are the basis of the Counterclaim are not stated there, but are incorporated from the Response to Civil Claim. The Statement of Facts is four paragraphs long. Paragraphs 1 and 4 are non-substantive on their face. Paragraph 2 incorporates most of Part 1, Division 2 (the "Defendants' Version of the Facts") of the Response to Civil Claim. Paragraph 3 appears to be substantive, but it essentially reiterates paragraph 10 of Part 1, Division 2 of the Response to Civil Claim, which is also incorporated by Paragraph 2. Any analysis of the material facts in the Counterclaim is therefore an analysis of the incorporated paragraphs of the Response to Civil Claim.

[45] After a brief introduction of the parties, the incorporated part of the Response to Civil Claim starts with paragraph 10, which begins as follows:

> The Plaintiff, in coordination with others, has engaged in a malicious campaign against [DWR]. The Plaintiff's campaign against [DWR] is driven by conduct that is wrongful, high-handed, and deserving of rebuke.

[46] It is clear from the outset that DWR is complaining of a "campaign" "in coordination with others". As we will see, this necessarily consists in the dissemination of information and images obtained from the drone to those others and then publication on the Internet and to the media. It is this aspect of Ms. Reynolds' conduct that is said to be "high-handed" and "deserving of rebuke", as opposed to merely "wrongful". I find that there is a link in the material facts, as set out, between Ms. Reynolds alleged "coordination with others" and her motive of opposing DWR's operations (characterized as "malicious") and DWR's request for punitive remedies.

[47] While paragraph 10 of the incorporated pleading starts with generalized allegations about a "malicious" "campaign" in "coordination with others", it then narrows its focus to the drone:

> The Plaintiff's wrongful conduct includes continuing acts of trespass, nuisance, invasion of privacy, and the illegal operation of a drone, all of which are calculated to disrupt, interfere with and ultimately shut down [DWR]'s business activities and operations.

[48] With the exception of the words “and ultimately shut down”, these sentences refer either to physical activities of the drone or the act of *taking* video footage. However because DWR uses the word “includes” and refers to “shut[ting] down” its business activities and operations — something that could only happen by affecting DWR’s reputation with the public and regulators — these sentences also reference a claim about the dissemination and communication of the video images to others as part of opposition to DWR’s operations.

[49] In other words, the opening paragraph of the material facts sets out three kinds of harm: physical intrusion on property rights, surveillance in the form of *taking* video footage, and the dissemination of that footage to hurt DWR’s reputation.

[50] The different types of harm are explained in greater detail in the subsequent incorporated paragraphs of the Response to Civil Claim.

[51] Paragraphs 11-14 set out alleged physical intrusions into what DWR claims as its property. DWR alleges that Ms. Reynolds flew the drone once or twice daily at a height between 30 and 100 feet, without permission. It claims that the operation of the drone causes a substantial and real danger to DWR and its employees and is contrary to various regulations. It also alleges that Ms. Reynolds personally entered onto the Property (i.e., the land surface), an allegation that counsel tells me is no longer being pursued. Other material facts said to be infringements of the legal requirements of operating a drone are set out at paragraph 20.

[52] At paragraphs 15-19 of the Response to Civil Claim (also incorporated into the Counterclaim), DWR sets out what it says are infringements of the *Privacy Act*. These include both alleged acts of recording/surveillance and of dissemination/communication. Paragraph 15 alleges *recording* and *surveillance* without a claim of right or permission. Paragraph 16, on the other hand refers to *publishing* and *sharing* the videos: “The Plaintiff has published and shared these recordings publicly and to third parties with malice, and without the DWR Defendants’ permission”. Paragraph 17 refers to both “unauthorized surveillance”

and “recordings” and to “dissemination” of the recordings, thus including both the taking and the communication of the footage.

[53] In the remainder of the incorporated material facts from the Response to Civil Claim, DWR alleges that it has told Ms. Reynolds to stop flying her drone in their airspace and that she continues to do so. It also includes a (disputed) allegation that the RCMP told Ms. Reynolds to stop.

[54] The one substantive material fact paragraph added to the Counterclaim itself is paragraph 3 of Part 1, which largely recapitulates the introductory paragraph 10 of the Response to Civil Claim, already incorporated by paragraph 2 of Part 1 of the Counterclaim. Like paragraph 10 of the Response to Civil Claim, paragraph 3 of Part 1 of the Counterclaim makes references to “coordination with others”, a “malicious campaign”, and the goal of “ultimately shutting down” DWR. These all implicitly refer to dissemination/communication of the footage.

The Relief Sought in the Counterclaim

[55] I will now analyze the relief sought by the Counterclaim, leaving aside court-ordered interest and costs.

[56] The first item is a “declaration that the acts of [Ms. Reynolds] are a trespass and are in violation of [DWR]’s property rights.” If established, this would have the retrospective effect of saying Ms. Reynolds had flown her drone where she could not legally, while prospectively making clear where Ms. Reynolds could not (and therefore could) fly her drone.

[57] The second item is “a declaration that the acts of [Ms. Reynolds] are a nuisance and are in violation of [DWR]’s property rights.” This would similarly have the retrospective effect of saying what impacts on DWR’s use of the lands were impermissible, with the prospective effect of saying what would (and would not) be forbidden.

[58] The third remedy requested is “an interim, interlocutory and permanent injunction restraining [Ms. Reynolds] from trespassing onto [DWR]’s property”, by

which is apparently meant the land surface of the property, and from “trespassing into [DWR’s] property by operating a drone in [DWR]’s airspace.” There does not appear to be any evidence of the surface intrusion and counsel for DWR did not pursue it. Injunctions against air intrusions would have the prospective effect of saying where Ms. Reynolds could and could not fly her drone.

[59] The fourth and fifth remedies requested are claims for damages for trespass and nuisance. In oral argument, DWR said these were purely for physical intrusions. Although this seems to be correct for the trespass claim, the nuisance claim could presumably also be a remedy for surveillance to the extent the psychological effects of the surveillance could be said to interfere with DWR’s reasonable use of the Property.

[60] The sixth item on the prayer for relief is a claim for statutory damages, pursuant to s. 1 of the *Privacy Act*, R.S.B.C. 1996, c. 373. This could either be a remedy for surveillance or for dissemination of the images and videos.

[61] The seventh remedy requested is “punitive damages”. I find that this is specifically tied in the pleadings to the alleged “campaign” against DWR, and therefore seems to be in relation to the dissemination of video footage by Ms. Reynolds to the public, other activists and the media. I find that the punitive damages make little sense if what is at issue is simply a matter of appropriate flying of the drone and must be attributed to the dissemination or communication of the footage.

The Legal Theories in the Counterclaim

[62] In Part 3 of the Counterclaim (“Legal Basis”), DWR sets out four legal theories on which to base its remedies.

[63] Paragraphs 1–4 set out an argument that Ms. Reynolds’ flying of her drone constitutes trespass and nuisance, and can be seen as the legal theory of why the physical acts of flying the drone either represented an entry onto DWR’s property or

interfered with its reasonable enjoyment of that property. The interference appears to be by distracting employees by engaging in surveillance of them.

[64] Paragraph 5 of Part 3 states:

> The Plaintiff has wilfully, and *for the purpose of advancing the campaign to shut down Deep Water Recovery's business*, conducted surveillance, recorded Deep Water Recovery's business activities, operations and employees on private property, and *disseminated the images and recordings collected to third parties*, without a claim of right or permission. The Plaintiff's unauthorized surveillance, recordings, *and dissemination* of the recordings of Deep Water Recovery's business activities, operations, and employees on private property was not reasonable in the circumstances, having regard to the lawful interests of Deep Water Recovery. The Plaintiff has thereby infringed upon the privacy of Deep Water Recovery, in violation of s. 1 of the *Privacy Act*, R.S.B.C. 1996, c. 373.
>
> [Emphasis added.]

[65] As I read this, there are two types of harms for which it is said there is a claim under the statutory cause of action created by the *Privacy Act*: those harms directly caused by recording DWR's business activities, operations and employees and those harms caused by the dissemination of those recordings to others. These two types of harm would, or at minimum, might, be treated differently under the *Privacy Act*. Section 2 of that Act makes a distinction between "publication of a matter", for which there is a defence under s. 2(3), and the "act or conduct by which the matter published was obtained", to which this defence does not apply.

[66] Paragraphs 6 and 7 of Part 3 set out DWR's basis for punitive damages. The legal basis for punitive damages is tied specifically to Ms. Reynolds' being "in concert with others" and engaged in a campaign to "ultimately shut down" DWR.

[67] In oral argument, Mr. Swanson confirmed on behalf of DWR that to the extent it suffers business losses as the result of the communication of the images either to the public or to regulatory authorities, it is *not* asking for compensatory damages in either trespass or nuisance, but these represent the basis of its claim for punitive damages.

[68] On its face, the Counterclaim asks for compensation for business losses from publication of footage of its operations as part of damages under the *Privacy Act*.

The Counterclaim Consists of Three Sub-Claims

[69] Based on this analysis of the Counterclaim, I find it can be divided into three parts, representing distinct harms, distinct remedies and legal theories:

a) The physical activity of the drone are alleged to be the basis of a claim in trespass and possibly nuisance, giving rise to a request for a declaration setting out what acts would be trespass or nuisance, an injunction against further flying of the drone in a way contrary to the declaration, and compensatory damages for any losses suffered prior to trial as a result of the flying. I will call these the "Physical Intrusion Claims".

b) The surveillance of DWR's workers and operations by the drone is said to be the basis for a claim under the *Privacy Act* and possibly nuisance, to the extent that the feeling of being under surveillance interferes with the reasonable use of the Property by DWR. I will call these the "Surveillance Claims".

c) The dissemination of the images obtained to other persons and on Ms. Reynolds' blog and on YouTube is also alleged to be contrary to the *Privacy Act* and to be the basis of a claim for punitive damages. I will call these the "Dissemination Claims".

IV. CAN I "PRUNE" THE COUNTERCLAIM TO SEPARATE "DISSEMINATION" CLAIMS FROM "PHYSICAL INTRUSION" AND "SURVEILLANCE" CLAIMS?

[70] In my view, a central issue in deciding how to deal with this application is to decide when the Counterclaim, as a single pleading, can and should be divided into different "proceedings" for the purpose of an application under the *PPPA*, a practice the Court of Appeal has referred to as "pruning": *Rooney* at paras. 118-143.

[71] If a single pleading may be "pruned", then *part* of it may be struck, while the remainder will be permitted to proceed to trial. In the case of the Counterclaim, the issue is whether the Physical Intrusion Claims, Surveillance Claims and Dissemination Claims should be analyzed separately or together under the tests set out in s. 4 of the *PPPA*. In my view, it is important to decide this issue before actually applying the tests.

[72] In *Rooney*, the Court of Appeal confirmed that "pruning" is possible, while also providing some cautions. I must thus interpret *Rooney* to determine whether, taking those cautions into account, this is an appropriate case for "pruning."

[73] One difficulty in doing this is that *Rooney*, like most cases under the *PPPA*, involved defamation actions. Therefore, all the material facts consisted in acts of communication. However, in my view, this indicates that a more liberal approach to "pruning" may be warranted in a case where some facts are, and some are not, themselves expressions.

[74] The analysis in *Rooney* begins with the proposition that each alleged defamatory statement constitutes its own cause of action. In other words, whether each statement occurred, whether it was actionable, and what, if any, remedy should flow from it is, in principle, separate and distinct from the same questions for all the other statements.

[75] Since a "cause" is included in the definition of "proceeding" set out in the *Supreme Court Act* and incorporated in the *PPPA*, each defamatory statement, along with the remedy claimed for it, as a separate cause is also a separate "proceeding". It is thus open to the court in determining an application under the *PPPA* to descend to the granular level of specific alleged statements and decide whether to dismiss each separately. On my interpretation of *Rooney,* this is only possible if the unit of analysis retains its integrity as a cause of action in the sense that it can be separately analyzed to determine whether the material facts have been established, whether they establish liability and what, if any, remedy should follow.

[76] Because the definition of “proceeding” is flexible, however, it is not *necessary* to comb that finely. It is within the discretion of the chambers judge hearing the application under the *PPPA*. But if that discretion is exercised in favour of “pruning”, some material facts, legal theories and remedies in a pleading can be dismissed, while others are left to go to trial, or addressed through some other pre-trial procedure.

[77] While recognizing that it is open to a chambers judge to “prune” or partially dismiss the proceeding, the Court of Appeal expressed concern that applications under the *PPPA* not lead to inefficiency or to replacing or superseding other tools in the *Supreme Court Civil Rules* that allow litigants to seek judgment on a finite issue: *Rooney* at para. 140. But so long as an application under s. 4 is not misused as an inappropriate vehicle for obtaining judgment on finite issues, *Rooney* affirms the ability of a chambers judge to “prune” a defamation claim with several expressions in it: *Rooney* at para. 142.

[78] In *Rooney,* the Court was concerned that parties in defamation actions might use the possibility of “pruning” under the *PPPA* as an (inappropriate) method for engaging in pre-trial summary decisions on the merits. The Court thus stated that an application for dismissal under the *PPPA,* at least in a defamation case, should be for an end to the litigation as a whole, although it would be up to the chambers judge to decide on a more granular basis.

[79] Both parties in this case agreed that under *Rooney*, I *could* consider parts of the Counterclaim separately and could thus dismiss some, all or none of the Counterclaim. For different reasons, however, they asked me to treat the Counterclaim here as a whole, and either dismiss all or none, while at least implicitly suggesting a pruning remedy as an alternative if I am not persuaded. In any event, I am persuaded that the strictures against a party asking for partial dismissal under the *PPPA* only apply where all of the causes of action pleaded are communicative in nature.

[80] What I take from *Rooney* is both that pruning is permissible, but also that it should only be engaged in if doing so is consistent both with the purpose of the *PPPA* and with the general principles of civil case management of promoting a just, speedy and inexpensive resolution of each dispute on its merits.

The Purpose of the *PPPA* Supports "Pruning"

[81] It is agreed that the purpose of the *PPPA* is, as described by the then-Attorney General when he introduced it, to "protect an essential value of our democracy, which is public participation in the debates of the day." Of particular concern were strategic lawsuits brought by the wealthy and powerful to shut down public criticism. In addressing the purpose of the *PPPA*, the Attorney General said:

> 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 values that this bill is aimed at addressing.
>
> *British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 41st Parl., 4th Sess., No. 198 (14 February 2019) at 7018 (Hon. David Eby)*

[82] The value of a robust public debate is clearly one side of the balance. While the then-Attorney General referred to the value of "reputation" as the other side of the balance, it is common ground that it is only one (if perhaps the most prominent) example of a countervailing value. *Pointes Protection* makes it clear that while defamation lawsuits may be paradigmatic (or archetypal) examples, they are not the only example: *Pointes Protection* at para. 24. Indeed, *Pointes Protection* itself was about an alleged breach of a settlement agreement.

[83] Thus it is not just reputation that must be balanced against the value of freewheeling debate. More broadly, the *PPPA* strikes a new balance between the protection of free expression values and the traditional common law protection of private interests. It is an example of what is often, if perhaps somewhat misleadingly, called "anti-SLAPP" legislation, with the acronym referring to "strategic litigation against public participation". While the archetypal "SLAPP" is brought by a powerful

or wealthy plaintiff, who has suffered only nominal damage, using litigation against a comparatively under-resourced defendant to silence criticism, none of these elements are necessary for a successful application under the *PPPA*. However, the purpose of legislation like the *PPPA* is to address the potential that litigation will *act* to silence the person against whom it is brought, and more broadly, to suppress debate on matters of public interest, rather than to remedy serious harm suffered by the person bringing the proceeding: *Hansman v. Neufeld*, 2023 SCC 14 at para. 48.

[84] The *PPPA* is modelled on the *Uniform Protection of Public Participation Act (2017)*, adopted by the Uniform Law Conference of Canada, which, in turn, was based on s. 137.1 of Ontario's *Courts of Justice Act*, and s. 4 of the *PPPA* is essentially identical to s. 137.1(3) and (4) of the Ontario statute: *Hansman* at para. 51. As a result, as para. 52 of *Hansman* makes clear, the Supreme Court of Canada's analysis of s. 137.1 of the *Ontario Courts of Justice Act* set out at length in *Pointes Protection*, applies with equal force to the *PPPA*.

[85] At para. 16 of *Pointes Protection*, the Supreme Court of Canada identified the mechanism of the equivalent of s. 4 as to "screen out lawsuits that unduly limit expression on matters of public interest." The fundamental value that the *PPPA* is attempting to protect is "public participation" in a democracy: *Pointes Protection* at para. 30. The Court makes clear that the effect of the new balance is not merely to allow for the elimination of lawsuits that are frivolous or otherwise without merit, but not to allow any litigation, even if it has "substantial merit" unless the harm the common law addresses "outweighs" that fundamental public interest: *Pointes Protection* at paras. 77–82.

[86] As with any statutory scheme, it is important not to *overshoot* its underlying purpose. It is clear from both the legislative debates and from the subsequent case law that the *PPPA* must be applied robustly and that courts must recognize that it marks a change in the pre-existing law in order to better protect the values of broad public participation in a robust public debate. As with any statute, though, it is important to recognize the presumption that legislation does not change the common

law “absent a clear and unequivocal expression of legislative intent”: *Canada (Attorney General) v. Thouin*, 2017 SCC 46 [*Thouin*] at para. 19. That presumption has special force where the common law rights are property rights that would normally require compensation before they can be taken by the state: *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 at para. 21.

[87] Since the *PPPA* attempts to perform a balance between these competing values, it will more likely make sense to sever a claim into sub-claims to determine whether “pruning” is appropriate if:

a) the various sub-claims are very different in the extent to which the value of public debate is at issue, or

b) the various sub-claims are also very different in the extent to which the harms that they seek to ameliorate are expressive harms, as opposed to non-expressive (“physical”) harms.

Would Analyzing the Sub-Claims Separately Promote the Goals of Civil Procedure?

[88] As I have discussed, *Rooney* requires chambers judges considering whether to analyze a pleading as a whole or on the basis of sub-claims to consider which will promote the basic goals of civil procedure: speedy, inexpensive and just resolution of disputes on their merits.

[89] *Rooney* points out that the procedures of the *PPPA* are unusual. Under s. 5 once an application for a dismissal order has been made, no further steps (with the exception of an injunction) in the proceeding can be taken. Under s. 6, pleadings may only be amended with the leave of the court. The default basis for costs is on a full indemnity basis, something ordinarily reserved in civil litigation for reprehensible litigation conduct. These differences create special incentives to use the *PPPA* rather than other, possibly more appropriate procedures and creates an additional dimension of complexity if some-but-not-all of a proceeding is dismissed under the

PPPA. The Court of Appeal in *Rooney* warned against "pruning" creating more complexity than the purposes of the *PPPA* justify.

[90] More specifically, DWR argues that because it is raising the same material facts in its Response to Civil Claim as in the Counterclaim, there is little advantage in terms of case management in granting *any* dismissal order since all the same issues will be live ones in the defence of Ms. Reynolds' own claim. Although it is not made explicitly, DWR could argue that the presence of the material facts in the Physical Intrusion Claims and Dissemination Claims in its defence means there is little advantage in terms of narrowing the action to addressing these elements separately.

[91] The materiality of many of the incorporated material facts from the Response to Civil Claim to any defence by DWR and Mr. Jurisich to the causes of action asserted by Ms. Reynolds is not before me, but I believe I can consider how plausible this would be when considering DWR's argument against separating the sub-claims. In my preliminary view, it can hardly be a defence to allegations of trespass to goods, intimidation or wrongful confinement that the plaintiff has been providing videos or stills to the Internet, activists or journalists. The prospect that these aspects of the Response could themselves be challenged on the basis that they do not set out a reasonable defence suggests that there is some merit in seeing if the issues in the Counterclaim can be narrowed.

[92] DWR relies heavily on the decision of Perell J. in *Mizzi v. Cavanagh*, 2021 ONSC 1594 [*Mizzi*] both on the merits and to argue that the dissemination "aspects" of its Counterclaim ought to be assimilated to what they characterize as the "gravamen" of their complaint, namely the trespass, nuisance and privacy violations of the drone itself in its physical activity and surveillance. In effect, this is an argument against pruning.

[93] In *Mizzi*, the applicant under the Ontario equivalent of the *PPPA* was a lawyer sued with other defendants for intrusion upon seclusion, intentional infliction of mental and emotional suffering and extortion. The applicant was counsel for a former employee of the plaintiff who had suspicions of fraudulent activities. Perell J.

found that the lawyer was aware that his client had surreptitiously accessed the plaintiff's email account—and had unsuccessfully attempted to do so himself—and had used the emails so accessed to try to obtain a civil settlement with the threat of going to the authorities and the public. The defendant lawyer argued that the lawsuit arose out of his interview with Global News about the alleged financial misdeeds of the plaintiff, an expression that related to a matter of public interest.

[94] While acknowledging that the Global News interview was an expression related to a matter of public interest and an "aspect" of the claim, Perell J. did not consider it to be the "gravamen" of the complaint: *Mizzi* at paras. 91, 96. He therefore proceeded to ask whether the complaint, *taken as a whole*, arose from such an expression and decided that it did not.

[95] To the extent the *Mizzi* case is relied on to support the view that what matters is *necessarily* the "gravamen" of the pleading as a whole, I do not find it helpful because at the time it was decided (and perhaps to this day) the Ontario courts had not developed the jurisprudence about "pruning" developed by our Court of Appeal in *Rooney*. At minimum, *Rooney* establishes that while it is *possible* to take the approach of evaluating the "gravamen" of the pleading, taken as a whole, it is also possible to take a more granular approach.

[96] To be sure, it is also possible that Perell J. would have taken a "gravamen" approach even if there was a worked-out "pruning" jurisprudence in Ontario on the basis that, in the case before him, the aspects of the claim relating to dissemination were truly incidental. As Perell J. emphasizes, his conclusion was very fact-specific: *Mizzi*, at paras. 7, 80, 97. In many cases, it will not be possible or appropriate to sever or "prune" an allegation about public communication in relation to a matter of public interest where the gravamen of the case is something else.

[97] This can be illustrated by a case that Ms. Reynolds relies on, and that was distinguished in *Mizzi*, namely *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 26 [*Subway*]. That case arose out of a CBC *Marketplace* program that said only about half of chicken sold by the

Subway chain was actually chicken, based on an analysis done by Trent University's Natural Resources DNA Profiling & Forensic Centre. In addition to a defamation claim against CBC and Trent University, the plaintiff alleged that the underlying DNA analysis was conducted in a negligent fashion. *Subway* differs from the present case in that the only damage the plaintiff could possibly be claiming for in its negligence claim was to its reputation and the only vector for that damage would be through the television program. In *Subway*, it might be inappropriate to "prune" the negligence claim, because negligence in the laboratory was tied so intimately with the allegation of harm in the television show.

[98] In my view, this case is different because in each of what I have referred to as the Physical Intrusion Claims, the Surveillance Claims and the Dissemination Claims, there are distinct (if related) facts, distinct legal theories and distinct remedies. Most importantly, the different sub-claims invoke the underlying values of the *PPPA* in very different degrees. If the Dissemination Claims are successful, then expression on a matter of public interest will be deterred. This would be especially true if punitive damages are awarded. Whether this is true of the Surveillance Claims or Physical Intrusion Claims at least raises different issues, which need to be analyzed on their own. Even at the pre-trial stage, if the Dissemination Claims go forward, then Ms. Reynolds' communications with other activists, her statements on her blog and what she may have provided to the media become relevant and subject to documentary and oral discovery. This in itself will chill not just Ms. Reynolds' speech but also that of other activists and journalists.

[99] As the Court of Appeal makes clear in *Rooney*, when deciding whether to "prune", each case must be taken on its own, based on the totality of what is going on. I am satisfied that the Physical Intrusion Claims, the Surveillance Claims and the Dissemination Claims, as I have defined them, should be analyzed separately.

V. SHOULD THE PHYSICAL INTRUSION CLAIMS BE DISMISSED UNDER S. 4 OF THE *PPPA*?

[100] Under s. 4(1)(a) of the *PPPA*, the onus is on Ms. Reynolds to show that these aspects of the Counterclaim "arise" from an expression made by her and that the expression is in relation to a matter of public interest. In this case, it is the former question that is really in issue. Starting with the Physical Intrusion Claims, the gravamen of which is that Ms. Reynolds flew the drone either in the airspace where DWR had a right to exclude or sufficiently close to DWR's operations to interfere with DWR's reasonable use of the Property, has Ms. Reynolds demonstrated that these "arise from" her own expression?

[101] At paragraph 24 of *Pointes Protection*, Justice Côté states that the phrase "arises from" by definition implies an "element of causality" and that it is sufficient if the expression is "somehow causally related to the proceeding". In a footnote, she declines to define a "precise" level of causation, but it is clear that if the proceeding would not have been brought "but for" the expression, then this will be sufficient: *Mizzi* at para. 96.

[102] Regardless of the level of precision of causation, it can clearly be established when the communication/expression is an element of the cause of action (as in defamation) or a key material fact to the theory of liability (as in the *Subway* case). It can also be established if the *motivation* for the proceeding—regardless of its content—was the expression of the person against whom it is brought, at least if that motive is a "but for" cause of bringing the proceeding. Thus, even if the *content* of the proceeding was entirely non-expressive, it would arise from expression if the claim would never have been made if the applicant had not engaged in expression.

[103] Ms. Reynolds has two principal arguments in favour of the proposition that the Physical Intrusion Claims arose from her expression:

a) First, she says that since she would not be able to effectively engage in her expression (on her blog or otherwise) if she could not have obtained the footage, her means of obtaining the footage are

expressive. As she puts it, she claims that "information gathering" is inseparable from information communication. DWR contends that the fact that physical activity was taken to obtain information to communicate does not make it expression. This is primarily a legal argument about how broadly the word "expression" in the *PPPA* can be interpreted.

b) Second, Ms. Reynolds could establish that the Physical Intrusion Claims "arise from" her expression by showing that DWR would not have brought them forward if she had not engaged in the expression. This is primarily a factual issue.

Does "Expression" in the *PPPA* Include Information Gathering?

[104] Ms. Reynolds says "expression" in the *PPPA* includes the activity of gathering her footage -- even its physical dimensions – if she would not be able to effectively engage in expression on matters of public interest without that activity. In support of this proposition, she points to *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23 [*Criminal Lawyers Association*] at paras. 33–37, which sets out a two-step inquiry into when a positive right of access to government documents is protected by the guarantee of freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

[105] I will start by acknowledging that video of DWR's operations, including activities occurring off asphalt pads, is central to making her case to the public, the media and to regulators. She obviously could not do this if she could not fly her drone in a way that allowed her to take that footage.

[106] The first problem with Ms. Reynolds' argument, however, is that it conflates the *constitutional* protection of freedom of expression against government in the *Charter*, the dimensions of which are necessarily determined by judicial construction with the *statutory* protection from private litigation created by the *PPPA*, the scope of which is up to the Legislature. While the Legislature could have adopted the s. 2(b)

case law in its definition of the scope of "expression" under the *PPPA*, it chose not to, and instead narrowed expression to the act of communication itself: *PPPA*, s. 1.

[107] Thus, the burden placed on an applicant by s. 4(1) of the *PPPA* is to show that the proceeding arises from expression by the applicant, with "expression" stipulated to be communication to other persons. This cannot be met by showing that the proceeding arises from activity that was useful, or even necessary, for the applicant's expression.

[108] Further, even if the standard in *Criminal Lawyers Association* were to be incorporated into the definition of "expression" in *PPPA*, contrary to the statute's text, Ms. Reynolds has not shown that the Physical Intrusion Claims arise out of activity *necessary* for the meaningful exercise of free expression on matters of public interest in the sense that not engaging in that activity would effectively *preclude* the exercise of Ms. Reynolds' rights under s. 2(b).

[109] In *Criminal Lawyers Association*, the Supreme Court of Canada set out a two-step inquiry into whether access to documents in government hands is guaranteed by the protection of freedom of expression in s. 2(b) of the *Canadian Charter of Rights and Freedoms*. To show that it is, the person seeking the government documents must show both that access is "necessary for the meaningful exercise of free expression on matters of public or political interest" and that no countervailing considerations inconsistent with production are present. As a result, it is not just expression (in the sense of non-violent acts that convey a meaning) that is protected by s. 2(b) of the *Charter*, but also those positive claims on the state necessary for that subset of expression that is of public or political if not having access "effectively precludes" the exercise of the right: see *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 at para. 27. "Effective preclusion" is a high standard under the s. 2(b) "positive entitlement" jurisprudence.

[110] The occupier of land has a right to exclude from the immediate air space up to *some* height. How that height is defined, however, is uncertain. The traditional Latin maxim *cujus est solum, ejus est usque ad coelum et ad ed inferos* ("whoever

owns the soil owns from the heavens to the underworld") is only ever quoted to be rejected, so it is clear that the occupier of the surface of the land does not have an absolute right to exclude *all* air traffic. See *Didow v. Alberta Power Limited*, 1988 ABCA 257 [*Didow*] for a comprehensive historical survey of the common law on this point.

[111] These principles clearly arise in new ways with the mass availability of personal drones. However, there are no reported cases applying them in these novel issues raised by drones, nor have Parliament or the provincial legislatures attempted to make the line more precise.

[112] However, in my view, there is no plausible interpretation of the law of trespass that would preclude *all* aerial photography or videography of DWR's open-air operations. At minimum, it cannot stop Ms. Reynolds from filming those operations from the foreshore or Baynes Sound, since that is Crown land. While we do not know what the vertical zone from which DWR may exclude Ms. Reynolds, she has not established that the possibility of such a zone would effectively preclude her from documenting practices she objects to. By asserting that it has the right to exclude the drone from spaces in which it has travelled, DWR, even if successful, would not be effectively precluding Ms. Reynolds from engaging in the public debate about DWR's operations.

[113] Interferences by aerial traffic with the use of land that do not amount to trespasses may be nuisances. As the Court in *Didow* explains, aerial intrusions have been the subject of nuisance complaints in a number of cases where noise or distraction prevents the reasonable use of the land.

[114] But, again, I do not see a plausible interpretation of the law of nuisance, at least in terms of physical interferences, that would preclude Ms. Reynolds' obtaining some aerial footage of DWR's open air operations. (I will leave to the next part of the analysis the issue of nuisance by violation of privacy, as in *Fearn & Ors v. Board of Trustees of the Tate Gallery* [2023] UKSC 4.) In order to show that Ms. Reynolds' activities constitute nuisance, DWR would have to demonstrate that the drone's

activities “substantially interfere” with DWR’s use or enjoyment of the Property and that this interference is “unreasonable” in light of all the surrounding circumstances: *Royal Anne Hotel Co. v. Ashcroft (Village)* (1979), 95 D.L.R. (3d) 756 at p. 760, citing Street, *Law of Torts, 5th ed.* (1972) at p. 215. Even if some of Ms. Reynolds’ activities with the drone are found to be a nuisance, I find it highly unlikely that *any* aerial videos of the industrial activity would be held to be nuisances.

[115] If this is correct, then it would only be on a highly expansive theory of causation that the *content* of the Physical Intrusion Claims would “arise from” her expression. An example of such a theory would be if the content of the claim “arises from” the manner in which a person engaging in expression chose to acquire information they subsequently communicated. However, such an interpretation would not be consistent with the text, context or purpose of the *PPPA*.

[116] I have already spoken about the text. “Expression” is a defined term and that definition is more restrictive than what Ms. Reynolds urges.

[117] The most important contextual reason to reject Ms. Reynolds’ approach is that it goes against the operative background presumptions when an enactment restricts common law rights. In those cases, the enactment is presumed not to do so more than can be found in the explicit meaning of the statute or its necessary implications: *Thouin* at para. 19.

[118] It is one thing to restrict the common law right to sue for communications themselves; it would be another, much more radical thing to restrict the right to sue for even physical harm caused by the process of information gathering.

[119] DWR points out that if I were to accept Ms. Reynolds’ interpretation, the *PPPA* could be used in defence of a person breaking into a commercial building or home and rifling through a filing cabinet, if the ultimate purpose is to bring to light a secret of public interest. It is easy to add hypothetical participants in this parade of horribles: for example, if Ms. Reynolds is correct, then a plaintiff allegedly injured by a media van speeding to the site of a news event would need to establish the factors

set out in s. 4(2) or face dismissal of their personal injury action. This would go well beyond the explicit or necessarily implied restrictions on common law rights of action found in the text, read in context, and taking into account its dual purpose of *balancing* the encouragement of public debate and protecting private rights.

[120] Mr. Gratl, on behalf of Ms. Reynolds, answers these arguments by pointing out that a case brought against the physical consequences of obtaining information would still be subject to the balancing under s. 4(2) of the *PPPA*. But this is already a substantial burden on common law rights, since it puts the burden of showing the elements of s. 4(2) at an early stage of the litigation on the claimant, and in the face of full indemnity costs if unsuccessful.

[121] Moreover, in s. 4(2)(b), the balance is between the "harm likely to have been or to be suffered by the respondent *as a result of the applicant's expression*" and the public interest in the expression. If the harm is not itself expressive, then it does not enter into the balance. This supports the inference that the Legislature was not aiming at civil actions for the physical consequences of the information-gathering process.

[122] Ms. Reynolds relies heavily on the *Subway* case as showing that the content of a claim that "arises from" expression can be very broad. In *Subway*, the Ontario Court of Appeal held that the chain's action in negligence for allegedly flawed or unreliable DNA analysis "arose out of" expression, even though the errors alleged were in the physical performance of the analysis in the lab.

[123] But in *Subway*, the material facts about the expression were a necessary part of the elements of the cause of action, viewed both from the perspective of the theory of liability and the theory of damages. If the Trent University lab had kept its results to itself, no duty of care would have arisen and no damages could have been caused: see *Mizzi* at para. 99. The heart of the claim is the *accuracy* of what is communicated on the matter of public interest, although the (alleged) error leading to that inaccuracy involves the physical act of information-gathering. By contrast, if an act of negligence causes a lab to explode, injuring bystanders, it could hardly be

said that the proceeding "arises out of" expression just because the intent of the experiment was to discover embarrassing facts about a fast food franchise. That is because the motive for this (hypothetically disastrous) experiment is immaterial to the cause of action.

[124] I conclude, therefore, that Ms. Reynolds has not met her burden of showing that the *content* of the Physical Intrusion Claims "arise from" her expression.

Was DWR Motivated By Ms. Reynolds' Expression in Bringing the Physical Intrusion Claims?

[125] This is not the end of the matter because even a purely physical cause of action can still be said to "arise out of" expression if the lawsuit was motivated by the expression.

[126] Before considering the evidence, I must address the problem that there are multiple standards for motivation that arise in relation to proceedings. In traditional "abuse of process" cases, the collateral purpose must be the *predominant* purpose: *Home Equity Development Inc. v. Crow*, 2002 BCSC 1747 at para. 19. By contrast, in "retaliation" cases under human rights or labour law, it is sufficient if the act alleged to be retaliatory was "tainted" by improper motivation, even if there were other, legitimate, motives that would have been sufficient to take the action: *Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54 at para. 48.

[127] In the absence of definitive appellate guidance on this question, I will take the middle ground that an applicant under the *PPPA* must establish, on a balance of probabilities, that the proceeding would not have been initiated if the expression had not occurred, taking into account generally-applicable causation doctrines such as *novus actus interveniens*. I am supported in this by the *Mizzi* case, which, on my interpretation, takes this approach. On this view, while it is not necessary for Ms. Reynolds to demonstrate that silencing or retaliating against her public or private communications were the predominant motivation for commencing this aspect of the Counterclaim, it is not sufficient for her to show a mere "taint" of mixed motivation. I will, however, make factual findings in case I am wrong on this score.

[128] Turning to the evidence, Ms. Reynolds points to what she says is a pattern of DWR and Mr. Jurisich threatening critics, including with legal action in response to and to prevent further criticism. There is some evidence of this, including the letter to CCOBS. In addition, she can point to the demand letter from Mr. Swanson to Mr. Gratl dated July 14, 2022, which included a demand to "remove all images, recordings and data which your client has published in respect of our clients, their operations and activities".

[129] There is no direct evidence of this as a generalized motivation. On cross-examination, Mr. Jurisich denied that public criticism bothered him, and asserted that he took the actions that are the basis of Ms. Reynolds' main claim because of the "intrusion in our personal space". Mr. Gratl, on behalf of Ms. Reynolds, argues that his claim that he was not bothered by complaints to government agencies was not credible. I agree that I cannot give much weight to this evidence.

[130] Nonetheless, I find that Ms. Reynolds has not proven that the Counterclaim would not have been filed "but for" DWR's desire to silence her. There is an obvious competing explanation, which is that the Counterclaim was filed in part to define what Ms. Reynolds can do with her drone and in part as a strategic response to her own civil action. On the evidence before me, I accept that DWR is sincere in disliking the presence of Ms. Reynolds' drone, over and above its concerns about the reputational impact of the footage. In particular, I have no reason to reject Mr. Ruttan's evidence that the drone is distracting and unwanted or his concerns that this distraction poses safety risks.

[131] Had Ms. Reynolds not communicated her video footage, but had engaged in the drone flying and had brought her own action against DWR, I find that they would still probably have filed a counterclaim including the Physical Intrusion Claims.

[132] To be sure, I think it is clear from Mr. Swanson's July 14, 2022 letter that there were multiple motivations for the Counterclaim and that these *included* DWR's objection to what it saw as unfair criticism. If the right test is mere "taint", then I find

that that existed, as is demonstrated by the letter. However, as I have already stated, I reject a "taint" test as a matter of law, and therefore I find that Ms. Reynolds has not met her burden under s. 4(1) of the *PPPA* in relation to the Physical Intrusion Claims.

VI. SHOULD THE SURVEILLANCE CLAIMS BE DISMISSED UNDER S. 4 OF THE *PPPA*?

[133] The analysis of what I have referred to as the "Surveillance Claims" with respect to s. 4(1) is essentially the same as for the "Physical Intrusion Claims" with one exception.

[134] For the same reasons explored in the last section, I find as follows:

a) The *content* of the Surveillance Claims does not "arise from" Ms. Reynolds' expression because the Surveillance Claims do not depend on how the footage was or will be *communicated*, but how it was *acquired*.

b) To the extent Ms. Reynolds' argument is based on the *motivation* for the Surveillance Claims, there is no basis to distinguish them from the Physical Intrusion Claims. While motivations were mixed, on a balance of probabilities, I find DWR brought these claims because of genuine opposition to the surveillance and as a strategic response to Ms. Reynolds' own lawsuit. It would have brought these claims even if Ms. Reynolds had not disseminated the footage to other activists, the media or the public.

[135] The only significant difference between the Physical Intrusion Claims and the Surveillance Claims is one that arises if, as a matter of law, the *Criminal Law Association* standard applies to the *PPPA*. I will not reiterate my reasons for concluding that it does not. But if I am wrong about that, there is a significant difference between the Physical Intrusion Claims and the Surveillance Claims, since while Ms. Reynolds quite clearly could have engaged in her expression without

engaging in an arguable trespass or (physical) nuisance, she could not have done so without obtaining some kind of footage of what was going on with DWR's operations on the Property.

[136] It is an open question whether visibility into what are ordinarily private spaces can constitute a nuisance if it interferes with the reasonable use of the land and whether a corporation can sustain an action under the *Privacy Act*: see *Fearn & Ors* (loss of privacy may constitute a nuisance) and *Madco Investments Ltd. v. Western Tank & Lining Ltd.*, 2017 BCSC 219 (a corporate person may, at least arguably, bring a cause of action under the *Privacy Act*).

[137] However, a court developing the law of nuisance in this context would have to consider what is reasonable in all the circumstances. This would include considering the values underlying the guarantee of freedom of expression in s. 2(b) of the *Charter*: see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at para. 39 (common law of economic torts must be developed consistent with constitutional values, including freedom of expression); *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083; *Doré v. Barreau du Québec*, 2012 SCC 12.

[138] Thus, I find it unlikely that the law of nuisance would develop in such a way that there is an absolute prohibition on the use of drones to document open air industrial practices that pose a risk to the environment, even if the specific actions taken by Ms. Reynolds in this case are found to constitute a nuisance.

[139] Similarly, in interpreting s. 1(2) of the *Privacy Act*, especially the phrase "the lawful interests of others", courts will inevitably have to balance the public's interest in knowing what is going on in industrial operations that may have environmental impact against whatever legitimate interests the corporation has in keeping them secret (assuming, without deciding, that such interests are protected by the *Privacy Act* at all): *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62.

[140] What the *Privacy Act* may do is promote a *balance* between transparency and privacy, including in the workplace. It would not "effectively preclude" Ms. Reynolds' ability to participate in the public debate over DWR's operations for her to face the argument that some of her actions were on the wrong side of that balance.

[141] In short, there should be no dismissal order against the Surveillance Claims because Ms. Reynolds has failed to meet her burden of showing they arise from her expression, either in content or in motivation.

[142] To be clear, I am *not* saying that *all* the alleged violations of the *Privacy Act* as set out in the Response to Civil Claim and incorporated into the Counterclaim are outside the purview of the *PPPA*. The *Privacy Act* itself distinguishes between "publication of a matter", which may be a breach of privacy but has the advantage of a special defence under s. 2(3) and acts or conduct by which the matter published was obtained, which does not have the benefit of that defence: s. 2(4). As I have interpreted the Counterclaim, it says that the dissemination of footage obtained by Ms. Reynolds is itself a violation of the *Privacy Act*. But those allegations are part of what I have defined as the "Dissemination Claims" and I will address them separately. To the extent DWR's claim is restricted to the way in which the videos were *obtained*, it does not arise out of Ms. Reynolds' *expression*, as defined in the *PPPA*, and therefore the application in relation to those allegations cannot succeed.

VII. SHOULD THE "DISSEMINATION" ASPECTS OF THE COUNTERCLAIM BE DISMISSED UNDER THE *PPPA*?

[143] I turn now to what I have defined as the Dissemination aspects of the Counterclaim. As defined, these manifestly "arise from" Ms. Reynolds' expression, both in content and motivation, and I have no doubt that the expression is about a matter of public interest. The burden therefore shifts to DWR under s. 4(2) of the *PPPA*.

[144] I will summarily address DWR's claim for punitive damages. I am not satisfied that there are grounds to believe it has substantial merit. Punitive damages are "restricted to advertent wrongful acts that are so malicious and outrageous that they

are deserving of punishment on their own": *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 62. There is simply no basis for suggesting that any of Ms. Reynolds' conduct reaches this standard. She has a constitutional right to publicly oppose DWR's operations and contribute to the debate on whether they should continue, on her own or in conjunction with others. Characterizing this as a "campaign" is fair enough. Characterizing it as "malicious", "wrongful", "high-handed" and "deserving of rebuke" is not just over-the-top-rhetoric, but troubling in itself in a pleading. Ms. Reynolds no doubt would like to see DWR's operations shut down, but that is her right.

[145] Even if it turns out that the activities of Ms. Reynolds' drone are offside the law of trespass and nuisance, all counsel agreed that this would be a novel development. It could be the basis for declaratory and injunctive relief and, if loss is established, compensatory damages. It could not plausibly be the basis for a punitive damage award.

[146] Since punitive damages are *intended* to deter the individual and others, the chilling effects of allowing that claim to go forward are obvious and weigh heavily in the balance under s. 4(2)(b). On the other side of the balance, I see little in the way of legitimate interest on DWR's part in obtaining damages over and above its actual loss. If it is serious about getting legal clarity about where the drone can fly and what it can record, it can obtain that in the form of declaratory and injunctive relief. If it has in fact suffered business losses, from either physical intrusions or surveillance – and I cannot conclude that such harm is "likely" on the record before me – then compensatory damages would be sufficient.

[147] As I read the Counterclaim, it is seeking compensatory damages for breach of privacy from *publication* of the footage. In this regard, a major problem for DWR is showing that there are grounds to believe that Ms. Reynolds has no valid defence under s. 2(3)(a) of the *Privacy Act*, which provides a defence for *publication* of a matter if "the matter published was of public interest or was fair comment on a matter of public interest".

[148] As s. 2(4) makes clear, the defence under s. 2(3)(a) of the *Privacy Act* is available even if the matter was obtained by a violation of privacy, although the defence does not *extend* to the act or omission by which it was obtained if that is the case. In other words, s. 2(3)(a) is a defence to the Dissemination Claims, to the extent they are grounded in the *Privacy Act*, although it is not a defence to the Surveillance Claims.

[149] Ms. Reynolds' publication of the video footage was clearly of public interest and so DWR has failed to make out a case against dismissal of the Dissemination Claims to the extent they are grounded in the *Privacy Act*.

[150] DWR did not claim it could ground the Dissemination Claims in either trespass or nuisance. Since the burden under s. 4(2) is on it, this is sufficient to dismiss the Dissemination Claims in their entirety.

[151] In any event, even if it is possible to sue in tort or nuisance for losses as a result of the dissemination of images obtained through the tort or nuisance, and even if DWR had tried to establish this on the application, I would still say that those harms are not "serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression." Tort and nuisance may be guardrails against *how* Ms. Reynolds actually obtained her footage in this case; they are not guardrails against any transparency about the physical effects of DWR's operations on the surrounding environment. The harms, if any, that DWR will experience as a result of the dissemination of images obtained tortiously are not materially different than they would have been from images obtained non-tortiously.

[152] On the other side of the balance, there is a very substantial public interest in getting information about what is going on, as indicated by the concern expressed by the K'ómoks First Nation and the Comox Valley Regional District. In coming to this conclusion, I am valuing the public interest in protecting *expression* about this issue, and not taking any view on the public interest in DWR's activities themselves. Whether the concerns of DWR's critics are valid or outweigh the positive environmental effect of recycling ships is not before me. What is clear is that this is

an important issue for the public to have information about. It is also clear that aerial images are useful and legitimate in that debate.

VIII. CONCLUSION AND ORDER

[153] I therefore order that the portions of the counterclaim referring to the dissemination of Ms. Reynolds' drone footage and the claim for punitive damages are dismissed under s. 4 of the *PPPA*, but that the remainder of the counterclaim can proceed. By agreement of the parties, I will address the costs and damages consequences separately.

[154] I make the following orders:

a) An order that the claim for punitive damages in paragraph 1(g) of Part 2 of the Counterclaim of Deep Water Recovery Ltd., filed July 13, 2022, is hereby dismissed under s. 4 of the *Protection of Public Participation Act*.

b) An order that the following portions of the Counterclaim are struck under s. 4 of the *Protection of Public Participation Act*:

i. in paragraph 2 of Part 1, the incorporation of paragraphs 10, 15, 16, 17 and 34 of the Response to Civil Claim of Deep Water Recovery Ltd. and Mark Jurisich, filed July 13, 2022;

ii. in paragraph 3 of Part 1, the phrase "and ultimately shut down";

iii. paragraph 1(g) of Part 2;

iv. in the first sentence of paragraph 5 of Part 3, the phrase "and for the purpose of advancing the campaign to shut down Deep Water Recovery's business" and the phrase "and disseminated the images and recordings collected to third parties, without a claim of right or permission";

v. in the second sentence of paragraph 5 of Part 3, the phrase "and dissemination of the recordings"; and,

vi. paragraph 6 of Part 3.

c) An order that the remainder of the application of the plaintiff Mary Reynolds under s. 4 of the *Protection of Public Participation Act* is dismissed.

d) An order that the application of the plaintiff Mary Reynolds for damages under s. 8 of the *Protection of Public Participation Act* is adjourned.

e) An order that the parties have leave to request a hearing on costs and on damages under s. 8.

f) A direction that the parties shall make that request no later than 4 p.m. 28 days after the date of this order.

g) An order that if no request is made by the date and time set in paragraph (f), there shall be no order for costs and no order for damages under s. 8.

"J. G. Morley, J."
The Honourable Justice Morley