IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Reynolds v. Deep Water Recovery Ltd.,* 2024 BCSC 1921

Date: 20240920
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

Oral Reasons for Judgment

(Costs Under Section 7 of the *Protection of Public Participation Act*)

(In Chambers)

Counsel for Mary Reynolds:	J. B. Gratl
Counsel for the Defendants Deep Water Recovery Ltd. and Mark Jurisich:	S. M. Gallagher
Place and Date of Hearing:	Vancouver, B.C. September 20, 2024
Place and Date of Judgment:	Vancouver, B.C. September 20, 2024

[1] **THE COURT:** These are edited reasons originally given orally.

Introduction

[2] In reasons indexed as *Reynolds v Deep Water Recovery Ltd.*, 2024 BCSC 570, I dismissed some, but not all, of a counterclaim filed by Deep Water Recovery Ltd. ("DWR") against Mary Reynolds under s. 4 of the *Protection of Public Participation Act*, SBC 2019, c. 3, ("*PPPA*"). Both Ms. Reynolds and DWR are now asking for costs.

[3] The general default rule for civil litigation in British Columbia is that the party that is substantially successful is entitled to "tariff" or "party-and-party" costs. Full indemnity ("special") costs are only available as a punitive measure designed to punish parties for reprehensible conduct in the course of the litigation: *Young v. Young*, [1993] 4 S.C.R. 3, at pp. 134-136; *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177. But s. 7 of the *PPPA* flips that presumption.

[4] Section 7(1) provides that if a court makes a dismissal order under s. 4, the applicant is entitled to costs "on the application" and "in the proceeding", assessed "on a full indemnity basis", unless the "court considers that assessment inappropriate in the circumstances". Section 7(2), on the other hand, provides the opposite presumptive rule. If "on an application for a dismissal order under s. 4, the court does not dismiss the proceeding". In that case, "the respondent is not entitled to costs on that application unless the court considers it appropriate in the circumstances."

[5] I should note at the outset that, at least on its literal terms, *both* the subsections of s. 7 apply here. I did "make a dismissal order under s. 4", as required for the application of s. 7(1), but I did not "dismiss the proceeding" and thus s. 7(2) applies as well.

[6] Ms. Reynolds is not asking for costs with respect to the proceeding as such (i.e. the counterclaim), but she is asking for an order of full indemnity costs on the application. In the alternative, she asks for 75 percent of full indemnity in recognition

of what she (alternatively) characterizes as partial success by Deep Water Recovery.

[7] Deep Water Recovery says it should not be paying costs at all on the grounds that it has been successful. It asks that its own costs not be subject to the presumption under s. 7(2), and instead be awarded. But like Ms. Reynolds, Deep Water Recovery has an alternative submission, based on a recognition of partial success on each side. In this position, it characterizes itself as two-thirds successful, and Ms. Reynolds as one-third successful, and asks for setoff of costs on that basis.

[8] For the reasons I am going to set out, I come to the following conclusions:

a) There was divided success. Viewed practically, Ms. Reynolds had two-thirds of the success and Deep Water Recovery had one-third success.

b) I do not see why it would be inappropriate to follow the presumption set by the Legislature for full indemnity costs for Ms. Reynolds's share of the costs.

c) On the other hand, it would be inappropriate not to award Deep Water Recovery any costs for its share of success, so I will award it one-third of its costs of the application.

d) Deep Water Recovery's costs should be on a party-and-party basis, in the cause.

There Was Divided Success

[9] I will first start with the basis for asserting that the result of the application was two-thirds success for Ms. Reynolds.

[10] In this regard, I recognize that there is considerable discretion that I have in terms of how I am going to characterize "substantial success". Success is not a matter of being successful on every single argument advanced. The case law directs

me to consider success in terms of the effect of the ruling, looking at it in a practical way in terms of the relative interests of the parties: *Russell v. Craigflower Housing Cooperative*, 2022 BCCA 121.

[11] On that basis, I think the majority of the success accrued to Ms. Reynolds. This is evaluated not by looking at the number of words in the counterclaim that were struck, but in terms of the "overall effect of the judgment": *Russell* at para. 7.

[12] The "overall effect of the judgment" cannot be reduced to the monetary liability that Ms. Reynolds might be subject to as a result of my order, compared with what would have been the case if I had dismissed the application, but that is surely relevant. She is no longer facing punitive damages, or any claim for business loss as a result of reputational harm or regulatory activity taken against Deep Water Recovery. She is still facing potential damages for nuisance and trespass, or for violation of privacy from surveillance as a result of the operation of the drone, and possibly injunctive and declaratory relief about what would be a lawful and non-tortious use of her drone. In monetary terms, that is a significant advantage for her relative to the situation she would otherwise have been in.

[13] Now, to be fair, Deep Water Recovery certainly emphasized that it was primarily concerned with the effect of the flying of the drone and the surveillance, and before me emphasized that it was seeking what it characterized as a physical claim as opposed to one with respect to the impact on its reputation of communication or expression on matters of public importance.

[14] However, I think on the face of the counterclaim itself, there were multiple references to dissemination of information, and in the argument before me this was said to be the basis for punitive damages. While I found that there was a mix of *motives* for bringing the counterclaim, the *stakes* were highest in relation to the way that the dissemination of footage from Ms. Reynolds's drone might impact Deep Water Recovery's business, either through affecting its reputation or through leading to action by local government or environmental regulators.

[15] That being said, Deep Water Recovery did have an important element of success, in terms of what it was asserting before me was the main interests it wanted to vindicate, namely its property rights, its privacy and that of its employees. The result of the application does not prevent them from vindicating those interests.

[16] Recognizing that this is not a science, I come to the conclusion that success was divided essentially on a 66 2/3 percent to 33 1/3 percent basis.

Should Full or Partial Indemnity Costs Be Awarded?

[17] The next thing I have to address is the significance of that in the specific costs regime provided for by the *PPPA*.

[18] The Legislature, under s. 7, decided to take a different path with respect to applications under the *PPPA* and for proceedings that are dismissed under the *PPPA*. Under s. 7(1), full indemnity costs are the default. However, there is discretion to do something different if assessment on a full indemnity basis would be inappropriate in the circumstances.

[19] The Court of Appeal has provided guidance in *Hobbs v. Warner*, 2021 BCCA 290 and, more recently, in *Mawhinney v. Stewart*, 2023 BCCA 484 as to how to decide when full indemnity costs would be "inappropriate in the circumstances".

[20] In *Mawhinney* at para. 49, the Court of Appeal stated the following:

> Full indemnity is the default position. Section 7(1) is broadly worded and on its face, invites an open-ended enquiry in deciding whether a different order is warranted. As part of that enquiry, a court may elect to consider the hallmark indicia of a SLAPP [Strategic Litigation Against Public Participation]. However, it is not mandated to do so and there are other factors relevant to the enquiry the court is obliged to undertake that may legitimately come into play, including the conduct of the parties in the litigation.

[21] I take this as direction to take the Legislature's choice of default rule seriously and not to import the considerations that govern special costs in ordinary civil litigation, while nonetheless exercising a wide discretion in a judicial way. The four indicia of a "SLAPP" that an application judge "may elect" to consider as part of the open-ended enquiry into the appropriateness of full indemnity costs, borrowed from

Platnick v. Bent, 2018 ONCA 687 at para. 99, aff'd 2020 SCC 23, are set out at para. 27 of *Mawhinnney* as follows:

> a) whether the plaintiff had a history of using litigation or the threat of litigation to silence critics;
>
> b) whether there was a financial or power imbalance that strongly favoured the plaintiff;
>
> c) whether the action was animated by a punitive or retributive purpose; and
>
> d) whether the plaintiff suffered or is likely to suffer only minimal or nominal damages as a result of the defendant's conduct

[22] These factors are not a code. I am also to consider, as the chambers judge did in *Mawhinnney*, whether and to what extent the parties engaged in unnecessary proceedings.

[23] The baseline set by the Legislature, the default, is only to be departed from if and when appropriate.

[24] In this case, there *is* evidence of Deep Water Recovery using the threat of litigation to attempt to deter criticism of its ship breaking operations. I have in the record before me three different cease-and-desist letters containing quite explicit threats of litigation if comments were not retracted that were critical of its operations. One was to Robert Kerr, one to an organization called Concerned Citizens of Baynes Sound or CCOBS, and one to Ray Rewcastle. All of those could fairly be seen as a threat of litigation to silence critics.

[25] On the second criterion of a financial or power imbalance that strongly favours the respondent to the *PPPA* application, the record is equivocal. There is not much evidence before me about the relative finances or power of each of the two different parties. Power is not necessarily financial, and I would not say Ms. Reynolds has no power. She certainly has a network that she is involved in and some ability to communicate to the public.

[26] I cannot say much about the parties' relative financial strength. I have no real information about Ms. Reynolds's wealth or income. I only know she is a retiree. I also have very limited evidence about the financial situation of Deep Water Recovery, and that which I have is of relatively low probative value. There were some cross-examination questions of Mr. Jurisich, in which he indicated that in 2021, the company had gross annual revenues of approximately $1 million. In 2022 he said it had gross annual revenues of approximately half a million dollars. The land on which Deep Water Recovery operates is owned by a related entity and is, according at least to Mr. Jurisich in his cross-examination, valued at about $2.3 million. It is apparently not subject to a mortgage.

[27] In any case where you have a corporation against a single individual, there is *some* reason to think there is a power imbalance, but I do not think I can go much beyond that generically in terms of this factor, so I do not give it much weight.

[28] The third element was whether the action was animated by a punitive retributive purpose. I did make some findings originally as to what animated the counterclaim and found that there were multiple motives, including a litigation response to the action brought by Ms. Reynolds, including a genuine dislike or concern about the drone and the surveillance from the drone and its effects on employees, and also a reaction to the criticism that she was generating. All of those were part of the reason for the counterclaim. So in terms of the third factor, to the extent it quires a *single* animating purpose, I would say it is not present.

[29] But to the extent a punitive or retributive purpose can be *part* of the story, then I would find that it is present here. Part of what the counterclaim was asking for was punitive damages, so a punitive or retributive purpose does not require any inferences. The punitive damage claim was explicitly connected to what I characterized as the "dissemination claim", which was precisely the claim that targeted expression on a matter of public interest.

[30] The fourth SLAPP factor is whether the respondent to the *PPPA* application suffered or is likely to suffer only minimal or nominal damages as a result of the

applicant's conduct. This goes to the question of what the level of damages are likely to be for the remaining causes of action in relation to the use of the drone. I do not want to speculate too much on that. I think it is fair to say that we have virtually no clear case law let alone about the assessment of damages in these circumstances. I would say it is unlikely to be at the same level as would be a claim for loss of the business, if it had been shut down as a result of regulatory activity or something like that, or punitive damages. This factor does not weigh heavily one way or the other.

[31] I have to also address the question of unnecessary proceedings. Here I think this factor weighs in favour of Ms. Reynolds. This application took a very long time to get heard, and much of this was due to Deep Water Recovery's litigation choices.

[32] The *PPPA* application was originally filed on August 8, 2022, only a few weeks after the counterclaim. Deep Water Recovery's response to this was to seek a declaration that the *PPPA* did not apply to it. That was dismissed by Justice Ahmad, who left the cost consequences of that to this proceeding that is before me today. This decision was sought to be stayed in the Court of Appeal, which denied that application. All of this added to the complexity and length of time and cost of this application, certainly compared to what was intended by the Legislature when it sought to have an early way of addressing whether a proceeding should be dismissed to protect expression on matters of public interest.

[33] Perhaps as a result of Deep Water Recovery's decision to bring a declaratory remedy to prevent the hearing of the application, and its subsequent appeal, the affidavits in response to this application came out piecemeal. There was also difficulty in setting down cross-examination. After the first cross-examination of Mr. Jurisich, he filed a subsequent affidavit that appended video and photographic evidence and further evidence about the height of the drone when it is operating. Ms. Reynolds' counsel reasonably thought he needed to have further cross-examination and because of the amount of time left under the *Act* the default time of seven hours in the *PPPA* would have had to be extended. There had to be an order made by Justice Coval as a contested chambers application on that point.

[34] I would say that this has been a complex and indeed unnecessarily complex path to getting to resolution. In general, we want to encourage parties that oppose applications to do so by putting in all their materials opposing the application when they file an application response. I do not think interlocutory applications to prevent the hearing of interlocutory applications are generally a good idea, and Deep Water Recovery may need to bear the consequences of this litigation approach.

[35] I have to think about the reasons the Legislature had for creating this presumption of full indemnity costs, which was that if the purpose of the *PPPA* was not to chill expression by exposing people engaged in public discourse to expensive litigation. It makes sense that there would be a presumption that if they are and to the extent they are successful, they would not face litigation expense, which can only be accomplished by full indemnification.

[36] So for those reasons, I am not satisfied that it would be inappropriate to provide the two-thirds of the costs of the application on a full indemnity basis.

[37] I want to note the case that was brought to my attention of *Joshi v. Allstate Insurance Company of Canada*, 2019 ONSC 5934, in which Justice Kimmel allowed a partial indemnity of costs under 137.1(7) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, which is the equivalent of our s. 7 of the *PPPA*. Deep Water Recovery argues this supports an approach of a partial, rather than full, indemnity where only part of a proceeding is dismissed.

[38] *Joshi* differed from the application before me because it was the equivalent of an *assessment* of a full bill of costs. What Justice Kimmel did was to allow those costs in relation to what would be for us the *PPPA* application and not the ones that could instead be more correctly attributed to the overall litigation, which continued.

[39] This is clearly appropriate, but I do not think it indicates that there should be less than full indemnity for those costs that are attributable to the *PPPA* application. If the costs of the application are assessed, the registrar will, of course, have to figure out what are the costs of this application as opposed to the proceeding as a

whole. I certainly do not intend by that term that the costs of the application would include costs that are more appropriately attributable to the overall defence or advancement of the litigation. Those costs are not being awarded at all. But for the costs of the application itself, it is not inappropriate that it be a *full* indemnity.

On What Basis Should DWR'S Share of Costs Be Assessed?

[40] Turning to the one-third of the costs of this application that reflect the partial success of DWR, s. 7(2) provides that the general rule is that the respondent to a *PPPA* application is not entitled to costs in the application. The court has discretion to depart from this default if it considers this appropriate in the circumstances.

[41] This subsection was carefully analyzed by Justice Shergill in *Lee-Sheriff v. Christman*, 2023 BCSC 258. Applying the principles in *Hobbs*, according to which there is not a narrow view of the circumstances in which the discretion to depart from the default rule under s. 7(1), she found that there is also not a narrow view under s. 7(2) to veer away from *its* starting point. In both cases, the ultimate consideration is what is appropriate in the circumstances, and for the court to direct its mind to what is fair and reasonable having regard to all relevant factors, including, of course, the legislative choice of default.

[42] In this case, a key point is that the basis of Deep Water Recovery's partial success was that part of the counterclaim is not about expression at all. It was therefore necessary if that part of the claim was to continue to be advanced, that Deep Water Recovery defend the application, at least to that extent. I do not think there is any unfairness of them having to bear the burden of the part that they were unsuccessful in, since they did not have to have alleged those matters in their original counterclaim, but I think it would not be fair and reasonable to award those costs, but not allow, at least in the cause, the costs that Deep Water Recovery would have had to expend in effect if it were to pursue the parts of its counterclaim that I say it was entitled to pursue.

[43] That leaves the questions of whether *Deep Water Recovery's* costs should be on a full indemnity basis and whether it should be in the cause. If I were to order

either of those things, I would depart not just from the default in s. 7(2), but also the default in ordinary litigation.

[44] That might be appropriate when what was at stake was different from what is at stake in ordinary litigation when a party resists an interlocutory application, but I do not think such a distinction applies in this case. What Deep Water Recovery was doing by resisting the application in relation to the parts of its claim that it is still pursuing was what it had to do in order to continue on with its claim. That claim may or may not ultimately be vindicated, and if it is not, then the costs would be unnecessary. That is the basis for the general rule in ordinary litigation of costs to a successful party in an interlocutory application in the cause. I do not see any reason to depart from that logic here.

[45] The considerations that drove the Legislature to provide for a default full indemnity to a successful applicant under the *PPPA* would apply to a successful resistance to such an application. Deep Water Recovery is in the same position as an ordinary litigant and therefore should get its costs, but they should be in the cause and, in the absence of reprehensible conduct, on a party-and-party basis at Scale B.

Order

[46] So the order is:

a) Ms. Reynolds is awarded two-thirds of her costs of the application on a full indemnity basis pursuant to s. 7(1) of the *PPPA*.

b) Deep Water Recovery Ltd. is awarded one-third of its costs of the application at Scale B in the cause.

c) Each party will bear her or its own costs of today.

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