



FORM 32 (RULE 8-1(4))

No. VLC-S-S-217976  
Vancouver Registry

*In the Supreme Court of British Columbia*

BETWEEN

SCOTT COUSENS

PLAINTIFF

AND

VIVIAN KRAUSE

DEFENDANT

### **NOTICE OF APPLICATION**

**Names of applicant:** Vivian Krause

To: The plaintiff and his counsel.

TAKE NOTICE that an application will be made by the applicant at the Law Courts, 800 Smithe Street, Vancouver, British Columbia V6Z 2E1 on September 21, 2022 at 9:45 a.m., via MS Teams for the orders set out in Part 1 below.

Pursuant to COVID-19 Notice No. 42, counsel to the applicant's contact information is as follows:

Email: [dburnett@owenbird.com](mailto:dburnett@owenbird.com)

Telephone number: 604-240-4650

Address: Owen Bird Law Corporation  
2900 – 595 Burrard Street, Vancouver, BC V7X 1J5

#### **Part 1: ORDER(S) SOUGHT**

1. An Order dismissing the claim herein pursuant to section 4 of the *Protection of Public Participation Act*.
2. An Order for costs of this application and of the entire proceeding on a full indemnity basis pursuant to section 7 of the *Protection of Public Participation Act* as well as damages pursuant to the said Act.
3. Such further and other relief as counsel may request and this Honourable Court may allow.

**Part 2: FACTUAL BASIS**

1. This is a defamation proceeding in relation to publications by the defendant criticized and questioned public statements by Fortius Foundation beginning in 2010 that Scott Cousens made a \$23M donation to Fortius Foundation and that this donation was a gift to create Fortius Sport & Health Centre in Burnaby.
  
2. The defendant has pleaded that the claim of a \$23M donation was deceptive or exaggerated, for reasons including that:
  - a) the original funds were not a \$23M donation but a high interest loan from New Dimensions to Fortius secured by a mortgage over all of Fortius' assets.
  - b) The plaintiff has through counsel confirmed by letter of May 12, 2021 that the claimed \$23M donation to the Sports Centre was in fact a series of transactions with the three foundations beginning in 2008 and extending beyond 2010. The plaintiff has not provided full documentation of the said donations or the basis of their valuation or, their terms and conditions, or the use of the said donations for the Sports Center, despite request;
  - c) The plaintiff was a director of the three foundations, New Dimensions, Fortius and Imladris and none of them are at arm's length from each other.
  - d) The flow of funds was a series of transactions and loan obligations between New Dimensions, Fortius and Imladris between 2008 and 2018 including millions of dollars in interest such that the public assertion of a \$23M donation was inaccurate;
  - e) The original mortgage loan from New Dimensions to Fortius was transferred in 2010 the plaintiff's private family foundation, Imladris Foundation for one dollar. With interest it amounted to a secured obligation from Fortius to Imaldris of approximately \$29M by 2018. This debt by Fortius, the benefit of which was transferred to the plaintiff's private foundation, exceeds and significantly alters the true picture of the claimed \$23M loan;
  - f) The said \$29M mortgage debt was transferred in 2018 by Imaldris to the Charitable Impact Foundation ("CHIMP"), but full documentation of its transfer terms and related transactions have not been provided. In 2020, CHIMP's independent auditors issued a statement that *"We were unable to obtain sufficient appropriate*

*audit evidence supporting the carrying amount of investments in certain unlisted securities with a total carrying value of \$193,037,460 as of July 31, 2020”;*

- g) Fortius, New Dimensions and Imladris have collectively reported donations and gifts totaling approximately \$106M, which is vastly more than the entire expenditure on the Sports Centre;
  - h) However, Fortius also reported bad debt, financing fees and interest paid on loans for a total of approximately \$45M (2009-2021) from various entities, which would not have been necessary if the asserted donations had been true gifts of true economic value.
  - i) Documentation of the above as well as additional facts underlying the impugned statements and opinions are set forth in affidavit #1 of Vivian Krause, served herewith.
3. The defendant has pleaded that her publications, in their natural meaning, meant that the claim of a \$23M donation, based on the information gathered, appears to be deceptive. The defendant has pleaded the said meaning is true, or in the alternative honest comment, or in the alternative protected by the defence of responsible communication.
4. The impact of this lawsuit includes its intimidating effect on further expression, the public interest in further reporting on the public interest issues at play, and likely on the willingness of sources to provide information.
5. This proceeding is in respect of expression on a matter of public interest. The claim does not have substantial merit. The defences raised are applicable and likely to prevail. The public interest in continuing this action is limited and is outweighed by the damage it inflicts upon expression generally, including the defendant’s expression and gathering of information on matters of significant public interest.

**Part 3: LEGAL BASIS**

1. This application seeks an order dismissing this proceeding as a claim arising from expressions on a matter of public interest pursuant to section 4 of the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 (the “*PPPA*”).
2. The *PPPA* applies to proceedings commenced on or after May 15, 2018 and provides legal protection to individuals who have had proceeding commenced against them for choosing to express themselves on matters of public interest.
3. Section 4 of the *PPPA* provides as follows:

4 (1) in a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that

- a) The proceeding arises from an expression made by the applicant, and
- b) The expression relates to a matter of public interest.

(2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that

(a) there are grounds to believe that

- (i) the proceeding has substantial merit, and
- (ii) the applicant has no valid defence in the proceeding, and

(b) the harm likely to have been or to be suffered by the respondent as a result of the applicant’s expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

4. Under s. 4, the first onus is on the defendants/applicants to show the subject matter is of public interest. The remaining burdens (that the action has substantial merit, that all defences are inapplicable, and that the public interest weighing favours the plaintiff) are upon the plaintiff. If the plaintiff fails on any one of them, the action must be dismissed.

*1704604 Ontario Ltd. v Pointes Protection*, 2020 SCC 22 (“*Pointes*”) at paras. 18-33

S. 4 (1) – Expression on a Matter of Public Interest

5. “Expression” is defined in the PPPA as “any communication, whether it is made verbally or nonverbally, publicly or privately, and whether it is directed or not directed at a person or entity”.

*PPPA, s. 1*

6. “Public interest” is a subject matter” inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached”.

*Pointes, at paras. 26-30*

7. Once the subject matter is shown to be of public interest, as it plainly is in the present case, the onus shifts to the plaintiff who must meet three onuses: substantial merit, inapplicability of defences and weighing of public interests. The failure to meet any one means the court must dismiss the action.

S. 4 (2) – Substantial Merit

8. The onus is on the plaintiff to show on a balance of probabilities that the proceeding has substantial merit, and that the Defendant/Applicant has no valid defence in the proceeding.

*PPPA, s. 1*

9. Substantial merit is something more than requiring a “reasonable prospect of success” and requires an “assessment of the basis or evidentiary foundation for a claim.”

*Pointes, at para. 50*

10. Proof by the plaintiff that the defences are inapplicable requires that the plaintiff present evidence that each and every defence put in play by the defendant weighs more in the plaintiff’s favour, in other words are more likely to fail than to succeed.

*Pointes, para. 49*

11. In the present case, the plaintiff has pleaded inferential meanings to the words. Where the plaintiff has done so, he must prove that those meanings or substantially similar meanings are what a reasonable person, not avid for scandal, would understand from the words in all

of their context. Failure to do so means the action is dismissed: *Lawson v. Baines*, 2012 BCCA 117 para 24.

12. The defendant says that the publications complained of do not bear the pleaded meanings, and were repeatedly couched in language indicating that the words in question were posed as opinion, questions, and subject to further information which had been requested from the plaintiff.
13. It is submitted that an examination of the words complained of in their context, as set forth in the affidavit of the defendant, leads to a conclusion that the words do not support the inferential meaning pleaded. As a result, the claim does not have substantial merit.

#### S. 4(2) - Defences

14. The second hurdle the plaintiff must meet is proof that the defences raised are inapplicable, meaning they are likely to fail as they weigh more in the plaintiff's favour: *Pointes*, para. 49. The defendant raises several defences, as follows:
15. **Justification:** the defendant has pleaded that the more natural meanings of the words complained of as pleaded by the defence, namely that the claims that the plaintiff provided the initial funding of the sports centre by way of \$23 million, were deceptive, misleading or exaggerated.
16. A justification defence succeeds if the words complained of, with the meanings the court finds apply to them, are proven true or substantially true, in the sense that they do not convey any worse meanings than a perfectly accurate account: *Taseko Mines Limited v. Western Canada Wilderness Committee*, 2016 BCSC 109 (at para. 22 (aff'd 2017 BCCA 431)). It is submitted that on all the evidence this defence is likely to succeed and the plaintiff cannot establish that the defence is likely to fail:
17. **Fair Comment:** In the alternative, the defendant's expression questioning whether the public claims that the plaintiff provided the initial funding of the sports centre by way of \$23 million, were deceptive, misleading or exaggerated were comments on a matter of public interest that a person could hold based on the facts stated or known publicly as pleaded. That is enough to succeed on fair comment, regardless of whether the plaintiff or anyone else thinks it is unfair: *WIC Radio Ltd. v. Simpson*, [2008 SCC 40](#) at para. 28.

18. In their context the impugned words were comment, based on stated and true facts, reflecting views which a person could honestly hold. It is submitted on all the evidence this defence is likely to succeed and the plaintiff cannot establish that the defence is likely to fail:
19. **Responsible communication:** The defendant also relies on the defence of responsible communication, having extensively researched the expression and having repeatedly sought the plaintiff's side of the story. Where, as here, the subject matter is of public interest, and the defendant has made responsible efforts in verification and publication in accordance with various "responsibility" factors, the communication, even if it conveys a fact that cannot be proven or is proven untrue despite those efforts, will be protected by the defence of responsible communication: *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII), [2009] 3 SCR 640, including paras. 70 and 126.

S. 4(2)(b) – The Weighing of Competing Interests

20. The onus is on the plaintiff to show on a balance of probabilities that the harm caused to the plaintiff is "sufficiently serious" that the public interest in allowing the Plaintiff to proceed outweighs the public interest in protecting expression.

*Pointes*, at paras. 18 and 61

21. This has been referred to as the "crux" of the analysis (*Pointes* para. 30). It is the stage where the court can examine what is "really going on" in the litigation. It mandates a court to dismiss an action even if it is meritorious, if the plaintiff cannot show that the public interest in the action proceeding outweighs the public interest in protecting the expression and that of others related to it, or the expression in future cases.

22. The Plaintiff must also show that he has been harmed and that the harm he has suffered resulted from the defamations claimed. A causal link between the harm and the defamations "is especially important where there may be sources other than the defendant's expression that may have caused the plaintiff harm".

*Pointes*, at paras. 68 and 72

23. When considering public interest, factors the court may also look to "indicia of a SLAPP" including:

- a) “a history of the plaintiff using litigation or the threat of litigation to silence critics”;
- b) “a financial or power imbalance that strongly favours the plaintiff”;
- c) “a punitive or retributory purpose animating the plaintiff’s bringing of the claim”;  
and
- d) “minimal or nominal damages suffered by the plaintiff”.

*Pointes*, at para. 78

24. The Court may also consider the effects of the litigation on other expressions related to matters of public interest, potential chilling effects on future expression, the defendant’s history of research and expression in the public interest, and whether the claim could adversely affect third parties.

*Pointes*, at para. 80

25. Here, assuming for the sake of argument that the claim or part of it survives the earlier stages of analysis, the court can examine various factors to determine whether the action has any real value as compared to the damage it inflicts upon the public interest in the expression and its benefits. It is submitted that the value of the defendant’s expression and research on a matter of significant public interest puts the need to protect her expression both now and in the future and that of others who may provide information or contribute to the research at the highest level. In contrast, the plaintiff is perfectly capable and better resourced to put forth any contrary information and has been repeatedly invited to do so. As such, the public interest in permitting him to inflict continued litigation upon the defendant and the resources of all involved puts the public interest in continuing this action at the low end. As such, the action should be dismissed.

**Part 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Vivian Krause, made May 20, 2022;
2. The pleadings herein;
3. Such further material as the applicants may tender and the court may accept.

The applicant estimates that the application will take two hours.

- This matter is within the jurisdiction of a master.
- This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- a) file an application response in Form 33,
- b) file the original of every affidavit, and of every other document, that
  - i) you intend to refer to at the hearing of this application, and
  - ii) has not already been filed in the proceedings, and
- c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  - i) a copy of the filed application response;
  - ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: May 24, 2022



\_\_\_\_\_  
Signature of lawyer for applicant  
Daniel W. Burnett, Q.C.

***To be completed by the court only:***

Order made

in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this notice of application

with the following variations and additional terms:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Date: \_\_\_\_\_

Signature of [ ] Judge [ ] Master

**APPENDIX**

**THIS APPLICATION INVOLVES THE FOLLOWING:**

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts.