



No. *5128358*  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JOHN FURLONG

PLAINTIFF

AND:

LAURA ROBINSON, DANIEL MCLEOD, CHARLIE SMITH,  
AND VANCOUVER FREE PRESS PUBLISHING CORP.

DEFENDANTS

### NOTICE OF APPLICATION

*FORM 32 (RULE 8-1(4))*  
*[B.C. REG. 241/2010, SCH. A, S. 3]*

Name of applicant: Laura Robinson

TO: the plaintiff John Furlong

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, British Columbia on Wednesday, the 4<sup>th</sup> day of December, 2013 at 9:45 for the orders set out in Part 1 below.

#### **PART 1: ORDERS SOUGHT**

1. The plaintiff shall post Security for the costs of the defendant Laura Robinson with the District Registrar, Supreme Court of British Columbia, Vancouver Registry, in the amount of \$100,000, by depositing the said sum in cash or by letter of credit in the form prescribed in Administrative Notice 4, dated July 1, 2010.
2. The action is stayed pending posting of the Security, and if the plaintiff does not post the Security within 30 days of the entry of this Order, the defendant Laura Robinson has leave to apply to dismiss the action against her.

3. Costs.

**PART 2: FACTUAL BASIS**

1. The plaintiff sues in libel.
2. The plaintiff seeks unspecified damages from the defendants for allegedly defamatory statements contained in a newspaper article written by the defendant Laura Robinson (“Robinson”) and published by the defendants Daniel McLeod, Charlie Smith and Vancouver Free Press Publishing Corp. (collectively, the “Georgia Straight”).
3. The aforesaid newspaper article was published in print and on the Georgia Straight’s webpage on September 27, 2012 (the “Article”).
4. The plaintiff has never sought to have the Article removed from the Georgia Straight’s webpage, and it remains available for viewing to this day.
5. The plaintiff filed his notice of civil claim (the “NCC”) on November 27, 2012.
6. The Georgia Straight filed their response to civil claim on January 14, 2013.
7. Robinson filed her response to civil claim on January 21, 2013.
8. The plaintiff served a notice of discontinuance on the Georgia Straight on October 29, 2013.
9. The plaintiff has yet to set this matter down for trial, which is anticipated to require a minimum of 19 days of hearing and a jury.
10. In accordance with Rule 9-8(4), the plaintiff must pay the Georgia Straight’s costs to the date of service of the notice of discontinuance.
11. The plaintiff has not listed any documents that show the name of his employer or his income, or whether he possesses exigible assets in this jurisdiction.

12. The plaintiff does not own any real property in British Columbia.
13. The plaintiff has not listed a residence as his address in this action. It is not known if he is ordinarily resident in British Columbia.
14. The plaintiff is an Irish citizen. It is not known if he has property in that non-reciprocating jurisdiction.
15. The draft bill of costs prepared by Robinson's counsel indicates that the fees, disbursements and taxes of the action if a verdict or judgment is given in favour of the defendant Robinson will be approximately \$100,000.

Affidavit 1 of Bryan Baynham.

### **PART 3: LEGAL BASIS**

#### **Section 19 of the *Libel and Slander Act***

1. Section 19(1) of the *Libel and Slander Act*, R.S.B.C. 1996, c. 263 (the "*Act*"), provides:

19(1) In an action brought for libel in a public newspaper or periodical publication the defendant may, at any time after the filing of the statement of claim, apply to the court for security for costs, on notice and an affidavit by the defendant or an agent, showing the following:

- (a) the nature of the action;
- (b) the defence;
- (c) that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a verdict or judgment is given in favour of the defendant;
- (d) that the defendant has a good defence on the merits;
- (e) that the statement complained of were published in good faith;
- (f) that the grounds of the action are trivial or frivolous.

(2) The court may order that the plaintiff give security for the costs to be incurred in the action.

(3) The security ordered must be given in accordance with the practice in cases where the plaintiff resides out of British Columbia.

(4) The order is a stay of proceedings until the proper security is given....

2. Pursuant to section 1 of the *Act*, “public newspaper or other periodical publication” includes:

(a) a paper containing public news, intelligence or occurrences, or any remarks or observations in it printed for sale and published periodically, or in parts or numbers at intervals not exceeding 31 days between the publication of any 2 papers, parts or numbers, and ...

3. The Georgia Straight meets this definition of “public newspaper or other periodical publication”.

Affidavit #1 of Bryan Baynham.

4. The class of persons able to apply for an order under section 19 of the *Act* includes the author of the allegedly defamatory report or article.

*Gill v. Pacific Newspaper Group Inc.*, 2006 BCSC 650 [*Gill*];  
and see *Brown on Defamation*, Vol. 5, Loose leaf (Toronto: Carswell, 1999) at 17-266.

5. Under the materially identical legislative equivalent in Ontario (R.S.O. 1990 c. L. 12, s. 12(1)), the court will not order the plaintiff to give security for costs unless the defendant shows by affidavit:

- (a) the nature of the action and of the defence;
- (b) that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a verdict or judgment is given in favour of the defendant; and
- (c) either

- (i) that the defendant has a good defence on the merits and that the statements complained of were made in good faith, or
- (ii) that the grounds of action are trivial or frivolous.

*Khan et al. v. Metroland Printing, Publishing & Distributing Ltd. et al.*  
(1995), 253 D.L.R. (4th) 265 (O.C.A.) at para. 29.

6. In an application brought pursuant to section 19 of the *Act*, the plaintiff must establish that there is “no arguable defence” in order to resist an application for security for costs.

*Gill* at para. 19.

7. Affidavit evidence that the allegedly defamatory statements are not defamatory of the plaintiff satisfies the defendant’s obligation to show that the grounds of action are trivial or frivolous.

*Robinson v. Mills* (1909), 19 O.L.R. 162 (S.C.J.) at 169.

8. Robinson’s Affidavit #1 satisfies section 19(1) of the *Act*:

- (a) As to the nature of the action, Robinson attaches the NCC (Exhibit B).
- (b) As to the defence and its merits, Robinson attaches her response to civil claim (Exhibit C).
- (c) As to the sufficiency (or lack thereof) of the plaintiff’s property, Robinson attaches the plaintiff’s list of documents (Exhibit G), which omits tax returns, T-4s, payslips or other evidence of property sufficient to answer the costs of this action in case a verdict or judgment is given in Robinson’s favour. She also attaches a search of the Land Title Office database showing that the plaintiff is not the registered owner of any real estate in this province (Exhibit F).

- (d) As to the good faith in which the allegedly defamatory statements were published, Robinson deposes that she “reported the statements complained of by the plaintiff in good faith on the basis of the facts that were provided to me by my sources and the documents which I discovered during my research” (para. 7), which research spanned six months and included dozens of interviews (para. 4).
- (e) As to the frivolousness of the grounds of the plaintiff’s action, Robinson deposes that:
- (i) the statements complained of are not capable of being defamatory of the plaintiff and are, in fact, not defamatory of the plaintiff (para. 9, referring to Exhibit C);
  - (ii) the plaintiff has recently been appointed to the advisory committee of a mining company (para. 10), belying his claims that the Article caused him “grave damage to his character and reputation” (para. 46 of the NCC);
  - (iii) the plaintiff has failed to list documents which show that his anticipated income in 2013 will be materially less than his income in 2012, and that the resultant difference is attributable to the Article; or documents which show that he has suffered a material loss of earning capacity due to the Article (as alleged at para. 48 of the NCC);
  - (iv) the plaintiff’s actions since he filed the NCC are decidedly inconsistent with his allegation that, as a result of the Article, he has “been brought into public scandal and contempt, and suffered... grave damage to his character and reputation” (para. 46 of the NCC); to wit: the plaintiff has never sought injunctive relief to have the Article removed and/or Robinson gagged from repeating its contents (para. 16 to 19); moreover, the plaintiff has discontinued his action against the Georgia Straight, thereby vindicating the newspaper and assuring the Article’s indefinite, continuous publication (para. 14 to 15).

9. The evidence demonstrates that the plaintiff has suffered little if any damage to his reputation and earning capacity due to the Article; moreover, one recognises in the plaintiff's decision to discontinue against the Georgia Straight an acknowledgement that his allegations have no realistic possibility of success at trial and are, thus, frivolous.
10. The plaintiff has also failed to set this matter down for trial. Given the expected duration of the trial, a date will not be available until at least early 2015. His dilatoriness in this regard is inconsistent with his claims of reputational and pecuniary injury specifically, or a meritorious case generally.
11. It is significant that the plaintiff has chosen to cut his losses and pay the Georgia Straight's costs in accordance with Rule 9-8(4). This decision suggests that the plaintiff is possessed of insufficient property to satisfy any order for costs following after trial and/or has an inadequately meritorious case to risk the very significant cost consequences of an unfavourable verdict.

### **The Court's Inherent Jurisdiction**

12. Since 1976, British Columbia has had no rule of court that authorises or governs orders for security of costs against individual plaintiffs.
13. The court's inherent jurisdiction must now be relied upon for such orders.

*Shiell v. Coach House Hotel Ltd.* 1982, 136 D.L.R. (3d) 470 (B.C.C.A.).
14. Section 19 of the *Act* does not oust the court's inherent jurisdiction to order security for costs. These two remedies operate concurrently.

*Gill* at para. 11, citing  
*Sorokin v. Trail Times Ltd.* (1960), 33 W.W.R. 414 at p. 415 (B.C.C.A.).
15. A defendant may obtain such relief pursuant to either or both jurisdictions.

*Gill* at para. 33.
16. And for good reason: section 19 of the *Act* provides for security for costs, but only in limited circumstances and under highly onerous conditions.

17. In cases where security is sought from an individual rather than a corporate plaintiff, the court will make the order where (a) the applicant can establish that she will be unable to recover her trial costs from the plaintiff, and (b) there are special circumstances that warrant the exercise of the court's discretion.

*Bronson v. Hewitt*, 2007 BCSC 1751 at para. 45 to 57.

18. Special circumstances may include a weak claim.

*Han v. Cho*, 2008 BCSC 1229 at para. 27.

19. Even where a defendant cannot establish that the plaintiff's libel claims are trivial or frivolous in accordance with section 19 of the *Act*, a good defence on the merits may provide the necessary special circumstances to warrant the exercise of the court's inherent jurisdiction to order security for costs.

*Gill* at para. 33.

#### **PART 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Laura Robinson, made 15 November 2013; and
2. Affidavit #1 of Bryan Baynham, made 22 November 2013.

The applicant estimates that the application will take 100 minutes.

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

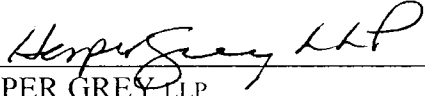
TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (g) file an application response in Form 33,
- (h) 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 proceeding, and



- (i) 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: 22 November 2013

  
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 HARPER GREY LLP  
 (Per Bryan G. Baynham, Q.C.)  
 Lawyer for the defendant, Laura Robinson

Name and address of lawyer:  
**HARPER GREY LLP**  
 Barristers & Solicitors  
 3200 - 650 West Georgia Street  
 Vancouver, BC V6B 4P7  
 Telephone: 604 687 0411  
 Fax: 604 669 9385  
 Attn: Bryan G. Baynham, 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 matter 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

Court File No.: *5128358*  
Court Registry: Vancouver

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HARPER GREY LLP  
Barristers & Solicitors  
3200 - 650 West Georgia Street  
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Telephone: (604) 687-0411

**Attention: Bryan G. Baynham/ts/127406**