

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Powertech Labs Inc. v. Das*,
2023 BCSC 2112

Date: 20230808
Docket: S230262
Registry: Vancouver

Between:

Powertech Labs Inc.

Plaintiff

And:

**Angela Das, Ronald Klopfer, Hyfluence Systems Corp., John Doe, Jane Doe,
and other persons unknown who have conspired with the named Defendants**
Defendants

And:

Powertech Labs Inc.

Defendant by Counterclaim

Before: The Honourable Justice Tammen

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff and Defendant by
Counterclaim:

R.J.C. Deane
M.G. Swanson
B.J. Cabott

Counsel for the Defendants:

J.G. Howard

Place and Dates of Hearing:

Vancouver, B.C.
June 7 and August 8, 2023

Place and Date of Judgment:

Vancouver, B.C.
August 8, 2023

[1] **THE COURT:** In this application, the applicants, who are defendants in the main action but are plaintiffs by counterclaim, seek the following orders:

- a) an interim and interlocutory order that Powertech Labs Inc. (“Powertech”), including its agents and employees, Pierre Poulain in his personal capacity, and Powertech's legal counsel be restrained and enjoined until the trial of this action or in the alternative until the joint hearing on the merits of this application and the Powertech injunction application from directly or indirectly communicating with entities or persons participating in the hydrogen fuel industry, including without limitation:
 - i. other hydrogen fuelling station (“HFS”) operators or purchasers;
 - ii. suppliers to HFS manufacturing companies;
 - iii. potential investors in or government-affiliated funders of Hyfluence Systems Corp. (“Hyfluence”);
 - iv. government agencies charged with developing or promoting clean technology such as hydrogen fuel, including without limitation the BC Centre for Innovation and Clean Energy and the BC Hydrogen office;
 - v. potential purchasers of HFS equipment and systems, including the alleged five customers defined in Powertech's injunction application.;
 - vi. hydrogen industry association and partnerships, including the Canadian Hydrogen and Fuel Cell Association, the Hydrogen Fuel Cell Partnership, and the Hydrogen Council based in Belgium;
 - vii. hydrogen industry event and conference organizers, including the Messe Stuttgart organization, which organizes the Hy-fcell

Conference to be held in Vancouver from June 5–9, 2023, and other similar conferences held in Europe and organizers of other hydrogen industry conferences.;

- viii. other participants in the hydrogen fuel industry, including attendees at the conferences above;

about or in relation to:

- ix. the facts, matters, and claims of Powertech set out in this action, including without limitation:

- 1) Powertech's allegations of wrongdoing against the defendants;
- 2) demands to preserve or provide alleged evidence allegedly in the possession of such parties relating to the action; and
- 3) the alleged content and effect of the interim orders.

- x. the reputation or actions of the defendants Hyfluence, Angela Das, and Ronald Klopfer,

without the prior written consent of counsel for the defendants or leave of the court.

- b) Powertech and its counsel be required to produce to the defendants all communications or correspondence, including texts, emails, and letters to hydrogen industry parties regarding the topics in (ix) and (x) within two business days of the date of this order.

[2] In short, the primary relief sought is a sweeping gag order enjoining the corporate plaintiff, its CEO, Mr. Poulain, and its counsel from discussing the facts giving rise to this litigation with a host of entities and individuals, many of them

prospective witnesses. That application must be and is dismissed. In my view, it was ill conceived. The applicants could never have obtained such an order and should have known as much at the time of filing.

[3] In the main action, the plaintiffs allege conspiracy to divert corporate opportunities, interference with economic relations, inducing breach of contract, and against Ms. Das, breach of fiduciary duties. In their counterclaim, the defendants allege defamation, interference with economic relations, inducing breach of contract, and in the case of Ms. Das, constructive dismissal.

[4] The broad backdrop to all the claims is participation and solicitation of customers in the hydrogen energy field. The use of hydrogen as an automotive fuel source is an emerging industry, and one with a comparatively small number of major players in BC. On May 16, 2023, Powertech obtained an interim interlocutory injunction enjoining the defendants from misusing confidential information and contacting certain Powertech customers. That interim order went by consent, in part based on the defendants' request to adjourn the hearing. The full application has since been argued and decided by Justice A. Ross in reasons indexed at 2023 BCSC 1187, released July 12, 2023.

[5] The application before me was heard over two days—June 7, 2023, after the applicants sought and obtained short leave, and August 8, 2023, because there was insufficient time to complete on June 7. The three main planks of the applicant's claim for injunctive relief are these:

- a) letters sent by Powertech's counsel on January 27, 2023, to at least three potential customers enclosing the notice of civil claim and requesting that they preserve relevant documents in their possession;
- b) Powertech's actions between May 16–June 5, 2023, in seeking to restrict the participation of Ms. Das and Mr. Klopfer in a panel presentation at a hydrogen industry conference being held in Vancouver the week of June 5, 2023; and

- c) Mr. Poulain's communications with an organization called the Canadian Hydrogen and Fuel Cell Association advising them of the litigation, stating that Powertech had won the injunction application on May 16, 2023 and suggesting that Hyfluence should be denied membership in the association.

[6] The applicants have failed to establish any of the prerequisites for obtaining injunctive relief, namely:

- a) a serious question to be tried;
- b) irreparable harm; and
- c) that the balance of convenience tilts in favour of the injunction.

[7] Because the main claim of the defendants is defamation and they seek to curtail the right to free speech, the first of these prerequisites is, in fact, stricter than the standard “serious question to be tried”. The Court should only grant the relief where the words are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal.

[8] Here, the claims of defamation are not at all obvious, and there are potential defences which might prevail. With respect to the communications of Powertech and its representatives, justification and qualified privilege are advanced as defences. With respect to the preservation letters, an extremely strong case of absolute privilege is apparent on the record.

[9] Counsel for the plaintiff sent those letters in the context of counsel for the defendants expressly stating in email communications that his clients were deleting relevant documents from their computers and other electronic devices. It is hardly surprising that counsel for the plaintiffs sought to have third parties thus preserve documents in their possession, including relevant communications with the defendants. There was certainly nothing improper in counsel enclosing a copy of the notice of civil claim with the letters.

[10] With respect to irreparable harm, the applicants have not persuaded me that any claim they might prove at trial could not be quantified in monetary damages. Nor am I persuaded that there was on June 7, 2023 or is now cogent evidence of likelihood of imminent future harm through repetition of any tortious conduct.

[11] With respect to the balance of convenience, given the broad proscription on free speech that was sought, it weighs overwhelmingly against granting the injunction. Stripped to its core, the relief sought would prevent the plaintiff and its counsel from discussing this litigation with a broad segment of the industry until the case concluded.

[12] As for item 4, immediate production of certain documents, I am not persuaded that there is any need for such an order. Document disclosure can occur in the normal course of this litigation, and if there is a failure to comply with a discrete request or demand, the defendants may bring such applications as they deem necessary.

[13] That leaves for consideration the issue of costs. The application respondent has been wholly successful and is entitled to costs of this application. Those costs will be in any event of the cause payable forthwith.

[14] Because the application was made on short leave and Powertech was forced to prepare its responding material on a very short timeline, I award them costs at Scale C for the entire application, with one exception. That is that part of the application related to the preservation letters, which sought to enjoin the conduct of Powertech's counsel. For that portion of the application, I award special costs to be assessed, if necessary, by the registrar. All costs are payable forthwith.

“Tammen J.”