

**CITATION:** Asselin v. McDougall, 2013 ONSC 1716  
**COURT FILE NO.:** 12-56054  
**DATE:** March 25, 2013

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Michel Asselin

Plaintiff

– and –

Matthew McDougall and Moviemat  
Entertainment Ltd.

Defendants

)  
)  
)  
) William R. Hunter, for the Plaintiff  
)  
)  
)

)  
) Jeff G. Saikaley, for the Defendants  
)  
)  
)

)  
)  
) **HEARD:** March 14, 2013

**REASONS FOR DECISION**

**TOSCANO ROCCAMO J.**

**Nature of Proceedings**

[1] The Plaintiff, Michel Asselin, moves for an interim injunction against the Defendants, Matthew McDougall and Moviemat Entertainment Ltd. (“Moviemat”), and for an order validating service upon the Defendants of a notice letter under the *Libel and Slander Act*, R.S.O. 1990, c. L. 12, delivered to the Defendants by leaving copies at Moviemat, located at 785 O’Brien Road, Renfrew, Ontario.

[2] Mr. Asselin has sued the Defendants for defamation under the Simplified Procedure in respect of two videos and comments generated by the Defendant McDougall and others on YouTube in relation to the videos.

[3] At the hearing of the motion, counsel for Mr. Asselin advised that his client really has no quarrel with the contents of the two videos, but takes issue with the commentary of the Defendant McDougall and others posted on YouTube.

[4] In addition, at the hearing of the motion, the Defendants conceded that the notice letter delivered to the Defendants, at their place of business, met the requirements in s. 5 of the *Libel and Slander Act*.

[5] The Defendants have served a statement of defence and a jury notice. Their pleadings assert a number of defences, including qualified privilege, fair comment, and responsible communication. The Defendants have also pleaded that the statements complained of were made by the Defendant McDougall in good faith and in the exercise of his constitutionally protected freedom of expression. The Defendants specifically pleaded that they are not responsible for the statements made by others.

[6] To date, the Plaintiff has not taken action against YouTube or the others who posted comments on the Defendants' YouTube channel.

## **Factual Background**

### **The Parties to the Litigation**

#### ***The Plaintiff***

[7] The Plaintiff, Michel Asselin, is the Director of Development and Works for the Town of Renfrew. He has been employed in this position since September 2005. The scope of his work as Director of Development and Works includes: directing and overseeing the development of engineering and capital works functions; project management; supervising the planning function and building codes; developing policies/standards; legislative compliance and reporting; and leading a team of employees in the construction and maintenance of infrastructure.

#### ***The Defendants***

[8] The Defendant, Matthew McDougall, is the sole owner and proprietor of Moviemat. Moviemat has been in operation in Renfrew since 1991, and is primarily in the business of selling pornographic videos and merchandise.

[9] Mr. McDougall also operates the YouTube channel, “Moviemat.com” and is the owner of the alias “moviematcanada.” The YouTube channel was used to post the comments by Mr. McDougall and others which gave rise to these proceedings.

Moviemat’s Move and the YouTube Videos

[10] In early 2012, Moviemat planned to move its operations from 213 Argyle Street South, Renfrew, Ontario, to 785 O’Brien Road (“the Property”). This new location is in the heart of the Town of Renfrew, in proximity to commercial and touristic venues.

[11] Mr. McDougall commenced repair work on the Property on or about June 20, 2012. On July 25, 2012, Chief Building Inspector Murray Gahan entered the Property, advising the Defendant McDougall that he needed a building permit (“the Permit”) to complete his repair work for the Property. On July 26, 2012, the Defendant McDougall submitted a Building Permit Application, with respect to the Property.

[12] On the week of July 30, 2012, Mr. Gahan advised the Defendants that, in addition to the Building Permit Application, they would need to file a site plan in order to obtain the permit. The Plaintiff submits that, pursuant to s. 41 of the *Planning Act*, R.S.O. 1990, c. P.13, the establishment of the retail business at the Property was a new development and was, therefore, subject to Site Plan Control.

[13] Mr. McDougall met with the Town’s Planner, Julie Stewart, regarding the necessity of a site plan and were informed that a Site Plan Agreement was unnecessary as the Defendants were not planning any development for the property that could trigger application of the *Planning Act*.

[14] By letter dated August 24, 2012, the Plaintiff overrode the decision of Ms. Stewart and advised the Defendants that the establishment of the Defendants’ retail business was considered new development and was, therefore, subject to a Site Plan Control. The Plaintiff also advised the Defendants that a site plan application had already been commenced in 2004/2005 that could

be reopened without requiring an additional application fee. The Defendants neither reopened the existing site plan application, nor made a new application.

[15] On October 26, 2012, the Town's employee, Mr. Gahan, issued a Stop Work Order, ordering the Defendants to "cease construction and obtain a building permit immediately." That same day, Mr. Gahan attended at the Property to post the Stop Work Order. The Defendant McDougall recorded a video of this encounter. On October 27, 2012, this first video and the Defendant McDougall's recorded comments were posted on Moviemat.com YouTube soliciting comments from the viewing public. This video was viewed 2,351 times and approximately 50 comments were posted.

[16] On October 30, 2012, counsel for Mr. Asselin sent a letter to the Defendant McDougall demanding an apology as well as removal of the first video from Moviemat.com YouTube as well as the comments generated by that first video.

[17] On or about November 8, 2012, Defendant McDougall posted a second video to Moviemat.com YouTube updating viewers of the status of his dispute with the Plaintiff and the Town of Renfrew. This video received 1,554 views and approximately 36 comments were posted in response.

[18] The Defendant McDougall also posted links to the documents and other material relied on by the Plaintiff and by the Town of Renfrew including official plans, the site plan and by-laws.

[19] In the course of expressing himself on the videos, the Defendant McDougall expressly stated that what he said was his opinion only, and he invited those among his viewing audience to express their own opinions and to communicate their views directly to the Plaintiff.

[20] Counsel for the Plaintiff approached YouTube requesting that the offending material be removed, only to learn that the Defendants alone could remove the comments or restrict access to them. In subsequent communications, he was informed that, in this case, there had not been any violation of YouTube's policy and guidelines. The policies and guidelines of YouTube were not part of the record before me.

[21] The Plaintiff submits that the two videos and several of the posted comments and, in particular, those of third parties not joined in these proceedings, contain false statements that discredit his personal and professional reputation.

[22] The Defendants submit that they honestly believed that they were being harassed by municipal officials because of their decision to operate a pornography store on the main boulevard of the Town. The Defendants were concerned that public officials were abusing their power by putting up unjustified and unlawful roadblocks to prevent the Defendants from operating their business. The Defendant argues that these matters affect the residents of the Town of Renfrew and are, generally, of public importance.

[23] The Defendants argue that unpopular decisions made by municipal officials can expect to be the “lightning rod” of lively discourse in the public domain.

#### The Allegedly Defamatory Statements

[24] According to the Plaintiff, the comments posted and broadcasted contain serious allegations against the Plaintiff, which suggest that: (1) the Plaintiff is abusing or misusing his authority in his position as Director of Development and Works for the Town of Renfrew; (2) the Plaintiff is incompetent or incapable of doing his job; (3) the Plaintiff should be fired from his job; and that (4) concerned citizens should direct their anger and take action against the Plaintiff.

[25] Some of the comments by the Defendant McDougall on his YouTube channel include statements that the Plaintiff is on a “witch hunt;” that small businesses in the Town of Renfrew who have had to deal with the Plaintiff do not have anything but negative things to say about him; and that it is a wonder that the Plaintiff is still employed.

[26] The Plaintiff also takes issue with the more offensive commentary posted by others under aliases in relation to both videos on Moviemat.com YouTube. These comments were attached to the affidavit of Mr. Asselin in support of this motion, and will not be repeated here.

[27] The Plaintiff argues that the Defendants are liable for all of the comments, including those posted by the unidentified third parties as defamatory attacks in the form of “cyber

bullying,” intended by the Defendants to personally and professionally discredit the Plaintiff in order to avoid having to comply with the requirements of a Site Plan.

**Issues:**

1. Has the Plaintiff met the legal test for an interlocutory injunction in the context of a defamation action?
  - a. Can it be said that the Defendants are liable for publication of statements made by others?
2. Has the Plaintiff established irreparable harm?

**Analysis and Conclusions**

[28] First, it bears repeating that an interlocutory injunction in a claim for defamation is an extraordinary remedy, granted sparingly, in the clearest of cases and only to the extent necessary: *Cameron & Johnstone Ltd. v. 810202 Ontario Inc.*, [1994] CarswellOnt 3349 (O.C.J.), at para. 17; and Peter A. Downard, *Libel*, 2nd ed. (Markham, Ont.: Lexis Nexis Canada Inc., 2010), at 14.04).

[29] The rationale behind the courts’ reluctance to grant an interlocutory injunction for cases in defamation was expressed by Auld L.J., in *Holley v. Smyth*, [1998] 1 ALL ER 853 at 862 (CA Eng)., as follows:

From the earliest days of the Courts’ consideration of their power to grant interlocutory relief in libel cases they seem to have been guided by two associated notions, one of high principle and one of principle and practicality. The first is the importance of protecting the individual’s right to free speech. The second is an acknowledgment that the judges should not, save in the clearest of cases, usurp the jury’s role by restraining at the interlocutory stage publication of a statement that the jury might later find to be no libel or true or otherwise defensible. Sometimes the second notion is expressed in the form that a judge should not interfere unless the evidence before him so clearly establishes a culpable libel that he is confident that he would have to set aside a contrary verdict of the jury as perverse.

[See also: Raymond E. Brown, *The Law of Defamation in Canada*, (loose-leaf consulted on 24 January 2013, 2d ed (Toronto, Ont: Carswell, 1999) ch. 26 at 22-23. Citing *Bonnard v. Perryman*, [1891] 2 CH 269 at 285-286 (CA Eng)].

As Robert Sharpe's treatise, *Injunctions and Specific Performance* (2nd ed. 1992 (loose-leaf)), observes, the Supreme Court of Canada has also affirmed the need for judicial restraint where there is a public interest in information and when a defendant demonstrates an intention to justify his or her statements. See: *Beidas v. Pichler* (2008), 294 D.L.R. (4th) 310 (Ont. Div. Ct.), at para 16; and *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para 49.

The Supreme Court in *Canadian Liberty Net*, at para. 49, and the Divisional Court in *Beidas v. Pichler*, at paras. 16 and 54, citing Robert Sharpe, have also held that:

There is a significant public interest in the free and uncensored circulation of information and the important principle of freedom of the press to be safeguarded.

...

The Internet should not be less free for expression than other media. The Internet may present unique problems and unique challenges but its use does not and should not invite unwarranted restriction of freedom of expression.

### **The Test for an Injunction in Defamation Cases**

[30] The test for an interlocutory injunction in a defamation case is set out in *Canadian Liberty Net*, and was earlier expressed in *Canada Metal Co. v. Canadian Broadcasting Corp.* (1975), 7 O.R. (2d) 261 (Ont. Div. Ct.), at para. 3, as follows:

For at least one hundred years and certainly since the leading cases of *William Coulson and Sons v. James Coulson and Co.* (1887), 3 T.L.R. 846, and *Collard v. Marshall*, [1892] 1 Ch. D. 571 and perhaps above all, in the leading case of *Bonnard v. Perryman*, [1891] 2 Ch. 269, it has been universally and consistently held by British and Canadian Courts that such an interim injunction will never be granted where the defendant expresses his intention to justify *unless the words in question are so clearly defamatory and so obviously impossible to justify that the verdict of a jury accepting a plea of justification as a defence would of necessity have to be set aside as a perverse finding on appeal.*

[Emphasis added]

[31] Griffiths J. in *Rapp v. McClelland and Steward Ltd.* (1992), 34 O.R. (2d) 452 (Ont. H.C.J.), at p. 455, later expressed the test as follows:

The guiding principle then is, that the injunction should only issue where the words complained of are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal. To put it another way where it is impossible to say that a reasonable jury must inevitably find the words defamatory, the injunction should not issue.

[32] Citing *Gatley on Libel and Slander*, 7th ed. (1974), at pp. 23-24, Griffiths J. observed that:

[W]hile the presiding trial judge has the duty to determine whether in law the words complained of are capable of being defamatory of the plaintiff it is the exclusive function of the jury to determine whether they are, under all of the circumstances, in fact defamatory. *The words to be defamatory must be false and the jury must be satisfied that the words in their natural or innuendo meaning tend to lower the plaintiff in the estimate of right-thinking members of society generally or cause her to be shunned or violated or exposed to hatred, contempt or ridicule.*

[Emphasis added.]

[33] In so doing, Griffiths J. echoed the reasons of Cory J., who held, in *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at para. 62, that defamation includes “a publication which tends to lower a person in the estimation of right-thinking members of society, or to expose a person to hatred, contempt or ridicule....”

[34] I have reviewed the words broadcasted by the Defendant McDougall in the first and second of his video recordings, as well as his comments posted on Moviemat.com YouTube. In these videos, the Defendant McDougall expressed his opinion that the Plaintiff was responsible for the Defendants’ difficulties with the Town of Renfrew. He characterized the treatment of the Defendants as “harassment,” and a “witch hunt.” He said that any small business that has ever had to deal with the Plaintiff has had difficulties, and he questioned how the Plaintiff has kept his job. He added that these were his opinions only, and encouraged others to express their own opinions, and direct their opinion and anger at the Plaintiff.

[35] The Plaintiff contends that the plain and ordinary meaning of the Defendant McDougall’s words suggests that he is abusing his position, is incompetent, should be fired, and that concerned citizens should take action against him.



[36] The Defendants have pleaded their intention to prove and justify Mr. McDougall's statements as expressed in good faith, on the basis of qualified privilege, and as fair comment in keeping with responsible communication and his constitutionally protected right of freedom of expression. The statement of defence adequately sets out the basis for these defences.

[37] On the record before me, insofar as the statements by Mr. McDougall are concerned, the Plaintiff has not met his onus to establish that the statements of opinion of Mr. McDougall are manifestly defamatory and that a jury will inevitably find his words defamatory of the Plaintiff.

**Have the Defendants “Published” Defamatory Comments Made by Others?**

[38] The Plaintiff submits that the Defendants have generated defamatory comments from contributors to their YouTube channel who use the aliases “Laurence Robert,” “FirstWavePureSoul,” “Cindy Renfrew,” “Jake Olson,” “Lauren6470,” and “TheMr.WV.”

[39] While it may be argued, on the Plaintiff's behalf, that a number of these comments are capable of being defamatory in that they contain serious allegations which, by their plain and ordinary meaning, describe him as a disgusting individual, worthy of scorn and ridicule, and incapable of doing his job as Director of Development and Works for the Town of Renfrew, an issue arises as to whether or not the Defendants manifestly defamed the Plaintiff by maintaining a YouTube channel including the defamatory statements of others.

[40] As previously noted, not only did the Defendant McDougall express his opinions as being merely his own, he has also pleaded that he is not responsible for the statements of others. In *Crookes v. Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269, the Supreme Court of Canada examined what constitutes publication in the mass media on the Internet. While that case considered whether an article published by the Defendant, which contained hyperlinks to other websites containing defamatory material, thereby amounted to publication by the Defendant of the defamatory material, the reasons of the majority suggest that the hyperlinks would constitute publication if, read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to. The court found a mere general reference to a website is not enough to amount to publication.

[41] Concurring in the result, Deschamps J. observed as follows, at paras. 85-86:

There appears to be an emerging consensus among the courts and commentators that only *deliberate acts* can meet the first component of the bilateral conception of publication. According to Prof. Brown, “a person must knowingly be involved in the process of publishing the relevant words” (para 7.4 (emphasis added)). In *Stanley v. Shaw*, 2006 BCCA 467, 231 B.C.A.C. 186, pleading that the defendants “said and did nothing” (at para. 7) was held to be insufficient to support a finding of publication, because no tortious act had been alleged in relation to their silence (see also *Smith v. Matsqui (Dist.)* (1986), 4 B.C.L.R. (2d) 342 (S.C.), at p. 355; *Wilson v. Meyer*, 126 P.3d 276 (Colo. App. 2005), at p. 281 (“[a] plaintiff cannot establish [publication] by showing that the defendant silently adopted a defamatory statement”); *Pond v. General Electric Co.*, 256 F.2d. 824 (9th Cir. 1958), at p. 827 (“[s]ilence is not libel”); Brown, at para. 7.3 In *Scott v. Hull*, 259 N.E.2d. 160 (Oh. App. 1970), at p. 162, a U.S. court held that “[l]iability to respond in damages for the publication of a libel must be predicated on a positive act, on something done by the person sought to be charge”. I agree with this view.

A deliberate act may occur in a variety of circumstances. In *Byrne v. Deane*, [1937] K.B. 818 (C.A.), the defendants, proprietors of a golf club, were found to have published the words contained on a piece of paper that was posted on premises over which they held complete control. The defendants admitted to having seen the paper, but denied having written it or put it there. Although the words were ultimately found not to be defamatory, Greene L.J., concurring on the issue of publication, concluded that there are circumstances in which, by refraining from removing or obliterating defamatory information, a person might in fact be publishing it (at p. 838):

The test it appears to me is this: having regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?

[Emphasis in original.]

[42] The law is far from settled as to whether or not circumstances such as those before me would constitute publication of defamatory content by the Defendants. In my opinion, I would be intruding upon the domain of the jury to assume, on a limited record, that the Defendants would inevitably be found liable in defamation for the comments of others. It is for the jury to find that the Defendants deliberately adopted and endorsed the opinion of others, having regard to all of

the circumstances, including the involvement of others who made comments of a defamatory nature against the Plaintiff and that of YouTube.

### **Irreparable Harm**

[43] In a defamation case, the moving party seeking an interlocutory injunction must prove irreparable harm. The onus will not have been met if the harm alleged is speculative, not readily determinable, or can be adequately compensated by an award of damages: *Rapp*, at para. 12; and *Beidas v. Pichler*, at paras. 26-27.

[44] The Plaintiff contends that he has and will continue to suffer irreparable harm if the videos and comments are posted to the Internet, are readily reviewable around the world, and mirrored on other sites. He argues that the damage to his reputation, both professionally and personally, is being perpetuated by the accessibility of the videos and comments, and the ability of others to post the videos on different websites.

[45] He relies on the case of *Busseri v. John Doe*, 2012 ONSC 5385 (Sup. Ct.), at para. 26, where an interim injunction was granted on an undefended action and motion. In that case, Goldstein J., at para. 26, specifically found evidence of irreparable harm where:

[The statements] have been viewed over 500,000 times. The extent to which the posts have been disseminated further is unknown and unknowable. Mr. Busseri will have enormous difficulty countering them. The posts have generated concern among Route 1 shareholders, analysts and the financial industry in general. Individuals have raised the allegations in the posts directly with Mr. Busseri. Route 1 shareholders have contacted Mr. Busseri as a result of the posts in order to express concern about them. Mr. Busseri has obvious and legitimate concerns that the posts will generate further baseless discussion and further harm his reputation at the Route 1 annual general meeting.

[46] In *Busseri*, the statements were found irreparable as they harmed Mr. Busseri's prospects of being retained as CEO during an annual general meeting of shareholders, a meeting which would take place long before the matter could proceed to trial.

[47] In the case before me, I have not received evidence from the Plaintiff's employer or colleagues that the statements could place his job in peril. To the contrary, the Town of Renfrew has supported the Plaintiff in these proceedings.

[48] In addition, while the Plaintiff attests to the fact that some of the commentary encourages the public to pry into his personal activities and finances, thereby causing emotional upset to him and his family, I am left to speculate as whether or not this has in fact occurred.

[49] The videos in the case at bar have been viewed 2,351 and 1,544 times respectively, as compared to the 500,000 or more views in the *Busseri* case. Further, it is important to note the videos in this case received comments supporting *both* sides of the debate, and that on their YouTube channel, the Defendants specifically provided links to the documents relied upon by the Town of Renfrew and the Plaintiff.

[50] Finally, it must be observed that the action has been commenced in the Simplified Procedure. The Defendants also have an interest in property or the proceeds of sale of such property in the Town of Renfrew, and an e-mail exchanged with the Plaintiff's counsel on December 5, 2012 advises that he has no intention to file bankruptcy to avoid a judgment in this action.

[51] In all of these circumstances, I am not satisfied that any harm suffered by the Plaintiff, for which the Defendants may be found liable, would not be adequately compensated by an award of damages.

### **Conclusion**

[52] The motion for an interim injunction requiring the Defendants to remove all videos and comments from YouTube that mention or refer directly or indirectly to the Plaintiff is hereby dismissed.

[53] In accordance with the agreement between counsel, an Order is granted validating the service of the notice letter to the Defendants under the *Libel and Slander Act*.

### **Costs**

[54] In the e-mail communications between the parties which were put before me by the Plaintiff, I note that the Defendants had temporarily marked all or part of the videos and comments private, limiting access to only those specifically authorized by the Defendants. The e-mails also reflect the fact that the Defendants were prepared to permanently delete the videos and

comments from YouTube to resolve the matters between the parties. The Defendants later restored the videos and posts to their public domain when counsel for the Plaintiff advised that the motion for injunctive relief would proceed and that he would seek legal costs of between \$12,000 and \$13,000.

[55] The Defendants are entitled to their costs for preparation and attendance on this motion and for reasonable costs for preparation and appearance before Smith J., on December 7, 2012, and before Hackland R.S.J., on January 25, 2013.

[56] If the parties are unable to arrive at an agreement on costs within 30 days, I will receive written submissions of no more than ten pages in length from the parties. The Defendants may deliver a reply to the Plaintiff's submissions of no more than five pages in length within 15 days thereafter.

---

Madam Justice Toscano Roccamo

**Released:** March 25, 2013

**CITATION:** Asselin v. McDougall, 2013 ONSC 1716

**COURT FILE NO.:** 12-56054

**DATE:** March 25, 2013

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Michel Asselin

Plaintiff

– and –

Matthew McDougall and Moviemat Entertainment Ltd.

Defendants

---

**REASONS FOR DECISION**

---

Madam Justice Toscano Rocco

**Released:** March 25, 2013