CITATION: Rainy River v. Olsen, 2016 ONSC 8009
COURT FILE NO.: CV-16-0013
DATE: 2016-12-20

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
The Corporation of the Town of Rainy River and Deborah Ewald	)	
	)	
	)	
	)	
Applicants	)	*Mr. Alan D. McKitrick*, for the Applicants
	)	
- and -	)	
	)	
	)	
Paul Olsen	)	
	)	
	)	
	)	
Respondent	)	Paul Olsen not appearing
	)	
	)	
	)	**HEARD:** at Fort Frances September 23, 2016 and by teleconference on October 25, 2016, at Thunder Bay, Ontario

Madam Justice H.M. Pierce

Reasons on Application

Introduction

[1] The respondent, Paul Olsen, is a citizen of the town of Rainy River. Although he was properly served with this application, he declined to appear at the initial hearing when the application was first argued at Fort Frances, or subsequently when additional submissions were heard by teleconference, even though he was granted leave to appear by teleconference. He filed no materials in response to the application.

[2] The Corporation of the Town of Rainy River, and the town's mayor, Deborah Ewald, apply for declaratory and injunctive relief as follows:

> 1) a declaration that Mr. Olsen has brought the Violence Free in the Workplace Policy and the Harassment Policy of the applicant into play, in accordance with the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended such that the applicant has a duty to protect its workers pursuant to the terms of the Act;
>
> 2) an interim, interlocutory and permanent order restraining Mr. Olsen from communicating with, disseminating, posting on the internet or publishing directly or indirectly any information about Deborah Ewald or any other town councillor, employee or agent without a further order of the court;
>
> 3) an interim, interlocutory and permanent order restraining Mr. Olsen from disseminating, posting on the internet or publishing in any manner whatsoever directly or indirectly, any statements or comments about Deborah Ewald or any other town councillor, employee or agent that are defamatory and/or made with malice or ill-will;
>
> 4) an interim, interlocutory and permanent order restraining Mr. Olsen from harassing in any manner whatsoever, directly or indirectly, Deborah Ewald or any other town councillor, employee or agent;
>
> 5) an interim, interlocutory and permanent order restraining Mr. Olsen from sending, directly or indirectly, any e-mail or series of e-mails to the town, Deborah Ewald or any other town councillor, employee, or agent that is, in whole or in part, malicious vexatious, harassing, defamatory and/or abusive; and
>
> 6) an interim, interlocutory and permanent order restraining Mr. Olsen from maintaining or purporting to maintain without permission or authority from the town, any town property, including any municipal streets, sidewalks and road allowances.

[3] There is no claim against Mr. Olsen for damages for defamation.

[4] As this is the first return of the application, I will deal with the matter on the basis that an interlocutory injunction is being sought.

[5] The Corporation of the Town of Rainy River has about 641 residents. Deborah Ewald is the town's mayor. She receives a modest stipend for acting in this capacity. Mayor Ewald is employed full-time at the Northwestern Health Unit, which is not a service sponsored by or associated with the town.

[6] Mr. Olsen is interested in horticulture and town beautification. Beginning in 2012, before he moved to Rainy River, he began writing to the mayor and council with his ideas about community services. The following year, he wrote about agricultural concerns. In 2014, he wrote about community beautification and gardening.

[7] Although the chief administrative officer responded to his letters and e-mails, by 2014, Mr. Olsen grew increasingly abrasive when the town council did not adopt the programs he suggested. He complained to the Ministry of Municipal Affairs about what he deemed to be incompetent management of the town's affairs. His communications with the mayor and council and the coordinator of the community gardening program became increasingly sarcastic and insulting throughout 2014.

[8] In addition, the applicants complain that, on June 6, 2014, Mr. Olsen attended at Ms. Ewald's workplace at the Health Unit, yelled at her and engaged in verbal harassment in a loud, aggressive tone. His comments concerned town business. Although the mayor offered to meet him at the town office in order to discuss his concerns, he did not accept this offer. The mayor has not spoken to him since that time.

[9] Late in 2014, it came to the town's attention that Mr. Olsen had removed mud and grass from the edge of the sidewalk and deposited it on the road allowance. The town viewed this as a nuisance, creating an obstruction on the roadway and in roadside parking areas. The town wrote

to Mr. Olsen, demanding that he cease this conduct, which caused the town time and money to correct.

[10] Seemingly as a provocation, Mr. Olsen sought permission from the town to clear snow from the town's sidewalks. Permission was refused.

[11] In 2015, the tenor of Mr. Olsen's communications continued to be critical and sarcastic. He complained about the delay in posting minutes of council meetings; he complained about beautification issues; he complained about signs that were blown over or obsolete; he complained about a memorial donation the town made to the Royal Canadian Legion.

[12] By 2016, when Mr. Olsen didn't get the response he hoped for from his e-mails, he complained to the Ombudsman's Office which did not credit the complaint.

[13] By the summer of 2016, Mr. Olsen wrote to town council to complain about the mayor's conduct with another individual that he alleged took place three years previously. He was not involved in the situation. The chief administrative officer of the Rainy River District Social Services Administrative Board confirmed that his allegations were untrue. A business owner also refuted Mr. Olsen's allegation that the mayor had been "banned" from attending at her business.

[14] Mr. Olsen also complained in an e-mail about the town's lawyer writing him a warning letter, and made several pejorative statements about the mayor. More recently, he has directed contemptuous letters to the court.

[15] The heart of the complaint against Mr. Olsen is that he has directed defamatory and abusive e-mails to the town and others, generally about the mayor and the town's administration. The applicants allege that he wrote to the Premier about the "unprofessional conduct of the town"

and sent malicious and defamatory e-mail about the mayor to her employer and to the Ministry of Municipal Affairs.

[16] Mr. Olsen disseminated offensive information about the mayor to her employer and to the local newspaper that publishes on-line and in-print. The newspaper declined to print these allegations.

[17] The applicants are concerned that Mr. Olsen's conduct is escalating, such that he is becoming more aggressive, threatening, erratic and unpredictable. Efforts by the Ontario Provincial Police and the town to deter him have been unsuccessful. Cease and desist letters from the town's solicitors have produced more vitriolic responses from Mr. Olsen about the mayor. The applicants are concerned that he will target town councillors or others associated with the town.

[18] The applicants' factum concludes,

> Since that date, Mr. Olsen has continued to send vexatious and harassing e-mails to the town and it is unknown what he may do next or when his next attack will occur.

[19] In addition to Mr. Olsen's abusive behaviour, the town complains about his unauthorized highway "maintenance." This included "repairing" potholes by putting mud and grass in them, with the result that town employees had to remove this material.

The Legal Framework

[20] The applicants submit that s. 32.0.1(1) of the *Occupational Health and Safety Act* requires municipalities to prepare a policy with respect to workplace violence and workplace harassment. Section 32.0.2(1) of the Act requires an employer to "develop and maintain a program to implement the policy with respect to workplace violence." Fortunately, when this matter was

argued, Mr. Olsen had not engaged in any violence. Rather, his behaviour could be characterized as disruptive, abrasive, and sarcastic. Accordingly, the town's obligation under the Act to deal with workplace violence does apply on the facts of this case.

[21] The applicants contend that the mayor fell within the definition of "worker" under the Act, triggering the town's obligation to protect her from workplace harassment as required by the Act. The relevant definition of "worker" is defined in the Act at s. 1(1) as follows:

> "worker" means any of the following, but does not include an inmate of a correctional institution or like institution or facility who participates inside the institution or facility in a work project or rehabilitation program:
>
> 1. A person who performs work or supplies services for monetary compensation.

[22] A "workplace is defined at section 1(1) of the Act as follows:

> "workplace" means any land, premises, location or thing at, upon, in or near which a worker works.

[23] "Workplace harassment" is defined in s. 1 (1) of the Act as:

> (a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or
> (b) workplace sexual harassment.

[24] No sexual harassment is alleged in this case.

[25] Section 32.0.6(1) of the Act, as amended, states:

> An employer shall, in consultation with the committee or a health and safety representative, if any, develop and maintain a written program to implement the policy with respect to workplace harassment required under clause 32.0.1(1)(b).

[26] The town developed a written policy dealing with workplace harassment. The policy defines "harassment" as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome."

[27] The policy also defines "bullying" as,

> Typically a form of repeated, persistent and aggressive behavior directed at an individual or individuals that is intended to cause, or ought reasonably to be known to cause fear and distress and/or harm to another person's body, feelings, self-esteem, or reputation. Bullying occurs in a context where there is a real or perceived power imbalance.

[28] An example of bullying described in the policy is "criticism that is persistent and non-constructive" and includes false allegations of incompetence.

[29] The town's policy further defines "workplace" as,

> … all locations where business or social activities of the Corporation are conducted. Workplace harassment/bullying may also include incidents that happen away from work (i.e. unwelcome phone calls or visits to a person's home if both the harasser and the victim of the harassment are employees of the Corporation and the incident poisons the workplace).

[30] The applicants submit that a municipality may seek relief for contravention of any of its by-laws, pursuant to s. 440 of the *Municipal Act, 2001,* S.O. 2001, c. 25. That section provides:

> 440. If any by-law of a municipality or by-law of a local board of a municipality under this or any other Act is contravened, in addition to any other remedy and to any penalty imposed by the by-law, the contravention may be restrained by application at the instance of a taxpayer or the municipality or local board. 2006, c. 32, Sched. A, s. 184.

[31] The applicants also submit that a general injunction is available by way of relief pursuant to s. 101 of the *Courts of Justice Act,* R.S.O. 1990, c. 43. Among other relief, that section permits the Superior Court of Justice to grant an interlocutory injunction or mandatory order where it appears to the court that it is "just or convenient" to do so.

[32] Section 97 of the *Courts of Justice Act* also empowers the court to grant declaratory relief even if no consequential relief is or could be claimed.

Declaratory Relief

[33] In this case, the applicants seek a declaration that Mr. Olsen has, by his conduct, triggered the application of the town's violence-free workplace policy, as well as its harassment policy. In my view, the facts do not support that violence has occurred or is likely to occur in the workplace. There is just one allegation that Mr. Olsen verbally harassed the mayor during an encounter at her workplace in the Health Unit in 2014. The mayor has not spoken to him since that time.

[34] This leaves the claim that the town's policy against harassment in the workplace has been triggered. Mr. Olsen does not work in either the mayor's workplace at the Health Unit, or at the municipal office. It is doubtful that the scope of the harassment policy as prescribed by the Act was ever intended to apply to persons who are not part of the workplace.

[35] By inference, the definition of "workplace" in s. 1(1) of the Act relates to a setting that is under the control or direction of the employer. The town's policy further narrows the application of the policy when harassment occurs outside the workplace. In those circumstances, the policy applies to harassing phone calls and visits to a person's home only if the harasser and the person being harassed are employees of the town *and* the incident poisons the workplace. In this case, Mr. Olsen is not a co-worker; accordingly, the policy does not apply. In my view, the facts of this case do not call for a declaratory order. The application for a declaration is therefore dismissed.

Injunction

[36] For the reasons that follow, I am not persuaded that it would be "just and convenient" to grant an interim injunction in this case.

[37] The test for granting injunctions is found in *RJR – MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, para. 48. In analyzing the factors, the court must balance the enforceability of legislation with fundamental rights of individuals. An injunction should be reserved for serious cases.

[38] Dealing with the test, the applicant must show that:

> 1) there is a serious question to be tried;
> 2) the litigant who seeks the interlocutory injunction would suffer irreparable harm unless the injunction is granted; and
> 3) the balance of inconvenience as between the parties favours granting an injunction pending a decision on the merits.

[39] Unfortunately, the applicants did not develop this analysis during oral argument.

Is there a serious issue to be tried?

[40] The first factor to be considered in *RJR – MacDonald* is whether there is a serious question to be tried. This is a low threshold: paras. 54 – 55. The judge on the application must make a preliminary assessment of the strength of the plaintiff's case. If the motions judge is satisfied that the application is not frivolous or vexatious, he or she should consider the next branch of the test.

[41] Assuming, without deciding, that the policy does apply to Mr. Olsen's conduct, did Mr. Olsen harass the mayor in a workplace that falls under the jurisdiction of the town's policy? It is conceded that the Health Unit is not an agency of the town. It is separately administered and is the location of the mayor's full-time employment.

[42] The definition of "worker" in the Act is broad, in order to capture a variety of work arrangements, including volunteer placements. If the application is granted, the town's policy against workplace harassment would in effect, be imported to the Northwestern Health Unit where Mr. Olsen harassed the mayor during her work day.

[43] There is no evidence whether the Health Unit also has a non-harassment policy for its workplace, and if so, what the content of that policy might be. To apply the town's policy to the Health Unit would cause confusion and uncertainty about overlapping or conflicting policies and potentially interfere with the administration of the Health Unit. Which policy applies to the workplace? Who administers that policy? Who has jurisdiction over the employees while they are at and subject to the control and supervision of the Health Unit?

[44] The applicants cite the case of *Blue Mountain Resorts Ltd. v. Bok,* 2013 ONCA 75; 114 O.R. (3d) 321 in support of their argument. In *Blue Mountain*, a guest at the resort drowned in an unattended swimming pool owned by the resort. His death was not a result of anything employees did or did not do. The issue on appeal was whether the death must be reported as a death or critical injury in the workplace pursuant to s. 51(1) of the *Occupational Health and Safety Act.* Setting aside the decisions below, the Court of Appeal determined that in order for a death of an individual who is not a "worker" (as defined in the Act) to be reportable,

> there must be some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at that site.

[45] The court held that public welfare legislation is remedial legislation, often drafted in very broad terms because it is drafted to promote public safety and to prevent harm in a broad range of circumstances. Nevertheless, the court cautioned that a generous interpretation of public welfare statutes "does not call for a limitless interpretation of their provisions…:" para. 26.

[46] At para. 27, the court continued:

> One of the problems with what is otherwise an understandable approach to the interpretation of public welfare legislation is that broad language, taken at face value, can sometimes lead to the adoption of overly broad definitions. This can extend the reach of the legislation far beyond what was intended by the legislature and afford the regulating ministry a greatly expanded mandate far beyond what is needed to give effect to the purposes of the legislation.

[47] By analogy, this is such a case. If the town's policy extends to protect the mayor from harassment even when she is working pursuant to the instructions and control of another employer, the reach of the town's policy regarding workplace harassment extends much beyond that intended by an admittedly broad definition of "workplace."

[48] The strength of the applicants' case is open to question. I am not persuaded that there is a serious case to be tried.

If the interlocutory injunction is not granted, will the applicant suffer irreparable harm?

[49] The second branch of the test is whether the applicants will suffer irreparable harm if an injunction is not granted.

[50] "Irreparable harm" is discussed at para 64 of *RJR - MacDonald*. It refers to the nature of the harm suffered, rather than its magnitude. The court observed:

> It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other…. The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration [citation omitted].

[51] In this case, there is no evidence that the mayor or members of council will suffer irreparable harm if the injunction is not granted. Although Mr. Olsen attempted to have defamatory allegations published, the local newspaper did not accept his submission. Instead, the

newspaper published an editorial reminding readers of its policy against publishing libelous material.

[52] As well, there is no evidence that either the Ombudsman or the Ministry of Municipal Affairs took Mr. Olsen's complaint seriously. As well, there is no evidence that the mayor or members of council have had their reputations damaged by Mr. Olsen's fulminations. Ms. Ewald was a member of council from 2003 – 2006 and served as mayor since 2006, having twice been acclaimed. Although Mr. Olsen may be a vocal and unpleasant part of civic life, there is no evidence that anyone takes his comments seriously.

[53] An injunction is an intrusive order; it should be used sparingly, in accordance with the test formulated by the Supreme Court of Canada. In this case, I am not satisfied that simpler measures have been tried to control Mr. Olsen's behaviour.

[54] While the town has sent Mr. Olsen a warning letter from its solicitors, and has asked the police to intervene (apparently unsuccessfully), there is no evidence that a trespass notice has been sent, or that his e-mails have been blocked or that obnoxious letters have been returned without a response. There is no evidence that the mayor or councillors have refused to deal with Mr. Olsen until he behaves civilly. There is no evidence that the mayor has applied for a peace bond. An action in defamation has not been commenced.

[55] Thus, the record does not support that the applicants will suffer irreparable harm if an injunction is not granted.

What is the balance of inconvenience as between the parties if an injunction is or is not granted pending a decision on the merits?

[56] Finally, the court must assess the balance of inconvenience as between the parties if an injunction is or is not granted. This requires balancing the public interest with that of the opposing party in cases involving constitutional issues.

[57] At para. 76 of *RJR - MacDonald,* the court held that in cases involving the *Charter of Rights and Freedoms,* where a public authority is involved, there is a lower onus to demonstrate irreparable harm to the public interest than that required by a private applicant. The court explained:

> In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoyed. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[58] This case is not a *Charter* case in which the application of policies to prevent workplace harassment is challenged by Mr. Olsen; therefore, the onus on the applicants is that of a private applicant.

[59] The applicants rely on the case of *Astley v. Verdun,* 2011 ONSC 3651 in which an injunction to prevent the defendant from making defamatory statements was sought after a jury found that defamation had occurred. A permanent injunction prohibiting the defendant from making further defamatory statements was granted. In that case, the court recognized that after there have been findings of defamation, permanent injunctions were consistently ordered to prevent a continuation of the conduct where it is likely that such conduct will otherwise continue,

or where there is a likelihood that the plaintiff will not be able to collect on a judgment for damages. See para. 21.

[60] In my view, *Astley* is distinguishable from the case at bar because the issue under consideration was a permanent injunction after a verdict of defamation. In this case, damages for defamation are not claimed. Even if they had been, there is no final judgment in defamation to ground a permanent injunction.

[61] The applicants also rely on *Barrick Gold Corp. v. Lopehandia,* 2004 CarswellOnt 2258 in arguing that a permanent injunction should issue. The issue in *Barrick Gold Corp.* was the proper amount of damages in the face of defamation on the internet and whether a permanent injunction should issue. The Court of Appeal granted the appeal, increasing the quantum of general and punitive damages and ordered a permanent injunction. This, too, was a final injunction and so on a different footing than the case at bar.

[62] *St. Lewis v. Rancourt,* 2015 ONCA 513, 2015 CarswellOnt 10241, [leave to appeal refused] is another case considering a permanent injunction following a verdict of defamation. At para. 16, the court held that "a broad ongoing injunction is an extraordinary remedy which should be used sparingly."

[63] The record does not support that the applicants will be greatly inconvenienced if an interim injunction is not granted. Apart from the periodic annoyances that correspondence from Mr. Olsen provides, there is no evidence that the town is not functioning in an orderly way in accordance with the *Municipal Act.* Indeed, the evidence is to the contrary: that meetings are held, decisions are made, and the town is being administered.

[64] The applicants have not met their onus with respect to the test for an interlocutory injunction as set out in *RJR - MacDonald.* The application for an interim injunction is therefore dismissed.

Injunction Regarding Repair of Municipal Streets, Sidewalks and Road Allowances

[65] The applicants also seek an interim injunction restraining the respondent from engaging in repair of municipal streets, sidewalks and road allowances.

[66] The claim for this relief stems from an instance in November, 2014 when it came to the town's attention that Mr. Olsen took mud and grass from a municipal road allowance and deposited it onto a travelled portion of Mill Avenue, necessitating a clean-up by the town's public works department. The town wrote a letter to Mr. Olsen requiring that he cease such activity immediately and it appears that he has done so. While Mr. Olsen has on-going complaints dealing with town beautification, it appears that he has not again resorted to self-help. Therefore, there is no evidence of irreparable harm to warrant the granting of an injunction. The application for an interim injunction on this basis is also dismissed.

Costs

[67] The applicants have not been successful in their application for interim relief. Accordingly, they shall bear their own costs.

"original signed by"
The Hon. Madam Justice H.M. Pierce

Released: December 20, 2016

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