Crt file # 00000 -373/14 (Oshawa SCC)

Ontario

SUPERIOR COURT OF JUSTICE

(SMALL CLAIMS COURT)

Between

JOSEPH OTAVNIK JR

Plaintiff
(Responding Party)

-and-

CTVGLOBEMEDIA

Defendant
(Moving Party)

BEFORE: Deputy Judge Elliott Goldstein

APPEARANCES: Joseph Otavnik Jr., self-represented

J. Lefebvre, Lawyer for the Defendant

HEARD: December 15, 2014 and February 20, 2015

REASONS FOR MOTION DECISION

1. This motion is brought by the Defendant under Rule 12.02 of the *Rules of the Small Claims Court*, for an order striking out the Plaintiff's Claim without leave to amend, and in the alternative an order striking out numerous paragraphs of the Plaintiff's Claim because they disclose no reasonable cause of action, and because they are inflammatory, a waste of time, a nuisance or an abuse of the court's process or they may delay or make it difficult to have a fair trial.

2. As the parties submitted a large amount of motion material including several affidavits, and books of authorities filled with numerous cases, I reserved my decision so that these could be reviewed and considered.

The Parties:

3. The moving party, Defendant is named as "CTVGlobeMedia" in the Plaintiff's Claim. However, its correct legal name is "CTV, a Division of Bell Media Inc." (hereinafter "CTV"). CTV is a Canadian corporation that owns and operates multiple television channels in Canada.

4. The responding party, Plaintiff, Joseph Otavnik Jr ("Otavnik") is an individual that resides in Oshawa, Ontario.

The Plaintiff's Claim

5. Otavnik has brought this action against CTV claiming damages for defamation, slander of title, negligent investigation and interference with economic relations arising out of two separate television broadcasts of the program Canada AM by CTV, which occurred in February 2014 and April 2014, respectively.

6. Otavnik also alleges that the defamatory material was rebroadcasted on CTV's website, "The Loop".

7. Otavnik also alleges that the television broadcasts directed people to a website that refers to Otavnik and states that Otavnik and his family has/have engaged in 'tax fraud'."

The Defence:

8. In response to the Plaintiff's claim for **Defamation**, the Moving Party Defendant, CTV, alleges in its Defence, *inter alia*, that:

(a) Otavnik has not identified the words complained of a defamatory in the Plaintiff's Claim;

(b) Otavnik is not mentioned or referred to during either television broadcast and none of the statements made by Sinclair or the host of Canada AM refer to Otavnik;

(c) Otavnik does not own the "Wheel of Life" painting, which was described as being allegedly inauthentic during the first broadcast; <1>

(d) CTV took active steps to portray both sides of the debate over the issue of (alleged) forgeries of Morrisseau's works in the Canadian art market.

9. In response to the Plaintiff's claim for **Slander of Title**, the Moving Party Defendant, CTV, alleges in its Defence, *inter alia*, that:

(a) Otavnik has not pleaded nor particularized his proprietary interest in any piece of Morisseau artwork;

(b) none of the statements made during the broadcasts are capable of injuring Otavnik with respect to any title of a Morrisseau work, in which Otavnik allegedly holds a proprietary interest;

(c) CTV did not broadcast with malice, or with an intention to injure Otavnik, or with any improper motive;

(d) All broadcasts had as their subject an issue of public interest.

10. In response to the Plaintiff's claim for **Negligent Investigation**, the Moving Party Defendant, CTV, alleges in its Defence, *inter alia*, that:

(a) it does not owe Otavnik a duty of care or that a relationship of proximity existed between CTV and Otavnik at the material time;

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1. This painting is the subject matter of the *Hatfield v. Child* case, cited in footnote 2 below.

(b) it breached any standard of care or that its actions or omissions cause the Plaintiff's damage.

11. In response to the Plaintiff's claim for **Interference with Economic Relations**, the Moving Party Defendant, CTV, alleges in its Defence, *inter alia*, that:

(a) the airing of the broadcasts were not intended to injure or cause a loss to Otavnik;

(b) it (CTV) did not interfere with Otavnik's business or livelihood by illegal or unlawful means;

(c) neither the broadcasts, nor any actions or omissions in relation to the broadcasts, were illegal or unlawful;

(d) no third party has actionable claims against CTV in relation to the broadcasts

(e) Otavnik did not suffer any economic loss caused by CTV's actions or omissions towards a third party.

12. CTV also denied that Otavnik has been injured or suffered any of the damages or harm as alleged in the Plaintiff's Claim.

The Facts:

13. The first broadcast, which occurred on February 7, 2014, was on the subject of Canadian painter Norval Morrisseau ("Morrisseau"), a well-known Aboriginal Canadian artist who produced numerous pieces of art.

14. In the past, there have been allegations and lawsuits that some of the paintings thought to be original Morrisseau paintings are fake. Prior to the first broadcast, the concern about possible Morrisseau fakes had already received media coverage from another Canadian

broadcaster, the CBC, and from two national newspapers, the National Post, and the Globe and Mail.

15. CTV asserts that the legacy of Norval Morrisseau, who died in 2007, at age 75, was a matter of public interest because of the serious allegations of fake Morrisseau paintings circulating in the art world for years. In neither of the broadcasts did CTV take a position on the authenticity of any particular Morrisseau painting or other artwork.

16. As stated in paragraph 5 of the Affidavit of Grace Shafran, affirmed November 20, 2014 (the "Shafran Affidavit"), during the first broadcast a guest on the program, Mr. Ritchie Sinclair ("Sinclair") "expressed his opinion that the Wheel of Life painting was not painted by Morrisseau. However, Sinclair conceded that the painting was found to be authentic after a full hearing before a judge. <2> Sinclair did not identify any other specific paintings that he alleged to be fakes during the first broadcast."

17. During the first broadcast Sinclair also discussed his history with Morrisseau, his (i.e., Sinclair's) opinions about the existence of forged Morrisseau paintings and his assertion that Morrisseau did not sign his painting in black with a dry brush."

18. Otavnik alleges in his Plaintiff's Claim that CTV provided Sinclair with a platform to make false statements that "affect(ed) the (market) value of anybody who owns/owned a painting done by the artist (Morrisseau)". Otavnik states he owns "a collection of paintings by Norval Morrisseau" in Otavnik's affidavit sworn February 9, 2015 (at paragraph 16).

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2. *Hatfield v. Child et al*, SC-09-87264 (Toronto Small Claims Court), a March 25, 2013 decision of Deputy Judge Paul J. Martial, which was upheld on appeal to the Divisional Court in *Hatfield v. Child*, 2013 ONSC 7801 (CanLII), a December 17, 2013 decision of The Honourable Justice M.A. Sanderson.

19. The second broadcast by CTV occurred on April 23, 2014 and it focused on the topic of possible Morrisseau fakes in general and in the *Hatfield v. Child et al* case in particular.

20. Unlike the first broadcast, the second broadcast "specifically provided an opportunity for individual on the other side of the *Hatfield v. Child et al* case to speak about the providence of Morrisseau paintings in general and the opinion Sinclair rendered in the *Hatfield v. Child et al* case in particular."

21. In addition, during the second broadcast, one of the guests was the expert, Dr. Singla, who testified in the *Hatfield v. Child et al* case. Dr. Singla stated during the broadcast that "the dry brush signature on the back of the painting Wheel of Life was authentic." This directly contradicted the allegations made by Sinclair.

22. In response to the first broadcast, Otavnik contacted CTV via phone to complain about it on February 7, 2014. Otavnik sent a letter, dated February 23, 2014, to CTV using his Linked-In account, and then both a letter and an email to CTV on March 10, 2014. Otavnik complained about the February 7, 2014 broadcast and requested an apology by CTV to Mr. Morrisseau's family and Mr. Joseph McLeod. Otavnik did not ask CTV to apologize to him (i.e., to Otavnik). (See exhibits D and E to the Shafran Affidavit referred to above.)

23. Nowhere in his Plaintiff's Claim does Otavnik allege that he was libeled. In fact, Otavnik's name was not mentioned during either broadcast.

24. Nowhere in his Plaintiff's Claim does Otavnik plead or particularize his proprietary interest in a specific piece of Morrisseau artwork.

25. However, Otavnik does state in his letter dated March 10, 2014 to Canada AM that "You have slandered my collection. I have donated some of my works of art by Norval

Morrisseau to several Class "A" museums in Canada." (See Exhibit "E" to the Shafran Affidavit, referenced above.)

26. If the Plaintiff donated works of art by Norval Morrisseau to museums, then the Plaintiff no longer owns those pieces of artwork and could not suffer any harm or loss if anyone disparaged said pieces by alleging they were fakes.

27. Otavnik's collection of artwork by Norval Morrisseau was never referred to in either of the two broadcasts.

28. There is no evidence that either of the two broadcasts intended to, or did, cause pecuniary damage to Otavnik or devalue Otavnik's property.

29. In the Supplementary Affidavit of Grace Shafran, affirmed December 11, 2014 (the "Supplementary Shafran Affidavit"), the deponent contradicts the statement made by Otavnik that "the offending material is still open the archives [sic] of 'The Loop' portion of the website."

30. Ms Shafran states in the Supplementary Shafran affidavit that "The Loop is a website owned by Bell Media Inc. It is not administered by CTV but does include materials from CTVNews.ca on its website."

31. Ms Shafran states that the first broadcast was posted on The Loop for a limited period of time, but was removed on or before April 2, 2014 and was not re-posted.

32. Obviously, if the original broadcasts were not defamatory then the archival material that was posted on The Loop, was also not defamatory.

33. In the Plaintiff's Claim, Otavnik pleads that Sinclair, also known as "The Stardreamer", "owns a website that refers to Otavnik and states that Otavnik and his family has/have

engaged in 'tax fraud'". Otavnik claims that this website (referred to in paragraph 7 of the within decision) was brought to the attention of the public by CTV.

The Law and Analysis:

34. Rule 12.02 of the *Rules of the Small Claims Court* reads:

12.02 (1) The court may, on motion, strike out or amend all or part of any document that,

(a) discloses no reasonable cause of action or defence;

(b) may delay or make it difficult to have a fair trial; or

(c) is inflammatory, a waste of time, a nuisance or an abuse of the court's process. O. Reg. 78/06, s. 26.

(2) In connection with an order striking out or amending a document under subrule (1), the court may do one or more of the following:

1. In the case of a claim, order that the action be stayed or dismissed.

2. In the case of a defence, strike out the defence and grant judgment.

2.1 In the case of a motion, order that the motion be stayed or dismissed.

3. Impose such terms as are just. O. Reg. 78/06, s. 26; Reg. 44/14, s. 11 (2).

35. Rule 12.02 was discussed at length in the 2010 case of *Van de Vrande v. Butkowsky* <3>, wherein the Ontario Court of Appeal held:

"[17] There are several important differences between r. 21.01 of the *Rules of Civil Procedure* and r. 12.02 of the *Small Claims Court Rules*.

First, where a rule 21 motion can be brought to strike a pleading, a r. 12.02 motion can be brought to strike any document.

Second, the prohibition on admitting evidence contained in r. 21.01(2) is absent from r. 12.02.

Third, where r. 21.01(3) allows an action to be struck on the very narrow grounds of its being frivolous, vexatious, or an abuse of process, rule 12.02(1)(c) adds the criteria of inflammatory, waste of time, and nuisance.

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3. 99 O.R. (3d) 641 (Ont. C.A.)

[18] Further, r. 12.02 applies in a somewhat different context than the *Rules of Civil Procedure.* Section 25 of the *Courts of Justice Act,* provides that in Small Claims Court proceedings the court is to "hear and determine in a summary way all questions of law and fact." The court can make "such order as is considered just and agreeable to good conscience". In addition, r. 1.03(1) of the *Small Claims Court Rules,* provides that the rules shall be "liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merit in accordance with s. 25 of the *Courts of Justice Act.*

[19] Conceptually, I view r. 12.02 as being situated somewhere between the rules 20 and 21 of the *Rules of Civil Procedure.* It is not a summary judgment motion involving extensive affidavits and a requirement such as contemplated in r. 20 of the *Rules of Civil Procedure* where the responding party must put his "best foot forward". It is more akin to a r. 21 motion, although it is worded more broadly and does not have the same prohibition on the filing of affidavit evidence. It is a motion that is brought in the spirit of the summary nature of Small Claims Court proceedings and involves an analysis of whether a reasonable cause of action has been disclosed or whether the proceeding should be ended at an early stage because its continuation would be "inflammatory", a "waste of time" or a "nuisance."

[20] In my view, the references to actions that are inflammatory, a waste of time, or a nuisance was intended to lower the very high threshold set by r. 21.01(3)(d)'s reference to actions that are frivolous, vexatious, or an abuse of process.

[21] It bears remembering that r. 12.02 motions will often be brought and responded to by self-represented litigants who lack the extensive training of counsel. The test to be applied on such a motion ought to reflect this, and avoid the somewhat complex case law that has fleshed out the *Rules of Civil Procedure.*"

36. In *Camm v. Kirkpatrick* <4> the Ontario Small Claims Court held that "the applicable test for dismissal under Rule 12.02(1) is 'no meaningful chance of success at trial': *O'Brien v. Ottawa Hospital*, [2011 O.J. No. 66 (Div. Ct.)]."

37. Otavnik argued that the test to be applied is "whether it is 'plain and obvious' that the plaintiff's claim discloses no reasonable claim". Otavnik submits that the claim should be struck only if the action is certain to fail because it contains a "radical defect". Otavnik relies on *Hunt v. Carey Canada Inc.* <5>, a British Columbia case based on Rule 19(24) of the *Rules of Court* [British Columbia].

38. In *Shtaif v Toronto Life Publishing Co. Ltd.* <6> the Ontario Court of Appeal held that "the three-month period in s. 6 (of the *Libel and Slander Act*) begins to run when the person defamed knew or could have known about the libel by the exercise of reasonable diligence."

39. Applying *Shtaif*, I find that Otavnik had knowledge of the first broadcast in February 2014. Otavnik contacted CTV by phone on February 7, 2014, and then sent two letters on February 23, 2014 and March 10, 2014, respectively, and an email to CTV on March 10, 2014. Whether the letters and email constitute a "notice of libel" upon CTV is a moot point because Otavnik did **not** commence his libel action within the three month period as required by the *Libel and Slander Act,* R.S.O. 1990, c. L.12.

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4. 2013 CanLII 53193 (Ont. S.C.S.M.).

5. [1990] S.C.R. 959 at

6. 2013 ONCA 405 (CanLII), at para 42.

40. As stated in the Shafran Affidavit, Otavnik issued his Plaintiff's Claim on September 12, 2014, over seven months after CTV's February 7, 2014 broadcast of the Canada AM segment at issue in the Plaintiff's Claim. Therefore, I conclude that the Plaintiff's Claim for Defamation is statute barred.

41. Even if the Plaintiff's Claim for Defamation was not statute barred, I would still dismiss the Defamation Claim because "[A]n action in libel is a personal action based upon injury to one's own reputation. Thus, it is necessary to show than an allegedly libelous publication (or broadcast) points to the plaintiff as a particular individual." <7>. The Plaintiff's name was not mentioned during the broadcasts and the alleged libel was not "of and concerning" the Plaintiff.

42. CTV submits that "the other causes of action pleaded are derivations of the defamation claim and not applicable to the facts of the case." CTV further submits that "assuming the pleaded facts can be proved, and given a generous reading of the Plaintiff's Claim, it is plain and obvious that it discloses no reasonable cause of action for slander of title, negligent investigation and interference with economic relations;"

43. Slander of Title is a tort that is a type of malicious falsehood. Section 16 of the *Libel and Slander Act,* R.S.O. 1990, c. L.12 states that "in an action for slander of title, slander of goods or other malicious falsehood, it is not necessary to allege or prove special damage

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7. *Bai et al. v Sing Tao Daily Ltd. et al.* 2003 CanLII 24013 (Ont. C.A.) at para 10.

(a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or ...."

44. Section 16 does not change the other elements of this common law tort but simply removes the requirement that the plaintiff prove it sustained special damages as a result. To succeed, a Plaintiff is still required to prove the words were published in disparagement of the Plaintiff's title to property; the words were false; and the words were published with express or actual malice. <8>

45. There is no evidence that the words allegedly spoken by Sinclair were calculated to disparage Otavnik's title to property or cause pecuniary damage or devalue Otavnik's proprietary interest.

46. It is not clear what specific property or what proprietary interest of Otavnik might be affected. Otavnik refers only to "my painting" in paragraph 3 of the Plaintiff's Claim but does not identify a specific painting or indicate the number of pieces in his "collection" of Morrisseau artwork (see also paragraph 16 of Otavnik's affidavit sworn February 9, 2015).

47. The common law cause of action for slander of title requires proof of malice in the legal sense as an essential element. <9> There is no evidence of malice on the part of Sinclair

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8. *Western Surety Company v. Hancon Holdings Ltd. et al.* 2007 BCSC 180.

9. *Captain Developments Ltd. v. Nu-West Group Ltd.* (1982), 3.7. O.R. (2d) 697 (Ont. HCJ).

or CTV. CTV did not know of Otavnik's existence when it aired the first Broadcast. CTV could argue that it acted in good faith by warning its viewers of the possibility of "fake" artwork and to be careful when purchasing artwork purportedly painted by Morrisseau.

48. Therefore, I conclude that Otavnik has not established the elements required to establish a cause of action based on the tort of slander of title.

49. Negligent investigation is a relatively new tort that came to prominence as a result of the Supreme Court of Canada's 2007 decision in the *Hill* case. <10> The *Hill* case was concerned only with a very particular relationship – the relationship between a police officer and a particularized suspect that the police officer is investigating.

50. In *Hill,* the Supreme Court of Canada held that "to establish a cause of action for negligent **police** investigation, the plaintiff must show that he or she suffered compensable damage and a causal connection to a breach of the standard of care owed to him or her. … The limitation period for negligent investigation begins to run when the cause of action is complete and the harmful consequences result. This occurs when it is clear that the suspect has suffered compensable harm." <11>

51. CTV argues that there are insufficient facts plead to support a claim for the tort of negligent investigation and that the entire tort relates to the duty of care owed by an

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10. *Hill v. Hamilton-Wentworth Regional Police Services Board et al.* [2007] 3 S.C.R. 129.

11. *Ibid.* at p. 132.

authority (e.g., the police) to a person under investigation for criminal (or quasi-criminal) behavior (e.g., a suspect).

52. Furthermore, according to CTV, the type of "investigation" contemplated by the tort is not "information gathering and research by the media in anticipation of a television program".

53. Otavnik has not established that CTV owes Otavnik a *prima facie* duty of care. CTV knew nothing about Otavnik prior to the first broadcast. There was no "close and proximate" relationship between CTV and Otavnik at any time. Otavnik was not the subject of any investigation by CTV. Morrisseau's paintings -- not the persons that owned them -- were the subject of investigation by CTV.

54. Therefore, I conclude that Otavnik has not established the elements required to establish a cause of action based on the tort of negligent investigation.

55. In addition to the allegation of negligent investigation, Otavnik also plead the CTV was negligent in allowing Sinclair to appear on the two television segments. Otavnik says in his affidavit that CTV "had a reckless and careless disregard to the truth when they (CTV) allowed this person (Sinclair) on National TV with the full knowledge of what was going to be presented to the viewer and took no steps to attempt to verify the veracity or accuracy of the defamatory statements made on the program by their guest ...."

56. Otavnik believes that CTV did not properly investigate Sinclair deciding to give Sinclair a "platform" for his "false statements". What Otavnik is alleging is that CTV was negligent in the manner in which CTV did its "research". "Negligent research is simply another way of framing the libel action" <12>

57. After it received Otavnik's complaint and Otavnik's request for an apology to Morrisseau, CTV presented a second segment and invited as guests persons with contrary views to that of Sinclair, in an attempt to present the other side of the story. It is unfortunate the CTV did not also invite Otavnik to present his side of the story on the second broadcast. However, CTV's failure to do so, does not make CTV negligent.

58. Interference with Economic Relations is a tort that requires proof of the following elements:

(i) an intent to injure and cause loss to the Plaintiff;

(ii) interference with the Plaintiff's business or livelihood by illegal or unlawful means;

(iii) unlawful means are directed at a third party who has an actionable claim or an actionable claim but for the absence of having suffered a loss; and;

(iv) the Plaintiff suffers economic loss as a result of the unlawful means. <13>

59. Otavnik has not plead any facts or presented evidence to establish the elements of a cause of action based on the tort of "interference with economic relations" also known as

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12. *Bai et al. v Sing Tao Daily Ltd. et al.* 2003 CanLII 24013 (Ont. C.A.) at paragraph 18.

13. See *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177.

"interference with a trade or business by unlawful means" or "intentional interference with economic relations" or "causing loss by unlawful means" or simply as the "unlawful means" tort.

60. There is no evidence that CTV aired the two broadcasts with the intention of injuring or causing a loss to Otavnik or anyone else. CTV did not interfere with Otavnik's business, whatever it is, by any means. There was nothing illegal or unlawful about either broadcast and there is no third party (of which I am aware) with actionable claims against CTV in relation to those broadcasts,.

61. Therefore, I conclude that Otavnik has not established the elements required to establish a cause of action based on the tort of interference with economic relations.

62. In summary, I find that the Plaintiff's Claim for Defamation fails because the plaintiff was not defamed and the claim for Defamation is statute barred. I find that the Plaintiff's Claim discloses no reasonable cause of action for slander of title, negligent investigation, and interference with economic relations, or negligence. I find that Otavnik would have no meaningful chance of success at trial.

Conclusion and Order:

63. For the reasons above, this Court Orders that :

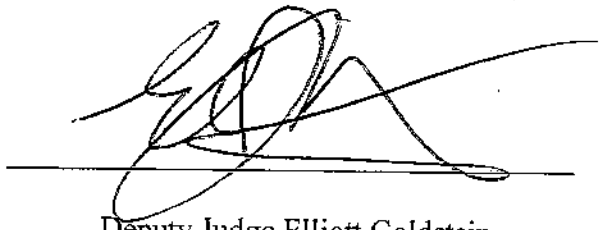
(a) the motion brought by the Defendant is granted;

(b) the Plaintiff's Claim is struck out without leave to amend;

(c) the action is dismissed.

64. CTV is victorious on this motion (and in this action) and to the victor go the costs. CTV has until July 15, 2015 to deliver (serve and file) written costs submissions and Otavnik has 15 days thereafter to deliver his written costs submissions.

Decision issued: June 29, 2015



Deputy Judge Elliott Goldstein,
Ontario Small Claims Court,
Central East Region