CITATION: MCLAUGHLIN v. MAYNARD, 2017 ONSC 6820
COURT FILE NO.: CV-17-0041
DATE: 2017, November 15

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
SHAUN MCLAUGHLIN and JOHN EDWARDS Plaintiffs/Defendants by Counterclaim	JONATHAN P.M. COLLINGS, for the Plaintiffs/Defendants by Counterclaim
– and –	
STEVEN MAYNARD also known as, STEVE MAYNARD Defendant/Plaintiff by Counterclaim	Self-Represented, Defendant/Plaintiff by Counterclaim
	HEARD: September 28, 2017 in Perth

HURLEY, J.

REASONS FOR DECISION

Introduction

[1] Shaun McLaughlin is the Mayor and John Edwards a Councillor of the Town of Mississippi Mills. Stephen Maynard was born and raised in Mississippi Mills and espouses an abiding interest

in its municipal governance which is regularly expressed in his personal and group Facebook pages.

[2] The plaintiffs commenced a defamation lawsuit against Mr. Maynard on July 14, 2017. In their statement of claim, they identify seven Facebook posts by Mr. Maynard, made by him in the period February to June 2017, which they allege to be defamatory.

[3] Mr. Maynard delivered a statement of defence and counterclaim on July 24, 2017 and an amended one on August 3, 2017. In his counterclaim, he alleges that the plaintiffs defamed him as a result of statements made by them on a group Facebook page, on Mayor McLaughlin's personal website and in a local online newspaper known as the "The Millstone" in June and July 2017.

[4] On the same date that he delivered the amended statement of defence and counterclaim, Mr. Maynard served a notice of motion seeking an order dismissing the plaintiffs' lawsuit pursuant to section 137.1 of the *Courts of Justice Act* R. S. O. 1990, c C. 43.

[5] The plaintiffs delivered a cross motion on August 17, 2017, requesting that Mr. Maynard's motion be adjourned, an order striking out the statement of defence without leave to amend or, alternatively, that the defendant provide particulars of the counterclaim and an order setting aside the noting in default of the plaintiffs on the counterclaim.

[6] Both motions were returnable September 22, 2017. On that date, Mr. Justice Abrams adjourned them to September 28, 2017. According to his endorsement, the parties confirmed that all of the material upon which they intended to rely was now before the court, that there would not be any cross-examinations on the affidavits included in the motion records and no further material could be filed without leave of the court.

[7] Mr. Maynard's motion was argued on September 28, 2017. At the conclusion of the hearing, I reserved my decision and made an interim order that there be no steps taken in the

litigation pending further order of the court and that the cross-motion be adjourned pending the decision in this motion.

[8] In these reasons, I will first set out the statutory provision and summarize the jurisprudence with respect to the interpretation of section 137.1 and the law of defamation. Next, I will review the evidence. Finally, I will apply the law to the evidence. I will refer to the plaintiffs as Mayor and Councillor or as the plaintiffs. The defendant will be referred to by his name or as the defendant.

Section 137.1 of the Courts of Justice Act.

[9] Section 137.1 (1) – (4) state:

> The purposes of this section and sections 137.2 to 137.5 are,
>
> (a) to encourage individuals to express themselves on matters of public interest;
>
> (b) to promote broad participation in debates on matters of public interest;
>
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
>
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.
>
> **Definition, "expression"**
>
> "expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity.
>
> **Order to dismiss**
>
> On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

No dismissal

A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

The interpretation of section 137.1 and the law of defamation

[10] Despite its relatively recent enactment, the section has been the subject of several decisions of the Superior Court of Justice. To date, there have been no appellate decisions. A general consensus has developed with respect to its interpretation and the following principles can be distilled from the jurisprudence.[1]

[11] The meaning of "public interest" is the same as that term was defined in the Supreme Court of Canada's decision in *Grant v. Torstar Corp.*, 2009 SCC 61 at paras. 101 – 105:

> In determining whether a publication is on a matter of public interest, the judge must consider the subject matter of the publication as a whole. The defamatory statement should not be scrutinized in isolation. The judge's role at this point is to determine whether the subject matter of the communication as a whole is one of public interest. If it is, and if the evidence is legally capable

[1] Levant v. Day, 2017 ONSC 5956; Rizvee v. Newman, 2017 ONSC 4024; Platnick v. Bent, 2016 Carswell Ont 19079; Thompson v. Cohodes, 2017 ONSC 2590; Able Translation Ltd. v. Express International Translations Inc., 2016 ONSC 6785; 1704604 Ontario Ltd. v. Pointes Protection Assn., 2016 Carswell Ont 7322; Fortress Real Developments Inc. v. Rabidoux, 2017 ONSC 167; Montour et al v. Beacon Publishing et al, 2017 ONSC 4735 (CanLII); United Soils Management Ltd. V. Mohammed, 2017 ONSC 4450

of supporting the defence, as I will explain below, the judge should put the case to the jury for the ultimate determination of responsibility.

How is "public interest" in the subject matter established? First, and most fundamentally, the public interest is not synonymous with what interests the public. The public's appetite for information on a given subject — say, the private lives of well-known people — is not on its own sufficient to render an essentially private matter public for the purposes of defamation law. An individual's reasonable expectation of privacy must be respected in this determination. Conversely, the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject.

The authorities offer no single "test" for public interest, nor a static list of topics falling within the public interest (see, e.g., *Gatley on Libel and Slander* (11th ed. 2008), at p. 530). Guidance, however, may be found in the cases on fair comment and s. 2(*b*) of the *Charter*.

In *London Artists, Ltd. v. Littler*, [1969] 2 All E.R. 193 (C.A.), speaking of the defence of fair comment, Lord Denning, M.R., described public interest broadly in terms of matters that may legitimately concern or interest people:

> There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the judge and not for the jury. I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment. [p. 198]

> To be of public interest, the subject matter "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached": Brown, vol. 2, at pp. 15-137 and 15-138. The case law on fair comment "is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews": *Simpson v. Mair*, 2004 BCSC 754 (CanLII), 31 B.C.L.R. (4th) 285, at para. 63, *per* Koenigsberg J. Public interest may be a function of the prominence of the person

> referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.

[12] If the defendant establishes that his expression related to a matter of public interest, the lawsuit shall be dismissed unless the plaintiffs satisfy me that it meets the three requirements of subsection (4): the proceeding has substantial merit; there is no valid defence; and the harm likely to be or that has been suffered by the plaintiffs as a result of the defendant's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[13] Substantial merit means that "there is credible and compelling evidence supporting the claim as being a serious one with a reasonable likelihood of success": *Able Translations Ltd v. Express International Translations Inc.*, 2016 ONSC 6785 at para. 49. A valid defence is self-explanatory. The final requirement, which is the balancing exercise, requires an analysis of the competing public interests.

[14] Mr. Justice Dunphy described this final requirement as follows in *Able Translations Ltd.* at para. 84:

> When weighing the public interest in affording private redress of that harm against the public interest in protecting the expression giving rise to it, I consider that my task is to conduct that weighing exercise in light of the stated objectives of the legislation as set forth in s. 137.1(1) of the *CJA*. In my view, that does not call for a subjective micro-analysis of the public interest in the actual content of the expression. The public interest is not a numbers game. Some members of the public may attribute more importance to an issue than others. I must be primarily focused on the subject matter of the communication and the degree to which the expression cleaves to that public interest (or strays from it as the case may be). I view the intention of the *PPPA* as being to create a safer space, not necessarily a bullet-proof enclosure, for debate and expression of views. Hateful or malicious attempts to inflict harm under the guise of free debate of matters of public interest were never intended to be sheltered.

[15] Most judges have followed Mr. Justice Dunphy's conclusion in that case that the burden of proof should be less than the normal civil standard of the balance of probabilities and instead, because of the summary nature of the proceedings, should be between the accepted civil standard and the "frivolous and vexatious" test applied to the striking of pleadings. In the recent decision of *Rizvee v. Newman* 2017 ONSC 4024, Mr. Justice Fitzpatrick opined that the standard civil onus should apply. I prefer Mr. Justice Fitzpatrick's opinion on the issue of onus, given that section 137.1 was enacted after the Supreme Court of Canada's decision in *F. H. v. McDougall* 2008 SCC 53 (CanLII).

Defamation

[16] In order to prove defamation, the plaintiffs must establish that the words referred to them; that they were communicated to at least one other person; and that the words complained of tended to lower the plaintiffs' reputation in the eyes of a reasonable person. If the plaintiffs prove this, falsity of the words and damage are presumed: *Grant* at para. 28.

[17] The three defences to a defamation claim that could apply in this care are: truth, fair comment and responsible communication. The first requires the defendant to establish the substantial truth of the "sting" or main thrust of the allegedly defamatory words. The second requires the defendant to prove that the comment was on a matter of public interest, based on fact, recognisable as comment and that a person could honestly express the opinion: *Grant* at para. 31. The third and final defence, arising out of the decision in *Grant,* is more complicated. It was described at para. 126:

The defence of public interest responsible communication is assessed with reference to the broad thrust of the publication in question. It will apply where:

A. The publication is on a matter of public interest, and

B. The publisher was diligent in trying to verify the allegation, having regard to:

(a) the seriousness of the allegation;

(b) the public importance of the matter;

(c) the urgency of the matter;

(d) the status and reliability of the source;

(e) whether the plaintiff's side of the story was sought and accurately reported;

(f) whether the inclusion of the defamatory statement was justifiable;

(g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and

(h) any other relevant circumstances.

[18] With the exception of truth, these defences are defeated if the plaintiffs establish malice. This may be either intrinsic to the words spoken or established by extrinsic evidence: *Korach v. More,* 1991 CanLII 7367 (ON CA). The plaintiffs prove this when the dominant motive for the defamatory expression is spite or ill will; ulterior purpose; or the defendant knew the statement was false or was reckless as to its falsity: *Cusson v. Quan*, 2007 ONCA 771(CanLII) at para. 40.

The Evidence

[19] The parties chose not to conduct cross-examinations as was their right. However, that carries with it consequences, particularly for the plaintiffs in this type of motion because, once the defendant establishes that the expression fell within the rubric of "public interest", the plaintiffs

must prove that their case has substantial merit, that there is no valid defence and that they have suffered serious harm that surpasses the interest in protecting a value that is so important in our country that it is constitutionally guaranteed – freedom of expression. The failure to prove any of these will result in the dismissal of the lawsuit at an early stage.

[20] This does not mean that simply because a party asserts the truth of a fact in an affidavit that I must conclude that it is accurate. However, bearing in mind the burden of proof, it will be difficult for plaintiffs to rely on conclusory statements in discharging their onus. This has been compounded by the approach of the plaintiffs in responding to Mr. Maynard's affidavit. With exhibits, it is 165 pages. As I will explain in these reasons, instead of focusing on a specific rebuttal of Mr. Maynard's detailed explanations in relation to each alleged defamatory post, the plaintiffs chose, to a substantial extent, to make general statements about the probity of their conduct, their personal integrity and the harm caused by the publication of Mr. Maynard's posts. While this may have been a suitable approach to an ordinary defamation lawsuit, the legal landscape has been significantly altered by section 137.1.

[21] The plaintiffs set out the alleged defamatory posts in chronological order in their statement of claim. They are dated February 23, May 13, May 17, May 22, May 25, June 5 and June 17. I will deal with each in turn.

February 23

[22] This post is directed at Councillor Edwards. It states that that he has been silent on making the parks in Mississippi Mills fully accessible to children with disabilities and refers specifically to the Gemmill Park project.

[23] In paragraphs 18 to 24 of his affidavit sworn September 11, 2017, Councillor Edwards deposes that he has been "far from silent" in his support for parks in the municipality and recounts his involvement in parks and recreational facilities that have been funded or approved during his tenure as a member of Council. He asserts that the Gemmill Park plan is compliant with all applicable legislative requirements but also contends that he "cannot be held liable for the Town's legislative accessibility duties"

[24] Mr. Maynard explains his position on this post in paragraphs 10 to 12 of his affidavit. He attaches as exhibits, copies of emails that he sent the Mayor and members of Council, employees of the municipality and Lashley and Associates, the firm responsible for the design of Gemmill Park. These emails detail his concerns about whether or not the proposed plan for Gemmill Park complies with the *Accessibility for Ontarians With Disabilities Act*, 2005,S.O. 2005,c. 11 (the "*AODA*")

[25] Councillor Edwards did not reply to the emails that were copied to him and Mr. Maynard believes that he would have been aware of the other emails. In the final email attached as an exhibit, which is dated January 16, 2017 and addressed to an employee of Lashley and Associates, copied to municipal staff, Mr. Maynard states:

> "None of you appear to be concerned with complying with what is a law in Ontario, nor do any of you seem to be concerned with the rights of people with disabilities as pertains to outdoor play spaces. This is unfortunate. I will continue with my attempts to have the AODA followed and I will publicize my concerns."

May 13

[26] This post consists of a photograph taken at a Council meeting held on May 2 which depicts a member of the public who spoke at that meeting lying facedown on the floor in the custody of three police officers. The commentary refers to Mayor McLaughlin requesting that he be treated in this fashion and a subsequent statement by Councillor Edwards in which he said that the person "deliberately staged" the episode.

[27] In his affidavit, Mayor McLaughlin does not address this post but complains that, in a subsequent post dated May 22, 2017, Mr. Maynard inaccurately claimed that he "incited" residents during this meeting. Councillor Edwards, in his affidavit, acknowledges that he used the phrase "deliberately staged" when he commented on the episode but considers this a reasonable opinion because the individual, Mario Cocoluzzi, had previously filed written representations and therefore did not have to address Council at the meeting.

[28] Mr. Maynard's position is that Mayor McLachlan was the chair of the Council meeting and, pursuant to section 29 (d) of the municipality's procedural bylaw, only he was authorized to request that the police expel a person from the room. He also deposes that the Mayor made previously unannounced changes to the meeting procedure and argued with some of the speakers.

May 17

[29] In this post, Mr. Maynard writes that the Mayor and his "lemming councillors" have discriminated against children with disabilities, their parents and caregivers, reiterating that Gemmill Park will not be fully accessible to them.

[30] Mayor McLaughlin does not specifically address this post in his affidavit nor does Councillor Edwards. Mr. Maynard does. He deposes that, at the time of this post, the Council was

still not complying with the *AODA* and includes, as an exhibit to his affidavit, an email exchange with Councillor Jill McCubbin about this issue which he believes the Mayor and Councillor Edwards would have had knowledge of.

May 22

[31] This post is directed exclusively at Mayor McLaughlin. It identifies five dates (March 18, 2014; September, 2014; August 9, 2016; May 2, 2017 and May 16, 2017) and states that the Mayor was involved in a vote to approve a heritage designation for a building where his spouse owned two condominium units therefore permitting her to apply for both a tax refund and grant; that he improperly obtained personal email addresses from what is referred to as the "Enerdu petition" which he subsequently used during his campaign; that he demonstrated disinterest in the public's pleas to save Don Maynard Park; and that he was belligerent to a resident before a Council meeting started.

[32] Mr. Maynard also refers to the Mayor giving preferential treatment to those who opposed to the Enerdu project; that he continues to discriminate against children with disabilities by not ensuring that new recreational facilities are fully accessible and asserts that he has engaged in "law breaking", citing the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M. 50 (the "*MCIA*"); the *AODA*; *The Planning Act*, R.S.O. 1990, c. P.13; and municipal bylaws.

[33] The Mayor does not address all of the statements but does refer to the alleged conflict of interest and his involvement with Enerdu. He acknowledges that he participated in discussions and voting in relation to condominium units owned by him and his spouse but contends that there was no breach of the *MCIA* because the exemptions in that statute applied and that, with respect to the condominium unit he owned, he declared a pecuniary conflict at a Committee of the Whole

meeting which Mr. Maynard did not refer to in his post. He claims that Mr. Maynard's post alleged that he had contravened legislation by using the information from the Enerdu petition during his campaign and he denies that he gave any preferential treatment to those opposed to Enerdu.

[34] Mr. Maynard provides his position for each date including numerous exhibits. With respect to the alleged failure of the Mayor to declare a pecuniary interest he attaches the minutes from the Council meeting on March 18, 2014 in which the Mayor voted on a bylaw to designate the Thoburn Mill building, where his spouse owned one or more units, as being of architectural and historical value and the minutes from the February 3, 2015 Council meeting at which he voted on a resolution that the Council support the recommendation of the Heritage Advisory Committee that the condominium complex where he owned a unit be eligible for a tax refund for 2014.

[35] With respect to Enerdu, he attaches as exhibits, documents from The Millstone newspaper in which the Mayor admitted using the information from the petition. He also deposes that Mayor McLaughlin has opposed Enerdu by writing to the Premier of Ontario and attaches a report by The Millstone which stated that residents opposing the company's project were allowed to speak despite not being on the agenda for the meeting as required by the municipality's procedural bylaw. Finally, he points out that he did not allege that the Mayor contravened any legislation with respect to his use of the personal information.

May 25

[36] This post is directed exclusively at Councillor Edwards. He is referred to as an "opportunistic liar" because of his support of the Mayor and fellow Councillors in relation to the development and sale of parkland in the municipality.

[37] Councillor Edwards does not specifically address this post but, as indicated above, his affidavit outlines what he has done in relation to parks and recreation facilities within the municipality.

[38] Mr. Maynard deposes that the parks in the municipality remain in "deplorable condition" and attaches photographs as exhibits to support this opinion.

June 5

[39] This is another post directed exclusively at Councillor Edwards which contains a photograph of him next to one of a clown and refers to what Mr Maynard believes to be inaccuracies in public statements made by the Councillor about parks in the municipality and the comment made by him about Mr Cocoluzzi's conduct at the May 2 meeting.

[40] Councillor Edwards does not specifically address this post in his affidavit but asserts that comments made by him about land development in the municipality were accurate.

[41] Mr. Maynard, in paragraphs 37 to 41 of his affidavit, sets out the information that he relied upon to support each criticism of Councillor Edwards' statements.

June 17

[42] This post is directed at the Mayor and members of Council. Mr Maynard claims that he has suffered "malicious and personal attacks" because of statements made by the Mayor on Facebook, his blog and in The Millstone. He states that the Mayor has "no morals or empathy". In the third paragraph of the post, he writes:

> "I also had posted in The Millstone that I will continue to take whatever legal action I have available to me to bring to light the shocking level of corruption and law breaking that is pervasive with this Mayor, Councillors and senior staff. I believe this is the reason that the Mayor has stepped up his attacks

> against me. There must be something really bad that has not come to light yet and there's a lot of fear at 3131 Old Perth Rd. about what I will find and make public."

[43] Neither Mayor McLaughlin nor Councillor Edwards specifically address this post in their affidavits. However, they complain that Mr. Maynard has wrongfully accused them of criminal conduct by referring to their "law breaking".

[44] In his affidavit, Mr. Maynard refers to statements made by Mayor McLaughlin on June 11 on his "Shaun Your Mayor" group Facebook page, his website bearing the same title and in The Millstone that he believes led to anonymous persons attacking him in emails and leaving voicemails on his home phone. He also identifies what laws he believes that the plaintiffs have contravened, all of which are either provincial statutes or municipal bylaws and emphasizes that he has never accused either of criminal misconduct.

[45] The Mayor's statements are not reproduced in his affidavit but some are identified in the counterclaim and, in the draft reply and defence to counterclaim which is attached as an exhibit to his affidavit, he admits that the statements were made by him but pleads the defences of justification and fair comment. They are critical of Mr. Maynard's conduct and refer to a decision of the Law Society Tribunal that denied his application to be licensed as a paralegal. The decision is also attached as an exhibit to Mayor MacLachlan's affidavit in this motion. It contains information about Mr. Maynard's personal background and his behaviour during acrimonious matrimonial litigation that would be embarrassing to him if disseminated in the community

[46] In his affidavit, Mr. Maynard deposes that he sent an email on June 15 to Mayor MacLachlan asking him to take down the posts on his website and blog. The subject line for this email is "Threat of Violence Against One of My Children" and states:

> "Now I have been left a message on my answering machine by somebody who knows when I come and go. I am clearly being stalked, I believe as a result of your posts and the people you incited.
>
> I am asking one last time for you to take down your post on Shaun Your Mayor. It was also drawn to my attention the same post is on your blog so I would appreciate if you would remove that too."

[47] The Mayor did not reply to this email.

Additional Evidence

[48] Mayor McLaughlin included in his affidavit a number of posts made by Mr. Maynard or comments by him in online newspaper articles about the lawsuit, most of which were made in July and August, that he claims "establish the incitement of harmful, pejorative discourse against me and Councillor Edwards." At the hearing, his counsel asserted that this evidence proved malice. None were included in the statement of claim nor did counsel advise me that the plaintiffs would be seeking an amendment to add these as additional defamatory statements. As such, their relevance to this motion is questionable. In any event, they do not establish malice.

[49] I will not review these except for two which have, as I will explain later in these reasons, an impact on my decision. One was a comment that I was specifically directed to by the plaintiffs' counsel during argument that Mr. Maynard made in response to an article concerning the lawsuit published in the Ottawa Citizen on July 31. In that comment, he revealed that the municipality was funding the lawsuit. There are number of comments following his in which individuals complain about this use of public funds. The second is a comment made by Mayor McLaughlin in The Millstone on July 2 where he refers to his use of Facebook as follows: "As for the critical posts on Facebook, I will stop if others do. Starting today. Let's see how long the truce lasts".

[50] To complete my review of the evidence, both sides also made general, conclusory statements in their affidavits to support their respective legal positions: Mayor McLaughlin and Councillor Edwards attesting to their personal integrity and how commentary such as Mr. Maynard's will deter people from seeking public office and Mr. Maynard alleging that all of his posts have been made in good faith, are substantially true, and either in the public interest or constitute political satire.

Analysis

[51] Is the public interest test met?

[52] All of the impugned statements were about acts or omissions on the part of the plaintiffs in the discharge of their public duties. Members of the community would have a genuine interest in the issues referred to in the posts. They are about matters which would have a general impact on the residents of the municipality. Based on the comments made by people on Facebook and following the online media articles, it is apparent that others in the community, even if they did not share all of Mr. Maynard's views, were concerned about the Council's actions on many of the issues.

[53] Mr. Maynard has met his onus of proving the requirement of public interest. As a result, the onus now shifts to the plaintiffs to prove that they have met all three requirements of section 137.1 (4) (a) and (b).

[54] Does the proceeding have substantial merit?

[55] Mr. Maynard admits being the author of the posts. Those which allege that the plaintiffs have acted in a discriminatory manner, that Mayor MacLaughlin breached the *MCIA* and that they are corrupt and have engaged in a pattern of law breaking meet this requirement.

[56] Does the defendant have a valid defence?

[57] I am not able to determine, on the evidentiary record before me, if the posts are substantially true. I can, however, find that the plaintiffs have not discharged their onus of satisfying me that the defence of fair comment is not available to Mr. Maynard with the exception of some of the statements made in the June 17 post.

[58] I come to this conclusion because of the way in which the plaintiffs have framed their action. They chose to identify seven Facebook posts and put them in chronological order in the statement of claim. As a result, the allegations of discrimination and law breaking must be placed in that context, which is that Mr. Maynard was referring to their alleged contravention of regulatory legislation that is open to differing interpretations of what is required by the statutes and what constitutes compliance with them.

[59] I cannot determine if the plaintiffs, in their capacity as Mayor and Councillor, were responsible for decisions of the Council that may not be in compliance with the *AODA* and *The Planning Act*. Nor can I conclude if Mayor MacLaughlin breached the *MCIA*.

[60] However, Mr. Maynard presented evidence that parks in the municipality, including the proposed Gemill Park project, do not comply with the *AODA*. They may in fact do so but Mr. Maynard could legitimately express an opinion that they do not and therefore assert that Mayor MacLaughlin and Councillor Edwards have acted in a discriminatory manner.

[61] With respect to the *MCIA*, there is evidence that Mayor MacLaughlin himself thought he should (and did) declare a pecuniary interest when the Committee of the Whole was considering the heritage designation of a building in which he owned a condominium. He did not repeat this declaration when Council subsequently considered the same matter. The exemptions in the *MCIA* might very well apply with respect to the condominium units owned by the Mayor and his spouse but that does not mean he did not breach the *MCIA*: *Davidson v. Christopher,* 2017 ONSC 4047 (CanLII)

[62] The other laws that Mr. Maynard referred to in his posts were *The Planning Act* and municipal bylaws. Again, he presented evidence which supported his opinion that the plaintiffs contravened these laws. They may not have done so but the plaintiffs have not satisfied their onus of proving that the defence of fair comment would not apply in the circumstances.

[63] I take a different view of the June 17 post and specifically those statements that Mayor MacLaughlin has "no morals or empathy" and that there is a "shocking level of corruption and law breaking that is pervasive with this Mayor, Councillors and senior staff". Mr Maynard did not adduce sufficient evidence to support an honest opinion of this level of malfeasance. The plaintiffs have established that these comments are not protected by either the defence of fair comment or that of responsible communication.

[64] Is the harm sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression?

[65] Contrary to what the plaintiffs claim in their affidavits, Mr. Maynard did not allege in any of the posts that they engaged in criminal misconduct. A reasonable person, reading those posts in

chronological order, would understand that he was only accusing them of contravening provincial laws. This would clearly not be considered the same as committing a crime.

[66] Nor did Mr. Maynard allege a personal vice or indiscretion unconnected to the exercise of their public duties. A politician being called dishonest or a liar is now so common in our political discourse that it cannot be seriously suggested that this would be the type of personal attack that might cause serious harm. The same is true of comparing a politician to a clown or a similar satirical imputation.

[67] It is apparent from reading Councillor Edwards' affidavit and the exhibits attached to it that he has a strong commitment to the disabled, particularly those involved in sports. If Mr. Maynard had alleged that Councillor Edwards discriminated against the disabled at large I would consider this an allegation that could result in serious harm to his reputation. However, the statements made by Mr. Maynard were always in the context of complaining that he had not done as much as he could or should have in his position as a Councillor to ensure that parks in the municipality complied fully with the requirements of the *AODA*.

[68] Alleging that a politician does not have any morals or empathy or that he is corrupt could cause serious harm but I have concluded that, in the particular circumstances of this case, the public interest in protecting Mr. Maynard's expression surpasses that harm.

[69] As stated earlier, freedom of expression is a constitutional right. I think that it is particularly important that people be free to express their disagreement with the acts or omissions of municipal politicians without fear that they will be sued. Unlike many decisions made at the provincial or federal level of government, those made by municipal politicians will often have a direct and immediate impact on the quality of life in the community. People would be reluctant to express

their opposition if they knew that their use of social media could result in a lawsuit by a public official unhappy with the criticism, with all the attendant stress and financial burden such litigation entails.

[70] Mr. Maynard's posts, by and large, dealt with issues that are of importance to civic life. The disabled, like other marginalized groups, can benefit from an advocate who is willing to "push the envelope". The plight of a citizen who, when he tries to speak at a Council meeting, is arrested, taken to the ground by police and removed from the Council chambers deserves attention. A public official who votes on a matter in which he or his spouse might receive a pecuniary benefit, however modest, should expect that his actions will be scrutinized and questions asked about whether or not he acted properly.

[71] In the recent decision of *Bracken v. Fort Erie (Town)*, 2017 ONCA 668, the Court of Appeal quashed a trespass notice issued to the plaintiff because of his conduct at the town hall. Mr. Justice Miller stated at para. 25:

> Freedom of expression has received broad protection in Canadian law, not only through the *Charter*, but also through legislation and the common law. As Rand J. noted in *Saumur v. City of Quebec*, 1953 CanLII 3 (SCC), [1953] 2 S.C.R. 299, at p. 329: "Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order." Section 2(b) further entrenches the limits on government action in order to safeguard the ability of persons to express themselves to others. As expressed in *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at pp. 968-969:
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> > Freedom of expression was entrenched in our Constitution and is guaranteed … so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the

> individual. Free expression was for Cardozo J. of the United States Supreme Court "the matrix, the indispensable condition of nearly every other form of freedom" (*Palko v. Connecticut*, 302 U.S. 319 (1937), at p. 327); for Rand J. of the Supreme Court of Canada, it was "little less vital to man's mind and spirit than breathing is to his physical existence" (*Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285, at p. 306). And as the European Court stated in the *Handyside* case, Eur. Court H. R., decision of 29 April 1976, Series A No. 24, at p. 23, freedom of expression:
>
> > . . . is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

[72] At para. 54, he stated:

> There can be no question that the area in front of the town hall is a place where free expression not only has traditionally occurred, but can be expected to occur in a free and democratic society. The literal town square is paradigmatically the place for expression of public dissent.

[73] Social media has, in many ways, replaced the necessity of travelling to the town square to engage in the agitprop that now seems endemic to all spheres of political commentary.

[74] I also take into account that the final post of June 17 was published by Mr. Maynard after Mayor MacLaughlin had decided to publicize the Law Society Tribunal's decision about Mr. Maynard's application for a paralegal licence. The Mayor must have known that the disclosure of this decision would not only diminish Mr. Maynard's reputation in the community but also likely provoke a reaction by him.

[75] It is clear from the evidence filed on behalf of the Mayor that he has not been reluctant to employ both traditional and social media to get his message out to his constituents and to respond to his critics. Mr. Maynard's use of the same platforms for a comparable purpose should not be

surprising to him. As the Mayor stated in July, he could have called for a truce before attacking Mr. Maynard on June 11 but chose to launch a salvo specifically directed at him, knowing that disclosure of the Law Society Tribunal's decision could potentially result in his public humiliation[2].

Conclusion

[76] More than a decade before the enactment of section 137.1, sitting at this same courthouse, Mr. Justice Pedlar dismissed a lawsuit for defamation brought by the Corporation of the Township of Montague against one of its vocal critics: *Montague(Township) v. Page,* 2006 CanLII 2192 (ON SC). In that decision, Mr. Justice Pedlar stated at para. 29:

> "In a free and democratic system, every citizen must be guaranteed the right to freedom of expression about issues relating to government as an absolute privilege, without threat of a civil action for defamation being initiated against them by that government. It is the very essence of a democracy to engage many voices in the process, not just those who are positive and supportive. By its very nature, the democratic process is complex, cumbersome, difficult, messy and at times frustrating, but always worthwhile, with a broad based participation absolutely essential. A democracy cannot exist without freedom of expression, within the law, permeating all of its institutions. If governments were entitled to sue citizens who are critical, only those with the means to defend civil actions would be able to criticize government entities. As noted above, governments also have other means of protecting their reputations through the political process to respond to criticisms."

[77] I can say it no better. Although in that case the plaintiff was the municipal corporation, I see little difference when it is two elected officials whose lawsuit is being publicly funded and the alleged defamatory statements are focused on their public, and not their private, lives.

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[2] Although not germane to the issues I have to decide in this motion, I found Mr. Maynard's written materials to be well organized, his oral submissions to be focused and his conduct in the courtroom to be civil and respectful of opposing counsel, the plaintiffs and me.

[78] The defendant's motion is granted and the action against him is dismissed. In his notice of motion, Mr. Maynard also sought an award of damages pursuant to section 137.1 (9). This was not argued at the hearing and neither was the issue of costs. I am prepared to deal with both either by way of oral or written submissions. If the parties prefer oral submissions, they should contact the trial coordinator to schedule a mutually convenient date. If they prefer written submissions (both must agree), the defendant's submissions, totalling no more than 10 pages, should be delivered within 30 days of the date of this decision followed by the plaintiffs' submissions, also not to exceed 10 pages, within 30 days of receiving the defendant's submissions. The defendant can deliver reply submissions, not to exceed 2 pages, within 7 days after receiving the plaintiff's submissions.

[79] I am not seized with the plaintiffs' cross-motion but it would make sense that I also deal with it. The date for the hearing of this motion can be scheduled through the trial coordinator's office. Given the contents of this decision, I would ask Mr. Maynard to consider whether or not he should proceed with the counterclaim because the plaintiffs would be at liberty to bring their own motion pursuant to section 137.1 for an order dismissing the counterclaim.

Mr. Justice Patrick Hurley

Released: November 15, 2017

CITATION: MCLAUGHLIN v. MAYNARD, 2017 ONSC 6820
COURT FILE NO.: CV-17-0041
DATE: 2017, November 15

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SHAUN MCLAUGHLIN and JOHN EDWARDS

Plaintiffs/Defendants by Counterclaim

– and –

STEVEN MAYNARD, also known as STEVE MAYNARD

Defendant/Plaintiff by Counterclaim

REASONS FOR DECISION

Hurley, J.

Released: November 15, 2017