

# Court of Queen's Bench of Alberta

**Citation: Inform Cycle Ltd. v. Draper, 2008 ABQB 369**

**Date: 20080618**  
**Docket: 0501 02030**  
**Registry: Calgary**

Between:

**Inform Cycle Ltd., Patrick Griffith and Lorie Griffith**

Plaintiffs

- and -

**Rebound Inc., carrying on business under the firm name and style of Rebound Cycle, Ryan Draper, Kevin Simpson, Paul Brown, Updaddy.com, Inc., Wild West Domains, Inc., Hostnut.com, Inc.**

Defendants

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**Reasons for Judgment  
of the  
Honourable Mr. Justice C.S. Brooker**

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## **Introduction**

[1] On September 20<sup>th</sup>, 2007 Inform Cycle Ltd. (hereinafter "Inform") was granted summary judgment against Ryan Draper (hereinafter "Draper") pursuant to the order of Master Hanebury made that date.

[2] The matter came before me to assess the damages under the summary judgment.

## **Facts**

[3] Various exhibits were put before the court as well as an Agreed Statement of Facts. In addition, I heard evidence from Patrick Griffith and Lorie Griffith, principals of Inform, as well as evidence from the defendant Draper.

[4] I do not propose to review the facts in detail. In brief, the Griffiths and one partner set up a business, Inform, in Canmore. It was a high-end bicycle business. It had its own registered computer internet website domain name (“domain name”) of InformCycle.ca.

[5] Draper had at one time worked briefly for another company owned by the Griffiths. However, long before the events in question, Draper had left that employment and commenced employment with Rebound Inc. (hereinafter “Rebound”) another bicycle business in Canmore, where he was employed as the manager at all material times.

[6] Draper was well aware of Inform and its bicycle business in Canmore. He was also aware that Inform used its domain name InformCycle.ca as part of the way it reached its customers and conducted its business. Despite that knowledge, Draper purchased the domain name InformCycle.com on October 18, 2004 and registered it, initially, to Rebound.

[7] Draper knew that his ownership of the InformCycle.com domain name would concern Inform and its principals. He claimed one of the reasons he did it was to get the attention of Inform’s principals.

[8] Draper caused “hits” on the InformCycle.com domain name to be automatically forwarded or transferred to Rebound’s website from October 18, 2004 to November 7, 2004, where Rebound used its website to promote its goods and services.

[9] On November 7, 2004 immediately after the close of business, Draper changed the forwarding address for InformCycle.com from the Rebound website to a gay pornographic website. He did this knowing that it would have an impact on Inform and its principals. Immediately after forwarding the “.com” address to the gay pornographic website, Draper left for a holiday in Costa Rica, where he remained until shortly after November 22, 2004.

[10] On November 22, 2004 one of the owners of Rebound was able to contact Draper in Costa Rica and obtain the password which permitted him to cancel the forwarding of the “.com” website to the gay pornographic website.

[11] On November 25, 2004 Draper verbally apologized to Patrick Griffith. He has never provided a written apology or retraction to anyone.

[12] It was Draper’s intent that anyone who was trying to reach InformCycle’s “.ca” website and erroneously typed in “.com” instead of “.ca”, would be immediately and automatically connected to the gay pornographic website.

[13] There is no record of the number of people who were forwarded to the gay pornographic website. We do know that Mr. Gillette and at least one other customer of Inform were so referred.

[14] Inform has refused to provide Draper with its accounting records or books or any other proof of actual losses caused to it by Draper’s actions.

[15] Draper's avowed excuse or reason for his actions is that he believed the Griffiths owed him money from his previous employment with them and he thought that his actions would get their attention, cause them to come to him and presumably negotiate some sort of resolution of the alleged debt.

### **Credibility**

[16] Before I begin my analysis I wish to deal with the credibility of the three witnesses who testified before me.

[17] Both Patrick and Lorie Griffith gave their evidence in an honest, frank and forthright manner. I find them to be credible witnesses.

[18] I cannot say the same for Ryan Draper. His evidence was at times contradictory and at other times, incredulous. For example, he said he had drafted a written apology but when challenged to produce it, not only did he not do so, he gave no explanation as to why he could not. He said it was referred to in the Statement of Defence that he had personally prepared and filed. Yet when he was directed to that Statement of Defence he had to admit that there was no such reference in it.

[19] Draper also testified that the reason he had kept the ".com" domain name registered to himself was because his previous lawyer had advised him to do so. Yet, he had to eventually concede on cross-examination that he had not retained counsel until over a year after he had renewed the registration of the ".com" domain name.

[20] Draper's excuse for his actions is incredulous. He says he did it to get the Griffiths' attention because they owed him money. Yet, he had never made such a claim before even though the last time he had worked for them through one of their other businesses was some one and one half years prior to these events. Surely if he thought he was owed money the first thing he would do was ask them for it and would do so contemporaneously to leaving the employment. I find his allegation of such a debt as well as it being the reason for his actions preposterous.

[21] Finally, Draper's explanation for initially registering the ".com" website in Rebound's name because the billing address had to be the same as the address on his credit card is nonsensical.

[22] As a result, I do not find Ryan Draper to be a credible witness.

### **Analysis**

[23] In her order of September 20, 2007 Master Hanebury granted judgment against Draper for three distinct torts: (1) passing-off as a result of forwarding from the ".com" website to the Rebound website between the period October 18, 2004 and November 7, 2004; (2) defamation in connection with the forwarding from the ".com" website to the gay pornographic website

between the period November 7 and November 22, 2004 and (3) the intentional tort of “knowingly and deliberately undertaking the registration and forwarding of the Misleading Domain Name (as defined in the pleadings).” I do not comment on the ability or desirability of a Master granting summary judgment in these circumstances and then directing the matter to a justice of this court to assess damages.

[24] Inform seeks general damages and aggravated damages as well as punitive damages for these torts. I will deal with each of these torts in turn, and address the issue of aggravated damages and punitive damages as a separate issue at the end.

**(1) Passing-off**

[25] The tort of passing-off is comprised of a misrepresentation that creates a public belief that the parties were associated, with the resulting damage occurring to the complaining party : *Law Society of British Columbia v. Canada Domain Name Exchange Corp.* (2004), 32 B.C.L.R. (4th) 129, 2004 BCSC 1102. Damages are presumed: *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120.

[26] Here, Inform was a fledgling business. In addition to high end bicycles, it offered spin cycle classes as well as various bicycling accessories for purchase. It had established its own website for people to use both to view its goods as well as register for classes. For a period of 21 days, anyone who typed in “InformCycle.com” instead of “InformCycle.ca” would have been directed to Rebound’s website which offered some of the same goods and services for sale as did Inform’s. There is no evidence as to how many people were so directed and there is no evidence as to whether Inform actually lost sales as a result of this. Indeed, it is difficult to see how Inform could have produced such information. It would have been helpful, however, to have had some sort of evidence as to the amount of sales or profit generated on a weekly basis at that time of the year in order to give the court some sort of frame of reference to set general damages.

[27] In the absence of any sort of evidence as to actual damages, and having regard to the presumption of damages flowing from passing-off actions, I assess general damages at \$5000 for this tort.

**(2) Defamation**

[28] The defamation for which summary judgment was granted to Inform consists of Draper deliberately and, in my view, maliciously, forwarding the “.com” website to an explicit gay pornographic website for a period of 16 days.

[29] I have already noted above that I have no evidence of actual special damages suffered by Inform. In defamation, general damages are presumed.

[30] As noted in *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.) at para. 29, factors to consider in assessing general damages for defamation include: the plaintiff’s position and standing, the nature and seriousness of the defamation, the mode and extent of the

publication, the absence or refusal of any retraction or apology, the whole conduct and motive of the defendant from publication through judgment and any aggravating or mitigating circumstances.

[31] Here, Inform was a new company. It was just becoming established in its business and thus would be particularly vulnerable to defamatory comments. However, the defamatory “comments”, though shocking, were not, in my view, as serious as would be a direct comment that Inform was a front for an illegal activity or an immoral activity. Here, the people referred to the “.com” site over that 16 day period were people who had made an error by choosing “.com” instead of “.ca”. We do not know how many people made that error. We do not know how many actually thought that the referral to the porn site was deliberate rather than a computer or internet glitch. We do not know if anyone, or how many, actually believed that Inform was involved in the porn site or business.

[32] As to the mode and extent of the distribution, although it was for only 16 days, it was on the world wide web and thus published to the world at large. As noted in *Vaquero Energy Ltd. v. Weir* (2004), 352 A.R. 191, 2004 ABQB 68 communication via the Internet is instantaneous, seamless, interactive, blunt, borderless and far reaching. However, I must also take into consideration the nature of the defamation — a referral to a porn site. It is not something that can be replicated almost endlessly over the internet as, say, an actual defamatory statement.

[33] I have noted and do take into account the absence of any public retraction or apology, which has continued up to the date of trial. While Draper made a private apology, the sincerity of which is suspect having regard to the e-mail to his girlfriend sent the same day, I think there is merit in counsel for the plaintiff’s argument that, at the very least, Draper should have put a retraction and apology on the “.com” website which he continued to own for many months after these events.

[34] Finally, I note and take into consideration Draper’s motive. Even if I accepted Draper’s reason for referring the “.com” website to the gay porn website (and I do not accept it), it is not a mitigating factor. It still smacks of malice. In fact, I find that the true reason for Draper’s actions was to embarrass and harm Inform and its principals, the Griffiths, by attempting to link them to this smut, thereby harming the goodwill that Inform was attempting to establish in its new business.

[35] Counsel for Inform as well as counsel for Draper referred me to a number of cases where general damages, some substantial, were awarded. I do not intend to refer to them as the factual matrices in most were quite different.

[36] However, in *WeGo Kayaking Ltd. v. Sewid*, [2007] B.C.J. No. 56, 2007 BCSC 49, the British Columbia Supreme Court made the following points on the issue of general damages for corporations: (1) general damages are intended to provide solace for personal distress and to vindicate one’s reputation, including business reputation; (2) corporations are incapable of suffering personal distress and thus cannot receive general damages for that, only for loss of

their business reputation; (3) generally, corporations should not receive large awards for loss of their reputation absent proof of actual economic loss. I agree with and adopt those points.

[37] *Vaquero Energy* is a relatively recent case from our court. The exact defamatory words written against the corporation there are not known, however I note that the defamatory statements were contained in 48 e-mails sent out over a period of about four months. Kent J. in awarding the company general damages of \$10,000 noted that there was no evidence that the e-mails caused any economic loss to it "...so that this amount should adequately compensate Vaquero for any loss to its reputation".

[38] Given the factors which I have discussed above, I award general damages to Inform for defamation in the amount of \$5000.

### (3) The Intentional Tort

[39] The learned Master held "The Defendant Draper is liable to the Plaintiff Inform Cycle Ltd. for the intentional tort of knowingly and deliberately undertaking the registration and forwarding of the Misleading Domain Name (as defined in the Pleadings)".

[40] With respect, I have difficulty understanding or recognizing this tort to which she refers. I would have thought there nothing wrong with registering a domain name — it would be the use of such a domain name that might be wrongful and thus tortious. In any event, no damages were proved to have arisen from simply registering the ".com" domain name and I see no basis for awarding general damages for that. Indeed, any such damages would, in my view, be subsumed in the damages awarded for the passing-off and defamation torts. The same comment applies to the wrongful forwarding of the ".com" domain name to the other sites.

[41] Accordingly, I do not award any additional damages for this tort.

### Aggravated and Punitive Damages

[42] Inform seeks both aggravated as well as punitive damages.

[43] Aggravated damages are intended to compensate a person for mental distress and hurt feelings. Since a corporation cannot have mental distress or hurt feelings, our court of appeal has held that it cannot be awarded aggravated damages: *Thomas Management Ltd. v. Alberta (Minister of Environmental Protection)* (2006), 397 A.R. 339, 2006 ABCA 303 at paras. 16 and 27. See also *WeGo Kayaking Ltd.* at para.95.

[44] On the other hand, punitive damages are available to a corporate plaintiff. As the SCC has noted in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para.196:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by

way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[45] In my view, the circumstances of this case and the malicious action of Draper are such as to engage the above quoted principle from *Hill*. People must be deterred from similar conduct. Accordingly, I award punitive damages in the sum of \$5000.

**Conclusion**

[46] In the result, I assess Inform's total damages at \$15,000.

Heard on the 14<sup>th</sup> day of May, 2008.

**Dated** at the City of Calgary, Alberta this 18<sup>th</sup> day of June, 2008.

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**C.S. Brooker**  
**J.C.Q.B.A.**

**Appearances:**

Shaun Cody  
for the Plaintiffs

Janet McCready  
for the Defendant Draper