CITATION: United Soils Management Ltd. v. Mohammed, 2017 ONSC 4450
COURT FILE NO.: CV-16-560261
DATE: 20170725

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
UNITED SOILS MANAGEMENT LTD.	)	*William A. Chalmers,* for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	*David Sterns, Sabrina Callaway*, for the
KATIE MOHAMMED	)	Defendant
	)	
Defendant	)	
	)	
	)	
	)	
	)	**HEARD:** April 11, 2017

LEDERER J.

INTRODUCTION

[1] In Canada we value participation in our public discourse. Our citizens and those who reside here are encouraged to take part in public issues.

[2] Over some time a practice designed to discourage if not thwart this involvement developed. It made use of the court. Parties, often corporations and other well-resourced members of our society, when confronted with negative comment or publication implicating matters of public interest of concern to them, commenced a law suit for libel. The purpose of the litigation was not to realize on a claim for damages. It was to suggest a potential vulnerability to the individual making the impugned observation or causing its publication. The goal was to illicit a quick retraction and apology and to have the party remove herself, himself or itself from taking part in any further public debate of the issue at hand.

[3] The practice was sufficiently utilized that it attracted a name: "Strategic Lawsuit Against Public Participation," colloquially "SLAPP" or, alternatively "Gag Proceeding".

BACKGROUND

[4] In the case I am asked to decide, the defendant, Katie Mohammed, became concerned when the council of Whitchurch-Stouffville, the municipality in which she lives, voted to amend an agreement it had with the plaintiff. The plaintiff, United Soils Management Ltd., operates a gravel pit. It is near Musselman's Lake on the Oak Ridges Moraine. The latter is well-known as a sensitive geological area which is the source of drinking water for much of the City of Toronto. The site is close to a water tower. The amendment allowed for the deposition, in the site, of "acceptable fill from small quantity source sites and hydro-excavation trucks [i.e. hydrovac trucks]."[1] On September 1, 2016, Katie Mohammed was shown a list of tweets concerning the Council meeting. These tweets indicated that two members of the Council, a councillor and the mayor, were concerned about the risk posed by what these trucks might deposit in the site. The story was reported in the local paper and published online on September 2, 2016.[2] The town has a history of involvement with contaminated soils. In 1983 it fought to close down a contaminated dumping site.[3] Katie Mohammed became concerned that the amended agreement could lead to contaminated material finding its way into the pit. As a result she placed certain posts on the internet.

[5] Counsel for United Soils Management Ltd. wrote a letter to Katie Mohammed.[4] It said that in her text messages she made false, malicious and defamatory statements about his client. The letter demanded that she immediately cease making any further libelous or slanderous representations or statements about the company and that she deliver to all the recipients of the texts a complete retraction and apology. Counsel advised of his client's intention to commence an action against Katie Mohammed and enclosed with the letter a Notice of Libel under section 5 of the *Libel and Slander Act*.[5]

[6] Katie Mohammed did what the letter demanded. At the end of the postings she added the following and delivered personal messages containing the same paragraph to each of the individual recipients identified in the letter from counsel for United Soils Management Ltd.:

> I retract and apologize for the defamatory and slanderous statements I made about United Soils. As strongly as I am concerned about the health and safety of our children, I apologize for any defamatory or slanderous statements I've made.

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[1] *Affidavit of Katherine Clancy Mohammed* sworn September 26, 2016, at para. 3
[2] *Ibid* at Exhibit H
[3] *Ibid* at paras. 8, 9, 14
[4] *Ibid* at Exhibit F (Letter dated September 6, 2016 from Aird & Berlis to Katie Mohammed.)
[5] R.S.O. 1990 c. L.12

> Blame me for being an over-protective mama-bear. Like others, will think twice before posting next time.[6]

[7] United Soils Management Ltd. sued her anyway. On September 9, 2016, she was served with the Statement of Claim in this action. The company seeks damages of $120,000 from Katie Mohammed. This is happening in circumstances where others have expressed similar concerns. Many residents of the Town of Whitchurch-Stouffville spoke against the amendment[7] and the story was reported in the local media.[8] Comments were delivered to the twitter account at "wstownhall.ca", the official website of council proceedings at the Town of Whitchurch-Stouffville.[9] Residents in the Town of Whitchurch-Stouffville formed a "Facebook group" in order to discuss a strategy directed to having the council of the Town overturn the decision to approve the amendment to the agreement between the Town of Whitchurch-Stouffville and United Soils Management Ltd. The group identified itself as the "Hydrovac Protest Group". Katie Mohammed joined.[10] On September 8, 2016, she attended at a meeting where a representative of a group concerned with the protection of the Oak Ridges Moraine ("Save the Oak Ridges Moraine" or "STORM") presented information as to its importance and suggested that if contaminated material got into the gravel pit of the plaintiff, it would make its way into the municipal water supply within 25 years and private wells within 6 months.[11]

[8] In the face of all of this attention and expressed concern one has to wonder why, especially with the apology and retraction in hand, United Soils Management Ltd. would continue with this law suit. Could it be an effort to limit the public discussion? Was it a response to the efforts apparently underway to have the Council of the Town of Whitchurch-Stouffville overturn its decision to amend the agreement? Was the objective to limit, if not control, public debate? What other individual would risk making public comment for fear of being confronted by an action such as this one?

[9] The Province of Ontario has responded to the efforts to use litigation to shut down public debate.

[10] The Attorney-General created an Advisory Panel on Anti-SLAPP legislation to advise the government as to how the Ontario justice system may prevent the misuse of our courts and other

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[6] *Affidavit of Katherine Clancy Mohammed* sworn September 26, 2016, at paras. 25 and also see 26
[7] *Transcript of the Cross-Examination of Katie Mohammed,* November 28, 2015, Q. 211, 892, 1059-1063
[8] *Affidavit of Katherine Clancy Mohammed* sworn September 26, 2016, at Exhibits C, H and I
[9] *Ibid* at para. 6 and Exhibit B and *Transcript of the Cross-Examination of Katie Mohammed,* November 28, 2015, Q. 233-235. (Among the comments made were: "Consultant says contaminated material could come into the site", "Stouffville water tower is right beside the pit. What guarantees this is not going to be contaminated", and "Nothing scientific in this document to tell me what's in those trucks.")
[10] *Ibid* at paras. 21 and 29
[11] *Ibid* at para. 30

agencies of justice, without depriving anyone of appropriate remedies for expression that actually causes significant harm.[12] The panel produced a report[13] and the government, with this report in hand, passed an amendment to the *Courts of Justice Act*[14] directed to allowing these law suits to be dismissed on a summary motion.[15]

[11] Section 137.1(1) of the *Courts of Justice Act* confirms the policy rationale for the amendments:

> 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.

[12] Section 137.1(3) provides this court with the jurisdiction to dismiss an action where the "expression"[16] of concern relates to a matter of public interest:

> (3) 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.

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[12] *Anti-Slapp Advisory Panel Report to the Attorney-General, October 28, 2010* at para. 2 and as referenced therein at fn. 3: "Ministry of the Attorney General, *Anti-SLAPP Advisory Panel*, online: http://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp ('Ministry web site')

[13] *Ibid*

[14] R.S.O. 1990, c. C.43: The amendment is the result of *Protection of Public Participation Act, 2015* S.O. 2015 Ch. 23: An Act to amend the *Courts of Justice Act*, the *Libel and Slander Act* and the *Statutory Powers Procedure Act* in order to protect expression on matters of public interest."

[15] On March 2, 2017 I released a decision that was preliminary to this motion. It considered whether the plaintiff, United Soils Management Ltd. would be permitted to examine the Mayor of the Town of Whitchurch-Stouffville. The paragraph footnoted and footnotes 12, 13 and 14 herein are quoted from that decision (see: *United Soils Management ltd. v. Mohammed*, 2017 ONSC 1396 at para. 4 and fns. 4,5 and 6)

[16] The term 'expression is defined by section 137.1 (2) as:

> "expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publically of privately, and whether or not it is directed at a person or entity.

[13] As this subsection makes clear, in bringing a motion to dismiss under its auspices it falls to the moving party, in this case Katie Mohammed, to demonstrate that the action arises from an "expression" related to a matter of "public interest". United Soils Management Ltd. concedes that these prerequisites for such an order are present.[17]

[14] I return to the question of why the plaintiff proceeded with this action. What is it that Katie Mohammed included in her emails that have caused such consternation and to who were they delivered?

[15] Having reviewed the tweets found on the web site of the Town of Whitchurch-Stouffville, having noted the concern for the possibility of contaminated soils being disposed of at the site, recognizing the objections expressed in tweets of the Mayor and a councillor and having read one of the articles published in the local media, Katie Mohammed sent an email to a "secret group on Facebook called Stouffville Mommies"[18] and to "a closed group on Facebook called Stouffville Buy and Sell"[19] (Emphasis added). These messages said:

> Hi Everyone,
>
> Please check the front page of yesterday's local paper - the town has approved hydro - vac trucks dumping their sludge into a pit by Muscleman's Lake [*sic*] - the location is beside Stouffville's water tower. Justin Altman [*sic*] voted against this, but 4 councillors voted for it to pass!! In the deal, United Soils looks to make $4.1 million in the deal [*sic*], where Stouffville would only make $108,000 - to *potentially poison* our children. I have received the tweets that documented this meeting, and I will post them if anyone would like to see... I've heard there may be a petition we can sign to overturn this crazy decision...[20]
>
> [Emphasis added]

[16] The postings were read. Comments were made. Some referred to the dumping of new waste in conjunction with a program of planting trees run by the plaintiff. In response Katie Mohammed posted the following:

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[17] *Factum of the Responding Party/Plaintiff* at paras. 33 and 34

[18] *Affidavit of Katherine Clancy Mohammed* sworn September 26, 2016, at para. 15 and 16 (A "secret" group on Facebook is one with the highest level of privacy. Only current and former members of a secret group can see the group's name and only current members can see what is posted to the group. To join a person must either be added or invited by an existing member (and see: *United Soils Management Ltd. v. Mohammed,* 2017 ONSC 1396 at para. 10))

[19] *Ibid* at para. 19 and 20 (A "closed" group has a moderate level of privacy. As with a "secret" group only current members can see what has been posted but unlike a "secret" group anyone can ask to join (and see: *United Soils Management Ltd. v. Mohammed,* 2017 ONSC 1396 at para. 10)).

[20] *Ibid* at para. 15

"Yup, love how they're "taking care of our children"!!"[21]

"Gotta love a family event with a *side of poison*!!!"[22]

[Emphasis added]

And

"That's real nice, come to our "free" events as we *poison your children*!" [23]

[Emphasis added]

[17] Counsel for United Soils Management Ltd. was definite in his submissions. What set the comments of Katie Mohammed apart from all the other expressions of concern was the use of the word "poison". But for the presence of that word his client would not have commenced this action; it would not have sued Katie Mohammed. In the end this motion turns on the presence and impact of the word "poison" as found in the postings placed on the internet by Katie Mohammed.

ANALYSIS

[18] Section 137.1 of the *Courts of Justice Act* does more than make plain the desire that people be encouraged to take part in our public debates without fear of unwarranted reprisal in our courts and authorizing the Court to hear motions to deal summarily with such actions. It also provides guidance as to how, or the basis on which, such motions are to be decided. Section 137.1(4) states:

> 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.

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[21] *Ibid* at para. 17(a)
[22] *Ibid* at para. 17(a)
[23] *Ibid* at para. 17(b)

[19] It having been accepted that the impugned "expression" is with regard to a matter of "public interest" the onus shifts from the moving party to the responding party to satisfy the tests that allow for the action to continue. I consider each of the three requirements:

Does the proceeding have substantial merit?

[20] The adjective "substantial" is important. It confirms the superior value being attributed to the desire that people feel free to take part in our public discourse. The acceptance that an action such as this one has merit (may, on its own terms, succeed) is not enough to displace that value:

> …Satisfying a judge that there are grounds to believe the claim has "substantial merit" requires that the judge be satisfied that there is credible and compelling evidence supporting the claim as being a serious one with a reasonable likelihood of success. … [24]

[21] To my mind there is no merit to this action much less "substantial merit". To determine whether the words complained of are defamatory, the plaintiff must show the main thrust, or "defamatory sting," of those words. In every defamation action, the trier of fact must determine the defamatory sting from both the plain meaning of the words complained of and from what the ordinary, reasonable person would infer from them in the context in which those words were published.[25]

[22] As perceived by counsel on behalf of United Soils Management Ltd., the word "poison," used as it was here in association with the word "children," cannot be understood in any context other than as referable to a criminal act. He referred to the *Criminal Code*.[26] Poisoning another person is a crime:

> 245 (1) Every one who administers or causes to be administered to any person or causes any person to take poison or any other destructive or noxious thing is guilty of an indictable offence and liable
>
> (a) to imprisonment for a term not exceeding fourteen years, if he intends thereby to endanger the life of or to cause bodily harm to that person; or
>
> (b) to imprisonment for a term not exceeding two years, if he intends thereby to aggrieve or annoy that person.[27]

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[24] *Able Translations Ltd. v. Express International Translations Inc.* [2016] O.J. No. 5740, 2016 ONSC 6785 at para. 49
[25] *Rutman v. Rabinowitz,* [2016] O.J. No. 6309 at para. 133 referring to *Cusson v. Quan* (2007) ONCA 771, (2007) 286 D.L.R. (4th) 196 at para. 34
[26] RSC 1985, c C-46
[27] *Ibid* at s. 245(1)

[23] From this understanding it is counsel's contention that the ordinary and reasonable person would understand the comments of Katie Mohammed to allude to the literal proposition that United Soils Management Ltd. would be setting out to, and would be, poisoning children ("your children" and "our children") contrary to the *Criminal Code*. Katie Mohammed was cross-examined. She explained her intention; what it was that she was attempting to communicate:

> Q. 116: Now you said that you don't believe that United Soils is actually poisoning the children of the town. Right? You still maintain that?
>
> A. Yes
>
> Q. 117: Okay, is it your belief that there is the potential for United Soils to poison the children of the town?
>
> A. It's my belief that contamination could make it into our groundwater from their operation. That is my belief.
>
> ……
>
> Q. 118: Do you believe that United Soils has the potential to poison the children of the town?
>
> A. I believe that they have a potential of causing harm to our groundwater, which would harm the kids in the future, yes.
>
> ……
>
> Q. 151: Now, as of September 2, 2016 -- you know what that date is?
>
> A. Yes.
>
> Q. 152: That's the date you published these words-- did you honestly believe that United Soils was poisoning the children of the town? So that's as of that date.
>
> A. I was worried, reading everything that I had read, about contamination making it into our groundwater and causing harm to our community, something that our community has been through before.
>
> I don't know if you're familiar with the history of Stouffville
>
> ……..
>
> Q. 665: Right. And we've been down that path before. That's your intention. Right? When you say "poisoning children" you intended to mean the potential of contaminating groundwater which could harm residents, could cause harm to our community?

A. Yes.

[24] In its factum, United Soils Management Ltd. acknowledged that "[t]he defamatory sting is not determined on a narrow reading of the words complained of in isolation. Context is crucial as it informs what meaning the ordinary person will infer from the words complained of: the words must be given their meaning in the context."[28] At the cross-examination of Katie Mohammed and in his submissions, Counsel for United Soils Management Ltd. gave short shrift to this idea. In the latter he was definitive: "poisoning children" can only be understood as referencing a criminal act. The context could not impact that simple idea. During the former he disavowed any interest in, or concern for, the context in which the words were spoken:

> Q. 32: I'm asking you a question not in the context of anything else. I'm asking you this simple question. I am asking you to agree with me that the statement, "United Soils is poisoning the children of the town," that statement, "United soils is poisoning the children of the town," is not wholly or completely true. Do you agree with me?
>
> A. Well, I believe it to be true in the context that it was meant.
>
> Q. 33: So I'm not talking about any context. So, your evidence is you believe the statement, "United Soils is poisoning the children of the town," to be true?
>
> A. Yes.

[25] The question of what was intended by the use of the word "poison" came up. Counsel was not interested in following up. There was no need. The only thing that was important was that this was an "extraordinarily serious allegation":

> Q. 153: Did you, as of September 2, 2016, honestly believe that United Soils was poisoning the children of the town?
>
> MS. CALLAWAY: Mr. Chalmers, could we clarify? I know we have discussed what does "poison" mean to you, what does "poison" mean to my client. Would you like to clarify the question?
>
> MR. CHALMERS: No. It's not necessary to clarify it, counsel, and I don't need to say anything else beyond that.
>
> This case, as you know, is all about the choice of words. Ms. Mohammed had an opportunity to use different words. She chose this word, the concept of

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[28] *Factum of the Responding Party/Plaintiff* at para. 39 quoting *Rutman v. Rabinowitz, supra* (fn. 25) at para. 135

> "poisoning" and "children." Nobody in this room thinks that that's anything other than an extraordinarily serious allegation to allege.

[26] To make the point that there was only one way to understand the meaning of "poison" and that the explanation provided by Katie Mohammed was inconsistent with that meaning, counsel attempted to distinguish the verb "contaminate" as in "contaminate groundwater" from the verb "poison" as in "poison our children". He drew an allusion to a bowl of candies. If all the candies were red and a single yellow candy was introduced it would serve to "contaminate" the uniform colour of the contents of the bowl. On this foundation "contamination" is benign whereas "poison" kills people. This is simplistic in the extreme and I do not accept it as demonstrative of what the ordinary, reasonable person would infer from these words as they were used by Katie Mohammed. Groundwater is not candy and if the wrong things are disposed of such that they come in contact with groundwater, more than its colour may change. People may drink the water and be harmed. The word "poison" can also be used with a nonthreatening intention. In some social circles the command "choose your poison" is nothing more than asking what another person may wish to drink and the expression "poisoning the well" alludes to the biasing of an argument, understanding or position. The use of the word "poison" in these contexts does not deny its common meaning. Rather it is a figurative, as opposed to literal, use of the word to ask a question or make a point in a more flamboyant or unusual way. The ordinary, reasonable person has little difficulty in making the distinction. What this underscores, is that the meaning to be taken does depend on the context.

[27] In his submissions counsel for United Soils Management Ltd. did make reference to context. As he sees it, the applicable context was set by United Soils Management Ltd. in the report prepared, on its behalf, by consultants, for submission to the Town of Whitchurch-Stouffville and two public meetings which it held in furtherance of obtaining the approval of the Town to the proposed site alteration. If Katie Mohammed had read the report and attended the meetings she would have been informed as to the commitments made by the company to avoid the problems that were the source of her concern. Context is not that narrowly drawn. To adhere to this conception of the applicable context is not to encourage public discourse but to suppress it. A person could not take part in such a debate without risking a law suit like the one brought in this case until educated in the detail of what the company had done, what it had said and what it had concluded. Part of the purpose of public debate is to educate. It is not carried out on the basis that everyone is already fully informed. It would be better if they were but an individual does not lose the right to take part in public discussion because she or he is not. Companies that work in areas that raise concerns for public health have to accept that any accompanying anxiety may be expressed. They should not expect to step around the issue through a law suit brought in respect of the unfortunate use of a single word ("poison"). That is the point behind the legislation that is at the foundation of this motion.

[28] As it is, the report in question may not answer all of the concerns of Katie Mohammed or those of like mind. For one thing it concedes there is a risk and provides that the continuing assessment and evaluation of the risk is projected to remain primarily the responsibility of the United Soils Management Ltd.:

> …Risk is inherent in any project and United Soils Management will assess risks continually and develop plans to address them…[29]

[29] Obviously it is not for the court to assess or evaluate the substance of the report and the operational program it proposed.[30] It may be that the approach it takes is conventional and accepted in the industry as well as by the applicable regulators. The point I seek to make is that it is not appropriate to take the context as being set by this work and to use a failure to have read the report as a basis for limiting public participation in any ensuing debate. The same applies to the two public meetings United Soils Management Ltd. is said to have held. So far as I am aware there is no reference to them in the Record other than to produce the list of attendees in order to show that Katie Mohammed was not one of them.[31] The evidence suggests that Katie Mohammed was not aware of the proposal to amend the agreement between the Town of Whitchurch-Stouffville and United Soils Management Ltd. until well after these meetings took place. They were not part of the study process. They took place nearly two years after the report, which is dated August, 2014, was prepared. They were conducted on June 23, 2016, at 6:30 pm at the town offices, in the council chamber and on June 30, 2016, at 4:30 pm at the site.[32] It appears they were to have taken place much earlier. The only reference I have found, in the report, to meetings of this kind is as follows:

> Although the public complaint procedures are outlined in section 4.26, the Town and United Soils Management can also be contacted for general inquiries and information on the Site works. To support and initiate this, prior to filling the Site under the Town Permit, as planned for fall 2014, United Soils Management will invite the public and adjacent land owners to visit the Site for a tour and information session. This session will include a tour, a summary on how the filling operations are planned to be undertaken with the opportunity for questions to be answered on the process.[33]

[30] Katie Mohammed was not aware of the proposed amendment prior to September 1, 2016. On that day a colleague showed her the list of "tweets" concerning the meeting of the council of the Town of Whitchurch-Stouffville that had taken place on August 23, 2016. Katie Mohammed was alarmed. The tweets made reference to "contaminated soils of the 1980s" and cited a consultant as saying that "contaminated material could come into the site". The tweets indicated

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[29] *United Soils Management: Site Alteration & Fill Management Plan, August 2014*, at p.62 (under the heading "Purpose and Objective")

[30] In his affidavit sworn on November 28, 2016, at paragraph 12 and Exhibit C, Alec Cloke, identified as an officer and director of United Soils Management Ltd., makes particular note of section 4.3 of the report which deals with Fill Quality Evaluation and Assessment, section 4.14 that deals with Fill Tracking and Figure 1 which is entitled Fill Quality Control, Environmental Protection, Monitoring and Oversight.

[31] *Affidavit of Alec Cloke* sworn November 28, 2016, at para. 13 and Exhibit D

[32] *Ibid* at para. 13

[33] *United Soils Management: Site Alteration & Fill Management Plan, August 2014* at p.52 (under the heading "Public and Adjacent Landowners")

that the two councillors were concerned about the risk.[34] The tweets were published on the official twitter account of the proceedings of the Town council. As a result Katie Mohammed trusted what was said in them.[35]

[31] On the same day (September 1, 2016) Katie Mohammed read the newspaper article. It was entitled "Risk of contaminants? Councillor says yes, owner says no, after Stouffville council passes gravel pit amendment". The story appeared in the *Stouffville Sun-Tribune*.[36] The article reported on the approval by vote of council of the proposed amendment. It quoted Alec Cloke, an officer and director of United Soils Management Ltd. (see fn. 30), as saying "It's not contaminated" and reviewed the vote: four in favour, three opposed. "The vote followed a lengthy discussion…concerning the possibilities of contaminants being brought into the site…" The article noted that there were concerns that the town had not done its due diligence.[37]

[32] From the "tweets" and the newspaper article Katie Mohammed concluded that the decision which had been made by the council of the Town would affect the welfare of a large number of the Town's residents.[38] This was the catalyst for Katie Mohammed to send out the postings of concern.[39] It is on this basis, with this knowledge, that she entered the public debate. The submissions of counsel for United Soils Management Ltd. say she should not have or, at least she should have realized that before doing so she was obliged to stop, seek out whatever reports had been prepared, look to see if there were any public meetings that had been, or would be held and attended them to learn what she could. Only then would she have been entitled to enter the public debate because it is only then that she would have understood the context as the company proposed it to be. This is not to say that Katie Mohammed would not still have been sued. It is the surmise of counsel and, it would seem, his client that with this information it would have been clear that there was no risk and no basis upon which the impugned comments could have been fairly made. To put it simply, if Katie Mohammed had behaved as it was suggested she should and the comments referring to "poison" had still have been made, Katie Mohammed would still have been sued. What this points out is that it cannot be that United Soils Management Ltd., on its own, set the context. It was the situation as a whole. Otherwise the company could foreclose any public comment relying on its view of the risk as forecast in the reports prepared on its behalf.

[33] In her postings Katie Mohammed was not referring to United Soils Management Ltd. as undertaking the criminal act of requiring children to consume a noxious substance. She was doing nothing more than recognizing the well-known relationship between the deposition of certain kinds of waste, in the ground, and the potential risk this can pose to the water we drink.

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[34] *Affidavit of Katie Clancy Mohammed*, sworn September 26, 2016, at para. 6 and Exhibit B
[35] *Ibid* at para. 14
[36] *Ibid* at para. 13 and Exhibit C
[37] *Ibid* at Exhibit C
[38] *Ibid* at para. 14
[39] *Ibid* at para. 14-20

[34] The *Environmental Protection Act*[40] defines contaminant as:

> "contaminant" means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that causes or may cause an *adverse effect*;[41]
>
> [Emphasis added]

[35] Adverse effect is defined as;

> "adverse effect" means one or more of,
>
> (a) impairment of the quality of the natural environment for any use that can be made of it,
>
> (b) injury or damage to property or to plant or animal life,
>
> (c) harm or material discomfort to any person,
>
> (d) an adverse effect on the health of any person,
>
> (e) impairment of the safety of any person,
>
> (f) rendering any property or plant or animal life unfit for human use,
>
> (g) loss of enjoyment of normal use of property, and
>
> (h) interference with the normal conduct of business;[42]

[36] This is the context which the ordinary, reasonable person would have understood Katie Mohammed to have been referring to in the postings that she made. Her concern was that whatever work had been done to justify the amendment to the agreement there was a risk that contamination would find its way into the groundwater and endanger those who used and drank it. This was not a risk she believed the Town should take. The language she used could have been more carefully considered but does not demonstrate the basis upon which an action in defamation can be said to have "substantial merit".

[37] In considering the question of the merit of the action there is one further issue to which I wish to refer. It is the apology. Upon receiving the demand from counsel for United Soils Management Ltd. Katie Mohammed posted apologies. The apology included the following: "Just

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[40] R.S.O. 1990, c. E.19
[41] *Ibid* at s. 1(1)
[42] *Ibid* at s. 1(1)

to be clear, the comments I made that I'm referring to and wholly retract are: 'In the deal United Soils looks to make $4.1 million in the deal, where Stouffville would only make $108,000 to potentially potion our children', 'putting on an event with a side of poison' and 'love how they're "taking care" of our children.'"[43] Despite this, the action was commenced. Not content with the apologies, in the course of cross-examining Katie Mohammed, counsel for United Soils Management Ltd. questioned whether she really meant it. Did she accept that she had been wrong to make the statements and assert the concerns found in the postings she had made? This was not a brief exchange. Counsel asked:

> Q. 869: Is your retraction or apology heartfelt, genuine? Let me use "genuine."
>
> A. I made that to avoid legal costs as indicated in your letter.
>
> Q. 870: So my question is -- here is a perfect example, right, of why this is taking so long. You just answered the question: Why did you do it? I didn't [ask] you that question. I asked you whether your apology was genuine.
>
> So, to the extent that we can focus on the question and answer, I think it will help us going forward.
>
> A. Okay. No, it was not. I guess parts of it were. For example, "as strongly as I am concerned about the health and safety of our children," that was genuine.
>
> Q. 871: Okay. So, let's go through it. "I retract," do you genuinely retract the statements you made?
>
> A. No.
>
> Q. 872: "And apologize for," do you genuinely apologize?
>
> A. No.
>
> Q. 873: "The defamatory statements," you agree that they're defamatory?
>
> A. No.
>
> Q. 874: "And slanderous statements," do you agree?
>
> A. No.
>
> Q. 875: Then you say:

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[43] Affidavit of Katherine Clancy Mohammed sworn September 26, 2016, at para 26

"I apologize for the defamatory and slanderous statements I have made."

So it's not a genuine apology. Correct?

A. No.

Q. 876: Yes, it's correct what I'm saying, it's not a genuine apology?

A. You're correct.

Q. 877: Okay. And you do not agree that your comments were defamatory or slanderous?

A. No.

Q. 878: Okay. And then you -- so we dealt with paragraph 25. Paragraph 26, you begin with "other personal messages through the Facebook messenger app" you retract. Is that genuine?

A. No.

Q. 879: You apologize. Is that genuine?

A. No.

Q. 880: Your assertion that statements are defamatory. Is that genuine?

A. No.

Q. 881: Slanderous?

A. No.

Q. 882: Then you apologize for defamatory and slanderous statements. Just a repetition. So, neither your apology nor your statement that the assertions were defamatory or slanderous, none of them is true. Correct?

A. The true part is that I'm concerned about the health and safety of our children? But everything else? I was worried about an expensive legal battle, so that's why, to be honest why I apologized.

Q. 883: Right. So, I'm asking you about whether they're genuine or true, so they're not?

A. No.

Q. 884: Okay. So, when you say:

"Just to be clear, the comments I made that I'm referring to and wholly retract

are --"

Then you refer to them again. Do you see that?

A. Yes.

Q. 885: Leave aside the propriety of referring to the comments again. Your statement:

"The comments I made that I'm referring to and wholly retract –"

That's not truthful, either. You don't wholly retract them?

A. No.

Q. 886: In fact, as at today's date, you stand by those comments. Is that correct?

A. Which comments?

Q. 887: The ones that you wholly retract in this reported apology.

A. Yes.

…..

Q. 910: Yes. You published a retraction and apologies. Do you say that [the] retraction and apology minimizes the damages that my client has suffered or might suffer?

A. You said in the letter that you originally sent to me for me to apologize and retract so the damage would be minimized. That's what you said to me so I tried to comply by doing that.

Q. 911: Yes, but now we know -- that truth is out now, isn't it, right here today -- that you didn't mean a word that you said. Correct?

A. Yes

Q. 912: So how is it possible, Ms. Mohammed, that your retraction and apology could do anything other than aggravate my client's damages when you have the audacity -- sorry, I shouldn't use that expression -- when you sit here and say that you didn't mean a word of the retraction or apology?

A. I don't know.

…

> Q. 928: Well, you knew at the time that you publish this retract and apology that you didn't mean it. Correct?
>
> A. Yes.

[38] The retraction referred to as resulting from the cross-examination of Katie Mohammed may be a retraction to United Soils Management Ltd. but it is not a retraction to the rest of the world. When Katie Mohammed, in response to the letter from counsel for United Soils Management Ltd. apologized, the apology was delivered through postings made to the recipients of her original statements. The retraction was delivered to no one. The only reason it exists at all is because counsel raised the issue in the questions he put to Katie Mohammed. The mistake is in failing to grasp what seems an obvious truth. People will apologize for making statements that, as a legal matter, are or could be defamatory to avoid or at least minimize the repercussions that follow. That does not mean that in the inner thoughts and beliefs of the person who made the statements she or he does not continue to believe them to be true. There is no legal liability for what a person may think.

[39] Contrary to what counsel asked Katie Mohammed, there was no aggravation of damages as a result of this supposed retraction because no one, until the motion was argued, knew about it and it would not exist if counsel had not asked the questions in the first place. This raises a question: why was it thought to be helpful much less necessary to ask if the apology was genuine? While there is a measure of conjecture in any answer the court may provide, the purpose in opposing a motion such as this one is to ensure that the action be allowed to continue. With the apology made there was little or no purpose in continuing the action. As counsel for Katie Mohammed pointed out, her comments have had no discernable impact. The vote approving the amendment to the agreement has not been set aside. To those who received the comments, Katie Mohammed has acknowledged it was wrong to have made them. The only apparent reason for the action to continue is as an impediment to public discussion and debate.

[40] Counsel for United Soils Management Inc. asked for an apology. He got it. Even so his client sued. Now, as part of his argument that the action should continue (that there is "substantial merit to the proceeding") the same counsel relies on the proposition that the apology was not genuine in circumstances where he is the one who sought to look behind it. Absent a retraction there is nothing to be gained by proceeding. Katie Mohammed has apologized. There is no continuing harm. The proceeding is not only without "substantial merit". There is no merit. What Katie Mohammed may or may not continue to think does not change that conclusion.

[41] I find that there are no grounds to believe that there is substantial merit to the proceeding.

Does the moving party have a valid defence?

[42] In the absence of a proceeding with substantial merit, there may be little purpose in reviewing whether there is a valid defence. The test allowing for the action to continue has not been met. However, this motion is brought under relatively new legislation. In the circumstances,

it may be as well if I make some comment. In his submissions counsel for United Soils Management Ltd. reviewed each of the four defences that could, or might, apply to this action for defamation: "justification", "fair comment", "qualified privilege" and "responsible communication".

[43] As counsel sees it, "justification" or truth cannot apply. Why? Because in making the apology Katie Mohammed was conceding that the statements that she had made were not true. This is sophistry ("a false argument" from Greek "*sophisma"* "clever device"[44]). On the one hand Katie Mohammed is to be held to her apology on the basis that it removes any possibility of a defence of justification; on the other hand she is to be held to a retraction of that apology on the basis that it aggravated any damage suffered by United Soils Management Ltd. To my mind the apology and the supposed retraction do not stand as independent acts, one directed at Katie Mohammed as the end of any defence of justification and the other as adding to the alleged damage. If it is to be argued that any damage was aggravated by the supposed retraction[45] then any defence that the comments were justified and truthful remains pertinent. United Soils Management Ltd. cannot have it both ways.

[44] Counsel for United Soils Management Ltd. went on to say that the concern expressed and relied on cannot be subjective. It must be objective. From the perspective of United Soils Management Ltd. the work done on its behalf shows that the concern expressed is not true. Thus, there can be no defence of justification. I do not agree. This may be the way that United Soils Management Ltd. reads the various reports that have been prepared. Others may read the results or the inferences to be drawn from them differently. I note again the main report acknowledges there are always risks. Controls are referred to. It is open to a concerned party to propose that the controls could fail and that "contaminants" (as that word is defined in the *Environmental Protection Act*) could enter the groundwater and cause an "adverse effect." It bears observing that, at this stage, Katie Mohammed does not have to prove there is justification. This being so, it does not matter that Katie Mohammed "did not ask for proof of the misconduct allegedly perpetrated by the plaintiff, and [that] she did not ask for notes, documents, evidence or source documents or conduct her own independent fact checking". [46] It is for United Soils Management Ltd. to prove this defence is not available. In this situation putting forward its reading of its own work is not sufficient. This issue was commented on in *Able Transportation Ltd. v. Express*

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[44] "Sophistry" is the "use of sophisms." "The explanation of "sophism" as referred to above is from the *The Concise Oxford Dictionary, Ninth Edition,* Oxford University Press

[45] I have called this a "supposed retraction" because (and I am repeating) it was never published. At best it is a transcription of answers to questions put by counsel and so instigated by, or on behalf of, United Soils Management Ltd.

[46] *Factum of the Responding Party/Plaintiff* at para. 49. In making this statement counsel relied on *Enverga v. Balita Newspaper,* [2016] O.J. No. 3995 at paras. 29 and 31. The situation there was different. It was a motion for summary judgment. The judge found that a trial was not necessary. The defence of justification was put forward and failed. In the case being decided the question is not whether the mechanisms of a trial are necessary to determine if such a defence will succeed but whether there are "grounds to believe…" the moving party has such a defence. Having a defence and proving it should be determinative of the action are significantly different standards.

International Translations Inc.[47] The judge added the word "reasonable" to explain the parameters that inform the phrase "grounds to believe" as found in Section 137.1(4) of the *Courts of Justice Act* (see para. [18] above). In considering where the test of "reasonable grounds" to believe fell, he concluded:

> There is a spectrum to which the merits of claims or affirmative defences may be subjected that extends from the very low threshold of not being frivolous or vexatious to the relatively high threshold of proof on the balance of probabilities. It is enough for present purposes that I conclude that the required standard under s. 137.1(4)(a) of the *CJA* is somewhat higher than the one and somewhat lower than the other. The *Muguesera* [*sic*] test of requiring the judge to look for "*credible and compelling evidence*" both of the substantial merits of the claim and the validity of the affirmative defences proposed commends itself to me as striking the appropriate balance. The Legislature clearly intended the *PPPA* to *tilt the balance somewhat* further towards protecting freedom of expression than the common law has accomplished with its gradual evolution but it is equally clear that the Legislature did not intend to provide a shield for unrestrained defamation in the public interest sphere. The "frivolous and vexatious" test filters few if any claims; the proof on the balance of probabilities standard would filter a large number and run the risk of turning s. 137.1 *CJA* motions into compressed (and expensive) summary judgment dry-runs. I am satisfied that the Legislature intended the courts to develop a standard that lies between the two extremes so as to give effect to the goals expressed in s. 137.1(1) of the *CJA*.[48]
>
> [Emphasis added]

[45] For the purposes of these reasons I accept that the test (however it is worded, with "reasonable" added or without) is both above "frivolous" and below the "balance of probability." I am inclined to the view that the legislature did more than just "tilt the balance somewhat". Rather the legislature created a steep hill for the plaintiff to climb before an action like this one is to be permitted to proceed. The legislation directs that we place substantial value on the freedom of expression over defamation in the public sphere. To put it simply, those who act in the public realm need to realize that not everybody will accept what they wish to do or agree with what they say and may make statements that go beyond what may seem, to the recipient, to be appropriate.

[46] For myself I confess to some uncertainty as to the application of the words "credible and compelling evidence" In the quotation from *Able Transportation Ltd. v. Express International Translations Inc.*, the case relied on in bringing these words forward is *Mugesera v. Canada (Minister of Citizenship and Immigration).*[49] I would not so easily apply the understanding of the

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[47] *Supra* (fn. 24) at paras. 45 to 47.
[48] *Supra* (fn. 24) at para. 48
[49] [2005] 2 S.C.R. 100, [2005] SCJ. No. 39, 140 A.C.W.S. (3rd) 710, 197 C.C.C. (3rd) 233, 254 D.L.R. (4th) 200

standard there to the situation here. In that case an adjudicator had ordered that Mugesera be deported. The decision was upheld by the Immigration and Refugee Board (Appeal Division). The Federal Court – Trial Division dismissed an application for judicial review on some grounds and allowed it on others. The Federal Court of Appeal reversed several findings of fact that had been made by the Immigration and Refugee Board (Appeal Division), found the allegations made by the Minister to be unfounded and set aside the deportation order. The Supreme Court of Canada overturned the decision of the Federal Court of Appeal. It held the deportation order was valid and that it should be restored. It considered the standard of proof and found that "reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information."[50] It found that the decision of the Immigration and Refugee Board (Appeal Division) met the standard. The subject matter was substantially different. The issue was whether there was evidence sufficient to demonstrate that were reasonable grounds to accept that the Mugesera had committed war crimes and crimes against humanity. The policy foundation reflected the nature of the question and the repercussions that came with the answer:

> In imposing this standard in the *Immigration Act* in respect of war crimes and crimes against humanity, Parliament has made clear that these most serious crimes deserve extraordinary condemnation. As a result, no person will be admissible to Canada if there are reasonable grounds to believe that he or she has committed a crime against humanity, even if the crime is not made out on a higher standard of proof. [51]

[47] In *Mugesera v. Canada (Minister of Citizenship and Immigration)* the individual was questioning the determination made by the government of Canada at the risk of being ordered to leave the country. The crimes alleged by Canada were among the most serious that can confront any person. Deportation could occur even if the crime was not made out "on a higher standard of proof." There was an intrinsic bias to protect the right of the individual to a proper process. In the case before this court, a company is unhappy about what an individual has said about it. The state is not involved. The party claiming to have been wronged is not in peril of being asked to leave. Rather the legislature is balancing the freedom of expression against unrestrained defamation. The balance intended by the legislature also has an intrinsic bias. It is to assure people they can take part in public discourse without being subjected to actions without "substantial merit" and, where there is substantial merit, there are grounds to believe they have a "valid defence".

[48] Whatever the words "compelling and credible" may mean it cannot be that they foresee that individuals, in the position of Katie Mohammed, are required, in a situation such as this, to have independent evidence to prove the "validity of a defence." To suggest an individual would

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[50] *Ibid* at para. 111 referring to *Sabour v. Canada (Minister of Citizenship & Immigration)* 5 Imm. L.R. (3rd) 61 (Fed. T.D.)
[51] *Ibid* at para. 115

need independent evidence is to undermine the intention and policy behind the legislative changes that are the basis for this motion. Counsel for United Soils Management Ltd. is certain that the reports prepared on behalf of his client prove there can be no truth to the concerns of Katie Mohammed (and it would seem many others). To counter such an assertion, Katie Mohammed, or anyone else in her position would have to hire experts to review the reports and any notes that might have been provided, if they had been requested, to establish the concerns she has expressed. There are few of us who have the resources necessary to willingly enter a public debate with this possibility so clearly at hand. If I am wrong in this and it is appropriate to apply the requirement that there be "credible and compelling evidence" for a defence to be "valid," the test is met. A review of the report and the risk that the proper operation of the site and the prospect that the tests and the controls to be put in place could fail, demonstrate that there are grounds to believe that there is a valid defence of justification or truth.

[49] I turn to the three remaining defences: "fair comment", "qualified privilege" and "responsible communication". Counsel for United Soils Management Ltd. submitted that none of these defences is available where malice is present. He submitted that Katie Mohammed was malicious. This is borne out by her failure to be more careful before accusing United Soils Management Ltd. of being prepared to poison children. This was reckless. Recklessness can be the foundation for a finding of malice. It is the failure of Katie Mohammed to read the reports and make further inquiries before issuing the posts that are said to be the demonstration that she was reckless and, on that formulation, demonstrated malice towards United Soils Management Ltd. I can only repeat what I have already said, the policy directive behind the legislative changes that are the foundation for this motion are not to impede but to encourage participation in public issues. There is no duty to read particular reports, attend public meetings or educate oneself to some established degree before being permitted to enter the fray free of concern of being sued. What Katie Mohammed did is nothing more or less than what many people do before becoming engaged in a public issue. She was told about the meeting of the town council. She was given or alerted to tweets on the web site of the Town that dealt with issue, the council meeting and the decision that had been taken. She read a newspaper article and from that foundation determined she was concerned enough to become involved. She published the texts and subsequently attended a meeting and joined a group that was opposed to permitting the deposition proposed and by the decision of council agreed to.

[50] There is nothing that crosses the line to recklessness and malice. The presumption of United Soils Management Ltd. that a reading of the reports and the information that could have been acquired would have convinced Katie Mohammed that there was no concern or, at least, that she would not have used the word "poison" is not borne out by the facts. She had knowledge and understood the potential relationship between the possible placement of contaminants in a pit and their leaching into the groundwater. There were many other people who were concerned, including municipal officials. The vote at council had been 4 to 3.

[51] The other indicator of "malice" as perceived by counsel for United Soils Management Ltd. is the fact that Katie Mohammed wished to see the vote of council reversed.[52] On this theory no one could enter into a public issue that had as its purpose having a legislative body change its mind without malice being present and the validity of the defences of "fair comment", "qualified privilege" and "responsible communication" lost to any action for defamation that might be forthcoming. Malice, as a legal premise, has to bear more ill intention than that:

> Malice means in law wrongful intention. It includes any intent which the law deems wrongful, and which therefore serves as a ground of liability. Any act done with such an intent is, in the language of the law, malicious, and this legal usage has etymology in its favour. The Latin *militia [sic – malitia]* means badness, physical or moral - wickedness in disposition or in conduct - not specifically or exclusively ill-will or malevolence; hence the malice of English law, including all forms of evil purpose, design, intent or motive….[53]

[52] There is nothing in the publication, actions or activities of Katie Mohammed that would demonstrate *wrongful* intent, *ill-will, malevolence, evil* purpose, design or motive towards United Soils Management Ltd. Malice not being present, it does not act to withdraw as possible defences either of "fair comment", "qualified privilege" or "responsible communication."

[53] The submissions of counsel for United Soils Management Ltd. made in respect of the defence of "fair comment" are for the most part directed to the understanding that the comments relied on convey the literal assertion that Katie Mohammed was saying, as a fact, that United Soils Management Ltd. would be poisoning children. The following paragraphs are from the factum filed on behalf of United Soils Management Ltd.:

> Mohammed does not express an opinion in the Defamatory Words. Mohammed does not say "I believe", or "it is my view", or "in my opinion" or anything equivalent to that. Instead Mohammed made the assertion that United Soils is involved in family events and poisons the children of the Town. Simply put, Mohammed asserts to parents in the Town that "we [United Soils] poison your children".
>
> Mohammed did not say anything that would enable a reader to distinguish between the facts and comment. Mohammed did not say anything that would indicate with reasonable clarity that it purports to be comment and not statement

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[52] *Factum of the Responding Party/Plaintiff* at para.72 where it is said: "Mohammed's purpose of the Defamatory Words was to influence and persuade counsel to change its mind and reverse its approval of the SAFM Plan Amendment."

[53] Bryan A. Garner: *Black's Law Dictionary*, Tenth Edition, Thomson Reuters at p. 1100

> of fact. The words and visual images projected create a factual impression that United Soils poisons the children of the Town[54]

[54] There is a time where counsel, in pressing a point, goes too far and steps beyond what is reasonable. Here counsel wishes the court to consider that what was being said was that United Soils Management Ltd. would literally be poisoning children and that this cannot be the subject of a defence of "fair comment." This is because it was being stated as a fact (not an opinion) and was not supported by any proven fact. It was submitted that:

> The defence of fair comment is only available for fair comment made upon true facts. It is not available if it is based on facts which are untrue or misstated. If the factual foundation is unstated, unknown, or turns out to be false, the fair comment defence is not available. Where the defendant cannot prove the truth of the facts upon which the comment is made, the defence of fair comment will not be available.[55]
>
> To be fair, comment must be based on facts truly stated and must not contain invitations of Crawford's honourable motives on the person whose conduct is criticized, save insofar as such imputations are warranted by the facts.[56]
>
> Mohammed cannot point to any proved fact upon which anyone could honestly expressed the opinion that United Soils is poisoning the children of the Town, or anyone. The statements made by Mohammed are a cloak for mere invective. The statement about poisoning the children is invective-insulting, abusive, highly critical language.[57]

[55] This is beyond the proverbial pale. The only way the comments relied on can be taken literally is if they are taken completely out of any context. Something, counsel conceded would not be proper. For the purposes of these reasons I accept that if what was being said was literally that United Soils Management Ltd. was getting ready to poison children the defence of "fair comment" would not be available. The problem is that it is not what was being said.

[56] I turn to the defence of "qualified privilege." In general terms qualified privilege applies where the maker of the defamatory statement has an interest or duty to make it and the person to whom it is made has a corresponding interest or duty to receive it.[58] "Employment references, business and credit reports, and complaints to police, regulatory bodies or public authorities are

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[54] *Factum of the Responding Party/Plaintiff* at paras. 60 and 61
[55] *Ibid* at para. 62 referring to *WIC Radio Ltd. Simpson*, [2008] S.C.C. 40, [2008] 2 S.C.R. 420 at para. 28
[56] *Ibid* at para. 63 referring to *Leenan v. Canadian Broadcasting Corp.*, [2001] O.J. 2229 (C.A.) at para. 15; *Weaver v. Corcoran*, [2015] B.C.J. No. 179; 2015 B.C.J. 165 at para.240
[57] *Ibid* at para 64
[58] *D'Addario v. Smith* [2015] O.J. No.6459, 2015 ONSC 6652 at para. 55 quoting from *Cusson v. Quan, supra* (fn. 25) at para. 38

classic examples of occasions of qualified privilege".[59] In the submissions made on behalf of United Soils Management Ltd., its counsel relied on the observation that "the Court of Appeal [has] signaled its reluctance to expand the categories of qualified privilege in view of the need to protect the important value of individual reputation".[60] This does not mean that new categories will not be identified. The judge who made the observation went on to set the test as it applied to the case he was deciding:

> …Communications to priests are not among the recognized occasions that are protected by the defence of qualified privilege.
>
> Therefore, in order to be able to successfully invoke the defence, the D'Addarios bear the onus of establishing a new occasion of qualified privilege. The D'Addarios bear the onus of proving that they had an interest or a duty, legal, social, or moral, to make it to Father Kerslake and that the person to whom it was made had a corresponding interest or duty to receive it. This reciprocity is essential.[61]

[57] In considering whether there are grounds to believe that a defence of qualified privilege could be available to Katie Mohammed (assuming, contrary to what I have found, that there were grounds to believe the action had substantial merit) the logic behind the defence should be borne in mind:

> The rationale for qualified privilege is that on such occasions, "no matter how harsh, hasty, untrue, or libellous the publication . . . the amount of public inconvenience from the restriction of freedom of speech or writing would far outbalance that arising from the infliction of private injury"[62]

[58] In making the legislative changes that authorize this motion the legislature has indicated that the objective that citizen be able to take part in public discourse without a general fear of being sued is a demonstration that the encouragement of freedom of speech as a value is to outweigh the accompanying private harm. It is not for the court on this motion to determine whether this is enough to expand the application of the defence of "qualified privilege." I do nothing more than point out that where a public issue in involved, there is a reciprocity between the interest and duty of the person making a public statement and the interest of the general public to whom it is directed. Whether this is enough to satisfy the requirements of the defence is for another day. It is sufficient for me to find that there are grounds to believe that that "qualified privilege" could be a valid defence in this case.

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[59] *Ibid* (*D'Addario*) at para. 55 quoting from *Ibid* (*Cusson*) at para. 39
[60] *Ibid* (*D'Addario*) at para. 57
[61] *Ibid* at paras. 57 and 58
[62] *Ibid* at para. 55 quoting from *Cusson v. Quan, supra* (fn. 25) at para. 39 in turn referring to *Huntley v. Ward* (1859), 6 C.B. (N.S.) 514, at p. 517.

[59] This leaves me to consider one further possible defence: "responsible communication". This remains a relatively new defence. It was identified in *Grant v. Torstar Corp.*[63] In that case an article was published citing the views of local residents concerning a proposed private golf course development: its environmental impact and the political influence being exercised to secure the required approvals. At trial the jury awarded damages totaling $1,475,000. The Court of Appeal set aside that decision and ordered a new trial. The developer (the plaintiff) appealed to the Supreme Court of Canada. The publisher of the article cross-appealed arguing that it was appropriate to revise the defences available to journalists to address the fact that the state of law impeded free expression. "This state of the law, they argue[d], unduly curbs free expression and chills reporting on matters of public interest, depriving the public of information it should have."[64] The court determined that the common law should be modified to recognize a defence of responsible communication on matters of public interest.[65]

[60] The court went on to formulate the test applicable to the application of the defence. It began:

> …In *Quan*, Sharpe J.A. held that the defence has two essential elements: public interest and responsibility. I agree, and would formulate the test as follows. First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, *in that he or she was diligent in trying to verify the allegation*(s), having regard to all the relevant circumstances.[66]
>
> [Emphasis added]

[61] The court outlined the factors that could aid in determining whether a communication that was defamatory but made on a matter of public interest was responsibly made: (i) the seriousness of the allegation, (ii) the public importance of the matter, (iii) the urgency of the matter, (iv) the status and reliability of the source, (v) whether the plaintiff's side of the story was sought and accurately reported, (vi) whether the inclusion of the defamatory statement was justifiable, (vii) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("Reportage"), and (viii) any other relevant circumstances.[67]

[62] As counsel for United Soils Management Ltd. sees it, there are no grounds to believe there is a valid defence of "responsible communication" because Katie Mohammed failed to exercise the necessary diligence "…to verify the allegation that United Soils is poisoning the children of the Town."[68] To my mind this falls into the same trap as the position taken with respect to the defence of "fair comment." The argument is made on the basis that the comments

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[63] [2009] S.C.J. No. 61, [2009] 3 S.C.R. 640, 258 O.A.C. 285, 79 C.P.R. (4th) 407, 183 A.C.W.S. (3d) 1173
[64] *Ibid* at para. 6
[65] *Ibid* at para. 7
[66] *Ibid* at para. 98 referring to *Cusson v. Quan, supra* (fn. 25).
[67] *Ibid* at paras. 110-125
[68] *Factum of the Responding Party/Plaintiff* at para. 94

complained are to be taken literally, without regard to the context. As counsel sees it these impugned statements are to be taken as saying that United Soils Management Ltd. will knowingly be administering noxious substances to children in breach of the criminal code. This is what counsel believes that Katie Mohammed would have had to attempt to verify to satisfy the requirement of being diligent.

[63] Interestingly, *Grant v. Torstar Corp.* considers what should happen where the comments of concern are open to more than one interpretation:

> If the defamatory statement is capable of conveying more than one meaning, the jury should take into account the defendant's intended meaning, if reasonable, in determining whether the defence of responsible communication has been established. This follows from the focus of the inquiry on the conduct of the defendant. The weight to be placed on the defendant's intended meaning is a matter of degree: "The more obvious the defamatory meaning, and the more serious the defamation, the less weight will a court attach to other possible meanings when considering the conduct to be expected of a responsible journalist in the circumstances" (*Bonnick v. Morris*, [2002] UKPC 31, [2003] 1 A.C. 300 (P.C.), at para. 25, *per* Lord Nicholls). Under the defence of responsible communication, it is no longer necessary that the jury settle on a single meaning as a preliminary matter. Rather, it assesses the responsibility of the communication with a view to the range of meanings the words are reasonably capable of bearing.[69]

[64] In this case it would certainly be open to the court to find that the interpretation placed by Katie Mohammed on the comments that she made was reasonable (see para. [23] above) and that, with the context in mind, the interpretation being relied on in the submissions made on behalf of United Soils Management Ltd. are extreme and not obvious. On this understanding it cannot be said that there are no grounds to believe that the defence of "responsible communication" is not valid.

[65] In any case, I have already indicated that having heard from a colleague, having reviewed the tweets on the Town web site and having read the article from the newspaper, Katie Mohammed exercised sufficient diligence to overcome the allegation that she was reckless in publishing the impugned comments. In the context of the defence of "responsible communication" the same acts amount to diligence to satisfy the test that there are grounds to believe that the defence is a valid one and to allow for the proceeding to continue. Presumably it would include an inquiry into whether, how and in what balance the factors to be accounted for (see para. [61] above) in assessing whether the defence applied, in the circumstances.

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[69] *Grant v. Torstar Corp*, *supra* (fn. 63) at para. 124

[66] I am not prepared to find that there are grounds to believe that the defendant does not have a valid defence. Katie Mohammed only needs one such defence for the motion to succeed. Anyone of the four proposed could be valid. This, of course, presumes that Katie Mohammed needs a defence; that it is found that there are grounds to believe the action has substantial merit. I have found that it does not. In the context of "fair comment" I am simply not prepared to accept that, with the context accounted for, there is any basis for proceeding on the understanding that the comments allege that United Soils Management Ltd. was setting out to literally poison children. If I am wrong and that the proposed literal meaning is the basis for analysis then the defence of "fair comment" would not be available.

Is the harm suffered by United Soils Management Ltd. sufficiently serious that it outweighs the public interest in protecting the expression?

[67] In considering this part of the test the judge is required to balance the harm caused by the expression against the public interest in protecting that expression. Each of these impacts should be examined separately[70] and then weighed against each other. Guidance as to how the balancing exercise should be carried out has been provided:

> 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.[71]
>
> [Emphasis added]

[68] The burden of proof rests with the responding party, the plaintiff.[72] In this case that would be United Soils Management Ltd. "The evidence of damages suffered or likely to be suffered must be such that there is credible and compelling evidence of harm that appears reasonably likely to be proved at trial."[73] The bar is not a low one.[74] In its submissions United

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[70] *Platnick v. Bent* 2016 ONSC 7340 at para. 120
[71] *Able Translations Ltd. v. Express International Translations Inc., supra* (fn. 24) at para. 84
[72] *Ibid* at para. 82
[73] *Ibid* at para. 83

Soils Management Ltd. relies on cases that demonstrate concern for the ubiquitous nature of the internet and the ease with which publication can be extended on it.[75] This is no evidence of damage in the particular case. There is no evidence of any particular harm to the plaintiff. This is to be weighed against the public interest. Counsel for United Soils Management Ltd. submitted that there was no evidence to suggest that the comments made by Katie Mohammed had any impact on the breadth of public debate. In the factum he submitted that the nature of the comments she made were of a type that would not engender considered or reasoned debate.[76] The policy proposition is to encourage public discourse. It is not to control the quality of the debate. Free expression by definition is not to be limited within any parameters set by the perceived value or substantive attributes of what was said or published. Moreover, the right to participate is extended to all members of our society. Exclude anyone from taking part and public debate is constrained. If this action is allowed to proceed there is no way of knowing how many people interested in this issue, or for that matter any other public concern, will feel intimidated and not take part for fear of being the subject of a similar law suit. The implications of this concern are broad:

> Participation by members of the community in matters of public interest is fundamental for democratic society. The very fabric of democracy is woven daily from acts of citizens who engage in public discussion and contribute in countless ways to creating a civil society alive to the interests and rights of its members…[77]

[69] Recognizing the "objectives of the legislation" are directed to public engagement and the general nature of the analysis (not "a subjective micro-analysis") the balance in this case lies to the favour of protecting the freedom of expression as opposed to permitting the action to continue. The harm likely to be suffered by United Soils Management Ltd. as a result of what was published by Katie Mohammed is not so serious that permitting the proceeding to continue outweighs the public interest in protecting that expression.

[70] For the reasons reviewed herein the motion is granted. The action is dismissed.

DAMAGES

[71] This leaves the question of the claim for damages made on behalf of Katie Mohammed. Section 137.1(9) of the *Courts of Justice Act* states:

> If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose,

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[74] *Ibid* at para. 83
[75] *Pritchard v. Van Nes*, [2016] B.C.J. No. 781 at paras. 80-83, 112-113 and 119; *Crookes v. Newton* 2011 S.C.C. 47 at paras. 37-38
[76] *Factum of the Responding Party/Plaintiff* at para. 108
[77] *Anti-Slapp Advisory Panel Report to the Attorney-General, October 28, 2010* at p.6 para. 4

> the judge may award the moving party such damages as the judge considers appropriate.

[72] There is little guidance as to how this determination of bad faith should be made in the context of this summary and expedited procedure. A subjective exercise calling for evidence and, where necessary, findings of credibility would be inconsistent with the summary nature of the process. I do not say that there will be no circumstances where this kind of examination would be required but not here. There is enough objective demonstration that this action was undertaken for an improper purpose that I am able to make that finding based on the record before the Court.

[73] On its way to a hearing of this motion, the proceeding was the subject of three interlocutory motions, each of them brought by the plaintiff, each involving time, expense and a questionable purpose. The first was a motion to strike out the Amended Statement of Defence. It was served and filed after this motion to dismiss was commenced. The *Courts of Justice Act* requires that once such a motion is brought no fresh step, in the proceeding can be taken.[78] The Master was asked to strike the Statement of Defence as a fresh step. Master Muir denied the motion. It was appealed. Mr. Justice Penny disagreed with the finding of the Master but concluded that the filing of the Statement of Defence has no impact on the motion, it could be placed before the court by other means. The Judge concluded with the following observation:

> The plaintiff was successful on the motion. However, it was an entirely technical and Phyrric victory given my disposition. The plaintiff turned a molehill into a mountain.[79]

[74] Despite the "victory" of the plaintiff, costs were awarded to the defendant (Katie Mohammed) in the cause.

[75] After the decision of Master Muir but before the hearing of the appeal, another motion was brought on behalf of United Soils Management Ltd. This one sought to compel Katie Mohammed to answer four questions, each of which dealt with her claim for damages:

> To advise how the $20,000 figure that is being claimed for damages in Ms. Mohammed's counterclaim was arrived at.
>
> To produce the entirety of Dr. Alvarez' file.

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[78] Section 137.1 (5) states:

> Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion including any appeal of the motion has been finally disposed of.

[79] *United Soils Management Ltd. v Katie Mohammed,* 2017 ONSC 904 at para. 24

> To produce a copy of the prescription that Dr. Alvarez prescribed to Ms. Mohammed.
>
> To produce a copy of the portion of the benefits plan from the York Catholic District School Board that sets out what the benefits are provided to recipients of the plan.

[76] It appears that the matter came on before Master Short. An endorsement he prepared refers to it and to the request for costs of that motion. It does not appear that an order requiring the questions to be answered was made. In this case the plea for damages made on behalf of Katie Mohammed is for "$20,000 pursuant to section 137.1(9) of the *Courts of Justice* Act".[80] The only basis provided to support the claim is the assertion that Katie Mohammed "…has suffered and will continue to suffer, significant distress, humiliation and anguish as a result of the commencement of the action."[81] The damage is described as stress manifested by collapsing upon receipt of the Statement of Claim, lack of sleep, the loss of 10 pounds, crying and difficulty focusing.[82] It is anecdotal. There is no report from any doctor. In preparation for this motion I heard a third interlocutory motion. This one was to examine the Mayor. I repeat what was said there in respect of the motion to compel that answers to the four questions be provided:

> …On this basis the claim can be for nothing more than the distress associated with the fact that the defendant was sued in circumstances where the law suit has been dismissed pursuant to section 137.1(3) of the *Courts of Justice Act* and was brought in bad faith or for an improper purpose. One can only speculate that such circumstances will be rare and the amount of any damages small. Taking these factors into account, to my mind the questions that were the subject of the motion to compel answers were disproportionate and lead to the prospect that this is all a continuing exercise to intimidate the defendant. Is it really necessary to obtain the "entire file" of the doctor or to understand the benefits provided to "recipients" under the plan provided by York Catholic District School Board (see fn. 25)? If we are to be responsive to the direction that people are to be able to express themselves on public issues, free from law suits and adjunct proceedings utilized to narrow their freedom to speak, we need to accept that there will be limits to the broad right to litigate.[83]

[77] The motion to examine the Mayor was dismissed:

> In the Affidavit sworn in support of this motion, in a paragraph introduced as provided from the "further cross-examination" of the defendant, and referred to as

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[80] *Amended Statement of Defence and Counterclaim* at para. 34(a)
[81] *Ibid* at para. 38
[82] *Affidavit of Katie Clancy Mohammed,* sworn September 26, 2016 at paras. 33-41
[83] *United Soils Management Ltd. v. Mohammed,* 2017 ONSC 1396 at para. 26

> including "evidence that is relevant to this motion" the plaintiff lists no fewer than 68 comments. Of these, only four refer to the Mayor. One establishes that the defendant knew that Justin Altmann was the Mayor of Whitchurch-Stouffville; another that the defendant and the Mayor have discussed this lawsuit; the third indicates that the defendant did not have a panic attack when the posts were put on Facebook or when she discussed the matter with Sue Pawley and the Mayor; and, the fourth that she did have a panic attack when she talked to the Mayor after receiving the Statement of Claim. The only substantive issue dealt with in these four comments is the presence and absence of "panic attacks". This could bear, in some fashion, on the claim made by the defendant that she has suffered distress as a result of the action being launched against her. It is evident from the large array of comments thought by the deponent of the Affidavit to be relevant to the motion that the intention is to extend the examination of the Mayor well beyond the four comments that expressly refer to him. This could be taken as another example of the intention of the plaintiff to make use of all the means possible to extend the motion to dismiss into every nook and cranny where something relevant might be found in contrast to the summary means by which these motions are intended to be resolved.[84]

[78] The purport of the closing sentence is that these motions were all part of a "continuing pattern which, by design or otherwise, acted directly contrary to the specific intention that motions brought [to dismiss proceedings under the pertinent amendments] to the *Courts of Justice Act* be summary in nature…"[85] These motions, each of them and in concert, are an objective demonstration of improper purpose. If more is needed I rely on the fact that having received the apology demanded, United Soils Management Ltd. went ahead and sued. What was the purpose? It had what it needed but it pressed on. This was a continuation of its desire to intimidate. Counsel for United Soils Management Ltd. submitted that a purpose of the apology was to foreclose the defence of justification. It was the apology that demonstrated that Katie Mohammed understood that her comments were not truthful and not justified. This is just wrong. Put differently, it demonstrates that United Soils Management was not concerned with minimizing any prospective harm. It was a tactical move to support the action being brought and confirm the harm said to have been the result.

[79] With an unjust purpose established this court is authorized to award the moving party such damages as the judge considers appropriate. The request is for $20,000. In *Jones v. Tsige* [86] the parties were both employed by the Bank of Montreal. Over four years, on 174 occasions the defendant accessed and reviewed the private banking records of the plaintiff. On a motion for summary judgment the action was dismissed. There was no freestanding right to privacy. The Court of Appeal set aside the judgment and awarded summary judgment in favour of the

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[84] *Ibid* at para. 36.
[85] *Ibid* at para. 40
[86] [2012] O.J. No. 148, 2012 ONCA 32, 108 O.R. (3d) 241, 346 D.L.R. (4th) 34, 287 O.A.C. 56

plaintiff. The defendant had committed the tort of intrusion upon seclusion. Damages in the amount of $10,000 were awarded. While the plaintiff was "understandably very upset" she had "suffered no …harm to her health".[87] Counsel on behalf of Katie Mohammed submitted that in view of the effect of this proceeding on her mental health more should be awarded.

[80] I do not agree. The evidence of stress is supported only by the statements of Katie Mohammed. There is no medical report and no confirmation from others who would have observed the effects relied on. Moreover, the test on a motion for summary judgment is different. Summary judgment is based on a finding that there is no genuine issue requiring a trial. The mechanics of a trial are not necessary to determine the issue on its merits. Here the action will be dismissed if it is without "substantial merit". It may have merit but still be dismissed.

[81] In the circumstances I accept that this action unnecessarily caused Katie Mohammed stress that affected her day to day life. I award damages to be paid to her by United Soils Management Ltd.in the amount of $7,500.

COSTS

If the parties are unable to agree as to costs I will consider written submissions on the following terms:

1. On behalf of Katie Mohammed no later than 15 days after the release of these reasons, such submissions to be no longer than 5 pages double spaced not including any Costs Outline, Bill of Costs or case law that may be referred to.

2. On behalf of United Soils Management Ltd. no later than 10 days thereafter, such submissions to be no longer than 5 pages double spaced not including any Costs Outline, Bill of Costs or case law that may be referred to.

3. On behalf of Katie Mohammed, in reply if necessary, no later than 5 days thereafter, such submissions to be no longer than 2 pages double spaced.

[82] In making any submissions I would ask counsel to bear in mind section 137.1(7) of the *Courts of Justice Act*:

> If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances.

[87] *Ibid* at para. 90

Lederer J.

Released: July 25, 2017

CITATION: United Soils Management Ltd. v. Mohammed, 2017 ONSC 4450
COURT FILE NO.: CV-16-560261
DATE: 20170725

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

UNITED SOILS MANAGEMENT LTD.

Plaintiff

– and –

KATIE MOHAMMED

Defendant

REASONS FOR JUDGMENT

Lederer J.

Released: July 25, 2017