

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
PARAMOUNT FINE FOODS and) *Jonathan C. Lisus and Fahad Siddiqui, for*
MOHAMAD FAKIH) the Plaintiffs/Responding Parties
)
Plaintiffs/Responding Parties)
)
- and -)
)
KEVIN J. JOHNSTON, RANENDRA) *Lorne Honickman, for the Defendant/*
BANERJEE, and FREEDOMREPORT.CA) Moving Party, Ranendra Banerjee
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Defendants/Moving Parties)
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HEARD: May 10, 2018

JUSTICE S. NAKATSURU

[1] This case is about a defamation lawsuit brought by the owners of a Middle Eastern restaurant against two men who made hateful comments about the restaurant in particular and Muslims in general.

[2] This is a case about freedom of expression. But it is also about the limits to that constitutionally protected right. Expressions of hatred and bigotry towards racial, ethnic, religious, or other identifiable groups have no value in the public discourse of our nation.

[3] It is alleged that the defendants, Mr. Banerjee and Mr. Johnston attended the Mississauga location of Paramount, a restaurant owned by Paramount Fine Foods and Mohamad Fakih, a Canadian-Muslim businessman, on July 20, 2017. A fundraiser had been organized for Prime Minister Justin Trudeau at the restaurant that day. A protest of the fundraiser had been organized, with members of the protest expressing displeasure about the government's settlement of Omar Khadr's lawsuit. It is alleged that both Mr. Banerjee and Mr. Johnston made comments on video that defamed the plaintiffs, Paramount Fine Foods and Mr. Fakih.

[4] Mr. Banerjee brings a motion to dismiss this defamation action against him before trial. The motion is brought under a law designed to protect people engaged in expressions on matters of public interest from lawsuits aimed at stifling their right to freedom of expression. He also

argues that the action should be dismissed because it is frivolous, vexatious, and an abuse of process.

[5] For the reasons below, I find that Mr. Banerjee's motion cannot succeed. The defamation action should not be dismissed.

A. OVERVIEW OF THE FACTS

1. The Parties

[6] Mr. Fakih grew up amidst the sectarian violence of the Lebanese civil war. His own mother was a victim of a bombing in Beirut. In the winter of 1998, while travelling to Toronto to visit a friend, Mr. Fakih found Canada to be a respite from the violence of Lebanon. He therefore immigrated and purchased a small restaurant near Dixie Road and Eglinton Avenue in Mississauga. This became the first Paramount Fine Foods restaurant. Since then, the Paramount Fine Foods chain has enjoyed success and has expanded to almost 50 establishments in Canada and worldwide including corporate retail locations, franchises, butcher shops and a food plant.

[7] Mr. Fakih is a Muslim-Canadian. Mr. Fakih has been active in charity work and is committed to cross-cultural understanding and the promotion of respect for diversity. He is active in the assistance of refugees and involved with interfaith engagements. His business has recruited refugees including recent Syrian refugees. Mr. Fakih has published articles denouncing racism including anti-Semitism and hate directed towards vulnerable religious, racial and sexual minorities. Mr. Fakih counts this charitable work and activism as a part of his and Paramount Fine Food's brand and success.

[8] Mr. Banerjee has a university education. He is a web developer and has written on issues in technology and business. He owns a website www.RiseCanada.com and is a director of an organization called Canadian Hindu Advocacy. He owns and administers a number of social media accounts including Twitter, You Tube, and Facebook. Mr. Banerjee generates, publishes, and broadcasts content on the digital media.

[9] Mr. Johnston is a digital journalist and the owner of Freedomreport.ca which has a website of the same name. He also has numerous You Tube channels, Twitter channels, and other social media accounts and websites.

[10] It is alleged by the plaintiffs that both Mr. Banerjee and Mr. Johnston use their social media outlets to spew hateful invective against Muslims. On July 24, 2017, Mr. Johnston was charged with two counts of willful promotion of hatred against Muslims contrary to s. 319(2) of the *Criminal Code*.

2. The eight videos taken on July 20, 2017, at Paramount Fine Foods Restaurant

[11] On July 20, 2017, Mr. Banerjee and Mr. Johnston were at the Paramount Fine Foods restaurant in Mississauga. Eight video clips that were taken that day were widely distributed on the internet including Freedomreport.ca and YouTube. Mr. Banerjee testified that he learned that the Jewish Defence League was organizing a protest that day in front of Paramount restaurant with respect to a settlement payment made to Mr. Khadr. Prime Minister Trudeau was attending

a fundraising dinner at the restaurant. Mr. Banerjee testified that this was the reason he went there. He testified that he did not know Mr. Fakih and had never been to a Paramount restaurant. He testified that sole purpose he went there was to protest the Khadr settlement.

[12] Generally speaking, the eight videos at the center of this lawsuit has Mr. Johnston with a microphone in hand making comments to the camera, talking to other people, and videoing what was taking place that day outside the Paramount restaurant, mainly from across the street. The videos portray themselves to be a broadcast of Freedomreport.ca with prominent logos of that defendant displayed. The following is a short summary of the various videos taken:

- **Video #1, published July 23, 2017:** Mr. Johnston is speaking directly to the camera. He also is directing the camera operator. He is at the Paramount Fine Foods location in Mississauga. He is standing at the intersection close to the restaurant. Mr. Johnston points to the restaurant and identifies the Paramount restaurant as being owned by Muslims. An image of the Paramount restaurant with a moon and star superimposed on it appears, along with text reading “Islamic Restaurant Paramount Fine Foods” and the restaurant’s address and phone number. Mr. Johnston states he has deep concerns about the restaurant and finds it suspicious that it is in the middle of an industrial area. He advises his audience to look up Paramount Foods and says they will understand it is little more than a front. Mr. Johnston says they will be following up on the story. Mr. Banerjee is not in this video clip.
- **Video #2, published July 23, 2017: (The alleged defamatory expressions attributed to Mr. Banerjee are contained in this video)** This video clip takes place immediately after the first. At the beginning, Mr. Banerjee and Mr. Johnston are present in close proximity to each other. There is almost no one else outside of the restaurant, which is nearby. Mr. Banerjee has a megaphone slung over his shoulder. Together Mr. Banerjee and Mr. Johnston walk towards the restaurant with the camera operator following them. They speak to someone who appears to work at the restaurant. There is text on the video clip, reading “Justin Trudeau Speaking at Muslim Only Meeting in Mississauga, Ontario, on July 20, 2017 – Part 2”. They approach a person passing by and strike up a conversation with the man and to each other:

Mr. Johnston (to the pedestrian): “I just told the guy I’m hungry, I don’t think I’m allowed in because I’m white”.

Mr. Banerjee: “No. You gotta be a jihadist”.

Mr. Johnston: “Yes.”

Mr. Banerjee: “You have to.”

[Mr. Johnston points to a nearby car apparently belonging to CBC and then turns back towards the Restaurant.]

Mr. Johnston: (To people standing in front of the restaurant) Hey guys? Is it possible to get inside and just say hello? No? Okay. We’ll find out...

Mr. Banerjee: (Pointing to the restaurant) “No listen. You need credentials. You have to have raped your wife at least a few times to be allowed in there.”

Mr. Johnston: “Someone else’s wife. Not your wife.”

Thereafter, a large Paramount sign and logo appears with the added sound of an Arabic incantation (apparently a reference to a call for prayer used by those who adhere to the Islamic faith).

- **Video #3, published July 23, 2017:** Mr. Johnston is speaking to the camera. He describes the activities of people standing at the restaurant’s entrance. He speaks to someone who drives up to the restaurant, then attempts to speak to a woman who is entering the restaurant. Mr. Banerjee is not visible. At the end of the video, the sound of an Arabic incantation re-appears over video of the restaurant’s façade.
- **Video #4, published July 23, 2017:** Mr. Johnston is speaking to the camera. Mr. Banerjee is walking down the street in the distance and is speaking to someone. Mr. Johnston comments that “‘Jihadi Justin Trudeau’ will be showing up soon”. He says that “we’ll talk about the amount of money Muslims always seem to have in Canada”, pointing to the restaurant as an example. He points to a car parked outside the restaurant that Paramount appears to be raffling. He says, “you can win this car...so everyone knows you’ve had Saudi Arabian money buy a car for you”. Mr. Johnston states that Justin Trudeau, who is “not a good guy”, will be coming later, and that Paramount Fine Foods wants to raise more money for Omar Khadr and “terrorist ilk just like him.”
- **Video #5, published July 26, 2017:** Mr. Banerjee and Mr. Johnston walk together. Mr. Johnston starts to speak with a CBC producer and a cameraman who has set up outside. Mr. Johnston queries why a restaurant is here unless it is up to something nefarious. There are now more demonstrators visible on camera. Mr. Johnston questions why CBC is there when they are told CBC is doing a documentary on Muslim children. He questions that. At one point when the CBC cameraman tells Mr. Johnston he is being aggressive, Mr. Johnston denies it. Mr. Johnston then appears in front of the protest, talking to the camera. He says,

“What does the CBC need to do with a protest about Jihadi Justin Trudeau? It’s because the CBC is gonna take all this and spin it into some kind of problem that doesn’t exist. And they’re gonna lie and show some Muslim kids crying in the background, then show this crowd over here, to make it seem like Muslims are the victims. But remember, Canada is the victim of Islam. Always remember that”.

Mr. Johnston then speaks to the CBC journalist again, while Mr. Banerjee stands beside him. He continues to question why the CBC is there, and suggests that they will use the footage to create a “left-wing diatribe”, suggesting that Muslim children are victims of Islamophobia. “Islam is the issue”, Mr. Johnston says, but Justin Trudeau is even worse.

- **Video #6, published July 31, 2017:** Mr. Johnston is across the street from the restaurant with other people of the protest. He along with others are calling a young man over to

join them on their side. Mr. Banerjee is heard saying to the young man that he is on the wrong side, that he knows what it is all about, and not to play dumb. The young man comes over and states he was just walking by. Mr. Johnston talks with him. The young man debates with Mr. Johnston about Mr. Khadr's settlement and disagrees with the small crowd's sentiments. Mr. Johnston disagrees with the young man. Mr. Banerjee is in and out of view, listening in.

- **Video #7, published on August 1, 2017:** Mr. Johnston is interviewed on camera by a City TV journalist with respect to why he was there. Mr. Johnston talks about Omar Khadr and the settlement. Mr. Banerjee is in the distant background with his megaphone speaking with others.
- **Video #8, published on August 1, 2017:** The entire video is of the president of the Jewish Defence League, Meir Weinstein, who is speaking to the small group present outside the restaurant, about his concerns surrounding the government's decision to settle the lawsuit with Omar Khadr. Mr. Johnston is not present, nor is he heard from. Mr. Banerjee is in the background from time to time, speaking with others, or listening in.

3. Past activities of Mr. Banerjee and his association with Mr. Johnston

[13] Mr. Banerjee admits that he has known Mr. Johnston for a period of time and that he is aware his website Freedomreport.ca. However, he denies ever being involved with Freedomreport.ca.

[14] There is a video of Mr. Banerjee dated September 11, 2015. Mr. Banerjee is outside the Eaton Centre. He is shouting to people passing by. He shouts amongst other things that Muhammad was a pedophile; that Muhammad was a dirty, filthy, pedophile; that Islam should be banned and is evil.

[15] There is a video dated February 29, 2016 of Mr. Banerjee, again at the corner of Yonge Street and Dundas Street near the Eaton Centre, holding sign supporting Donald Trump's candidacy. Mr. Banerjee is shouting out to people passing by to join Trump. He says Islam is evil and wicked, that Muslims should be banned from all civilized countries worldwide, that there should be a special registry for Muslims, and that Muhammad was a child molester.

[16] Another video published on January 18, 2018, has Mr. Banerjee at some point in 2016 using a megaphone speaking to a small assembled crowd. In that crowd is Mr. Johnston, who stands next to Mr. Banerjee. Mr. Banerjee is speaking for RiseCanada.com. He states that he is against Islamic prayer in school. He shouts out that Islam is a rape culture; that Muslims systematically rapes children; that every rape in India is done by Muslims, and that Muhammad was a great deceiver.

[17] On March 27, 2017, Mr. Banerjee publishes a video from an event organized for the then candidate for the leadership of a federal party, Ms. Kellie Leitch. Mr. Banerjee is speaking at a podium in what appears to be a modest conference room with chairs set up. This is before Ms. Leitch arrives. Mr. Johnston is seated in the room. Mr. Banerjee speaks about fighting Islam. After Ms. Leitch arrives and leaves, Mr. Banerjee records a video of Mr. Johnston. There is

money being counted. Mr. Banerjee asks how much money Mr. Johnston raised from the Hindu community to help stop a building of a mosque. Mr. Banerjee states “Ok! 245 bucks, you’re half way there Kevin!” Mr. Johnston replies that he will get the paperwork together for Friday. Mr. Banerjee states “Do we do it or what!” and “Let’s stop that mosque; let’s stop that mosque.”

[18] The Twitter accounts that Mr. Banerjee administers also have comments such as banning Muslims; Islam is a rape culture because their prophet was a child rapist; a dead Muslim is no great loss but a net gain for humanity; Muslims are rotten from the time they are born. Regarding a widely disseminated image of a young Syrian boy who had washed up on a beach while fleeing the war-torn country, Mr. Banerjee’s Twitter account released the following tweet: “The sharks would’ve loved to eat him. A nice morsel for them...We should never allow any Muslim to enter. Ban all Islamic immigration.” Mr. Banerjee testified that he may or may not have written those tweets.

B. SECTION 137.1 OF THE COURTS OF JUSTICE ACT

[19] The material subsections of s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 state:

137.1 (1) 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. 2015, c. 23, s. 3.

(2) In this section,

“expression” means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

(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. 2015, c. 23, s. 3.

(4) 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. 2015, c. 23, s. 3.

[20] Section 137.1 was enacted to prevent the misuse of the judicial system or other agencies of justice at the hands of litigants who resorted to lawsuits for strategic purposes: Ministry of the Attorney General, *Anti-Slapp Advisory Panel Report to the Attorney General* (Ontario: Ministry of the Attorney General, 2010). In *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 4450, 7 C.P.C. (8th) 58, at para. 2, Lederer J. described such lawsuits, often referred to as Strategic Litigation Against Public Participation (SLAPP) in the following way:

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 [*sic*] a quick retraction and apology and have the party remove herself, himself or itself from taking part in any further public debate of the issue at hand.

[21] Thus, s. 137.1 is referred to as an anti-SLAPP provision. As I understand it, although a number of cases dealing with this provision have been argued before the Ontario Court of Appeal, no appellate direction has yet been forthcoming on its interpretation. However, this provision has been considered on a number of occasions at the trial level: see, for example, *United Soils Management Ltd.*

C. ANALYSIS UNDER S. 137.1 OF THE CJA

[22] Mr. Banerjee submits that he has no connection to the approximately 36 minutes of video taken at the protest posted on Mr. Johnston's website, Freedomreport.ca. Of those eight videos, Mr. Banerjee speaks directly to Mr. Johnston on camera for about 7.5 seconds. He submits those statements are not defamatory. Mr. Banerjee submits that the comments were not about Mr. Fakih and/or Paramount Fine Foods.

[23] Further, Mr. Banerjee submits that the plaintiffs wrongly attempt to make him jointly liable for the entire eight videos published which contain alleged defamatory statements by Mr. Johnston. Mr. Banerjee is not a publisher, producer, or editor of any of the impugned videos.

[24] Mr. Banerjee argues the plaintiff's lawsuit should be dismissed under s. 137.1. He submits that Mr. Banerjee's expression relates to a matter of public interest in that when one examines the entire context, his expression related to the federal government's awarding of the \$10.5 million to Mr. Khadr to settle his lawsuit. This is an important matter of public interest. Further, Mr. Fakih and Paramount Fine Foods have not shown that there are grounds to believe

the claim has substantial merit, there is no valid defence, nor that the harm suffered by them is sufficiently serious that it outweighs the public interest in protecting expression.

[25] Paramount Fine Foods and Mr. Fakhri responds that even aside from the broader allegations that Mr. Banerjee and Mr. Johnston acted in concert by publishing all eight videos, Mr. Banerjee's own statements made to Mr. Johnston were defamatory. The comments he made clearly refer to the Paramount restaurant and its Muslim owner. They bear no relationship to Mr. Khadr or the government's settlement. Mr. Banerjee is an experienced and prolific speaker of hateful language, often promulgating it through the medium of social media. This expression is not protected under s. 137.1(3). Alternatively, the plaintiffs submit they have amply met their burden under s. 137.1(4).

1. The expression made by Mr. Banerjee does not relate to a matter of public interest

[26] On this motion, the onus is initially on Mr. Banerjee to establish that the impugned expression is related to a matter of public interest.

[27] As previously noted, Mr. Banerjee submits that his brief 7.5 second statement to Mr. Johnston must be assessed in a broader contextual framework. This includes the fact that he was attending a protest in front of Paramount restaurant with other protestors to protest the federal government's settlement with Mr. Khadr. When the expression is looked at as a whole, he submits that this statement is one regarding a matter of public interest.

[28] Mr. Fakhri and Paramount Fine Foods submit that his statement is tantamount to hate speech. It is based upon racist tropes associated with Muslims that portray them as terrorists and rapists. There is no public interest in these types of statements. Thus, it is argued that Mr. Banerjee's motion should be dismissed at this initial stage of the test.

[29] Before addressing the merits of the submissions, I would like to make this initial observation. This law, like many other laws, attempts to strike a balance. Animating this statutory provision are competing important values. Equally applicable to s. 137.1 are the following comments made by Binnie J. in *WIC Radio v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 2, on the development of the defence of fair comment in the law of defamation:

[T]he worth and dignity of each individual, including reputation, is an important value underlying the *Charter* and is to be weighed in the balance with freedom of expression, including freedom of the media. The Court's task is not to prefer one over the other by ordering a "hierarchy" of rights...but to attempt a reconciliation. An individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to "chill" freewheeling debate on matters of public interest. [Citation omitted.]

[30] The legislature did not define "public interest" as it is used in s. 137.1. Both parties have referred to *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, as the authority that can provide substance to its definition. A number of cases have also adopted that definition in order to elucidate the term in the context of its use in s. 137.1: *United Soils Management Ltd.*;

Able Translations Ltd. v. Express International Translations Inc., 2016 ONSC 6785, 410 D.L.R. (4th) 380; *Rizvee v. Newman*, 2017 ONSC 4024; *Fortress Real Developments v. Ravidoux*, 2017 ONSC 167, 6 C.P.C. (8th) 373; *Hudspeth v. Whatcott*, 2017 ONSC 1708, 98 C.P.C. (7th) 40; *McCarthy-Oppedisano v. Muter*, 2018 ONSC 2136.

[31] I too agree that *Grant* provides invaluable assistance in this regard. I must note though that that case may not be the last word on this issue. *Grant* modified the common law of defamation to provide a defence of responsible communication on matters of public interest. Section 137.1 is not limited to defamation. The definition of “expression” in s. 137.1 is very broad and would include a communication that is made privately, involves just conduct, or is one-sided advocacy. In addition, the test formulated in *Grant* regarding “matters of public interest” was one aspect of a two-part test for a defence which also included “responsible” communication, once the plaintiff had shown the impugned statements were defamatory. By contrast, section 137.1 involves a statutory scheme whereby the onus is initially placed on the moving party in subsection (3) and then reversed on the responding party in subsection (4). The constituent components of the test in s. 137.1 are also obviously very different.

[32] All that being said, the legislator did not choose this wording in a legal vacuum. The principles underlying why expressions involving matters of public interest should be encouraged are essentially the same whether one is speaking of s. 137.1 or the defamation concepts of responsible communication or fair comment.

[33] In my view, from *Grant* and the authorities applying it in the context of s. 137.1, some principles can be distilled:

- The judge functions as a gatekeeper in making the determination as to what is in the public interest by ensuring only worthy material falls within the protection of the section;
- In making this determination, the focus is on the substance of the expression and not the “occasion” or the circumstances in which it is communicated;
- The whole of the expression should be considered and not just the isolated portions that are impugned. The question is whether the subject matter of the expression as a whole is one of public interest. Care must be taken in determining the subject matter accurately. An overly narrow or an overly broad characterization of the subject matter may lead to an skewed analysis;
- Whether the expression is related to a matter of public interest is an objective assessment. The subjective intention or motive of the communicator is not material;
- To be of public interest, some segment of the public must have a genuine stake in knowing about the expression. This is a normative determination. It is not simply a question of whether a subject matter would or would not interest some members of the public. It is broad in terms of matters that it can legitimately encompass ranging from politics, science, arts, environment, religion, and morality. There is no static list of topics that fall within it. It is said that to be of public interest, the subject matter “must be shown to be one inviting public attention, or about which the public has some substantial

concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached”: Brown, Raymond, *The Law of Defamation in Canada*, (Toronto: Carswell).

[34] Before analyzing Mr. Banerjee’s specific expression, I wish to first refer to *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11, [2013] 1 S.C.R. 467. This is because a crucial issue in this motion is whether or not Mr. Banerjee’s expression amounts to hate speech. Thus, it is useful to consider what the Supreme Court of Canada has defined such speech to be. Of course, I fully appreciate that this case was decided in the context of a specific piece of human rights legislation. But I see no reason why I should not use such well-tailored garments to clothe the body of s. 137.1.

[35] In *Whatcott* it was held that two anti-gay flyers constituted publications that contravened s. 14 of *The Saskatchewan Human Rights Code* because they exposed persons to hatred and ridicule on the basis of their sexual orientation, and concluded that s. 14 of the *Code* was a reasonable restriction on Mr. Whatcott’s rights to freedom of religion and expression guaranteed by s. 2(a) and (b) of the *Canadian Charter of Rights and Freedoms*. In the course of deciding this issue, Rothstein J. considered the definition of hate speech. He held that in the human rights setting, where a reasonable person, aware of the context and circumstances, would view an expression as likely to expose a person(s) to detestation and vilification on a prohibited ground of discrimination, this would amount to prohibited hate speech. He expanded upon this in the following way at para. 41:

In my view, "detestation" and "vilification" aptly describe the harmful effect that the *Code* seeks to eliminate. Representations that expose a target group to detestation tend to inspire enmity and extreme ill-will against them, which goes beyond mere disdain or dislike. Representations vilifying a person or group will seek to abuse, denigrate or delegitimize them, to render them lawless, dangerous, unworthy or unacceptable in the eyes of the audience. Expression exposing vulnerable groups to detestation and vilification goes far beyond merely discrediting, humiliating or offending the victims.

[36] Rothstein J. then reviewed some authorities that summarized the “hallmarks of hate”: blaming members of the group for the current problems in society alleging they are a powerful menace, carrying out secret conspiracies, or plotting to destroy civilization; labelling them as criminals, parasitic, or pure evil; equating targeted group with groups traditionally reviled in society such as child abusers or deviant criminals; dehumanizing the targeted group by describing them as animals, lesser creatures, or the like.

[37] In *Hudspeth*, Perell J. dealt with a cross-motion brought by the same Mr. Whatcott under s. 137.1 to dismiss an action brought against him for distributing anti-gay pamphlets at the Toronto Pride Parade. Perell J. dismissed that motion, finding that Mr. Whatcott did not prove that his pamphlets were an expression that related to a matter of public interest. Mr. Banerjee attempts to distinguish this case by pointing to the fact that the pamphlets in question had already been determined by the Supreme Court of Canada to be hate speech, unlike the impugned expression in the case at bar. This attempt to so distinguish the authority is unpersuasive. More

significant is that Perell J. concluded that this type of speech could not in principle be considered a matter of public interest within the meaning of s. 137.1. He stated at para. 183:

[H]ate speech is by its nature not in the public interest and hate speech interferes with public discourse and debate. The anti-SLAPP provisions of the *Courts of Justice Act*, do not create a "safe space" for defamation because the subject matter is one of public interest and hateful or malicious attempts to inflict harm under the guise of free debate of matters of public interest are not protected from suit by the legislation. [Citations omitted.]

[38] It is not necessary for me to conclude that the comments at issue in this case is in fact hate speech as defined in the *Criminal Code* or a piece of human rights legislation. It is Mr. Banerjee's onus to establish that his expression, when looked at as a whole, relates to a matter of public interest. Even when viewed in context, I find that Mr. Banerjee's remarks shares all the essential hallmarks and attributes of an expression that is not worthy of protection under the anti-SLAPP provision.

[39] First of all, I agree that it is important to deal with the whole of the expression and not just isolated bits of it. Both this factor and the careful assessment of the expression itself, requires me to take into account the context in which it took place. Mr. Banerjee argues that when this is done, it is plain that his comments were related to a matter of public interest. He submits this is so because he is at a protest making his views about the Khadr settlement known. It is contended that when one looks at the whole of the eight videos, this is clear. He submits that his own comments form but a fraction of the over half hour of video and when assessed in its proper context, he has met his onus.

[40] To assess this argument, I have scrutinized all the videos closely. In the first series of videos, Mr. Banerjee and Mr. Johnston are there mainly alone with the camera operator. It appears that they are there early to the gathering when others are not present. Also, in the first series of videos, the focus is almost exclusively on the plaintiffs. Indeed, I find that Paramount is their target. Prime Minister Trudeau, Omar Khadr, or the settlement are seldom mentioned. Mr. Banerjee is there with Mr. Johnston and a cameraman. It is a reasonable inference that they are together and in association. Clearly they are within earshot of each other in video #2. Just prior to Mr. Banerjee's impugned expression, Mr. Johnson queries why a restaurant would in the middle of an industrial plaza unless "the restaurant was up to something nefarious". A reasonable interpretation of that comment is a suggestion of some illegal conspiracy occurring in the restaurant. Mr. Johnson then states to a pedestrian that he does not believe he is allowed in because he is white. That comment suggests that only non-white persons are permitted into Paramount restaurant and their practices are discriminatory. It is at this point Mr. Banerjee says "No. You gotta be a Jihadist." Mr. Banerjee says it quite forcefully and seriously to Mr. Johnson who stands next to him. Equally forcefully and seriously said was Mr. Banerjee's comments about how you need credentials, those being that you had to have raped your wife a few times before being allowed in. Although, Mr. Banerjee submits that during this exchange there was laughter, it was only Mr. Johnston who chuckled while looking at his phone when he said "someone else's wife. Not your wife." Mr. Banerjee does not laugh. He just walks out of camera range.

[41] Following these initial videos, there is a video that, for some reason only known to Mr. Johnston, also seems to target the *bona fides* of the CBC. It is only the later videos that deal more with the Khadr settlement. Videos #6 to 8 are the ones that clearly have the Khadr settlement as the focal point, when Mr. Johnston debates the bystander, gives an interview to City Television, and records a speech given by Mr. Weinstein.

[42] While all 8 videos form the context in which Mr. Banerjee expressed his alleged defamatory comments, there is a difference in that context between the videos themselves. At the beginning, in my opinion, the plaintiffs are the clear targets of the expressions of both Mr. Banerjee and Mr. Johnston. What is being communicated in these videos is that the plaintiffs and those who go into the restaurant are not up to any good because they are Muslims. They are impugned as terrorists, criminals, discriminators, and as being involved in some form of a secret conspiracy.

[43] In my view, the fact that later videos incorporate matters that are more manifestly political and therefore in the public interest, does not alter the fundamental nature of the communications in the earlier videos. They may be a backdrop to those comments, but they do not change their essential character.

[44] I agree that at first glance, the broad definition of “expression” as defined in s. 137.1(2) would seem to support Mr. Banerjee’s position. “Expression” includes both verbal and non-verbal communication. Thus, an argument could be constructed that it was Mr. Banerjee’s overall presence and participation in the protest against the payment of money to Mr. Khadr that needs to be assessed. However, in my view, this would ignore the wording of s. 137.1(3) which states it is “*the proceeding (that) arises from an expression*” which must relate to a matter of public interest. The proceeding in this case arises from the alleged defamatory statements made Mr. Banerjee. It is not Mr. Banerjee’s participation in the protest that gives rise to this defamation proceeding. Rather, it is the statements that he made about Paramount Fine Foods and Mr. Fakhri. Thus, the onus is on Mr. Banerjee to connect this expression that has brought him before the courts to a matter of public interest.

[45] Merely uttering something in a forum or at an event where matters of public interest are being discussed does not make the expression a matter of public interest within the meaning of s. 137.1. For instance, a serious threat to kill a politician uttered by an audience member at political debate between candidates is not an expression related to a matter of public interest. In my view, it was reasoning along these lines that led Healey J. in *McCarthy-Oppedisano* to conclude that someone who embeds defamatory comments within political, economic, or social commentary cannot claim immunity on the basis that this expression related to a matter of public interest. When it comes to hate speech, this is particularly important. Often such expression is disguised or colored in an attempt to avoid censure, prohibition, or prosecution. A person may communicate hate in forums or contexts where legitimate debate is taking place. For the purposes of the proper application of the anti-SLAPP provisions, the true nature of the expression, and not just the setting in which it takes place, must be carefully scrutinized before it is permitted to pass the first hurdle of the test.

[46] Even if there is a dual character to the expression uttered by Mr. Banerjee, this does not alter my thinking. In other words, where the expression can reasonably be interpreted as both

hate communication and a communication on a matter of public interest, s. 137.1 does not extend its protection. This is so because hate communication raises no subject matter that is related to the public interest, regardless of its other features. Indeed, the public interest lies in its suppression. My thinking on this has support in the following comments made by Dickson C.J. in *R. v. Keegstra*, [1990] 3 S.C.R. 697:

The suppression of hate propaganda undeniably muzzles the participation of a few individuals in the democratic process, and hence detracts somewhat from free expression values, but the degree of this limitation is not substantial. I am aware that the use of strong language in political and social debate – indeed, perhaps even language intended to promote hatred – is an unavoidable part of the democratic process. Moreover, I recognize that hate propaganda is expression of a type which would generally be categorized as “political”, thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process. Nonetheless, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee.

[47] In this case, I need not go that far. The expression uttered by Mr. Banerjee is focused against the plaintiffs. Viewed contextually and as a whole, it is unrelated to Mr. Khadr or the government’s settlement with him. The 7.5 seconds long video of his statements forms the dominant part of the case against him. This is not a case where there was a long diatribe being communicated by Mr. Banerjee of which only a portion is said to be defamatory. When Mr. Banerjee argues that the entire 8 videos are the whole of his expression, I cannot agree. This in my view is simply the setting or the occasion in which he uttered his very brief expression. The substance of the expression I must consider cannot reasonably include the other published videos where Mr. Banerjee has little if any presence, except being seen or heard from time to time as a member of a small group of protesters.

[48] While the protest itself in front of Paramount restaurant can be viewed as something dealing with a matter of public interest, the comments made by Mr. Banerjee are not. As *Grant* suggests, it is the substance of the expression that must be examined, not the “occasion” on which they are made.

[49] Let me turn to the objective assessment of the expression from which this proceeding then arises. In this case, Mr. Banerjee’s comments go beyond offensive or hurtful expression. They involve hallmarks of hate. He refers to the patrons as “jihadists”. While the term can have different meanings, looked at in context and objectively, the statement signifies that only Muslim insurgents or terrorists were allowed into Paramount restaurant. In this day and age, such an imputation can only inspire extreme ill-will and disdain. He further states that you would have to “rape your wife a few times” to be allowed in. These representations “abuse, denigrate or delegitimize” those who attend Paramount restaurant and its owners. The expression renders them as “lawless, dangerous, unworthy or unacceptable in the eyes of the audience.”

[50] It may be contended that my assessment of whether Mr. Banerjee's expression relates to a matter of public interest is a normative one. I do not disagree. To a certain extent, that is unavoidable. But I find that it is an assessment that can be properly defined by the law. It is one required by s. 137.1. I would also like to add that it is one that I am able to come to without reliance upon the evidence regarding Mr. Banerjee's past expressions and activities.

[51] Bluntly put, if I were to allow Mr. Banerjee to justify his comment as an expression related to a matter of public interest, I would be undermining and trivializing the laudable objectives of this anti-SLAPP provision.

2. It is not necessary to determine whether the plaintiffs have proven s. 137.1(4)

[52] The plaintiffs bear the onus on proving whether there are grounds to believe the proceeding has substantial merit, the defendant has no valid defence, and the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. Given my conclusion that the defendant has not discharged his onus with regards to s. 137.1(3), it is not necessary for me to consider this. That said, it is obvious given my conclusion above that any analysis under this subsection would have favoured the plaintiffs.

[53] If it was necessary to analyze whether the plaintiffs have established the requirements of s. 137.1(4), I would have had resort to the evidence of the videos and digital messaging involving Mr. Banerjee on other and unrelated occasions. This evidence is relevant to Mr. Banerjee's motivation in making the remarks that are the subject-matter of this motion. It is also relevant to his credibility when he has said that he was either joking, being satirical, or making a political point about Mr. Khadr's settlement. This evidence is also relevant to the issue of whether on the day in question, Mr. Banerjee was acting in concert with Mr. Johnston.

[54] Let me say this about Mr. Banerjee's affidavit where he avers that when he made the impugned comments, he was referring to the fact that Mr. Khadr was a convicted terrorist. It is his position that his comments meant to convey the message that the only people the officials would allow to come into the restaurant to speak to them would be people who acted like terrorists. He also averred that his alleged comments bore no relation or connection to Paramount Fine Foods or Mr. Fakhri. Another part of his defence is that he did not participate in, encourage, or condone Mr. Johnston's publication of the webcasts. In short, his defence is that he was just an innocent participant in a political protest. He submitted that these were valid defences and that the plaintiffs have no meritorious case against him.

[55] I do not find these averments credible.

[56] Mr. Banerjee was cross-examined on his affidavit. Although I fully appreciate that I have only the transcript of that cross-examination and did not hear *viva voce* evidence, much of what he said was not plausible. For instance, Mr. Banerjee testified that when he made these anti-Muslim comments in the past, he was only referring to Islamic extremism or radical Islam. This explanation is not worthy of belief. They are only designed to extricate himself from the consequences of his past expression. When I assess them, it is clear and obvious that he was not making such a distinction at the time he made those statements as he now claims in justification. There are other examples. Mr. Banerjee further testified that when he said Muhammad was a

pedophile and child molester he meant that people who commit those crimes use the name Muhammad. When he said ban Muhammad, Mr. Banerjee testified under cross that he meant ban the radical ideology that is promoted by people who use the name Muhammad. With respect, these explanations are nonsensical. In addition, I found him evasive when he claimed that his memory failed him when shown tweets on an account for which he was an administrator. Finally, Mr. Banerjee was inconsistent in his explanations of why he uttered the impugned expressions to Mr. Johnston on camera. In an email sent to Mr. Johnston dated August 4, 2017, where he distanced himself from the webcasts, Mr. Banerjee stated they were just personal humorous comments made to Mr. Johnston. In an email to Mr. Lisus, counsel for the plaintiffs, on the same date, he again stated they were humorous comments to Mr. Johnston. Mr. Banerjee composed these emails carefully after getting the Libel Notice and consulting counsel. There is no reference to Mr. Khadr, the government settlement, or his purported explanation on the motion that since Mr. Khadr was a convicted terrorist, he was merely proffering an opinion that only people who would be allowed in that day to speak to government officials were those who acted like terrorists. I find these explanations inconsistent. Mr. Banerjee's credibility on this point suffers.

[57] I do not need to explain why these findings about Mr. Banerjee's credibility would have worked to his detriment were it necessary for me to have considered s. 137.1(4). The explanation is self-evident.

D. ANALYSIS UNDER RULE 21.01(3)(d)

[58] In the alternative, Mr. Banerjee argues that this action should be dismissed under rule 21.01(3)(d). While he makes many of the same points previously argued above, the core of his submission here is that the plaintiffs have brought this lawsuit for an improper purpose and it is an abuse of process. It is submitted that Mr. Banerjee was brought into the lawsuit and is being sued as a co-producer and a co-publisher with his co-defendants to punish him or to teach him a lesson for his past improper conduct and not for his 7.5 second remarks in front of the restaurant.

[59] Rule 21.01(3)(d) allows for the staying or dismissal of an action when the cause of action is clearly one on its face that no reasonable person could treat as a *bona fide* one. Where an action cannot succeed, is clearly without merit, or if the action can lead to no possible good or where no reasonable person could expect relief, it is frivolous, vexatious, or an abuse of process: *Currie v. Halton Regional Police Services Board* (2003), 179 O.A.C. 67 (C.A.) at paras. 14-18. In determining this, the whole history of the matter is considered and not just the question of whether there is a good cause of action.

[60] That said, the starting point is whether the pleadings set out an actionable cause. The plaintiffs are suing Mr. Banerjee for defamation. One generally accepted definition for defamation is from *Salmond on the Law of Torts*, 17th ed. (London: Sweet & Maxwell, 1977), at pp. 139-40, which is based on the test proposed by Lord Atkin in *Sim v. Stretch* (1936), 52 T.L.R. 669 (H.L.), at p. 671, and which was approved by the British Columbia Court of Appeal in *Vander Zalm v. Times Publishers* (1980), 109 D.L.R. (3d) 531 at p. 535:

A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him in the

estimation of right-thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem.

[61] This test is often construed as setting a low threshold for establishing *prima facie* defamation: *Gatley on Libel and Slander*, 10th ed. (London: Thomson/Sweet & Maxwell, 2004). Even a defamation action that appears unlikely to succeed or lacks proportionality will not meet the test for dismissal under rule 21.01(3)(d): *Temilini v. Ontario Provincial Police Commissioner* (1990), 73 O.R. (2d) 664 (C.A.); *Sussman v. Ottawa Sun* (1997), 22 O.T.C. 75, (Ont. C.J., Gen. Div.).

[62] A reasonable person would understand that Mr. Banerjee's statements were directed against the restaurant owned by the plaintiffs. The remarks made by Mr. Banerjee are facially defamatory and would tend to lower Paramount Fine Foods and Mr. Fakih's reputation in the eyes of a reasonable person.

[63] Mr. Banerjee submits that there is no evidence and no material facts pleaded as to Mr. Banerjee's role in publishing the videos on the internet. It is submitted that only his co-defendants are responsible for this. I agree with the plaintiffs that it is not necessary to prove Mr. Banerjee's publication of the defamatory remarks in this way. Mr. Banerjee has published these statements by knowingly communicating his statements in video #2 to Mr. Johnston and the camera person that was brought along: *Crookes v. Wikimedia Foundation Inc.*, 2011 SCC 47, [2011] 3 S.C.R. 269, at para. 1. The statement of claim captures this allegation of publication. In addition, when the matter is looked at as a whole, it is alleged in the claim and it could be reasonably proven that Mr. Banerjee and Mr. Johnston were joint tortfeasors and participated in the publication of the defamatory expression in furtherance of a common design: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 176. Put simply, while Mr. Johnston may have put the videos up on his website, Mr. Banerjee knew Mr. Johnston would do this and chose to make his statements to the camera while it was recording. Indeed, given their past knowledge of and association with each other, it could reasonably be proven that they both attended in front of the restaurant that day to further a common design to injure the plaintiffs' reputation.

[64] Mr. Banerjee submits the cross-examination on his affidavit was almost exclusively about his previous comments and speeches where he espoused anti-Islamic rhetoric, and not about the videos that are the subject-matter of the lawsuit. He points to this as evidence of the improper motives of the plaintiffs. I do not see it in that way. As already stated, this evidence is relevant to the motion and the lawsuit. They are pleaded as material facts. A tactical consideration by counsel to focus on these issues on the cross-examination does not advance Mr. Banerjee's argument that the lawsuit is being advanced for an improper purpose.

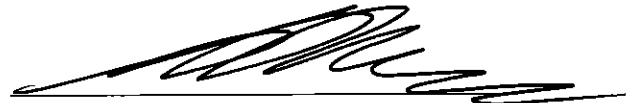
[65] In addition, Mr. Banerjee points to some comments made by Mr. Fakih about his frustration with the actions of the defendants in sowing discord in the community. That evidence falls significantly short in demonstrating the plaintiffs have brought this lawsuit to harass, oppress, or abuse Mr. Banerjee for his past conduct. An indication that Mr. Fakih may be motivated by altruistic as well as purely self-interested financial concerns, far from demonstrating an abuse of process, only re-affirms the role of the courts as the forum to which

litigants can turn to for settling private law disputes – including ones with broader societal ramifications.

[66] There is no merit to Mr. Banerjee's motion for dismissal under rule 21.01(3)(d).

[67] Let me leave my decision by referring to Binnie J.'s observation at para. 4 of *WIC Radio* that we live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones. I acknowledge that. But we also live in a country where alleged hateful and defamatory expressions can appropriately be litigated in the judicial system.

[68] If the issues of costs cannot be resolved between the parties, I will entertain written submissions, each one limited to two pages excluding any attachments (any Bill of Costs, Costs Outline, and authorities). Paramount Fine Foods and Mr. Fakhri shall file within 20 days of the release of these reasons. Mr. Banerjee shall file within 10 days thereafter. There will be no reply submissions without leave of the court.



JUSTICE S. NAKATSURU

Released: June 20, 2018

CITATION: Paramount v. Johnston, 2018 ONSC 3711
COURT FILE NO.: CV-17-580326
DATE: 20180620

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

PARAMOUNT FINE FOODS and MOHAMAD
FAKIH

Plaintiffs/Responding Parties

– and –

KEVIN J. JOHNSTON, RANENDRA BANERJEE, and
FREEDOMREPORT.CA

Defendants/Moving Parties

REASONS FOR JUDGMENT

NAKATSURU J.

Released: June 20, 2018