

Niagara Peninsula Conservation Authority v. Smith, CITATION: 2017 ONSC 6973

COURT FILE NOS.: 11409/16 (Welland)

and 56966/16 (St. Catharines)

DATE: 2017-11-23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Niagara Peninsula Conservation Authority
and Carmen D'Angelo

Plaintiffs

and

Ed Smith

Defendant

Paul DeMelo and David Winer for the
plaintiffs

Erin Pleet and Sapna Thakkar for the
defendant

AND BETWEEN:

William Montgomery, Value Media Corp.
and Stream Three Inc.

Plaintiffs

and

Ed Smith

Defendant

William Montgomery for himself and the
corporate plaintiffs

Erin Pleet and Sapna Thakkar for the
defendant

**HEARD: November 20-21, 2017
at WELLAND**

MR JUSTICE RAMSAY

[1] In separate actions the two sets of plaintiffs are suing the defendant for defamation for publishing statements in writing in a document called “*A Call for Accountability at the Niagara Peninsula Conservation Authority*.” The parties refer to this document as “the report.” The defendant is moving for an order dismissing both actions under s.137.1 of the *Courts of Justice Act*.

The parties

[2] The plaintiff Niagara Peninsula Conservation Authority (the NPCA or the Authority) is a body created by the *Conservation Authorities Act*, RSO 1990, c. C.27. Like other conservation authorities under the Act, it has jurisdiction over certain territory. Its territory includes territory in the Regional Municipality of Niagara, the City of Hamilton and Haldimand County. Its statutory objects are to establish and undertake a programme designed to further the conservation, restoration, development and management of natural resources other than gas, oil, coal and minerals. Under s. 21 of the Act it has the power to expropriate or otherwise acquire land and to initiate projects such as projects that manage the watershed, for instance by altering the course of rivers. It can require municipalities to raise funds to finance its projects and apportion the requirements among municipalities. Such decisions are reviewable by the Ontario Municipal Board (s. 25). The Authority can levy fees for maintenance on municipalities. Under s. 27 of the Act, such decisions are reviewable by the Mining and Lands Commissioner appointed under the *Ministry of Natural Resources Act*, RSO 1990, c. M.31. The Authority can make regulations with the approval of the Minister of Natural Resources. The Authority is managed by a board consisting of appointees of the municipalities in which its territory lies. Of the 15 members of the board, 12 are appointed by municipalities within Niagara Region, one by Haldimand County and two by the City of Hamilton.

[3] The NPCA created a charitable foundation, the Niagara Peninsula Conservation Foundation (the NPCF or the Foundation) to raise money for the Authority through donations. Like the NPCA, the NPCF is a registered charity.

[4] The plaintiff Carmen D'Angelo is the Chief Administrative Officer of Niagara Region. At times he was a member of the NPCA's board. At other times he was its chief administrative officer.

[5] The plaintiff William Montgomery is a businessman who had a contract with the Foundation to provide fund raising services.

[6] The defendant Ed Smith is a retired military officer and RCMP officer who wrote and submitted the report that is the subject matter of the proceedings.

Overview

[7] The defendant's report contained information about two transactions that are the subject-matter of the actions:

- a. A contract given by the Foundation to the plaintiff William Montgomery's company, Stream Three Inc., to engage in fund raising activity; and
- b. A contract given by the Police Services Board to the plaintiff Carmen D'Angelo's business, D'Angelo Performance Management, which uses the trade name DPM Consulting.

[8] The alleged link between the two contracts was Regional Councillor Andy Petrowski. He was on the Police Services Board that gave the contract to D'Angelo, and he was linked to Mr Montgomery who got the contract from the Foundation, at a time when D'Angelo was the chief administrative officer of the Authority. The implication is that these contracts may have been given as consideration for each other, or "swapped."

[9] The implication, however, depends on inaccurate information in the report. Andy Petrowski had a previous and publicly known link to Montgomery's operation, but it was in the past and had nothing to do with the Authority or the Foundation.

[10] There was a further inaccurate allegation in the report, to the effect that Mr D'Angelo's company was not licensed to do business in Ontario. The error came about because of an inaccurate listing in an on-line business directory and because the defendant did not know the registered name of Mr D'Angelo's business. He only knew the name it used.

[11] For the reasons that follow, I find:

- a. The report constitutes an expression that relates to a matter of public interest within the meaning of s.137.1 of the *Courts of Justice Act*.
- b. The Authority has no reasonable cause of action and therefore has failed to show that there are grounds to believe that its claim has substantial merit. A government entity cannot sue an individual for defamation for criticizing it.
- c. Mr D'Angelo and Mr Montgomery and his companies have failed to show that there are grounds to believe that the defendant has no valid defence. The impugned communications were made without malice on an occasion of qualified privilege.

Relevant events in chronological order

[12] On February 13, 2013 Regional Councillor Andy Petrowski made a presentation to the council of the Township of Wainfleet. Council had passed a bylaw to restrict the establishment of wind farms and had been sued by a developer. At the February 13 meeting Petrowski told the township council that "his" organization, the plaintiff Value Media Corp., would raise money by publicizing the township's problem. He started the Wainfleet Defence Fund with a personal donation of \$750, which seems to be the sum total of money raised. An account of the meeting was published in the local newspaper and the defendant relied on this

account in writing his report. In April 2014 the bylaw was struck down by the Superior Court: *Wainfleet Wind Energy Inc. v. Wainfleet (Township)*, 2013 ONSC 2194.

[13] In fact, Value Media Corp. is not Petrowski's company. It is owned and managed by the plaintiff Montgomery. Mr Montgomery confirmed in an email to a concerned citizen in 2014 that Andy Petrowski was Value Media's account manager in 2013. I take it that he was the account manager for the Wainfleet account. He does not seem to have worked for Value Media thereafter.

[14] On November 20, 2013 Mr D'Angelo took a leave of absence from the board of NPCA so that he could work as a private consultant on a human resources restructuring project for the NPCA. The contract was worth \$41,000. He gave his report in February 2014. In the ensuing months the NPCA let a number of its staff go and hired others, including him.

[15] In May 2015 the plaintiff offered to provide services aimed at raising charitable donations to support the Authority for a price of \$45,000. With HST, the total would be \$50,850. He was paid \$22,500 plus HST. The persons with whom he was dealing, who were officials of the Authority, had in mind to pay him the rest after he had commenced work. He refused to commence work until he had been paid in full. He sued the Authority and the Foundation. The lawsuit was settled after mediation. In September 2016 a written contract was signed between one of Montgomery's companies, Stream Three Inc. and the Foundation, confirming the arrangement for fund raising services, acknowledging that \$22,500 had already been paid and providing that Stream Three Inc. would be paid a further \$22,500 before starting work. The contract contained a clause in which Montgomery agreed not to engage in any business with any councillors of Niagara, Haldimand or Hamilton or members of the board of the Authority or the Foundation that would give rise to a conflict of interest.

[16] The Authority's conflict of interest policy requires that a contract worth \$50,000 before HST be tendered. The Foundation has no such rule.

[17] In 2015 Mr D'Angelo's consulting firm was given a contract to conduct a survey for Niagara Region's Police Services Board, of which Andy Petrowski was a member. The local

press described the award of the contract as “fishy.” The consulting firm reported on the survey in September 2015. It labelled every page of its report “DPM Consulting.”

[18] The defendant had for some time been concerned about governance at the Authority. He had been doing research, making Freedom of Information requests and on-line searches. He compiled his findings into a report. He consulted another retired police officer and was told to submit the report to the Niagara Regional Police because there were grounds to suspect corruption.

[19] On October 26, 2016 the defendant sent his report to the Niagara Regional Police.

[20] On October 28 the regional chairman called a special meeting on short notice for October 31 in the daytime. Regular council meetings are held in the evening, when councillors find it easier to attend. The special meeting was called for the purpose of hiring Mr D’Angelo as chief administrative officer of the Region.

[21] The defendant got wind of this so he sent his report to Brian Heit, a regional councillor, with a view to having it distributed to Council before they made the decision. Mr Heit had the report distributed to Council members.

[22] At the time, the defendant wrote by e-mail to Mr Heit:

What if you were to find out that he is the subject of a police investigation ... is that enough for you guys to make a reasonable case to at least defer this?

[23] The report contains allegations of factual matters related to the conduct of NPCA business, including the impugned communications. The report was not signed, but Council knew who had authored it. The defendant identified himself in the emails to Heit.

[24] The matters raised by the report included the following:

- a. The contract for human resources restructuring to Mr D’Angelo’s company, which was identified as “DPM Consulting” and, on the basis of a search of Zoom

Info, an on-line directory, was described as an Australian registered company with no business licence in Ontario.

- b. The contract between the Foundation and Stream Three Inc., which it described as a contract between the Authority and Cornerstone Sponsorship Management (a business name of Mr Montgomery's) and noted that Cornerstone shared the same address as Value Media, the company that is "run by Andy Petrowski."

[25] In connection with these and other matters it raised questions about conflict of interest, favouritism and improper awarding of contracts and the legality of various actions.

[26] On November 14, 2016, the Authority's lawyers (not Mr DiMelo or Mr Winer) wrote to the defendant threatening to sue him for disseminating the report. Among other things, they told him that Mr D'Angelo's business was "D'Angelo Performance Management, sometimes referred to as DPM Consulting." They also said that Councillor Petrowski does not own Cornerstone Sponsorship Management or Value Media Corp. and that Mr D'Angelo was not instrumental in awarding the contract. Furthermore, the contract was with the Foundation, which does not need to tender and in any event contracts with the Authority only need to be tendered if they exceed \$50,000 *before* HST.

[27] The Authority demanded that Major Smith:

- a. Deliver a full and unqualified apology and retraction in a form approved by the Authority;
- b. Deliver a written undertaking not to distribute "the document" to any other person and not to refer to it publicly in future, and not to make similar defamatory statements about the NPCA in future; and
- c. Provide the identity of the authors of the document, and if known the person who created the fabricated Zoom Info Profile Report.

[28] It appears that an article was published in Postmedia on November 21 that referred to the report and the letter from the lawyers in response. I do not know the source of Postmedia's

information. On November 24 the NPCA put a “special statement” from its chairman, Bruce Timms, on its website. Mr Timms wrote that he was disappointed with the Postmedia article because while it mentioned portions of “the letter sent by our legal counsel to Ed Smith with respect to false and defamatory statements in the unsigned document he has circulated, Postmedia omitted crucial facts in the letter ... Of greatest concern, the Postmedia article omitted that the unsigned document contains fake business records, which were fabricated by the author of the document to support its false accusations about the NPCA. The document is unsigned because the author knows that it contains falsehoods and fabricated documents.”

[29] On November 30, 2016 the defendant held a press conference referring to the letter from the lawyers and said that he stands by his research.

[30] On December 1, 2016 the Authority took out a full page advertisement in Niagara This Week and published the special statement again.

[31] On December 8, 2016 David Meagher, the owner of DPM Consulting Pty Ltd in Australia, wrote to the Authority to confirm that his firm had nothing to do with Mr D’Angelo and that the ZoomInfo listing was false as far as it referred to Mr D’Angelo. On December 15, 2016 Smith, through counsel, offered to add to his report mention that Mr D’Angelo’s company was D’Angelo Performance Management, also known as DPM Consulting and that Mr D’Angelo’s company is licensed in Ontario.

The pleadings

NPCA and D’Angelo

[32] Paragraph 9 of the amended statement of claim of the NPCA and Mr D’Angelo complains about the contents of pages 3 and 5 of the report, in which the defendant wrote:

“In October 2013, the current CAO of the NPCA (Carmen D’Angelo) was a sitting Board member representing Hamilton.

According to the minutes of the Board meeting of Nov. 20, 2013, Carmen requested a four month ‘leave of absence’ from the Board, effective October 17,

2013 to February 17, 2014 in order to complete the 'HR restructuring' project as per the NPCA Strategic Plan (ref A)".

Mr. D'Angelo was awarded an untendered, unsolicited contract in the name of his company, DPM Consulting for which he was paid \$41,000.00 (ref B) ...

External to his work at the NPCA, Carmen D'Angelo heads a consulting company called DPM Consulting (ref I), the same company that was awarded the \$41,000.00 HR restructure work.

In a request with Service Ontario to verify the registration of DPM with the government they returned no match from their database (ref J).

The online site "Zoom info" lists Carmen D'Angelo as the "head" of DPM. An Australian address is given for this company and the Australian Business Registry shows DPM earning \$17.5 million AUD in annual revenues (ref K). ...

If DPM Consulting is not an Ontario registered business is it legal for it to operate here?

If DPM Consulting is a foreign registered company is the government agencies contracting with them aware?

Is HST paid to the CRA? Was HST paid to Carmen D'Angelo and not remitted to the government?"

[33] Paragraph 16 complains about pages 5 and 8 of the report:

"In September 2015, DPM was hired by the Niagara Regional Police (NRP) Services Board to conduct an NRP public survey (ref I). ...

Carmen D'Angelo presented an unsolicited proposal for the NRP survey via Regional Councillor Andy Petrowski. As a result he is awarded a contract from NRP in excess of \$40,000.00. A few months earlier (May 15, 2015) Councillor Petrowski's company (CSM/VMC) presented an unsolicited proposal to the

NPCA (which Mr. D'Angelo heads) and was awarded a contract in excess of \$50,000.00 (ref L). ...

Does this pass the test for conflict of interest? Arm's length? Is it legal? ...

In May 2015, the NPCA received an unsolicited proposal from Cornerstone Sponsorship Management (CSM) 'to raise funds for the NPCA' (ref L).

The costs to engage CSM for their contract was more than \$50,000.00 and in accordance with the NPCA tender policy (ref Q) a tender was required. This never happened, a contract was awarded sole source to CSM (ref L). ...

The NPCA awarded a large untendered contract to a company with direct ties to a Regional Councillor: does this pass the conflict of interest / arm's length test?"

[34] Paragraph 19 complains about the emails to Councillor Heit.

Montgomery

[35] In paragraph 10 of his second amended statement of claim Mr Montgomery complains of the following statements made in the report:

- a. Value Media and Stream Three through Cornerstone are owned, operated, run and directly connected to a controversial member of Niagara Regional Council named Andy Petrowski.
- b. Petrowski used his influence to secure a contract for one of his businesses from the Authority.
- c. Stream Three through its trade name Cornerstone improperly and illegally obtained a contract and money from the Authority.

[36] Paragraph 26 complains about the following contents of the report:

- a. "The cost to engage CSM (Cornerstone Sponsorship Management) for their contract was more than \$50,000 and in accordance with the NPCA tender policy a tender was required. This never happened."
- b. "VMC (Value Media Corp.) is run by Regional Councillor Andy Petrowski."
- c. "The NPCA awarded a large untendered contract to a company with direct ties to a Regional Councillor."
- d. "Was cash awarded to Regional Councillors and/or senior management and/or NPCA Board members in situations that seem difficult or impossible to explain?"
- e. "Have contracts been made with companies of questionable arm's length relationships?"
- f. "Question surrounding the NPCA seem to warrant immediate actions. Provincial intervention is needed."

[37] Paragraph 30 complains about an interview with the St Catharines Standard on November 3, 2016 in which the defendant said that NPCA may have crossed some ethical lines and that a forensic audit is warranted.

[38] Paragraph 31 complains about an article in the Standard on November 21, 2016 in which it is reported that the defendant said that the NRP have transferred the file to the OPP for review. "I think some of our regional councillors and some people at the NPCA have a lot to answer for."

[39] Paragraph 32 and 33 complain about an email of November 28 announcing the press conference of November 30, attaching the NPCA's statement of defence in Montgomery's lawsuit against the NPCA and in which he attached a summary that referred to Value Media Corp. as "Andy Petrowski's company," noting that it is a \$10 million lawsuit brought against the NPCA by a company that a sitting regional councillor claims to own.

[40] Paragraph 34 complains about a statement by Major Smith to Niagara At Large that he wants a forensic audit of NPCA “to find out how much money may have been awarded to Cornerstone in the settlement,” presumably referring to Mr Montgomery’s action against it.

[41] Paragraph 35 complains about the November 30 press conference in which Major Smith said “I stand by the research that went into the report.”

The test under s.137.1 CJA

[42] The *Courts of Justice Act*, RSO 1990 c. C.43 provides:

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.

(5) 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. 2015, c. 23, s. 3.

(6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding; or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding. 2015, c. 23, s. 3.

(7) 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. 2015, c. 23, s. 3.

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances. 2015, c. 23, s. 3.

(9) 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,

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

[43] This court has had occasion to apply this relatively new legislation: *Platnick v. Bent*, 2016 ONSC 7340; *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785; *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 4450. It is intended to protect persons who speak on matters of public interest not only from liability in tort, but from being sued in tort.

[44] Once the defendant shows that the subject matter of the claim arises from a communication related to a matter of public interest, the action must be dismissed unless the plaintiff satisfies the judge of three things:

- a. There are grounds to believe that the proceeding has substantial merit (subs. (4)(a)(i));
- b. There are grounds to believe the moving party has no valid defence in the proceeding (subs. (4) (a) (ii)); and
- c. The harm likely to be or have been suffered by the plaintiff is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression (subs. (4) (b)).

[45] I agree with my colleagues on the interpretation of subsection 137.1 (4). I think that as far as a. and b. are concerned, the use of “grounds to believe” means that the plaintiff does not have to prove its case on the preponderance of the evidence at this point. On the other hand, the use of the terms “substantial merit” and “no valid defence” means that it is not enough for the plaintiff to show only that there is a genuine issue that requires a trial or that its case is not frivolous or hopeless.

[46] It seems to me that the balance between the competing public interests, which is only undertaken if the plaintiff succeeds on the first two requirements, requires the plaintiff to

satisfy me with respect to the relative seriousness of the competing concerns in the particular case.

NRPA

[47] As far as the Authority is concerned, the motion is decided on the first criterion. It has failed to satisfy me that there are grounds to believe that the proceeding has substantial merit because as a government entity, it has no right to sue an individual for defamation. I do not arrive at the other criteria.

[48] The Authority argued first that it is not a government entity. In view of the legislation that I summarize in paragraph [2] of these reasons this argument is not tenable.

[49] The Authority argued second that a government entity can sue an individual for defamation. In *Windsor Roman Catholic Separate School Board v. Southam Inc.*, (1984) 46 OR (2d) 231, Dupont J. held that the school board could sue a newspaper publishing company and some individuals, including board members, in libel. He disagreed with a 19th century English case that held the contrary view and noted that this authority had been doubted in England more recently. He held that the common law does not prevent a government entity that otherwise has a right to sue from suing in defamation.

[50] In *Montague (Township) v. Page*, [2006] O.J. No. 331, Pedlar J. was aware of Dupont J.'s decision, but he had the benefit of the reasoning of the House of Lords in *Derbyshire County Council v. Times Newspapers Ltd*, [1993] 1 All E.R. 1101, which settled the question in English law in favour of the proposition that a government entity cannot sue a citizen in defamation. Pedlar J. agreed with the House of Lords and further reasoned that in order to interpret the common law in the light of section 2 of the *Charter of Rights* a citizen must be free from the threat of action by the government for expressing issues relating to government. He said:

[29] In a free and democratic system, every citizen must be guaranteed the right to freedom of expression about issues relating to government as an absolute privilege, without threat of a civil action for defamation being initiated against

them by that government. It is the very essence of a democracy to engage many voices in the process, not just those who are positive and supportive. By its very nature, the democratic process is complex, cumbersome, difficult, messy and at times frustrating, but always worthwhile, with a broad based participation absolutely essential. A democracy cannot exist without freedom of expression, within the law, permeating all of its institutions. If governments were entitled to sue citizens who are critical, only those with the means to defend civil actions would be able to criticize government entities. As noted above, governments also have other means of protecting their reputations through the political process to respond to criticisms.

[30] This decision should not be seen in any way as an encouragement to those who might engage in the making of irresponsible defamatory statements against government. If their statements are false, and particularly if made with a malicious intent, that will be brought to light through the various avenues of the political process, and those statements will be discredited. Individual members of the government who are defamed have the right to sue in order to protect their personal reputations. As pointed out by Cory J. in the *Hill v. Church of Scientology* case ... at para. 106:

Certainly, defamatory statements are very tenuously related to the core values which underlie section 2(b). They are inimical to the search for truth. False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society.

[51] Both *Windsor Roman Catholic Separate School Board* and *Montague Township* were decided after the Charter, although the former did not consider the exposition of the common law in the light of the relatively new Charter. Pedlar J.'s decision was followed in this court in *Halton Hills (Town) v. Kerouac*, (2006) 80 OR (3d) 577. I do not propose to re-examine the question. I consider Pedlar J.'s decision to be authoritative until a higher court says

otherwise. I do not say that a government authority can never sue anybody for defamation, but it cannot sue an individual for defamation for criticizing it. The Authority has no cause of action at law and therefore cannot show grounds to believe that its action has substantial merit.

[52] I would add something. I share the defendant's disappointment at his treatment by the Authority. A private citizen, he raised questions about the governance of the authority. He was met with a public accusation of forgery and the threat of litigation from "his own government," as he put it, together with a demand that he issue a written apology, undertake never again to publish "the document" which contained many things that are not said to be actionable, and reveal his sources. There are many places in the world where I might expect such a thing to happen, but not in our beloved Dominion.

[53] This and other things I read about in the materials suggest to me a body that has had trouble finding its way. That is perhaps not surprising given its structure. It is governed by a large, disparate, non-expert board, composed chiefly of municipal politicians, who typically have to maintain employment while also attending to their many other onerous public duties. Together they govern the policy of the Authority but it is not realistic to expect them to be aware of the details of its administration. While the Authority is accountable to other bodies for some of its decisions, it has little accountability for its own administration. That makes public participation and comment all the more important.

Communication on a matter related to the public interest

[54] There is no single test to determine whether a communication is in the public interest. The general principles are set out by the Supreme Court of Canada in *Grant v. TorStar Corp.*, 2009 SCC 61 at paragraphs 99-108. It seems to me beyond question that the expressions in question relate to a matter of public interest, to wit: the governance of the Niagara Peninsula Conservation Authority. It is a body funded by public money. Its action or inaction in its sphere of responsibility can affect the public welfare. It has been the subject of controversy.

[55] To the extent that the communications deal with the Foundation, they are also a matter of public interest. The affairs of a registered charity constitute a matter of public interest. A

registered charity linked to a public body such as the Authority is all the more a matter of concern to the public.

[56] Both sets of plaintiffs therefore must meet the requirements of s.137.1 of the *Courts of Justice Act* if they are to continue their actions.

D'Angelo

[57] Mr D'Angelo's action is determined by the application of the second criterion in subsection 137.1 (4) of the *Courts of Justice Act*. He has failed to show grounds to believe that the defendant has no valid defence. The defendant has an obvious and credible defence: qualified privilege, together with lack of malice. See *Hill v. Church of Scientology*, [1995] 2 SCR 1130 and *Grant v. TorStar Corp.*, 2009 SCC 61. I do not arrive at the balancing of public interests, although my previous comments suggest how I might have struck the balance.

[58] The submission of the report to the Regional Council was an occasion of privilege. As a citizen, Major Smith had a compelling interest and a moral obligation to raise the matters that had come to his attention. He had already submitted the report to the police (another occasion of privilege) after being told by a retired detective that it was worthy of investigation. It is clear from the emails that he acted not out of personal malice toward Mr D'Angelo, but out of concern that the Region would hire him before the matters could be investigated. The news conference and the communications that led up to it were also an occasion of privilege. Major Smith was responding to Councillor Timms's public attack on his character. In his response Major Smith went no farther than he had to.

[59] I now look at the evidence in some more detail.

Use of an unregistered company

[60] D'Angelo took a leave of absence from the NPCA board in November 2013. That is true.

[61] He was awarded an untendered, unsolicited contract in the name of his company, DPM Consulting for which he was paid \$41,000.00. That is true.

[62] In a request with Service Ontario to verify the registration of DPM with the government they returned no match from their database. That is true, too but there is an innocent reason for the negative return that Major Smith did not know. The real name of the company is D'Angelo Performance Management.

[63] The online site "Zoom info" lists Carmen D'Angelo as the "head" of DPM. An Australian address is given for this company and the Australian Business Registry shows DPM earning \$17.5 million AUD in annual revenues. This is the true listing, but the listing is wrong. Zoom Info now informs us that the listing was not entered manually. It must, then, have been entered when its web crawler found the name on the Internet or a member uploaded, or permitted the upload, of his e-mail contacts. Major Smith was not to know this.

[64] The Australian DPM exists, but Mr D'Angelo's contact information should not be in the listing. The contact information included an Australian e-mail address for Mr D'Angelo. That fact suggests that the entry is deliberately misleading. Once the Authority heard back from David Meagher, the real owner of DPM Proprietary Ltd, it was reasonable for it to conclude that the listing was a forgery, as opposed to a mistake, but there is no reason to assign the blame for that to the defendant. His omission to do more research than he did does not amount to malice. He is not a law firm with access to a corporate web search service. He is a private citizen living on a government pension.

[65] The mistake about DPM led to the remaining questions, which strike me as comment rather than statements of fact: "If DPM Consulting is not an Ontario registered business is it legal for it to operate here? If DPM Consulting is a foreign registered company are the government agencies contracting with them aware? Is HST paid to the CRA? Was HST paid to Carmen D'Angelo and not remitted to the government?" There was no malice or recklessness with the truth. These questions arose out of a mistake caused by an unknown person who uploaded false information to the Internet.

Contract swapping

[66] The second defamatory expression has to do with the hiring of D'Angelo Performance Management by the Police Services Board, of which Councillor Petrowski was a member, a

few months after Cornerstone/Value Media was hired by the “NPCA” to raise funds. If Value Media was “Petrowski’s company”, that gives the appearance of contract swapping. The other concern was the amount of the contract and the lack of tendering.

[67] “Does this pass the test for conflict of interest? Arm’s length? Is it legal?” asked the report.

[68] As it turns out, neither Cornerstone nor Value Media is “Petrowski’s company.” We now know that Value Media, which sometimes operates as Cornerstone, belongs to Mr Montgomery. But the gist of the allegation is that there is a connection between Petrowski and Value Media, which would amount to a link with Stream Three, in whose name the written contract was made. Mr Montgomery has since confirmed the link between his business and Councillor Petrowski. And Petrowski’s statements to the Wainfleet Council gave Major Smith and anyone else good reason to identify him as the principal of Value Media. There was no malice and no recklessness on the part of the defendant.

[69] Obviously, these two contracts were not corruptly swapped. There is not enough of a continuing connection between Petrowski and Montgomery to suspect that one contract was awarded in exchange for the other. But that is hindsight.

[70] There is also the matter of the NPCA awarding the Stream Three contract without tender. The plaintiffs make three points:

- a. It is only a breach of the Authority’s policy if the person in a conflict of interest fails to recuse himself from taking part in the decision to award the contract;
- b. The contract was with the Foundation, which does not have that rule; and
- c. The rule applies to contracts for over \$50,000 *before* HST.

[71] As to a., whether the person with a conflict of interest took part in the decision was not known to Major Smith. Either way, it was a matter of public concern.

[72] As to b., while the written contract was signed on behalf of the Foundation, it is not so clear that the Authority was not involved. As with all his allegations, the source of Major Smith's information is known. He has appended a copy of everything he relied on to his report. In the case of this contract, somehow he got his hands on a memorandum on the letterhead of the Authority, recounting the story behind the awarding of the contract. The author's name is blacked out. For my purposes, the parties did not make an issue of the fact that the memo appears to be addressed to a lawyer. In the memo, the author throughout refers to Montgomery's dealing with the Authority, not the Foundation. When the deal faltered, Montgomery sued the Authority and the Foundation. As I have mentioned, the contract that was signed after the lawsuit is signed on behalf of the Foundation. It includes a clause that Mr Montgomery is not to do business with any councillor or board member who could be in a position of conflict of interest. I infer that making clear the separation of the work of the Authority from the work of the Foundation and avoiding the appearance of conflict of interest were not matters in the forefront of the Authority's thinking in 2015, but by September 2016 they were trying to do better.

[73] Major Smith was justified in relying on the source he had. He tried to get more information about the contract from the Authority using the Freedom of Information legislation, but with negative results, because the records were kept by the Foundation. The Authority did, however, have some emails on the topic. I do not know why they were not given to him.

[74] As to c., from the public interest point of view this is a quibble. It was fair to question why any contract approaching \$50,000 would be given out unsolicited and without tender in the circumstances as they were thought to be.

[75] Mr D'Angelo has satisfied me that he did not operate with an unregistered company and that there was no favouritism or corruption in awarding the contracts in question. But I am not satisfied that the defendant has no defence. Indeed, I am convinced that he made the impugned expressions on an occasion of qualified privilege and that he acted without malice.

[76] It has been argued that the Authority put the defendant on notice of the inaccuracies in his report in the letter of November 14, 2016. This, of course post-dated the circulation of the report to Council, but it pre-dated the press conference of November 28. I do not impute knowledge of any inaccuracies to the defendant on account of this letter. The letter did not explain anything. It simply contradicted his information, called the Zoom Info listing a “complete fabrication” and threatened to sue him if he did not come to heel as demanded. I think a reasonable person in Major Smith’s position would not have been inclined seriously to reconsider the accuracy of his information based on this letter. It looked more like the opening salvo in a war. In view of the subsequent publishing of the “special statement” I infer that it was in fact just that.

Montgomery

[77] The claims related to the communications mentioned in paragraphs 30 and 31 of Mr Montgomery’s statement of claim are determined by application of the first criterion in s. 137.1 (4) of the *Courts of Justice Act*. He and his companies are not the subject-matter of the communications there cited. There are no grounds to believe that his claim has substantial merit in this respect.

[78] As to the remaining communications, mentioned in paragraphs 10, 26 and 32 -35 of his statement of claim, the action is determined by application of the second criterion in s.137.1 (4). There are no grounds to believe that the defendant does not have a valid defence. As I have said about these communications in the context of Mr D’Angelo’s action, they were made on occasions of qualified privilege. There was no malice even in those parts of the communication that turned out to be incorrect. I am satisfied that the defendant has a valid defence to these claims. Again, I do not arrive at the balancing of public interests.

[79] It is unfortunate that Mr Montgomery was swept up in this controversy. He made a straightforward offer to perform services for a fee. He had to sue the Authority to complete the contract. He is not responsible for the governance of public authorities. He got his contract honestly. He is not mixed up in this business through his own fault. I hope that this

observation will repair any damage that may unintentionally have been done to his reputation.

Conclusion and order

[80] Both actions are dismissed. The parties may make written submissions to costs consisting of three pages maximum, to which may be appended a bill of costs and any offer to settle, the defendant within 10 days of release of these reasons and the plaintiffs within 10 days thereafter.

A handwritten signature in black ink, reading "J.A. Ramsay", is written over a horizontal line. The signature is cursive and stylized, with a long horizontal stroke extending to the right.

Released: 2017-11-23

Niagara Peninsula Conservation Authority v. Smith, CITATION: 2017 ONSC 6973

COURT FILE NOs.: 11409/16 (Welland)

and 56966/16 (St. Catharines)

DATE: 2017-11-23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN: 11409/16

Niagara Peninsula Conservation Authority and Carmen
D'Angelo, Plaintiffs and Ed Smith, Defendant

AND BETWEEN: 56966/16

William Montgomery, Value Media Corp. and Stream
Three Inc., Plaintiffs and Ed Smith, Defendant

REASONS FOR JUDGMENT

MR JUSTICE RAMSAY

Released: November 23, 2017