
CANADA / JUDGMENT

Lougheed v. Wilson

2010 BCSC 1318

COURT

Supreme Court of British Columbia

DECIDED

20 September 2010

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2010 BCSC 1318 Lougheed v. Wilson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lougheed v. Wilson,

2010 BCSC 1318

Date: 20100920

Docket: S081334

Registry: Vancouver

Between:

William F. Lougheed, in his capacity as Executor of
the Estate of Norma Yvonne Lougheed, deceased, and
William F. Lougheed, in his personal capacity and Norbill
Investments Ltd.

Plaintiffs

And

Kelly Janine Wilson and Charles Blair Wilson

Defendants

And

Judeline Tyabji Wilson, Tugboat Enterprises Ltd.

Mark Allan Marissen, Elaine O'Connor, Canwest Publishing Inc.,

Publications Canwest Inc., and Steve Janke

Defendants by

Counterclaim

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Defendant by Counterclaim, Mark Allan Marissen:

H. Poulus, Q.C.

A. Bespflug

Counsel for Defendant, Charles Blair Wilson:

J.L. Straith

Place and Date of Hearing:

Vancouver, B.C.

August 10, 2010

Place and Date of Judgment:

Vancouver, B.C.

September 20, 2010

- [1] This is an application brought pursuant to Rule 9-7(2) by the defendant by counterclaim, Mark Allan Marissen ("Marissen") seeking dismissal of the claim brought against him by the defendant Charles Blair Wilson ("Wilson") and for costs.

Background

- [2] The plaintiff, William Loughheed, personally and his capacity as executor of the estate of his late wife, Norma Yvonne Loughheed, claims the defendant Wilson and his wife, co-defendant, Kelly Janine Wilson, failed to repay various loans made to them. The loans relate to various real estate purchases made by the Wilsons and to personal loans.
- [3] Wilson and his wife deny they owe monies as alleged and Wilson has counterclaimed against Loughheed and the other named defendants by counterclaim that he has been defamed by them.

- [4] Wilson asserts such defamation consists of an "Anonymous Report" dated October 24, 2007 which he claims was authored by the defendant by counterclaim Tyabji Wilson and distributed by others including Marissen and an article which appeared in The Province newspaper on October 28, 2007 entitled "West Vancouver-Sunshine coast MP had unpaid debts, allegations of improper campaign spending" authored by O'Connor and published by Canwest.
- [5] I will refer to the defendants by counterclaim as defendants for the purposes of this application.
- [6] The defendant Marissen was, from January 2007 to December 2008 the National Campaign Co-Chair of the Liberal Party of Canada ("LPC").
- [7] The defendant Tyabji Wilson is a former B.C. provincial MLA and is the CEO of the defendant Tugboat Enterprises Ltd. Tyabji Wilson is alleged to be the author of the October 24, 2007 Anonymous Report. The Anonymous Report contained allegations Wilson deliberately misled Elections Canada on various election expense claims contrary to the Canada Elections Act, S.C. 2000, c. 9.
- [8] It is alleged the defendant Janke operates a website called "Angry in the Great White North" which published the Anonymous Report and which website has further commented on the nature of Wilson's election expenses.
- [9] The defendant Elaine O'Connor is a reporter with The Province newspaper and is alleged to have been the author of a newspaper article dated October 24, 2007 which Wilson asserts contained false and misleading information.
- [10] The defendants Canwest Publishing Inc. and Publications Canwest Inc. are the publishers of The Province newspaper.
- [11] The issue raised on this application relates solely to the claim made by Wilson against the defendant Marissen.

The claim against Marissen

- [12] The claim against the defendant Marissen is set out in the following paragraphs of the counterclaim:
- 15. In the month of September 2007, the Defendant Tyabji, acting on behalf of and using the premises and facilities of the Defendant Tugboat, contacted the Defendant Marissen, then an employee of the Liberal Party of Canada.
- 16. During the months of September and October 2007, the Defendant Tyabji and the Defendant Marissen discussed steps to be taken to launch media attacks against the persona and character of the Defendant Blair Wilson, using allegations of financial misconduct and allegations of violations of the Canada Elections Act 2000, c. 9 to damage the Defendant Blair Wilson's reputation and political career.

17. During the months of September or October, 2007, the Defendants Tyabji and Marissen came in contact with the Defendant O'Connor, a newspaper reporter employed with the Defendant Canwest.
- ...
19. During the months of September and October 2007, the Defendants Tyabji, Marissen and the Plaintiff Loughheed supplied information to the Defendant O'Connor in regard to alleged debts of the Defendant Blair Wilson owing to the Plaintiff Loughheed, and claims that the Defendant Blair Wilson had been involved in numerous violations of the Canada Elections Act 2000, c. 9 during the campaign for the Federal Election of January 23, 2006.
20. During the months of September and October, 2007, the Defendants Tyabji and Marissen communicated about assembling documentation relating to the Defendant Blair Wilson's activities during the 2006 election campaign. Included in this, was accessing confidential material held by the Liberal Party of Canada including, but not limited to:
- a) Copies of material in the Defendant Blair Wilson's Green Light forms submitted in regard to the 2004 and 2006 election campaigns; and,
 - b) Copies of material submitted by the Defendant Blair Wilson's Official Agent which were copied to the Liberal Party of Canada.
21. The Defendant Tyabji prepared a report dated October 24, 2007, purporting to be a letter addressed to the Commissioner of the Canada Elections Act ("the October 24, 2007 Anonymous Report") and forwarded the October 24, 2007 Anonymous Report to the Defendants O'Connor, Canwest, Marissen and Steve Janke with the intention that they would republish the report and its contents.
- [13] Paragraph 22 of the counterclaim then sets out Wilson's assertion that Marissen circulated copies of the Anonymous Report to various officials within the LPC.
- [14] The other paragraphs of the claim against Marissen are:
43. In their natural and ordinary meanings of the words published in the October 24, 2007 Anonymous Report, as republished by the Defendants, O'Connor, Canwest, Marissen and Janke, were meant and understood the mean that the Defendant Blair Wilson was untruthful, intended to deceive, and committed civil and/or criminal wrongdoings, and was guilty of criminal and/or civil misconduct, was untrustworthy, and was dishonest as a candidate in the 2006 Federal Election in his completion of his return to Elections Canada.
44. The words used by the Defendants were calculated to cause and have caused pain, distress, anguish and suffering to the Defendant Blair Wilson, his family and persons close to him.
- ...

46. The actions of the Plaintiff Lougheed and the Defendants O'Connor, Canwest, Tyabji, Tugboat, Marissen and Janke were malicious, scandalous, vexatious, and done in a deliberate attempt to cause political and financial damage to the Defendant Blair Wilson.
47. The Plaintiff Lougheed and the Defendants O'Connor, Canwest, Tyabji, Marissen and Janke are jointly and severally liable to the Defendant Blair Wilson for their actions.
- [15] Wilson seeks general, special, exemplary and punitive damages against all defendants and costs.

Marissen's Response

- [16] The defence filed by Marissen denies he received or had any involvement with the Anonymous Report. It states:
2. In answer to the whole of Wilson's Amended Statement of Defence and Counterclaim, Marissen denies that he published a copy of the October 24, 2007 Anonymous Report as alleged or at all and puts Wilson to the Strict proof thereof.
- [17] In an affidavit sworn December 17, 2009 in support of this application Marissen deposed:
3. At paragraphs 21-22 of his Amended Counterclaim filed on September 24, 2008, Charles Blair Wilson ("Wilson") alleges that:
- (a) Judeline Tyabji Wilson ("Tyabji") gave me a document defined as "the October 24, 2007 Anonymous Report"; and
- (b) I, in turn, published a copy of the October 24, 2007 Anonymous Report by giving it to officials in the LPC.
4. Paragraph 14 of Wilson's Affidavit #1 sworn on March 13, 2009 (the "Wilson Affidavit") references the October 24, 2007 Anonymous Report and attaches it as Exhibit "D". Attached hereto and marked as Exhibit "A" to this my Affidavit is a true copy of paragraph 14 of, and Exhibit "D" to the Wilson Affidavit.
5. Contrary to the allegations made at paragraphs 21 and 22 of Wilson's Amended Counterclaim, I never:
- (a) received a paper or electronic copy of the October 24, 2007 Anonymous Report from Tyabji or anyone; or
- (b) gave a paper or electronic copy of the October 24, 2007 Anonymous Report to officials in the LPC or anyone.
- [18] Marissen admits he sent a copy of the newspaper article prepared by O'Connor on to the LPC but did not receive or pass on the Anonymous Report to anyone.

Position of parties on application

- [19] Marissen's position on this application is that there is no evidence to contradict the denials made in his affidavit sworn on December 17, 2009 and filed on March 8, 2010 in support of this application. Marissen's counsel argued Wilson had months in advance of the hearing of the motion to produce evidence in support of the allegations made in the counterclaim and has been unable to do so.
- [20] In response, Wilson argues there are significant issues of credibility between Marissen and Wilson and that Marissen has made important admissions when he responded to Wilson's Notice to Admit Facts. Counsel for Wilson further argued this motion should not be heard until after he had an opportunity to examine the defendant O'Connor because such examination would be important in resolving the credibility issues between Wilson and Marissen. It was submitted those issues could only be resolved through such examination. I was advised an application was scheduled to be heard in court this October to determine Wilson's right to examine O'Connor on her knowledge of the identity of the author of the Anonymous Report and other issues concerning the production of documents given to him by a confidential source. Wilson says O'Connor's examination on those issues, if permitted, may very well reveal Marissen was involved in publication of the Anonymous Report.
- [21] In my view, there is no merit to Wilson's argument that Marissen has admitted facts which support Wilson's claim. The asserted admissions are said to be contained in Marissen's response to Notice to Admit #3 issued July 12, 2010.
- [22] Wilson sought admissions that Marissen circulated 24 pages of documents Tyabji Wilson provided to him to senior members of the LPC, that Tyabji Wilson intended to and did publish the documents by delivering them to Marissen and that Tyabji Wilson expected the documents delivered to Marissen to be republished to the LPC.
- [23] In response, Marissen admitted he received documents (which he identified as not including the Anonymous Report) from Tyabji Wilson and that he forwarded the documents to Martin MacLachlan (involved in the LPC's "green-light committee" which vets the appropriateness of Liberal Party candidates) but denied forwarding them to other members of the LPC. He denied he had any knowledge of Tyabji Wilson's intent with regard to the documents and "cannot therefore admit" that she intended to publish these documents to him. He also denied other paragraphs in the Notice as he pled he "lacks knowledge with respect to their facts".
- [24] Wilson also sought admissions from Marissen concerning Janke's internet link address referred to in an e-mail from Marissen to Janke of November 7, 2007.
- [25] In his response, Marissen admitted that Janke's internet link address had been used by others but "denies authoring or sending an email" to Janke's address.

[26] The fact Marissen is unable to answer because "he lacks knowledge" does not constitute an admission under the Rules of Court. Lack of knowledge is a sufficient answer to a Notice to Admit. An admission is a clear and deliberate concession to the opposing party: *Adams v. Fairmont Hotels and Resorts Inc.*: (2008) BCCA 444 at paras. 10 and 11. Marissen's responses to the Notice to Admit do not fall in this category.

[27] There is, in my view, more substance to Wilson's second argument: that is that the Court should not hear this application before O'Connor is examined.

[28] The Province article contains the following:

B.C. Liberal organizer Mark Marrissen (sic) told The Province he recently was passed documents that he submitted to the party's green-light committee which vets candidates.

If proven true, the allegations would represent a serious breach of the Elections Act and could bring penalties of(sic) fines, prison time or a restriction on being "entitled to be elected or to sit in the House of Commons."

Among the allegations against Wilson the Province has learned:..."

[29] In my view, Wilson should be allowed to develop his case against Marissen to the extent of being able to cross-examine the co-defendant O'Connor on the discussions she had with Marissen including whether he provided her with a copy of the Anonymous Report or any other documents concerning Wilson.

[30] In his affidavit sworn March 13, 2009, Mr. Wilson states:

6. During the last week of October, 2007, I had a conversation with Mark Marissen, at which time he advised me that he had received material and a phone call from Elaine O'Conner [sic] of The Vancouver Province that would likely be appearing in a news article in the next few days. I asked Mr. Marissen which material he had, and requested that he provide me with copies. He advised me that he had forwarded the material to other people in the Liberal Party, and did not have it in his possession at that time. I asked him where he received the material from, and he indicated, after pausing, that he had received the material from Judy Tybaji [sic].
7. On October 28, 2007, I awoke to find published in the Vancouver Province the article that is attached to this my affidavit and marked as Exhibit "B". I believe that the attached copy from the internet is a true copy of the article as printed in the Vancouver Province on that date.

(emphasis added)

[31] The action brought by Wilson contains serious allegations, which, if proven to be true raise serious issues for determination at trial.

- [32] In an application under Rule 9-7 it would be unjust to proceed when there is evidence available which could assist the court in assessing whether Marissen's evidence is to be believed. Wilson says the O'Connor article contains remarkably similar content to that contained in the Anonymous Report and that accordingly it is likely Marissen passed that Anonymous Report on to O'Connor.
- [33] While a party faced with an application under Rule 9-7 must take every reasonable step to be in a position to defend the application by marshalling necessary facts to support their position, in this case the application to examine O'Connor has been set for hearing for several months before the present application came on for hearing. Her examination for discovery was conducted July 16, 2010. She refused to divulge sources of her material. An application to require her to do so will be heard in several weeks.
- [34] In the often cited case *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 36 C.D.C. (2d) 199 (C.A.), MacEachern C.J.B.C. stated at pages 215 and 216:

In deciding whether the case is an appropriate one for judgment under Rule 18A the chambers judge will always give full consideration to all of the evidence which counsel place before him but he will also consider whether the evidence is sufficient for adjudication. For example, the absence of an affidavit from a principal player in the piece, unless its absence is adequately explained, may cause the judge to conclude either that he cannot find the facts necessary to decide the issues, or that it would be unjust to do so. But even then, as the process is adversarial, the judge may be able fairly and justly to find the facts necessary to decide the issue.

... It may be ... notwithstanding sworn affidavit evidence to the contrary, that other admissible evidence will make it possible to find the facts necessary for judgment to be given. For example in an action on a cheque, the alleged maker might by affidavit deny his signature while other believable evidence may satisfy the court that he did indeed sign it. Again, the variety of different kinds of cases which will arise is unlimited. In such cases, absent other circumstances or defences, judgment should be given.

[35] Lambert J.A. stated at pages 218-219:

... since ample notice, namely 14 days, must be given on a R. 18A application, the chambers judge is entitled to know why the evidence of a relevant witness has not been made available in an appropriate form. It is not unjust for a chambers judge to give judgment without the evidence of a significant participant or observer of the events in dispute, if the evidence has not been put forward and there is no good explanation.

So judgment should not be given under R. 18A(3) without asking these two questions: Has any party been denied an opportunity to produce relevant testimony? Is there a conflict in the evidence, which the judge can not readily resolve, on a point of fact which could affect the result? If the answer is "Yes" to either question then the case is probably not ready for judgment. And the steps that must be taken to answer those questions "No" will indicate whether the best course is to manage the case to judgment under R. 18A(5) and (3) or to send the case to the trial list.

See also *Everest Canadian Properties Ltd. v. Mallman*, 2008 BCCA 275.

[36] Clearly, any material passing between O'Connor and Marissen concerning the allegations made against Wilson may well have significance to the issues raised in the action.

[37] As mentioned, an application is scheduled to be heard next month to resolve issues concerning an examination for discovery of Ms. O'Connor. The present application should not proceed until that examination, if permitted, proceeds. Accordingly, the application is dismissed with liberty to Marissen to reapply at that time.

[38] Costs of this application are to be costs in the cause.

"GREYELL J."

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