

CANADA / JUDGMENT

Lougheed v. Wilson

2012 BCSC 169

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 169 Lougheed v. Wilson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lougheed v. Wilson,

2012 BCSC 169

Date: 20120201

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 Madam Justice Dardi

Reasons for Judgment

Counsel for Plaintiffs:

R. Massel

Counsel for the Defendants (Respondents by Counter-Claim), Charles Blair Wilson:

J.L. Straith,

D. Fiorvento

Counsel for Defendants by Counterclaim Elaine O'Connor and Canwest Publishing Inc.
Publications Canwest Inc.:

Z.J. Ansley

Place and Date of Hearing:

Vancouver, B.C.

September 6 - 9, 2011

Written Submissions:

September 16, 28, 30,

October 13 and 21, 2011

Place and Date of Judgment:

Vancouver, B.C.

February 1, 2012

INTRODUCTION

- [1] Blair Wilson, the plaintiff by counterclaim in this defamation action, applies to strike significant portions of the defendants' Statements of Defence under R. 9-5(1) of the Supreme Court Civil Rules. He argues that the defences of justification, fair comment, and fair reporting should be struck based on the application of the doctrines of either *res judicata* or abuse of process.
- [2] In a prior proceeding, Mr. Wilson's wife, Kelly Wilson sought a variation of her late mother's will in her favour pursuant to the Wills Variation Act, R.S.B.C. 1996, c. 490 (the "WVA Action"). Ms. Wilson's mother, the late Norma Lougheed, died on May 24, 2007. Ms. Wilson, who was Mrs. Lougheed's only child, brought the WVA Action against her father, William Lougheed, both in his personal capacity and as the executor of Mrs. Lougheed's estate (the "Estate"). The reasons for judgment of Ballance J. in those proceedings are indexed at 2010 BCSC 1868 (the "Reasons").

- [3] In a counterclaim to the WVA Action, as well as in a separate debt action (the "Debt Action"), Mr. Lougheed in his personal and representative capacities and as the directing mind of the Lougheeds' private company, Norbill Investments Ltd. (Norbill Investments), sought to recover monies allegedly loaned to Ms. and Mr. Wilson primarily to facilitate the acquisition of six parcels of real property in British Columbia. In the Reasons Ballance J. referred to the six properties by their respective locations: the Jefferson Avenue property, the Gordon Avenue property, the Lawson Avenue property, the Pemberton Valley property, the Whistler property, and the Roberts Creek property. For convenience in these reasons I will reference to the six properties in the same manner. Ms. and Mr. Wilson were both named as defendants in the Debt Action.
- [4] Shortly after the WVA Action was commenced, Mr. Lougheed was widely quoted on the subject of the debt allegations and other matters in an October 28, 2007 article about Mr. Wilson in The Province (the "Article"), entitled "Family exposes MP's trail of debt". The Article gave rise to the present action in defamation (the "Defamation Action"). The claim was initiated as a counterclaim by Mr. Wilson to the Debt Action. The terms of a consent order dated November 4, 2009, provided that the WVA Action and the claims in the Debt Action against Ms. Wilson be tried at the same time. Pursuant to a subsequent consent order dated November 12, 2009, (the "Consent Order") the Defamation Action, along with Mr. Lougheed's claims against Mr. Wilson in the Debt Action, was severed from that proceeding.
- [5] The claims in the Debt Action against Ms. Wilson and the Counterclaim in the WVA Action were overlapping. Prior to the trial in the WVA Action, Mr. Lougheed discontinued his claim in the Debt Action for repayment of the alleged loans in respect of the Jefferson Avenue, Gordon Avenue, and Lawson Avenue properties. However, at trial Mr. Lougheed pursued the debt allegations against Ms. Wilson in relation to the Gordon Avenue and Lawson Avenue properties by way of his counterclaim in the WVA Action. He discontinued those claims when Ms. Wilson closed her case at trial. Madam Justice Ballance adjudicated upon the claims in the Debt Action regarding Ms. Wilson's indebtedness with respect to the Whistler and Roberts Creek properties. For the sake of convenience, the debt claim against Ms. Wilson heard by Ballance J. and Ms. Wilson's claim under the WVA Action will be referred to collectively in these reasons as the "WVA Action". The matter proceeded to a 16-day trial.
- [6] The record shows that in the Debt Action against Mr. Wilson, the only extant claims relate to a \$22,480.82 "loan" from Mrs. Lougheed to Mr. Wilson, which the Article alleged Mr. Wilson requested while Mrs. Lougheed was on her deathbed (the "Deathbed Loan"), and an alleged loan from Mr. Lougheed to Mr. Wilson in the amount of \$5,000.00.
- [7] In addition to Mr. Lougheed, the Defamation Action is brought against Elaine O'Connor, the author of the Article, and Canwest Publishing Inc. Publications Canwest Inc. the publisher of The Province (collectively, the "Canwest Defendants"). The other defendants by counterclaim are Judeline Tyabji Wilson, Tugboat Enterprises Ltd., Mark Allan Marissen, and Steve Janke.

- [8] The Canwest Defendants and Mr. Lougheed opposed this application. The other defendants by counterclaim (Judeline Tyabji Wilson, Tugboat Enterprises Ltd., Mark Allan Marissen, and Steve Janke) did not appear or participate in any way on this application.

POSITION OF THE PARTIES

Mr. Wilson's Position

- [9] In essence on this pre-trial motion, the applicant seeks an order that the respondents, the Canwest Defendants and Mr. Lougheed, are precluded from relying on certain defences in the Defamation Action because as a matter of law and/or fairness the parties are bound by the findings of the Court in the WVA Action.
- [10] More particularly, the applicant argues that it is plain and obvious that the doctrines of res judicata and abuse of process apply to preclude the respondents from relying on the defences of justification, fair comment, and fair reporting in the Defamation Action. To the extent that any of these defences requires the respondents to prove the truth of the alleged defamatory statements, the applicant submits that permitting the respondents to call evidence regarding the debts allegedly owed by the Wilsons to either Mr. Lougheed, the Estate or Norbill Investments in relation to the six properties would amount to a relitigation of matters that were finally determined in the WVA Action. For convenience I will refer to these matters collectively in these reasons as the "Property Advances".
- [11] The applicant's primary contention is that the "truth-based" defences are plainly unsustainable and should therefore be struck. In the alternative, he seeks an order that the parties are bound by Ballance J.'s findings in the WVA Action regarding the Property Advances.
- [12] In the further alternative, he asks for such orders with respect to the defences of fair comment, justification and fair reporting as the Court considers will further the object of the Rules for the just, speedy and inexpensive determination of the action on its merits.
- [13] At the hearing of the application, Mr. Wilson's counsel took the alternative position that allowing the respondents to adduce evidence which contradicts the findings in the WVA Action would prejudice, embarrass, or delay the fair trial or hearing of the proceeding and therefore the defences ought to be struck or amended pursuant to R. 9-5(1)(c). Counsel for the respondents objected to this line of argument because R. 9-5(1)(c) was not referenced in the Notice of Application.
- [14] Upon reflection I determined that in all the circumstances it would be just and convenient to allow an amendment to the Notice of Application to include a reference to R. 9-5(1)(c) and invited the respondents to file written submissions on the matter.

- [15] At this juncture, I also note that at the conclusion of the hearing the Court also invited supplemental written submissions on specific questions. Those submissions were provided in accordance with the schedule the Court directed.
- [16] The respondents object to the applicant's supplemental submissions because they assert that with the exception of seven paragraphs, the submissions, which are 17 pages in length, are not responsive to the questions raised by the Court. I agree.
- [17] With the exception of the seven paragraphs identified by the respondents, the applicant's supplemental submissions seek to repeat, amplify and modify his submissions at the hearing. This is not one of those exceptional circumstances in which the applicant should be permitted to make further argument after the completion of oral submissions.
- [18] In the end, I have disregarded those portions of the applicant's supplemental submissions which are not responsive to the questions posed by the Court and which do not pertain to R. 9-5(1)(c).

Position of Mr. Lougheed and the Canwest Defendants

- [19] The overarching submission of Mr. Lougheed and the Canwest Defendants is that the application should be dismissed because the applicant has not established the requisite elements for either *res judicata* or abuse of process.
- [20] In broad terms, the respondents' position can be summarized as follows:
- i. With respect to issue estoppel, they assert that there is no mutuality between these proceedings and the WVA Action because the parties to the Defamation Action are not the same as those in the WVA Action. Mr. Wilson himself was not a party to the WVA Action and therefore he cannot complain of being "twice vexed". The Canwest Defendants were not parties to the WVA action nor are they privies of Mr. Lougheed.
 - ii. With respect to abuse of process, they argue that the tests for establishing liability in debt are different from the tests for making out the defences of justification, fair comment, and - as it pertains to the Canwest Defendants - fair reporting. They maintain that the questions before the Court in these proceedings raise issues that were not decided in the WVA Action. Therefore, the adjudication of the impugned defences does not risk inefficient use of judicial resources, undermine the finality of proceedings, or challenge the integrity of the adjudicative function of the courts.
- [21] In developing their primary contention, the respondents forcefully assert that they are not required to make out their defences in order to defeat the present pleadings motion; rather they need only show that it is not plain and obvious that the impugned defences are doomed to fail.

- [22] Insofar as the alternative relief sought, the Canwest Defendants submit that neither res judicata nor abuse of process is applicable and, therefore, the findings in the WVA Action are not binding in the Defamation Action. However, it emerged at the hearing of the application that the Canwest Defendants do not intend to challenge Ballance J.'s findings in the WVA Action. They reiterated this position in their supplemental written submissions.
- [23] At the hearing Mr. Lougheed maintained that the impugned defences do not seek to relitigate issues that were decided in the WVA Action. He argues therefore that the defences should not be struck and that the parties should not be bound by any findings in the WVA Action. Notably in his supplemental written submissions he made four narrowly prescribed admissions. I will refer to these admissions later in these reasons.
- [24] At this juncture I note that Mr. Lougheed's principal defence is his denial of any publication of the alleged defamatory statements. He relies on the defences of justification and fair comment in the alternative.

FACTS

- [25] Before turning to the analysis it is necessary to summarize the pertinent background facts. More particularly, this application must be considered in the context of the allegations in the Article, the findings of the Court in the WVA Action, and the correction to the Article which was published on January 23, 2011 in The Province (the "Correction").

The Debt Allegations in the Article

- [26] The Article quotes Mr. Lougheed as alleging, among other things, "a history of unpaid debts" against Mr. Wilson. The Article states that the Wilsons are alleged to have borrowed "roughly \$1.9 million" from Mr. and Mrs. Lougheed, much of which purportedly remained unpaid at the time of publication. The subject loans at issue were alleged to have been made at various times between 1989 and 2006 to assist the Wilsons in purchasing the six properties.
- [27] Although the allegedly defamatory content in the Article goes well beyond the allegations of the Wilsons' indebtedness to the Lougheeds, the scope of this application is limited to those particular matters.

Reasons for Judgment in the WVA Action

- [28] In the Reasons, Ballance J. thoroughly reviewed the evidence regarding the acquisition of the six properties and the Property Advances. Her findings may be summarized as follows:

The Jefferson Avenue property

- [29] The Wilsons purchased the Jefferson Avenue property in November of 1989. The purchase price of \$295,000 was financed entirely by Mrs. Lougheed and both Mr. and Ms. Wilson's names were registered on title. The Wilsons granted Mrs. Lougheed a registered mortgage in the amount of \$168,000. The following spring, Mrs. Lougheed loaned the Wilsons another \$30,000 so that they could add a basement suite to the property.
- [30] According to the mortgage document, the Wilsons were to make monthly payments in the amount of \$1,502.74. However, Ballance J. found that Mrs. Lougheed did not actually expect the Wilsons to adhere to this payment scheme, given their financial situation at the time. Instead, she and Mr. Wilson worked out a more affordable payment in the range of \$550 to \$600 per month. Madam Justice Ballance concluded that Mrs. Lougheed was perfectly content with their payment record and with the financial arrangement overall.
- [31] A few months after the purchase of the Gordon Avenue property, the Wilsons sold the Jefferson Avenue property for \$300,000. From the sale proceeds, the sum of \$193,539.55 was paid to Mrs. Lougheed. According to Mrs. Lougheed's records, the amount owing to her was closer to \$207,000. However, the preponderance of the evidence indicated that Mrs. Lougheed did not consider the alleged deficiency to be an account receivable or an indebtedness that she planned to collect.

The Gordon Avenue property

- [32] In the spring of 1991, Mrs. Lougheed, who was assisting the Wilsons in their house-hunting efforts, located the Gordon Avenue property and facilitated its acquisition by paying the purchase price of \$560,000 on Ms. Wilson's behalf. Title was registered in Ms. Wilson's name alone and on that basis Mrs. Lougheed did not require the Wilsons to sign a mortgage or provide any other form of security. Moreover Mrs. Lougheed did not require the Wilsons to make monthly payments toward the purchase price. The terms of any repayment were left vague and undefined. As of 2001, there was no account receivable recorded in Mrs. Lougheed's records with respect to the Gordon Avenue property.
- [33] Madam Justice Ballance ultimately concluded that Mrs. Lougheed had gifted the Gordon Avenue property to Ms. Wilson and that Mr. Lougheed was aware of the gift.

The Lawson Avenue property

- [34] Mrs. Lougheed purchased the Lawson Avenue property in 1986 for the price of \$171,000. For many years, she rented it at a discounted rate to various relatives and family friends.
- [35] On October 1, 2001, Mrs. Lougheed transferred the Lawson Avenue property to Ms. Wilson.

- [36] Mrs. Lougheed and Mr. Wilson discussed how the title would be held. They agreed that Ms. Wilson would be the sole owner of the Lawson Avenue property and that Mrs. Lougheed would not require a formal mortgage or other form of security if title was registered in Ms. Wilson's name alone.
- [37] The price of \$171,000 was to be paid in full within one year. Madam Justice Ballance found that the parties did not make any firm financial arrangements beyond a general understanding that Ms. Wilson would acquire title to the property for the sum that Mrs. Lougheed had originally paid for it, even though its value at the time was estimated to have appreciated significantly. The purchase price was to be paid out of the proceeds of the Gordon Avenue property, which was expected to be sold within the year.
- [38] In June 2002, the Gordon Avenue property was sold for \$795,000. The Court found, at para. 123, that: "As had been agreed, [Ms. Wilson] eventually paid her mother the sum of \$171,000, or thereabouts, for Lawson Avenue out of the proceeds of sale she received from Gordon Avenue."
- [39] On the evidence, Ballance J. concluded that Mrs. Lougheed was perfectly content with this arrangement and that as far as she was concerned Ms. Wilson owed nothing further with respect to it.

The Pemberton Valley property

- [40] In November 2002, Ms. Wilson, with a view to one day building an equestrian centre and possibly a residence, acquired a 16-acre property in the Pemberton Valley. She applied \$380,000 of the sale proceeds from the Gordon Avenue property to purchase this property. Title was registered in Ms. Wilson's name alone.

The Whistler property

- [41] In December 1990, the Lougheeds jointly purchased a condominium in Whistler (the "Whistler property") for the sum of \$202,200.
- [42] On February 4, 2003, the Lougheeds executed a transfer document conveying title to the Whistler property to Ms. Wilson alone.
- [43] Madam Justice Ballance found that Mr. Wilson and Mr. Lougheed agreed on the purchase price of \$450,000, and that the details of the payment schedule were left to be determined between Mr. Wilson and Mrs. Lougheed.
- [44] Although the "Whistler Payment Schedule" set the monthly payments at \$2,899.36 and incorporated an interest component in the calculation of the monthly amount, Mr. Wilson and Mrs. Lougheed agreed that the Wilsons' monthly payments were to be applied in their entirety against the principal amount of the loan. Interest would not be payable.

- [45] Mrs. Lougheed prepared a separate document recording the Wilsons' payments for the Whistler property which payments were not made every month. The Court found there was no agreement that the Whistler Property Loan would be repaid by a certain date.
- [46] With respect to the terms of repayment, Ballance J. found as follows, at para. 151:
- [151] This was not an arm's length commercial transaction. It was a sweetheart family arrangement between wealthy parents and their daughter and son-in-law. I conclude that much like all of Norma's financial dealings with the Wilsons, other than ensuring the purchase price was acceptable to William and reaching an agreement on the monthly amount payable, there was a lack of formality surrounding the repayment of the loan. Blair and Norma left the terms of repayment loosely defined along the lines that the Wilsons would do their best to pay the agreed monthly amount.
- [47] With respect to the payments made by the Wilsons on the Whistler Property the Court found at paras. 143-144 and 309-310:
- [143] Norma's Whistler Accounting shows that although the Whistler Property was transferred into Kelly's name the first week of February 2003, the Wilsons' payments did not begin until May 2003. Two cheques were evidently returned for non-sufficient funds in 2003. There was no evidence that Norma or William sought to recoup those missed payments.
- [144] The Wilsons typically paid by supplying Norma with several post-dated cheques and rounded up many of their monthly payments to \$2,900 or \$3,000. They made twelve monthly payments in 2004, ten payments in 2005 and seven payments in 2006. Payments up to an including July 2006 were reflected in Norma's Whistler Accounting, although four more payments were made after that time.
- ...
- [309] On December 6, 2006 - after the October conversation - Norma deposited a cheque for \$3000 received from the Wilsons relative to the Whistler property loan. I conclude that the cheque deposited by Norma in December was one of the many post-dated cheques from the Wilsons and had likely been in Norma's possession for several months. I accept further that Norma deposited that cheque inadvertently along with a batch of other post-dated cheques.
- [310] A few days later, the Wilsons' December cheque was returned by the bank NSF. There is no evidence that Norma ever raised the matter of the NSF cheque with Kelly or Blair, or thereafter discussed with them the status of future payments against the Whistler Property loan or sought further payments in the form of additional post-dated cheques...
- [48] The Court concluded that Mrs. Lougheed did not forgive the Whistler Property loan. The balance owing on the loan as of the date of Mrs. Lougheed's death was determined to be \$350,703.84. Accordingly, Ms. Wilson was ordered to repay that sum, together with pre-judgment interest, in equal proportions to the Estate and to Mr. Lougheed personally.

The Roberts Creek property

- [49] Ms. Wilson listed the Pemberton Valley property for sale in late 2005. The listing price was \$599,000.
- [50] Mr. Wilson was elected to Parliament on January 23, 2006. In the summer of 2006, Ms. Wilson and Mrs. Lougheed began looking for a new acreage within Mr. Wilson's political riding on the Sunshine Coast, which would in effect replace the Pemberton Valley property. Mrs. Lougheed discovered a suitable 10-acre lot of bare land in the Roberts Creek area, which had not been advertised in the usual multiple listing publications. The asking price was \$428,000.
- [51] In discussions between Ms. Wilson and Mrs. Lougheed, it was agreed that the Lougheeds would advance Ms. Wilson the purchase price, which she would repay from the sale proceeds of the Pemberton Valley property. The proposed arrangement for bridge financing was subject to Mr. Lougheed's approval.
- [52] With respect to the terms of the parties' financing arrangement for the acquisition of the Roberts Creek property the Court found that the payment of the purchase price was structured as follows: Mrs. Lougheed provided a personal cheque in the amount of \$16,000 for the deposit and issued a cheque from a Norbill Investments account in the amount of \$445,710.29 for the balance of the purchase price and closing costs. On the same day, title was registered in Ms. Wilson's name alone. On the totality of the evidence, the Court concluded that the parties had agreed that the Roberts Creek loan would not become due until after the Pemberton Valley property was sold.
- [53] The court found that as of trial the total amount owing in respect of the loan was \$461,719.29. The court concluded that \$16,000 was due to the Estate and the balance of the loan was owed to Norbill Investments. The loan, which bears no interest, is payable on the sale of the Pemberton Valley property, which as of the date of trial had not yet sold.
- [54] In discussing the purchase of the Roberts Creek property with her parents, Ms. Wilson did not disclose that she had granted a number of collateral mortgages against the Pemberton Valley property, the Lawson Avenue property, and the Whistler property in favour of various financial institutions (the "Collateral Mortgages"). The Court found that Ms. Wilson's handling of these transactions was attributable to her naiveté and inexperience with financial matters. The Court concluded that Ms. Wilson did not intentionally misrepresent the timing of the sale of the Pemberton Valley property to her parents in order to secure bridge financing for the acquisition of the Roberts Creek property.

Collateral Mortgages

[55] While initially on this application there was some controversy as to whether the findings on the particulars of the Collateral Mortgages were the subject of this application, the applicant's counsel confirmed in his oral submissions that he was not seeking any orders relating to this matter. I therefore have not considered the matter in these reasons.

The Correction

[56] On January 23, 2011, approximately three weeks after the WVA Action was decided, The Province printed the Correction, which states as follows:

Update to a Province article on Blair Wilson on Oct. 28, 2007: In a Dec. 31, 2010, judgment of the B.C. Supreme Court regarding the estate of Blair Wilson's mother-in-law, Norma Lougheed, it was held that all money advanced by the Lougheeds to purchase properties was repaid to a degree acceptable to Norma Lougheed or eventually gifted to Blair Wilson's wife, Kelly, except the Whistler and Roberts Creek properties, on which a total of approximately \$812,000 remains owing by Kelly Wilson. As noted in the original article, all current properties are in Kelly Wilson's name. The Pemberton Valley property was not purchased with money advanced by the Lougheeds, but with the sale proceeds of the Gordon Avenue home, which had been paid for by the Lougheeds. The \$22,480 transaction in April of 2007 was not a loan from Norma Lougheed to Blair Wilson, but a repayment to Blair Wilson of money he had loaned his election campaign fund. Norma Lougheed had also loaned the campaign approximately \$16,000 in preceding months, which was repaid by Blair Wilson out of the \$22,480. The online version of this article has been updated and corrected.

Analysis

[57] There is no dispute as to the legal principles which govern the disposition of this application.

Rule 9-5: Striking Pleadings

[58] It is common ground that the onus on an application to strike pleadings under the current R. 9-5(1) is the same as under the former R. 19(24): it must be "plain and obvious" that the pleadings should be struck. With respect to R. 9-5(1)(d) specifically, the Court of Appeal in *World Wide Treasure Adventures Inc. v. Trivia Games Inc. et. al.* (1996), 68 B.C.A.C. 241 (B.C.C.A.) at para. 37, affirmed that on an application to strike pleadings based on the applicability of *res judicata*, the applicant must establish that it is "plain and obvious" that the doctrine of *res judicata* applies to the impugned pleading.

[59] The threshold for striking pleadings is high and the test articulated in the authorities is to be applied stringently: *Ontario (Pension Board) v. Ball*, 2010 BCSC 1267 at para. 21.

[60] The test for an application to strike under R. 9-5(1)(c) is the same as it is under R. 9-5(1)(a), (b) or (d) - it must be plain and obvious that the pleadings at issue may prejudice, embarrass or delay the fair trial of the proceeding: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266 (B.C.S.C.) at para. 47.

Res Judicata

[61] Res judicata is a core doctrine of our Canadian justice system. The policy objectives underlying res judicata are well established and can be distilled as follows - there is an interest in putting an end to litigation and no person should be twice vexed by the same cause of action: *Foreman v. Niven*, 2009 BCSC 1476 at para. 9; *Giles v. Westminster Savings Credit Union*, 2006 BCSC 1600 at para. 26 (the relevant portions of which were ultimately affirmed on appeal: 2010 BCCA 282). Notwithstanding the importance of these objectives, they must be balanced with the competing principle that litigants should not be deprived of their right to have their cases decided on the merits: *Cliffs Over Maple Bay Investments (Re)*, 2011 BCCA 180 at para. 26.

[62] The Court in *Tylon Steepe Homes Ltd. v. Pont*, 2011 BCSC 385, appeals quashed on other grounds, 2011 BCCA 162, provides the following formulation of the doctrine of res judicata at para. 52:

... Where a cause or a fundamental issue has been decided, it is said to be res judicata and, absent special circumstances, is precluded from being adjudged a second time. When res judicata applies, a litigant is estopped by the prior suit from proceeding in the subsequent action. The maxim has traditionally been regarded as an exclusionary rule of evidence. The paramount policy considerations include the avoidance of duplicative litigation, potential inconsistent results and inconclusive proceedings. Finality to litigation is the prime objective. (Internal citations omitted.)

[63] The doctrine of res judicata has two branches: issue estoppel and cause of action estoppel. Relitigation may be precluded in relation to an entire cause of action or with respect to a discrete issue. The essential principles of res judicata apply, albeit with modifications, to defences previously litigated as well: *Tylon Steepe*, at para. 53.

[64] In this case the applicant grounds his submissions in the principles of issue estoppel.

[65] There are three criteria which must be satisfied in order to successfully invoke issue estoppel:

- (a) that the same question has been decided and was fundamental, as opposed to collateral or incidental, to the decision;
- (b) that the decision in the first proceeding said to create the estoppel was final; and
- (c) the parties to both proceedings must be the same or their privies.

(See *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; *Grdic v. The Queen*, [1985] 1 S.C.R. 810; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44)

[66] I turn to address the requirement that the parties invoking issue estoppel must establish that the parties to the current and prior proceeding are the same or their privies.

[67] Who constitutes a privy at law? The concept of "privity" is somewhat elastic and the degree of interest which will give rise to privity cannot be stated categorically: *Danyluk* at para. 60.

[68] In *Giles*, Sigurdson J. cited the definition of privity provided by Donald J. Lange, *The Doctrine of Res Judicata in Canada*, Third Edition (Markham, ON: LexisNexis Canada Inc., 2010) at 83-84:

A privy of a party has been variously defined in issue estoppel cases. Privity can be one of blood, title, or interest. Before a person can be a privy of a party, there must be community or privity of interest between them, or a unity of interest between them. They cannot be different in substance. A person who is privy in interest to a party in an action and has notice of that action is equally bound by the findings in that action. The privy must have notice of the previous proceeding to be bound by it. A privy is a person who has a right to participate with a party in the proceeding or who has a participatory interest in its outcome. A person who has no right to participate as a party in a proceeding lacks a due process requirement to make a finding of privity of interest. To determine whether a person has a participatory interest in the outcome of the proceeding is to determine whether the outcome could affect the liability of that person. Privity requires parallel interest in the merits of the proceeding, not simply a financial interest in the result.

[69] I turn to consider the applicability of issue estoppel, and in particular the requirement for mutuality, to the circumstances of this case.

[70] The first question is essentially this: were the Canwest Defendants, who are named parties in the Defamation Action, either parties or privies of Mr. Lougheed in the WVA Action?

[71] The Canwest Defendants assert that they did not attend the trial of the WVA Action and maintain that they are not properly characterized as parties to that action.

[72] As mentioned earlier, the Canwest Defendants were named as defendants in the defamation counterclaim in the Debt Action which was set for trial at the same time as the WVA Action. However, it was an express term of the Consent Order that Mr. Wilson's defamation counterclaim and the debt claims of Mr. Lougheed against Mr. Wilson be severed and tried separately from the proceedings before Ballance J. The effect of the Consent Order was to sever the entirety of the Defamation Action and the claims in the Debt Action that relate to Mr. Wilson in order that these claims could be tried separately from the WVA claim and the debt claim against Ms. Wilson. The clear objective of that order was efficiency and to limit the issues and the parties in the proceedings before Ballance J.

- [73] Any obligation the Canwest Defendants may have had to participate in the WVA Action was terminated by the Consent Order. Nonetheless, the applicant asserts that because the Canwest Defendants chose not to participate in the WVA Action, they are now estopped by *res judicata* from making a full defence in the current proceeding. To argue as the applicant does, that the Canwest Defendants were initially parties to the underlying litigation and, as such, had the opportunity to attend those proceedings, and to examine witnesses on matters relevant to their defamation defences, but chose not to, violates the clear objective of the Consent Order.
- [74] In the result, I conclude that for the purposes of the application of issue estoppel, the Canwest Defendants were not parties to the WVA Action.
- [75] Having concluded that the Canwest Defendants were not parties, the matter turns on whether the Canwest Defendants, who are named as co-defendants by counterclaim in the Defamation Action, shared a privity of interests with Mr. Lougheed in the WVA Action. For the reasons that follow, I am not persuaded that they did.
- [76] Firstly, I note that although there was some controversy at the hearing on the point, the record does not show that the Canwest Defendants were served with the Notice of Trial for the WVA Action. The authorities mandate that the Canwest Defendants must have had notice of the trial in the WVA Action in order to be bound as privies by the judgment in that proceeding: *West Moberly First Nations v. British Columbia*, 2007 BCSC 1324 at paras. 23-24.
- [77] Moreover, I accept the Canwest Defendants' assertion that with respect to the issues adjudicated upon by the Court in the WVA Action, they did not share a community of interest with Mr. Lougheed, the Estate, or Norbill Investments. They had no stake whatsoever in the outcome of Ms. Wilson's action under the WVA or in Mr. Lougheed's claims in debt against Ms. Wilson. A successful result for Mr. Lougheed conferred no direct benefit to them.
- [78] In the end, I find that there is not a sufficient degree of identification between the Canwest Defendants and Mr. Lougheed such that it would be just to hold that the Canwest Defendants are privies of Mr. Lougheed.
- [79] In the result, I conclude that the doctrine of issue estoppel is not applicable in this case. In view of my findings on this point it is not necessary to consider whether the other constituent elements of issue estoppel have been established.

Collateral Attack

- [80] Contrary to the applicant's submissions, the circumstances of this case do not engage the rule against collateral attack.

- [81] On the authorities it is clear that the focus of the rule is on precluding attempts to indirectly reverse, vary, or nullify a court order. The rule is anchored in the principle articulated by Binnie J. at para. 20 in *Danyluk*, "that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it".
- [82] There is no suggestion whatsoever that in the Defamation Action the respondents seek to attack the legal force of the order made in the WVA Action. In the circumstances of this case the more appropriate approach is to consider the applicability of the doctrine of abuse of process.

Abuse of Process

- [83] Modern Canadian courts have developed the evolving and flexible doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of *res judicata* are not met - typically the requirement of mutuality - but where permitting the litigation to proceed would nonetheless violate the integrity of the adjudicative process. As observed by the trial judge in *Tylon Steepe*, at para. 79, abuse of process "finds its roots in the court's residual discretion to prevent an abuse of process". The Supreme Court of Canada in *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63 at para. 37, summarized the fundamental underpinnings of the doctrine as encompassing the vital principles of judicial economy, consistency of results, finality to litigation and the integrity of the administration of justice.
- [84] In *C.U.P.E.*, the Court held that an employee who had been criminally convicted of sexual assault was barred from contending in a subsequent labour arbitration that the assault did not occur. The Court affirmed that the primary focus of the doctrine of abuse of process is on the integrity of the adjudicative process and not on the motives of the parties. Madam Justice Arbour, writing for the majority, set out the following helpful formulation at para. 51:

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. [Emphasis added.]

- [85] Recently, in *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367 at para. 71, the Court of Appeal affirmed that relitigation of an issue that has been finally determined in a previous proceeding challenges the integrity of the adjudicative function of the courts in the following two respects:

... First, the duplication of efforts results in inefficient use of judicial resources. This inefficiency directly impacts the ability of the courts to function. It also tends to diminish public respect for the judicial process. Second, in opening up the possibility of inconsistent findings of fact, relitigation of an issue diminishes the credibility authority of judgments.

[86] As with issue estoppel, the requirement of finality is a constituent element of the doctrine of abuse of process as it pertains to relitigation. In discussing this requirement, Roscoe J.A. in *Lienaux v. 2301072 Nova Scotia Ltd.*, 2005 NSCA 97 at para. 32, leave to appeal to SCC refused, [2006] 1 S.C.R. xi, cited the following excerpts from Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Markham, ON: Butterworths Canada Ltd., 2000), at 77:

The decision must be a final decision. A final decision for the purposes of issue estoppel is a decision which conclusively determines the questions between the parties...

The test for finality for issue estoppel, therefore, is that a decision is final when the decision-making forum pronouncing it has no further jurisdiction to rehear the question or to vary or rescind the finding.

The "Same Question" Test

[87] It is essential to the analysis to appreciate that in addition to the finality requirement, the "same question" test must also be satisfied in order to invoke the doctrine of abuse of process regarding relitigation. The Court in *Petrelli*, at para. 72, stated that the integrity of the adjudicative process is challenged when a court is invited to come to a "different finding of fact on an issue than was reached in previous litigation".

[88] Mr. Justice Binnie's formulation in *Danyluk* of the matters to which estoppel applies in the context of an issue estoppel case informs the analysis of the "same question" test in the case of abuse of process by relitigation (at para. 24):

This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell*, supra, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle*, supra, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings. [Emphasis added, internal citations omitted.]

- [89] I turn to address the application of these principles to the circumstances of this case. The Applicant asserts that the doctrine of issue estoppel is applicable because the common issue to both proceedings, and which he says was determined in the WVA Action, "is the indebtedness of either Kelly or Blair Wilson in relation to the six properties to either William or the Estate of the late Norma Lougheed". In my view the applicant's postulation misconceives the test for striking the defences in this case. Rather the disposition of this matter turns on whether the impugned defences in the Defamation Action raise triable issues which fall outside the ambit of the judgment of Ballance J. in the WVA Action.
- [90] Before turning to the analysis it is necessary to identify the constituent elements of each of the impugned defences. It is common ground that each of these defences depends, in varying degrees, upon establishing the truth of the underlying assertions.

Justification

- [91] The test for justification in respect of the publication of an allegedly defamatory statement is whether the statement was "substantially true" or "true in substance". However it is key to observe that the defence of justification turns on the overall "sting" of the defamation, not whether the published words were true in every respect: *Jay v. Hollinger Canadian Newspapers, Limited Partnership*, 2002 BCSC 1655; *Miller v. Canadian Broadcasting Corp.*, 2003 BCSC 258, *P.G. Restaurant Ltd. v. Cariboo Press (1969) Ltd.*, 2005 BCCA 210 at para 33, application for re-hearing dismissed, 2005 BCCA 288, leave to appeal to SCC refused, [2005] 3 S.C.R. vii. Minor inaccuracies which do not affect the substantial truth of the statement or add materially to its defamatory quality may be overlooked: *Raymond E. Brown, The Law of Defamation in Canada*, 2nd Edition, Vol. 3, loose-leaf (Toronto: Carswell, 2009) at 10-40 to 10-45 [Brown on Defamation].
- [92] The applicant's primary contention is that the pleas of justification should be struck in their entirety from the respondents' Statements of Defences.
- [93] The respondents forcefully assert that the issue in the Defamation Action is not whether Mr. Wilson was in fact indebted to Mr. Lougheed or the Estate when the allegedly defamatory statements were published; it is whether the overall defamatory "sting" of the Article, which dealt with Mr. Wilson's debts - including to other unrelated parties - was true in substance.
- [94] In my view the defence of justification raises issues which were not determined in the WVA Action. While significant elements of the Article relate to the allegations of indebtedness by the Wilsons to the Lougheeds, the substance of the Article patently goes beyond matters that were before the Court in the WVA Action. The Article also includes references to Mr. Wilson's business ventures, business debts, and alleged breaches of the Canada Elections Act, S.C. 2000, c. 9. It follows that the issue of whether the statements in the Article were "justified" cannot be reduced to a question of assessing the accuracy of the allegations of indebtedness to the Lougheeds described therein in light of the findings in the WVA Action.

- [95] Moreover I am satisfied that in order to determine the overall sting of the alleged defamation, the Court at trial will be required to assess the Article in its entirety. I agree with the Canwest Defendants that the determination of the overall sting of the Article and the determination of whether it is substantially true are not suitable for disposition on a pleadings motion. These determinations, which lie at the heart of the Defamation Action, raise triable issues.
- [96] In the result, I conclude that it would be inappropriate at this stage to strike the pleas of justification.

Fair Comment

- [97] In contrast to justification, which pertains to statements of fact, the defence of fair comment protects statements of opinion, which includes any "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof": *Ross v. New Brunswick Teachers' Assn.*, 2001 NBCA 62 at para. 56, cited in *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 31.
- [98] The test for fair comment was reformulated by the Supreme Court of Canada in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, and summarized by McLachlin C.J.C. in *Grant v. Torstar Corp.* 2009 SCC 61 at para. 31. Under the current framework, a defendant claiming fair comment must establish the following:
- (a) the comment was on a matter of public interest;
 - (b) the comment was based on fact;
 - (c) the comment, though it can include inferences of fact, must be recognizable as comment;
 - (d) the comment satisfies the following objective test: could any person honestly express that opinion on the proved facts? and
 - (e) the defendant in making the comment was not actuated by express malice.
- [99] The requirement that the comment be based on fact does not mean that the fair comment defence is bound to fail if any aspect of the factual basis is untrue. A plea of fair comment will succeed if the facts which are shown to be true are sufficient to support the comment: *Kemsley v. Foot and others* [1952] 1 All E.R. 501 (H.L.). Lord Denning observed in *London Artists Ltd. v. Littler*, [1969] 2 All E.R. 193 (C.A.) at 198, that "the commentator must get [the] basic facts right. The basic facts are those which go to the pith and substance of the matter".
- [100] The applicant seeks to strike the pleas of fair comment in their entirety, except paragraph 11 (which references Mr. Wilson's businesses and finances) and subparagraph 13(a) (which references Mr. Wilson's involvement in the Pan Smak pizza business) of the Canwest Defendants' Statement of Defence. The respondents contend that the comments in the Article - for example, Mr. Loughheed's expressed opinion that Mr. Wilson was "not fit for public office" - are protected by the defence of fair comment. They argue firstly that this

defence does not necessarily fail if aspects of the factual foundation for the comment are not true. Secondly, they emphasize that the factual foundation supporting the comment in the Article is not restricted to the factual matrix of the Property Advances. Rather, they contend that the "comments" in the Article are anchored in a broader framework of factual underpinnings.

- [101] I agree that the court in the WVA Action found some but not all of the facts pertaining to the factual substrata for the comment. In determining the applicability of the defence of fair comment it is clear the court will be required to decide questions which were not decided in the WVA Action. In the result, I cannot conclude that the defence of fair comment is bound to fail based on the doctrine of abuse of process.

Fair Reporting

- [102] The common law has long recognized a defence of fair and accurate reporting in respect of judicial proceedings. The analysis of this defence does not mandate an examination of the truth of the charges made during the proceedings but rather the accuracy of the reporting of proceedings. The rationale for the defence is rooted in the right of public to be informed of all aspects of proceedings to which it has the right of access: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 151.

- [103] *Brown on Defamation* sets out the following articulation of the test for fair reporting at 14-2 and 14-27 to 14-28:

Fairness does not require that the report be literally true so long as it is substantially correct...The report must be confined to proceedings that took place in open court, and extends to papers and documents filed with, and the comments of all those properly involved in, judicial or quasi-judicial proceedings at every level of jurisdiction. (14-2)

The "report need be neither exhaustive and detailed nor perfectly precise in language". It is sufficient if the report is true in substance. (14-27 to 14-28)

- [104] The right to report on court proceedings extends to pleadings and court documents filed before trial. Where the filing of court documents occurs after the litigant or lawyer describes their intention to file those court documents, fair reporting privilege can apply: *Hill* at para.152. The courts have cautioned that considerable care must be taken in reporting on such documents to minimize the risk of harm to innocent persons who may have no opportunity to reply to potentially defamatory statements: *Taylor-Wright v. CHBC-TV*, 2000 BCCA 629, var'd on other grounds 2001 BCCA 298; *M.D. Mineralsearch Inc. v. East Kootenay Newspapers Ltd.*, 2002 BCCA 42.

- [105] The authorities do not require that the entire proceeding be reported at one time "so long as a substantially fair report is eventually made": *Brown on Defamation* at 14-43.

- [106] The Canwest Defendants argue that insofar as the Article describes allegations of the Wilsons' indebtedness to the Lougheeds, it refers to Mr. Lougheed's statement that he and his late wife were owed in the range of \$1.9 million by the Wilsons. They point out that Mr. Lougheed commenced an action seeking recovery of those monies within a few months of the Article's publication. The Canwest Defendants maintain that the discontinuance of some of those claims in the Debt Action does not alter the essential fact that at the material time debts were alleged in respect of all of the various property loans referred to in the Article. Finally, they emphasize that shortly after the judgment was rendered, The Province accurately reported the judicial conclusions on these matters in the Correction.
- [107] In light of the governing legal principles, the defence of fair reporting clearly raises triable issues which were not determined in the WVA Action. It is not plain and obvious on this pleadings motion that the defence of fair reporting should be struck based on the doctrine of abuse of process.

Summary

- [108] In summary on this issue I conclude that the defences of justification, fair comment, and fair reporting raise triable issues which fall outside the ambit of the judgment of Ballance J. It is not plain and obvious that the doctrine of issue estoppel or abuse of process can be invoked to preclude the respondents from relying on these defences in the Defamation Action. The applicant has failed to establish that the defences should be struck pursuant to Rule 9-5 (1)(d).
- [109] Further, the applicant has failed to establish that the impugned defences may otherwise prejudice, embarrass, or delay the applicant's opportunity for a fair trial such that they ought to be struck under R. 9-5(1)(c).
- [110] The applicant's submissions address the merits of the respondents' defences. Having concluded that the defences should not be struck, it is not for this Court on this application to consider the merits of the defences.
- [111] In the result, the application to strike the defences of justification, fair comment, and fair reporting in whole or in part is dismissed.

THE ALTERNATIVE RELIEF SOUGHT

- [112] In the alternative, the applicant - who participated in the WVA Action, albeit not as a named party - seeks an order that the parties are bound by Ballance J.'s findings.
- [113] To put the issue properly in context, I turn to address the principles which inform the analysis of a claim brought pursuant to the WVA.

- [114] The key provision of the WVA is s. 2. That section provides that if, in the court's opinion, a will fails to make adequate provision for the proper maintenance and support of the testator's spouse or children, the court is empowered, in its discretion, to vary the will to make provision that it considers adequate, just and equitable in the circumstances.
- [115] *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, is the governing authority in British Columbia on the WVA. Madam Justice McLachlin (as she then was), writing for the Court, articulated the relevant considerations and principles that animate the application of the WVA: *Brown v. Ferguson*, 2010 BCSC 1890.
- [116] Madam Justice McLachlin clarified that the adequacy of the testamentary provision in a will is measured on an objective standard, assessed in light of current societal legal and moral norms. Pursuant to the principles articulated in *Tataryn*, legal norms are the obligations that would be imposed upon the testator during his or her life if the question of provision for a claimant's spouse or child were to arise. A testator's moral duties are to be grounded in "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards": *Tataryn* at 820-821, cited in *Brown* at para. 96.
- [117] The findings in the WVA Action regarding the Property Advances were material facts for the purpose of assessing Ms. Wilson's claim under the WVA. Madam Justice Ballance held that Ms. Wilson's claim under the WVA turned on "the determination of the nature and event of the moral obligation Norma may have owed Kelly," and whether that moral duty had been negated. As referred to in paragraph 385 of the Reasons, it is well settled on the authorities that where a testatrix has made inter vivos gifts or conferred inter vivos benefits on a claimant, the moral duty of the testatrix to that claimant may be diminished or even negated. It follows that the Court's findings regarding any gifts or benefits Ms. Wilson may have received in connection with the six properties were necessary and fundamental determinations in deciding Ms. Wilson's claim under the WVA.
- [118] It is axiomatic that the findings with respect to the Property Advances and the amounts owing on the Roberts Creek and Whistler properties were fundamental to the Court's adjudication of the debt claims against Ms. Wilson.
- [119] Section 6(b) of the WVA empowers the court to refuse relief to a claimant whose character or conduct disentitles that claimant to the benefit of an order under the Act. The findings relating to Ms. Wilson's non-disclosure of the Collateral Mortgages to her parents were fundamental to the Court's consideration of section 6(b) of the WVA.
- [120] These fundamental questions which have been determined in the WVA Action cannot be relitigated and are binding in these proceedings.

- [121] Based on the principles articulated in the authorities I am satisfied that Ballance J.'s findings on these matters were final determinations. The Reasons and findings therein were final in that the Court has no further jurisdiction to rehear the questions or to vary or rescind the findings. The Reasons left nothing to be judicially determined or ascertained thereafter. I note parenthetically that the Canwest Defendants properly conceded this point at the hearing of the application and in their supplemental written submissions.
- [122] Relitigating this matter and permitting the respondents an opportunity to persuade a trier of fact to come to findings contrary to those made by Ballance J. in the WVA Action on essential points would constitute an abuse of the Court's processes. It would result in an inefficient use of judicial resources, an unnecessary expense for the parties, and in facilitating the potential for inconsistent findings on primary facts, would undermine the authority and finality of the previous judgment in the mind of a reasonable observer. In my view, inconsistent findings in the subsequent action would challenge the integrity of the adjudicative function of the courts and thereby impugn the authority of the justice system.
- [123] As noted earlier, the Canwest Defendants, who were not parties to the prior litigation, do not seek to challenge the findings in the WVA Action. It would be most unjust if Mr. Lougheed, either personally or in his representative capacity, was permitted an opportunity to challenge the findings in the Reasons relating to the Property Advances. Significantly, in my view, in his supplemental written submissions, which were filed after the hearing, Mr. Lougheed formally admitted that prior to the late Mrs. Lougheed's death:
- (i) she forgave the loan to the Wilsons of \$569,097.00 in relation to the Gordon Avenue property;
 - (ii) the loan of \$171,000.00 made by the late Mrs. Lougheed on October 2001 to enable the Wilsons to acquire the Lawson Property was repaid by Mr. Wilson in June 2002; and
 - (iii) the Pemberton Property was paid for from the sale proceeds of the Gordon Property.
- [124] I am mindful of the Court's observation in Petrelli, at para. 72, that there are situations in which overriding concerns of fairness to the parties require challenges to the integrity of the adjudicative function of the courts to be tolerated. This is not one of those cases. I am not persuaded that there are any special factors that would compel me to exercise my discretion to refuse to apply the doctrine of abuse of process.
- [125] While I accept the respondents' submissions that R. 9-5(1)(c) does not confer jurisdiction to grant the alternative relief sought by the applicant, I am satisfied that I have the inherent jurisdiction to make the order.
- [126] In summary on this issue, this Court orders that Ballance J.'s findings in the WVA Action - as they are set out earlier in these reasons under the headings, the Jefferson Avenue property, the Gordon Avenue property, the Lawson Avenue property, the Pemberton Valley property, the Whistler property, and the Roberts Creek property - are binding in the Defamation Action. The parties are barred from challenging these findings in the Defamation Action.

[127] It will remain open to the court to determine whether on these facts, among others, the impugned defences can be sustained.

[128] Given my conclusions on the applicability of the doctrine of abuse of process, it is not necessary to address the parties' submissions regarding the legal significance of Mr. Lougheed, both in his personal and representative capacities, having discontinued certain of the debt claims.

RULE 7-7(6): ORDERS ON ADMISSIONS

[129] Pursuant to R. 7-7(6), which provides for orders based on admissions, the applicant seeks an order regarding the Deathbed Loan and in respect of Mrs. Lougheed's Retirement Income Fund (the "RIF").

[130] An application under R. 7-7(6) can only be based on an admission made by a party, whether by pleadings, in response to a notice to admit, or in a statement under oath. Only a clear and deliberate concession to the opposing party will provide a basis for an order under this Rule: *Adams v. Fairmont Hotels & Resorts Inc.*, 2008 BCCA 444 at paras. 10-11. Although a party who unreasonably refuses to make an admission can be penalized in costs, this Court has no jurisdiction to compel a party to make an admission.

The Deathbed Loan

[131] The applicant did not particularize with any precision what orders he seeks regarding the Deathbed Loan; only that the Court make such an order as "will further the objectives" of the Rules.

[132] The relevant excerpt from the Article reads as follows:

The final straw for Lougheed, he says, was when Wilson asked his mother-in-law for money on her deathbed. Lougheed has a copy of a cheque Norma wrote Blair for \$22,840.82 on April 27, 2007, just a month before she died from cancer.

[133] There is no mention of the Deathbed Loan in the Reasons. Given that there has been no judicial determination on this matter, neither issue estoppel nor abuse of process is engaged.

[134] Mr. Lougheed, by way of his formal admission dated September 28, 2011, admitted that the late Mrs. Lougheed did not write a cheque on April 27, 2007, for \$22,840.82.

[135] The Canwest Defendants, while not making a formal admission under the Rules, published the Correction, which states that the \$22,480.82 transaction was not a loan from Mrs. Lougheed to Mr. Wilson, but a repayment to Mr. Wilson of money he had loaned his election campaign fund.

[136] I cannot conclude that the acknowledged inaccuracy regarding the Deathbed Loan renders it plain and obvious that any of the defences of justification, fair comment or fair reporting are bound to fail. The precise legal effect of both the Correction and Mr. Lougheed's formal admission on this particular point is not properly determined on the limited evidence before the Court on this motion. It is a triable issue.

The Retirement Income Fund

[137] Prior to commencing her action under the WVA, Ms. Wilson brought a summary trial application seeking payment of her mother's RIF. On March 20, 2009, Russell J. found that Mr. Lougheed had breached his fiduciary duty by failing to pay Ms. Wilson, who was the designated beneficiary of her late mother's RIF, an amount equal to the face value of the RIF. She granted judgment in favour of Ms. Wilson in the amount of \$422,251.33 plus interest. Upon the application of Mr. Lougheed the Court granted a partial stay by ordering that \$200,000.00 of the judgment amount be held in trust pending the outcome of the WVA Action.

[138] Although it was not clear at the hearing of this application precisely what order the applicant was seeking regarding the RIF, in his written submissions he seeks an order pursuant to R. 7-7(6) that paras. 302-305 of the Reasons - which deal generally with Ms. Wilson's claim for payment of the RIF - are binding on the parties in the Defamation Action and that "no evidence shall be called to contradict this finding of the court."

[139] In my view, it is fatal to applicant's submissions that the RIF is not referenced in the Notice of Application. The Notice of Application refers exclusively to the "debt allegations" against the Wilsons. If the applicant wishes to pursue this matter he is at liberty to file the appropriate application materials.

CONCLUSION

[140] The application to strike the respondents' Statements of Defence in whole or in part is dismissed.

[141] In the Defamation Action, the parties are barred from challenging the findings in the WVA Action which I have particularized in paragraph 126 of these reasons.

COSTS

[142] If the parties are unable to resolve the issue of costs, they may reserve a date through Supreme Court Scheduling to address the issue.

____ "Dardi, J." _____

Madam Justice Dardi

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