COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Canwest Publishing Inc. v. Wilson,*
2012 BCCA 181

Date: 20120427
Docket: CA038733

Between:

Canwest Publishing Inc. and Elaine O'Connor

Appellants
(Plaintiffs)
(Defendants by Counterclaim)

And

Charles Blair Wilson

Respondent
(Defendant)
(Plaintiff by Counterclaim)

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Saunders
The Honourable Madam Justice Levine

On appeal from the Supreme Court of British Columbia, December 31, 2010
(*Lougheed v. Wilson*, 2010 BCSC 1871, Vancouver Registry,
Docket Number S081334)

Counsel for the Appellants:	D.W. Burnett
Counsel for the Respondent:	J.L. Straith D. Fiorvento
Place and Date of Hearing:	Vancouver, British Columbia March 16, 2011
Place and Date of Judgment:	Vancouver, British Columbia April 27, 2012

Written Reasons by:
The Honourable Madam Justice Ryan

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Madam Justice Ryan:

Introduction

[1] The appellants, Canwest Publishing Inc. ("Canwest") and Elaine O'Connor, appeal the December 31, 2010 order Mr. Justice Williamson pronounced pursuant to Rule 7-3(7) of the *Supreme Court Civil Rules*, requiring Ms. O'Connor to answer questions contained in two interrogatories served upon her by the respondent, Charles Blair Wilson. The effect of the order is to require Ms. O'Connor, a professional journalist, to reveal the identity of a confidential source.

Factual Background

[2] The October 28, 2007 edition of The Province, a Vancouver-based newspaper owned by Canwest, featured an article written by Ms. O'Connor. The article contained certain details of alleged financial improprieties of Mr. Wilson, who at that time was a member of the Liberal Party of Canada and Member of Parliament for the riding of West Vancouver—Sunshine Coast—Sea to Sky Country.

[3] The newspaper article was based on information obtained from a number of sources, many of whom Ms. O'Connor named in the article. However, a limited amount of information was provided by three confidential sources who spoke on condition of anonymity. The article reported that Mr. Wilson and his wife Kelly Wilson owed millions of dollars to the estate of Mrs. Wilson's late mother, Norma Lougheed. The article also recounted allegations of electoral financial corruption in Mr. Wilson's successful 2006 campaign for his seat in Parliament. The impugned article, the first in a series of two, ended with a comment from Mr. Wilson's father-in-law, William Lougheed, that his son-in-law was "not fit for public office".

[4] The article contained comments from persons associated with the Liberal Party of Canada and Mr. Wilson's electoral campaign who questioned Mr. Wilson's campaign spending and financial competence. Two of those people were Judy Tyabji and Mark Marissen. At the time, Mr. Marissen was a B.C. Liberal organizer and Ms. Tyabji operated a public relations firm, Tugboat Enterprises Ltd.

[5] The allegations of family debt and wrongful campaign spending were picked up and published on the Internet by Steve Janke, who ran a website entitled “Angry in the Great White North”.

The Litigation

[6] The litigation between Mr. Lougheed and the Wilsons has been copious and complex. The proceeding underlying the instant appeal is one of two related sets of actions. Each set features a claim and counterclaim, for a total of four suits between these parties. I will briefly review the history of all this litigation before turning to the ruling under appeal.

[7] Mr. Wilson’s action for defamation (the “Defamation Action”) arises by way of counterclaim to a debt repayment action Mr. Lougheed, acting in various capacities, launched against the Wilsons (the “Debt Claim”). Mr. Lougheed claims sums allegedly owing to him, his company, and his wife’s estate (of which he was the sole executor). Mr. Lougheed’s Debt Claim was initiated on February 26, 2008; Mr. Wilson filed the Defamation Action counterclaim on April 2, 2008. Additional defendants to the Defamation Action – Canwest, Ms. O’Connor, Ms. Tyabji (Judeline Tyabji Wilson), Tugboat Enterprises Ltd., Mr. Marissen and Mr. Janke – were added on September 24, 2008.

[8] The other related set of actions commenced with a claim Mrs. Wilson initiated under the *Wills Variation Act*, R.S.B.C. 1996, c. 490, with respect to her late mother’s Will (the “*Wills Variation Act* Action”). Mr. Lougheed filed a counterclaim to the *Wills Variation Act* Action alleging unpaid debt against Mr. and Mrs. Wilson (the “Debt Counterclaim”). Mrs. Wilson’s *Wills Variation Act* Action was initiated on October 3, 2007, three weeks before publication of the newspaper articles at hand.

[9] In summary, the four actions are the Debt Claim and Debt Counterclaim, both initiated by Mr. Lougheed, and the *Wills Variation Act* Action and the Defamation Action, launched by Mrs. and Mr. Wilson, respectively.

[10] The Defamation Action was severed from Mr. Lougheed's Debt Claim on November 12, 2009, and, by consent, ordered to be tried separately. The *Wills Variation Act* Action and Mr. Lougheed's two debt actions were tried together before Madam Justice Ballance.

[11] During the trial before Ballance J., Mr. Lougheed withdrew the Debt Counterclaim but maintained the Debt Claim. On December 31, 2010, Ballance J. found that outstanding loans the Lougheeds made to the Wilsons to finance purchase of properties in Roberts Creek and Whistler totalled around $812,000. Justice Ballance found that Mrs. Wilson misinterpreted a conversation she had with her mother to mean that her mother was forgiving those loans. On the *Wills Variation Act* Action, Ballance J. varied Mrs. Lougheed's Will to include a specific legacy to Mrs. Wilson in the amount of $5,500,000. The reasons for judgment of Justice Ballance may be found at *Wilson v. Lougheed*, 2010 BCSC 1868.

[12] As no appeal has been launched from Ballance J.'s order, the only litigation that remains unresolved is Mr. Wilson's Defamation Action.

[13] The pleadings in Mr. Wilson's Defamation Action allege that his father-in-law was provoked by inquiries Mr. Wilson made of him about Mrs. Wilson's inheritance. Mr. Wilson alleged that, as a result, his father-in-law engineered and mobilized a campaign designed to hurt his financial and political career. The following excerpt from Mr. Wilson's lengthy pleadings contains the central allegations necessary to deal with the issues raised by this appeal:

> 19. During the months of September and October 2007, the Defendants Tyabji, Marissen and the Plaintiff Lougheed supplied information to the Defendant O'Connor in regard to alleged debts of the Defendant Blair Wilson owing to the Plaintiff Lougheed, 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.
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> ...
>
> 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.
>
> ...
>
> 25. On or about October 28, 2007, the Defendant Canwest published certain articles entitled "West Vancouver Sunshine Coast MP has unpaid debt, allegations of improper campaign spending" authored by the Defendant O'Connor, which, contained numerous financial allegations by the Plaintiff Lougheed of unpaid debts and, the contents of the October 24, 2007 Anonymous Report authored by the Defendant Tyabji.
>
> 26. Included in the articles were the following statements:
>
> ...
>
> f) This week, a citizen in the riding filed an Elections Canada challenge to Commissioner William Corbett to have Wilson's campaign expenditures investigated. "The election result was very close and had Mr. Wilson actually only spent what he was allowed to, he may well have lost. In the interest of a fair and accountable democratic election process, Mr. Wilson's campaign must be investigated," the submission alleges.
>
> ...
>
> 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 to 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.
>
> …
>
> 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.
>
> [As written; underline emphasis removed.]

[14] At its conclusion, Mr. Wilson's statement of defence and counterclaim pleads that the defendants Mr. Lougheed, Ms. O'Connor, Canwest, Mr. Marissen, Ms. Tyabji and Mr. Janke are jointly and severally liable for their actions. Mr. Wilson seeks general, special, exemplary and punitive damages against all parties.

[15] In their statement of defence to the Defamation Action, Canwest and Ms. O'Connor have pleaded justification, fair comment, responsible communication, fair reporting privilege, and qualified privilege.

[16] Elections Canada conducted an investigation as a result of which Mr. Wilson entered into a compliance agreement under s. 517 of the *Canada Elections Act*, S.C. 2000, c. 9. The contents of the agreement are confidential. Mr. Wilson submits that pursuant to s. 517(5) of the *Elections Act*, the fact that the compliance agreement was entered into and any statement admitting responsibility is not admissible in evidence against the contracting party in any civil or criminal proceeding. I mention it here only because the chambers judge referred to the investigation of the Commissioner of Elections in passing in his reasons for judgment and the parties referred to it in argument in this Court. Nothing turns on any of this for the purposes of this appeal. If the respondent is correct, it appears that the appellants will be required to prove the truth of the offending portions of the Anonymous Report without reference to the compliance agreement.

The Chambers Application

[17] On June 7, 2010, while his wife's *Wills Variation Act* Action was ongoing, Blair Wilson delivered interrogatories to Ms. O'Connor in relation to the Defamation Action.

[18] Rule 7-3 of the *Supreme Court Civil Rules* governs interrogatories. The subrules material to this appeal are as follows:

> **Rule 7-3 – Discovery by Interrogatories**
>
> **Party may serve interrogatories by consent or with leave**
>
> (1) A party of record to an action may serve interrogatories in Form 24 on any other party of record, or on a director, officer, partner, agent, employee or external auditor of a party of record, if
>
> (a) the party of record to be examined consents, or
>
> (b) the court grants leave.
>
> …
>
> **Objection to answer interrogatory**
>
> (6) If a person objects to answering an interrogatory on the grounds of privilege or on the grounds that it does not relate to a matter in question in the action, the person may make the objection in an affidavit in answer.

> **Insufficient answer to interrogatory**
>
> (7) If a person to whom interrogatories have been directed answers any of them insufficiently, the court may require the person to make a further answer either by affidavit or on oral examination.

[19] The interrogatories prepared by Mr. Wilson for Ms. O'Connor included the following questions:

> 28. Who provided you with "Copy of Report Submitted to William Corbett, Commissioner of Canadian Elections – Elections Canada re–Wilson and campaign dated October 24, 2007" ["item 135"].
>
> 29. Had you been provided with earlier drafts of this document? If so please provide them.
>
> 30. What communications did you have with the author(s) of this document. When did that communication take place? If it was phone, fax or e-mail please provide copies of records.
>
> 31. Did the author(s) tell you in advance that they were distributing this letter addressed to Commissioner Canadian Elections dated October 24, 2007 to other members of the media including web bloggers?
>
> …
>
> 34. Produce unredacted copies of documents 195, 196, 197, 198, 199, 200, 201, 202 of your list of documents.

[20] Ms. O'Connor responded by way of affidavit dated July 16, 2010. She stated in part:

> 28. The document listed as item 135 was provided by a confidential source. It would have been received in or around October 2007. As the source is confidential we will not provide an unredacted copy. The redactions are of information which may reveal the identity of the confidential source.
>
> 29. No.
>
> 30. As the source is confidential we will not provide details of our communications.
>
> 31. No.
>
> …
>
> 34. Some of these documents have not been redacted. Where documents have been redacted, the redactions consist of identifying information for confidential sources and so will not be supplied.

[21] Ms. O'Connor's response triggered Mr. Wilson's chambers application and the resulting order that is the subject matter of this appeal. In his application, filed August 3, 2010, Mr. Wilson sought the following orders in addition to costs:

> 1. Declaring the answers of the Defendant by Counterclaim Elaine O'Connor dated the 16th day of July 2010, in response to questions 28, 29, 30, 31 and 34 to the Interrogatories of the Defendant/Plaintiff by Counterclaim Charles Blair Wilson insufficient in failing to disclose the identity of the author [of] the letter to the Commission of Elections Canada.
>
> 2. Requiring the Defendant by Counterclaim Elaine O'Connor to make a further answer in response to questions 28, 29, 30, 31 and 34 either by affidavit or on oral examination.
>
> 3. Requiring the Defendant by Counterclaim to produce unredacted copies of documents 195, 196, 197, 198, 199, 200, 201 and 202 of her List of Documents.

[22] Ms. O'Connor responded to the application by way of affidavit dated October 13, 2010. She swore in part that:

> 5. I have reviewed the words from the Province articles which are alleged in the Counterclaim to be defamatory. There is only one passage in the words complained of, being paragraph 26(f) of the Counterclaim, which came from a document supplied by a confidential source. This passage included a quote from the Anonymous Report to Elections Canada. The passage said:
>
> > 26(f) This week, a citizen in the riding filed an Elections Canada challenge to Commissioner William Corbett to have Wilson's campaign expenditures investigated. "The election result was very close and had Mr. Wilson actually only spent what he was allowed to, he may well have lost. In the interest of a fair and accountable democratic election process, Mr. Wilson's campaign must be investigated", the submission alleges.
>
> 6. The information in the quote from the Anonymous Report above was simply that Blair Wilson's Election was close, which was objectively verifiable; that there were election spending questions, for which I had several named sources including for example Elizabeth Wood and Laurie McNiel; and that there should be an investigation, which was an obvious opinion arising from the first two facts.
>
> 7. Notwithstanding the minimal role the confidential sources played in the statements complained of in the Counterclaim, the promises of confidentiality I have made are matters I take very seriously as a journalist. I have never in my career revealed the identity of a person who was a confidential source. I regard the keeping of those promises as vital to my work as a journalist, and I fear that breaking such a promise would make it difficult for future sources to trust me and provide information.

> 8. The specifics of my promises of confidentiality to three individuals in the present case are:
>
> a) For confidential source A, the confidentiality agreement was made in a verbal conversation at a meeting early in the fall of 2007. The agreement was such that the source insisted I maintain their complete and total anonymity and confidentiality before the source would provide documents in their possession. There was a third party present as a witness. I agreed to these terms and promised the source complete and total anonymity. This promise was invoked several times in the course of our correspondence.
>
> b) For confidential source B, the confidentiality agreement was made in a verbal agreement later in the fall of 2007. This agreement was made over the phone and the issue was discussed later in email as well. The source had provided some documents to me, but in order to use them and obtain further documents I had to promise the source's name or identity would not be revealed nor would the source of the documents. I agreed to these terms and promised the source complete anonymity in exchange for using the documents. This promise was invoked several times in the course of our correspondence.
>
> c) For confidential source C, the confidentiality agreement was made early in the fall of 2007. The source was willing to provide documents and assistance provided that their identity would be confidential and that their name not appear anywhere in print. I agreed to those terms. This promise was invoked several times in the course of our correspondence.
>
> ...
>
> 11. In the case of questions 29 and 31, I did not object to answering and did answer. In the case of questions 28 and 30, the document which is referenced was the "Anonymous Report" which is discussed above. Answering question 28 would directly identify one of my confidential sources and answering question 30 would do so either directly or indirectly. If I was ordered to answer those questions, identifying information for the confidential sources would be compromised and my promise of confidentiality would be broken.

[23] Thus, the question posed to the chambers judge was whether Ms. O'Connor and Canwest should be permitted to refuse to answer interrogatories numbered 28, 30, and 34 on the basis of journalist-source privilege.

The Reasons for Judgment

[24] The chambers judge began his reasons with a review of the factual background to the application, following which he moved to the test for journalist-source privilege set out in both *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R.

477 ("*National Post*"), and *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592 ("*Globe and Mail*"). In the course of his discussion of the law, the chambers judge said:

> [19] In *Globe and Mail*, the Court affirmed that any journalist source privilege must be established on a case by case basis. The Court notes that in a civil proceeding the party seeking disclosure of a confidential source must first demonstrate that the questions are relevant and if they are, the evidence flowing from such questions is presumptively compellable and admissible. At that point, the onus rests upon the party asserting privilege to convince the Court that the evidence should not be disclosed. In determining this, the Court must go on to consider the "Wigmore criteria" which are as follows:
>
> 1. The relationship must originate in a confidence that the source's identity will not be disclosed.
>
> 2. Anonymity must be essential to the relationship in which the communication arises.
>
> 3. The relationship must be one that should be sedulously fostered in the public interest.
>
> 4. The public interest served by protecting the identity of the informant must outweigh the public interest in getting at the truth.
>
> [20] Where these requirements are all met, journalist source privilege will be recognized. In considering the circumstances in the case here, this Court must take into account, among other things, the following:
>
> 1. The battle going on between Lougheed and his stepdaughter and son-in-law, the Wilsons, has been carried on for some time on multiple fronts in these Courts, including the debt action, the defamation counterclaim, and a wills variation action. There have been a number of decisions concerning these parties. See for example:
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> *Lougheed Estate v. Wilson*, 2010 BCSC 1318;
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> *Lougheed Estate v. Wilson*, 2009 BCSC 849;
>
> *Wilson v. Lougheed Estate*, 2009 BCSC 1841
>
> *Wilson v. Lougheed Estate*, unreported, October 15 2009, Vancouver Registry, docket S076668 and S081334;
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> *Lougheed Estate v. Wilson*, 2009 BCCA 537;
>
> *Lougheed Estate v. Wilson*, 2009 BCCA 438, 312 D.L.R. (4th) 559;
>
> *Lougheed Estate v. Wilson*, 2009 BCCA 399, 275 B.C.A.C. 40.
>
> 2. The evidence is that the source provided the letter to O'Connor only upon her agreeing that his or her identity would remain confidential.

> 3. The source, or someone else, forwarded the same letter, also anonymously, to other persons or institutions, including a political "blogger" and the Office of the Commissioner of Canada Elections, actions which may call into question any claim by the source for confidentiality.
>
> 4. There is no suggestion in the material of any ongoing relationship between O'Connor and the unidentified source of the letter in question. In other words, one may infer their contact with each other appears to be a "one off" occurrence confined to the events giving rise to the issue that is before me.
>
> 5. The material discloses that Wilson was never charged pursuant to the Canada *Elections Act*, and the Office of the Commissioner of Canada Elections has "closed the file".
>
> 6. The Statement of Claim was filed on [Feb.] 26, 2008. One week later, on March 5, 2008, Lougheed filed a Notice of Discontinuance with respect to some of the claims, reducing the overall claim by approximately $750,000.
>
> 7. In the defamation counterclaim, the plaintiffs by way of counterclaim allege that the publication, distribution, and anticipated re-publication of the allegations concerning Wilson were done maliciously for the deliberate purpose of causing financial and political harm to Wilson. Specifically, the counterclaim at para. 46 states that the actions of Lougheed and the defendants by way of counterclaim "were malicious, scandalous, vexatious, and done in a deliberate attempt to cause political and financial damage to the defendant Wilson".
>
> ...
>
> 9. Subsequent to the publication of this information, Wilson was asked to resign from the federal liberal caucus. He did so. In the next federal election, held on Oct. 14, 2008, he was defeated.
>
> [Emphasis added.]

[25] According to *National Post* and *Globe and Mail*, the first question for the chambers judge was whether the questions were relevant. He found that they were, "given the pleadings of malice".

[26] In discussing what he meant by "malice", the chambers judge said:

> [27] ... It must be kept in mind here that a significant issue in a defamation claim is the element of malice. Malice, in the context of defamation, is described in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 145 of S.C.R., as any "indirect motive or ulterior purpose that conflicts with the sense of duty or the mutual interest which the occasion created."
>
> [28] While the names of witnesses are usually not relevant to a material fact and therefore are not discoverable through interrogatories, this is only a

> "general rule": see *Hoyt v. I.C.B.C.* 2001 BCCA 154, 89 B.C.L.R. (3d) 44. Here, I have concluded that the identity of the anonymous source is relevant to the issue of malice as pleaded in the counterclaim for defamation.
>
> [Emphasis added.]

[27] Once he had determined that the question of the identity of the source was relevant to the issues raised in the Defamation Action, the chambers judge was obliged, as required by *Globe and Mail,* to consider the Wigmore criteria before ordering disclosure. The chambers judge found that the communications between Ms. O'Connor and her confidential source were made in agreed confidence, thus satisfying the first Wigmore criterion. As to the second and third Wigmore criteria, he expressed uncertainty:

> [23] Second, I ask whether confidentiality is essential to the relationship in which the communication arose? I have some doubt about this. In the first place, the defendants to the counterclaim generally take the position that information in the anonymous letter was unnecessary to the story. This is consistent with the fact, noted above, that a number of sources were identified in the story itself. On the other hand, this is not a continuing relationship. It is not one that needs to be preserved, except possibly as an encouragement to others holding important information who may be reluctant to come forward without an expectation of anonymity.
>
> [24] ... [The third criterion] is a difficult question to answer given the information which I have set out in para. 20 above concerning the intra-family battle going on between the Wilsons and Lougheed. One can infer from this that the motive of the person who gave O'Connor a copy of the letter may not be to protect the public interest with respect to the integrity of the political system. Framed as a question, is the source a person who felt compelled by his or her civic responsibility to disclose inappropriate activity or wrongdoing in the political system, or is that source involved in a malicious intra-family squabble and promulgating information not for the purpose of protecting the integrity of our system of government but for purposes related to personal gain and/or vindictiveness? If it is the former, the relationship between the source and O'Connor should be sedulously fostered. If it is the latter, the source should not be permitted to hide behind the cloak of journalist source privilege.

[28] Moving to the fourth criterion, the chambers judge said:

> [25] ... This fourth criterion is inextricably bound up with the third. Again, if the motive of the source was to disclose information concerning the integrity of our system of government then the protection of the identity of the source triumphs. But if the source released the letter to the journalist based upon intentions that are personal, malicious, and vindictive, his or her identity should be disclosed.

[26] The Court in *Globe and Mail,* at paras. 58 and following, discusses a number of factors which may be considered when analyzing the fourth of the Wigmore criteria. The first is the stage of the proceedings at which privilege is raised. When the case is in its early stage, such as examination for discovery, it may be courts should be slow to require disclosure of a journalist's source. However, given the exploratory aims of examinations for discovery and the confidentiality with which they are cloaked, the sought after evidence may resolve or simplify issues prior to trial, a factor favouring disclosure.

[27] The Court also discusses the importance of the centrality of the question to the dispute between the parties. It must be kept in mind here that a significant issue in a defamation claim is the element of malice. …

…

[29] Another factor is whether the journalist is a party to the lawsuit, or merely a witness. At para. 61 of *Globe and Mail* the Court states:

> ... whether it is in the public interest to require a journalist to testify as to the identity of a confidential source will no doubt differ if the journalist is a defendant in a defamation action, for example, as opposed to a third party witness, compelled by subpoena to testify in a matter in which he or she has no personal stake in the outcome. In the former context, the identity of the source is more likely to be near the centre of the dispute between the parties.

[30] A crucial question, according to *Globe and Mail* (at para. 61) is whether the information sought is available by other means. Here both the Office of the Commissioner for Canada Elections, and the political blogger received a copy of the same letter, also anonymously. There is no evidence the former knows the identity of the source. The latter has deposed that he is not aware of the identity of the author of the letter. O'Connor, on the other hand, is aware of that person's identity.

[31] Finally, I keep in mind the judgment of the Chief Justice, writing for the majority in *Grant v. Torstar Corp.*, [2009 SCC 61] at para. 58:

> Canadian Law recognizes that the right to free expression does not confer a licence to ruin reputations. In assessing the constitutionality of the *Criminal Code's* defamatory libel provisions, for example, the Court has affirmed that "... the protection of an individual's reputation from wilful and false attack recognizes both the innate dignity of the individual and the integral link between reputation and the fruitful participation of an individual in Canadian society": *R. v. Lucas,* [1989] 1 S.C.R. 439, per Cory J., at para.48. This applies both to private citizens and to people in public life. People who enter public life cannot reasonably expect to be immune from criticism, some of it harsh and undeserved. But nor does participation in public life amount to open season on reputation.

> [32] These considerations are of assistance in this case. The parties are at the discovery stage in the pre-trial proceedings, and the information sought will likely provide information which will bear upon the element of malice in the defamation claim. O'Connor is a party. She and her source are central to the dispute. There is no alternative practical way to divine who provided a copy of the critical letter to O'Connor.

[29] In concluding his analysis on and application of the Wigmore criteria, the chambers judge returned to the motive of the journalist's source, stating:

> [33] I am satisfied that if the source is an arm's length person disclosing information to a member of the media out [of] a sense of civic responsibility grounded in a desire to foster accountability and responsibility in Members of Parliament, the public interest in protecting the identity of such a source outweighs the public interest in ensuring the proper administration of justice. But I also am satisfied that if the source is a participant in a scheme to favour the interests of one side in an acrimonious family dispute, or is a participant in a politically motivated scheme to defame and discredit an elected politician, then the public interest in fostering the proper administration of justice outweighs the public interest in protecting a journalist's anonymous source.
>
> [34] Finally, there is no material in evidence which describes the source in any way. There is no evidence that the source is or is not intimately involved in the political aspect of this saga. There is no evidence that the source is or is not a member of, or a friend or agent of, the extended Lougheed – Wilson family.

[30] The chambers judge then ultimately concluded:

> [35] On the material before me I am unable to determine into which of these two above categories the source falls. It follows that Lougheed [*sic*] and the defendants by counterclaim have failed to meet the onus which lies upon them to sustain a claim of journalist source privilege. I find, therefore, that the privilege cannot prevail.
>
> [36] I also conclude that knowing the identity of the anonymous source or sources is critical to deciding the matter between the parties upon its merits. I am of the view that in the circumstances pertaining here, ordering the disclosure of the identity of the source is consistent with the inherent jurisdiction of the Court to control its proceedings, and with R. 13-1(19) of the *Supreme Court Civil Rules* which provides that the Court may give directions "it considers will further the object of these Supreme Court Civil Rules". The objects of the *Rules* include securing "the just, speedy and inexpensive determination of every proceeding on its merits". The disclosure ordered here will permit counsel to narrow the issues and therefore better conduct these proceedings in a speedier and less expensive manner.

Grounds of Appeal

[31] The appellants state their grounds of appeal as follows:

1. The learned chambers judge erred in holding that the identity of the confidential source was relevant.

2. The learned chambers judge erred in failing to apply the correct legal test to require a journalist to identify a confidential source at the discovery stage.

3. The learned chambers judge erred by adding elements to the legal test which are contrary to law and principle.

Discussion

The first ground of appeal – is the evidence relevant?

[32] The first ground of appeal asserts that the trial judge erred in finding that the identity of the confidential source is relevant to the issues raised in the Defamation Action.

[33] The chambers judge found that the identity of the person who provided the Anonymous Report to Ms. O'Connor is relevant to the issue of malice as pleaded by Mr. Wilson. Thus, the first question on this appeal becomes what role the presence or absence of malice plays in the law of defamation as applicable to the case at bar.

[34] In *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, the Supreme Court of Canada recognized a new defence of "responsible communication on matters of public interest". Before discussing this new defence, Chief Justice McLachlin neatly reviewed the law of defamation as it had developed to then:

> [28] A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and

damage are presumed, though this rule has been subject to strong criticism... The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.

[29] If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

[30] Both statements of opinion and statements of fact may attract the defence of privilege, depending on the occasion on which they were made. Some "occasions", like Parliamentary and legal proceedings, are absolutely privileged. Others, like reference letters or credit reports, enjoy "qualified" privilege, meaning that the privilege can be defeated by proof that the defendant acted with malice: see *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.). The defences of absolute and qualified privilege reflect the fact that "common convenience and welfare of society" sometimes requires untrammelled communications: *Toogood v. Spyring* (1834), 1 C.M. & R. 181, 149 E.R. 1044, at p. 1050, *per* Parke B. The law acknowledges through recognition of privileged occasions that false and defamatory expression may sometimes contribute to desirable social ends.

[31] In addition to privilege, statements of opinion, a category 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, 201 D.L.R. (4th) 75, at para. 56, cited in *WIC Radio*, at para. 26), may attract the defence of fair comment. As reformulated in *WIC Radio*, at para. 28, a defendant claiming fair comment must satisfy the following test: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognisable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?; and (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice. *WIC Radio* expanded the fair comment defence by changing the traditional requirement that the opinion be one that a "fair-minded" person could honestly hold, to a requirement that it be one that "anyone could honestly have expressed" (paras. 49-51), which allows for robust debate. As Binnie J. put it, "[w]e live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones" (para. 4).

[32] Where statements of fact are at issue, usually only two defences are available: the defence that the statement was substantially true (justification); and the defence that the statement was made in a protected context (privilege). The issue in this case is whether the defences to actions for defamatory statements of fact should be expanded, as has been done for statements of opinion, in recognition of the importance of freedom of expression in a free society.

[33] To succeed on the defence of justification, a defendant must adduce evidence showing that the statement was substantially true. This may be difficult to do. A journalist who has checked sources and is satisfied that a statement is substantially true may nevertheless have difficulty proving this in court, perhaps years after the event. The practical result of the gap between

> responsible verification and the ability to prove truth in a court of law on some date far in the future, is that the defence of justification is often of little utility to journalists and those who publish their stories.
>
> [34] If the defence of justification fails, generally the only way a publisher can escape liability for an untrue defamatory statement of fact is by establishing that the statement was made on a privileged occasion. However, the defence of qualified privilege has seldom assisted media organizations. One reason is that qualified privilege has traditionally been grounded in special relationships characterized by a "duty" to communicate the information and a reciprocal "interest" in receiving it. The press communicates information not to identified individuals with whom it has a personal relationship, but to the public at large. Another reason is the conservative stance of early decisions, which struck a balance that preferred reputation over freedom of expression. In a series of judgments written by Cartwright J. (as he then was), this Court refused to grant the communications media any special status that might have afforded them greater access to the privilege: *Douglas v. Tucker*, [1952] 1 S.C.R. 275; *Globe and Mail Ltd. v. Boland*, [1960] S.C.R. 203; *Banks v. Globe and Mail Ltd.*, [1961] S.C.R. 474; *Jones v. Bennett*, [1969] S.C.R. 277.
>
> [35] In recent decades, courts have begun to moderate the strictures of qualified privilege, albeit in an *ad hoc* and incremental way. When a strong duty and interest seemed to warrant it, they have on occasion applied the privilege to publications to the world at large. For example, in suits against politicians expressing concerns to the electorate about the conduct of other public figures, courts have sometimes recognized that a politician's "duty to ventilate" matters of concern to the public could give rise to qualified privilege: *Parlett v. Robinson* (1986), 5 B.C.L.R. (2d) 26 (C.A.), at p. 39.
>
> [36] In the last decade, this recognition has sometimes been extended to media defendants. For example, in *Grenier v. Southam Inc.*, [1997] O.J. No. 2193 (QL), the Ontario Court of Appeal (in a brief endorsement) upheld a trial judge's finding that the defendant media corporation had a "social and moral duty" to publish the article in question. Other cases have adopted the view that qualified privilege is available to media defendants, provided that they can show a social or moral duty to publish the information and a corresponding public interest in receiving it: *Leenen v. Canadian Broadcasting Corp*. (2000), 48 O.R. (3d) 656 (S.C.J.), at p. 695, aff'd (2001), 54 O.R. (3d) 612 (C.A.), and *Young v. Toronto Star Newspapers Ltd.* (2003), 66 O.R. (3d) 170 (S.C.J.), aff'd (2005), 77 O.R. (3d) 680 (C.A.).
>
> [37] Despite these tentative forays, the threshold for privilege remains high and the criteria for reciprocal duty and interest required to establish it unclear. It remains uncertain when, if ever, a media outlet can avail itself of the defence of qualified privilege.
>
> [Emphasis added.]

[35] Later in her reasons for judgment, the Chief Justice summarized the new defence of public interest responsible communication in this way:

> [126] The defence of public interest responsible communication is assessed with reference to the broad thrust of the publication in question. It will apply where:
>
> A. The publication is on a matter of public interest, and
>
> B. The publisher was diligent in trying to verify the allegation, having regard to:
>
> (a) the seriousness of the allegation;
>
> (b) the public importance of the matter;
>
> (c) the urgency of the matter;
>
> (d) the status and reliability of the source;
>
> (e) whether the plaintiff's side of the story was sought and accurately reported;
>
> (f) whether the inclusion of the defamatory statement was justifiable;
>
> (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and
>
> (h) any other relevant circumstances.
>
> [Emphasis added.]

[36] Earlier in her judgment, the Chief Justice remarked (at para. 92) that it makes little sense to speak of malice defeating an assertion of responsible journalism as "the absence of malice is effectively built into the definition of responsible journalism itself".

[37] As far as the elements of the tort of defamation are concerned, then, it is unnecessary that Mr. Wilson prove malice. Once he has established that the words were defamatory, that the words refer to him and were published, it is up to the defendant(s) to show that that the words were true, or constituted fair comment. Express malice will defeat the defence of fair comment. Proof of malice will defeat a defence of qualified privilege. The appellants have also pleaded public interest responsible journalism. A necessary absence of malice is woven into the defence.

[38] Malice also plays a role in the question of damages; a successful plaintiff may obtain aggravated damages from a defendant whose malice has been proved (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at paras. 188-91).

[39] As I understand his reasons for judgment, the chambers judge concluded that if Mr. Wilson could establish that the Anonymous Report was given to Ms. O'Connor by someone involved in the Lougheed-Wilson family financial wranglings, rather than a civic-minded third party, this would provide evidence of malice on the part of the confidential source. He also found that the identity of the source might assist in determining whether there existed a politically motivated scheme to defame a politician. This would defeat any defence the other named defendants might have of qualified privilege or fair comment.

[40] I note here that the appellants put forward no argument on this appeal that Mr. Wilson was not entitled to pose interrogatories to them concerning matters that would affect only their co-defendants. I am aware of only one case, *Bronson v. Hewitt*, 2008 BCSC 1605, considering that specific issue under the old rule, 29(1). In *Bronson*, Goepel J. concluded that a party could be compelled to answer interrogatories dealing with matters in question in the action generally, even though not in issue as between the interrogating and answering parties.

[41] I am of the view that if, as in this case, the purportedly privileged evidence sought in the interrogatories is more relevant to the interrogating party's claim against other parties than to his or her claim against the answering parties, this is a factor that ought to be considered in the application of the Wigmore criteria. I will return to this point later in these reasons.

[42] It is difficult to see how evidence in the Defamation Action of malice on the part of the other defendants or the confidential source would affect the appellants' defences; it is the appellants' malice that would have to be shown in order to negate their defences of fair comment and qualified privilege, assuming that those defences are otherwise made out. A possible exception might be the appellants' plea of public interest responsible journalism. Here, Mr. Wilson might strike at the defence by arguing that the source of the Anonymous Report had an axe to grind, and the reporter accordingly ought to have exercised more caution before publishing material attributable to the source.

[43] Canwest and Ms. O'Connor submit that the Anonymous Report itself is objectively verifiable by examining the statements contained within it, much of which drew on the allegations of campaign workers named in the impugned newspaper article, but not named as defendants in the Defamation Action. Thus, Canwest and Ms. O'Connor say the Anonymous Report source's reliability is not relevant.

[44] In my view, when examining the potential evidence in this light, it must be said that the identity of the person who provided Ms. O'Connor with the Anonymous Report is relevant to the defences of the co-defendants, but not of central importance to the appellants' defences.

[45] It follows from all of the foregoing that, while I do not view the relevance of the evidence sought by Mr. Wilson in the same way as did the chambers judge, I nevertheless would not accede to the first ground of appeal. Although the evidence sought is relevant primarily to the co-defendants' defences, it is of some relevance to the appellants' defences. I will deal with the consequences of the possible strength of the evidence when discussing the other grounds of appeal.

The second and third grounds of appeal – did the chambers judge err in failing to apply the correct legal test to require a journalist to identify a confidential source at the discovery stage?

[46] The second and third grounds of appeal allege error in the chambers judge's formulation and application of the test for journalist-source privilege.

[47] More specifically, the appellants say that the chambers judge erred in his interpretation and application of three of the four factors that constitute the Wigmore criteria as employed in the test for journalist-source privilege.

[48] The journalist-source privilege test that the chambers judge was obliged to apply was endorsed by the Supreme Court of Canada in *National Post* and *Globe and Mail*. These two cases established that journalist-source privilege is a common law privilege the existence of which will only be recognized on a case-by-case basis. Although the privilege is not derived from s. 2(b) of the *Charter*, which protects

freedom of expression and freedom of the press,[1] this constitutional provision is closely aligned with and informs the privilege. The source of journalist-source privilege is the common law. Where the identity of a journalist's confidential source is relevant to a litigant's case and is sought by the litigant from the journalist, the court will protect the information from compelled disclosure if the journalist asserting the privilege can establish that: 1) there exists a confidential relationship between the journalist and his or her source that ought to be protected; and, 2) the circumstances are such that the public interest in protecting the identity of the source outweighs the public interest in getting at the truth in the particular case.

[49] The Supreme Court of Canada summarized the test in *Globe and Mail* at para. 65:

> In summary, to require a journalist to answer questions in a judicial proceeding that may disclose the identity of a confidential source, the requesting party must demonstrate that the questions are relevant. If the questions are irrelevant, that will end the inquiry and there will be no need to consider the issue of journalist-source privilege. However, if the questions are relevant, then the court must go on to consider the four Wigmore factors and determine whether the journalist-source privilege should be recognized in the particular case. At the crucial fourth factor, the court must balance (1) the importance of disclosure to the administration of justice against (2) the public interest in maintaining journalist-source confidentiality. This balancing must be conducted in a context-specific manner, having regard to the particular demand for disclosure at issue. It is for the party seeking to establish the privilege to demonstrate that the interest in maintaining journalist-source confidentiality outweighs the public interest in the disclosure that the law would normally require.

[50] The four Wigmore factors were identified in *Globe and Mail* at para. 22 as follows:

> (1) The relationship must originate in a confidence that the source's identity will not be disclosed; (2) anonymity must be essential to the relationship in which the communication arises; (3) the relationship must be one that should be sedulously fostered in the public interest; (4) the public interest served by protecting the identity of the informant must outweigh the public interest in getting at the truth. [Citations omitted.]

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[1] s. 2(b) of the *Charter of Rights and Freedoms* provides:

> s. 2 Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[51] Before turning to the Wigmore factors, I note that the respondent argued in this Court that, because the source of the Anonymous Report sent the report to other people such as the defendant Mr. Janke, whatever privilege that might have protected his or her anonymity was lost. The respondent referred to cases such as *Alberta (Treasury Branches) v. Ghermezian*, 1999 ABQB 407, in which an argument was made that because information had been disseminated beyond the confidential relationship, the information was no longer protected by privilege. That and similar cases have no application here, where the journalist-source privilege claimed is not over the contents of the Anonymous Report, but rather over the identity of its provider. The majority in *National Post* recognized this distinction:

> [56] … Wigmore was concerned with the confidentiality of the *contents* of the communication itself (which is not the issue here because it was the mutual intention of the journalist and the source to make the content of the communication public). However, I think the rationale underlying the Wigmore criteria may be applied equally to a new role, namely the maintenance of the confidentiality of the *identity* of the source. … [Italic emphasis in original.]

The cases the respondent cites do not support his argument that the identity of the confidential source has been waived, and I would not accede to it.

[52] In the case at bar, the chambers judge found that the first Wigmore criterion was satisfied. In moving to the second criterion, the chambers judge expressed doubt that confidentiality was essential to the relationship in which the communication arose. He found that the relationship was not continuing and not one that needed to be preserved, "except possibly as an encouragement to others holding important information who may be reluctant to come forward without an expectation of anonymity".

[53] I agree with the appellants that, in so concluding, the chambers judge misapplied the second criterion. Ms. O'Connor's affidavit made it clear that without a promise of anonymity, the communication would not have been made. Thus, not only was the first criterion satisfied (i.e., the relationship originated in a confidence that the source's identity would not be disclosed) but so was the second (i.e.,

anonymity was essential to the relationship in which the communication arose). In other words, but for the promise of confidentiality, the communication would not have been made. It follows that in these circumstances the fulfillment of the first Wigmore criterion was the fulfillment of the second.

[54] Next, in examining the third factor, the chambers judge found that he could reach no conclusion on the question whether this was a relationship that should sedulously be fostered because he did not know whether the motive of the source was high-minded or malicious. He stated: "[i]f it is the former, the relationship between the source and O'Connor should be sedulously fostered. If it is the latter, the source should not be permitted to hide behind the cloak of journalist source privilege".

[55] In my view, this analysis conflates the third and fourth Wigmore criteria. The third Wigmore criterion deals with the general relational context in which the communication is made, and not with the specific circumstances of the individuals involved. Here, Ms. O'Connor obtained the relevant information in the context of her investigation into the propriety of election campaign spending of a Member of Parliament. The informant required and received a guarantee of anonymity and would not have otherwise disclosed the information. Accordingly, the pertinent relationship is that between a professional journalist and a confidential informant, and the following passage from *National Post* is apposite:

> [57] The third criterion (that the source-journalist relationship is one that should be "sedulously fostered" in the public good) introduces some flexibility in the court's evaluation of different sources and different types of "journalists". The relationship between the source and a blogger might be weighed differently than in the case of a professional journalist like Mr. McIntosh, who is subject to much greater institutional accountability within his or her own news organization. These distinctions need not be canvassed in detail here since the appellants have made out on their evidence, in my opinion, that in general the relationship between professional journalists and their secret sources is a relationship that ought to be "sedulously" fostered and no persuasive reason has been offered to discount the value to the public of the relationship between Mr. McIntosh and his source(s) in this particular case. [Emphasis added.]

[56] Any questionable ulterior motives the informant might have are irrelevant to the consideration of the Wigmore criteria in this particular case. The source may have hoped to destroy Mr. Wilson's parliamentary career, but that desire would be beside the point if the information provided was true and thus in the public interest to reveal. The public's "interest in being informed about matters of importance that may only see the light of day through the cooperation of sources who will not speak except on condition of confidentiality" (*National Post* at para. 28) is not diminished merely because the source is motivated wholly or partly by self-interest. The confidential relationship between a person who reveals the possible existence of electoral fraud to a reporter investigating corruption is a relationship that must sedulously be protected in the public interest.

[57] As stated in *National Post* at para. 58 and repeated in *Globe and Mail* at para. 57, it is the fourth factor "that will do most of the grunt work in the analysis of any claim for journalist-source privilege". To repeat, the fourth factor is whether the public interest served by protecting the identity of the informant outweighs the public interest in getting at the truth. As I read his reasons for judgment, the principal reason the chambers judge found that the appellants had not satisfied the fourth Wigmore criterion was the absence of evidence before him of the confidential source's motives. He held that because there was no material in evidence that described the source, he could not discern whether the source was or was not intimately involved in the political aspect of "this saga". In effect, the chambers judge concluded that because he was unable to determine whether the source was malevolent or high-minded, the appellants had not established journalist-source privilege in the case at bar.

[58] In my view, the chambers judge imposed on the appellants an obligation that the jurisprudence does not require. As mentioned earlier, the motives of the informant have little to do with the concept of journalist-source privilege. The sort of "motive evidence" required by the chambers judge would go a long way to identifying the source before any decision is made whether to uphold the privilege, thus prematurely defeating it.

[59] In concluding that the fourth Wigmore criterion had not been met, the chambers judge also considered and dismissed other factors which might militate in favour of establishing privilege. The Supreme Court described these considerations in *Globe and Mail* at para. 66:

> The relevant considerations at this stage of the analysis, when a claim to privilege is made in the context of civil proceedings, include: how central the issue is to the dispute; the stage of the proceedings; whether the journalist is a party to the proceedings; and, perhaps most importantly, whether the information is available through any other means. As discussed earlier, this list is not comprehensive. ... [Emphasis added.]

[60] As I have discussed in the paragraphs above, I am of the view that the issue of the identity of the source is not central to the dispute between the appellants and Mr. Wilson. The identity of the source is not relevant to whether the statements in the Anonymous Report are true or false and thus has little bearing on the component factors of the public interest responsible communication defence. It is difficult to see how the identity of the confidential source could be relevant to whether Canwest or Ms. O'Connor acted maliciously.

[61] The identity of the source has potential relevance to the dispute between Mr. Wilson and the other defendants. Rather than turning first to the appellants at this stage of the proceedings, Mr. Wilson ought to exhaust his discovery process with those defendants he suspects provided the Anonymous Report to the press. The Court noted in *Globe and Mail* at para. 63, "[r]equiring a journalist to breach a confidentiality undertaking with a source should be done only as a last resort".

[62] I recognize that the chambers judge concluded that requiring Ms. O'Connor to reveal her source at this stage of the proceedings might have the potential to resolve certain issues prior to trial. It would be expedient to require Ms. O'Connor to reveal her source right now. However, at least at this procedural stage of the Defamation Action, expediency must yield to freedom of the press. As the Court stated in *Globe and Mail* at para. 58 after citing *Attorney-General v. Mulholland*, [1963] 2 Q.B. 477, "at this point the procedural equities do not outweigh the freedom of the press, but [the journalist] may be required to disclose at trial".

Conclusion

[63] For the reasons I have given, I am of the view that the chambers judge erred in his expression and application of the Wigmore criteria to the claim of journalist-source privilege in this case. In my view, consideration of the pertinent factors favours preserving the privilege at this preliminary stage of the proceedings in the Defamation Action.

[64] Rather than remitting the application to the chambers judge for its inevitable dismissal, I would allow the appeal, set aside the order of the chambers judge requiring Ms. O'Connor to supplement her answers to the June 7, 2010 interrogatories numbered 28 and 30, and substitute an order dismissing Mr. Wilson's application.

"The Honourable Madam Justice Ryan"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Levine"