

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lougheed v. Wilson*,
2010 BCSC 1871

Date: 20101231
Docket: S081334
Registry: Vancouver

Between:

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

Plaintiffs

And

Kelly Janine Wilson and Charles Blair Wilson

Defendants

And

**Judeline Tyabji Wilson, Tugboat Enterprises Ltd.,
Mark Allan Marissen, Elaine O'Connor, Canwest Publishing Inc.,
Publications Canwest Inc., and Steve Janke**

Defendants by Counterclaim

Before: The Honourable Mr. Justice Williamson

Reasons for Judgment

Counsel for the Applicant, Charles Blair
Wilson:

J.L. Straith
D. Fiorvento

Counsel for the Defendants by Counterclaim,
Elaine O'Connor and Canwest Publishing
Inc:

D.W. Burnett

Place and Date of Hearing:

Vancouver, B.C.
October 28 - 29, 2010

Place and Date of Judgment:

Vancouver, B.C.
December 31, 2010

[1] This is an application by the defendant, and plaintiff by counterclaim, Charles Blair Wilson (Wilson) for an order requiring Elaine O'Connor (O'Connor), one of the defendants by counterclaim, and a journalist, to disclose the identity of one of her sources.

[2] Rule 7-3(6) of the *Supreme Court Civil Rules* reads:

- (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.
- (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.

Background

[3] The plaintiff, William F. Lougheed (Lougheed), is executor of the estate of his late wife, Norma Yvonne Lougheed. He claims that Wilson and his wife, Kelly Janine Wilson, who is the stepdaughter of Lougheed, owe substantial amounts of money to the estate. It is said that before the death of the late Mrs. Lougheed, the Lougheeds loaned substantial amounts of money to the Wilsons, often in relation to the purchase of real estate.

[4] The Wilsons deny that they owe any money to the estate. Further, in a counterclaim, they say that Wilson has been defamed by the plaintiff Lougheed and others. The defamation claim arises out of a lengthy story given front page prominence by the Vancouver newspaper *The Province* on October 28, 2007. At the time, Wilson was the Liberal Member of Parliament for the riding of West Vancouver-Sunshine Coast. The headline on the front page read: "Family Exposes MP's Trail of Debt". The lengthy story commences on page A8 with a headline stating Lougheed was proclaiming publicly that Wilson was "not fit for public office".

[5] The lengthy story reported among other things that *The Province* had learned Wilson did not report campaign expenses as he was required to do, that Wilson and his wife borrowed \$1.9 million from the Lougheeds to purchase six properties and

that much of this money remained unpaid, that Wilson and his wife were subject to *Social Services Tax Act* liens, that they owed \$2.1 million in mortgages, and that Wilson had misled the media about the extent of his business successes.

[6] The sources relied upon in the story include the plaintiff Lougheed, a named veteran liberal campaign manager, other named workers in Wilson's campaign, and an unnamed source.

[7] With respect to the unnamed source, the story read:

This week, a citizen in the riding filed an Elections Canada challenge to Commissioner William Corbet 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.

[8] The letter, which was written and submitted to Elections Canada, is in evidence. It runs to three full pages and is anonymous. It is said that the unidentified author of that letter provided a copy of it to *The Province* reporter, the defendant by counterclaim Elaine O'Connor. Ms. O'Connor has declined, in answers to interrogatories, to identify the source. Rather, she has deposed that she received the information only after promising the source that his or her identity would remain confidential.

[9] She deposed that in the course of her research she spoke to dozens of individuals. She noted that in her article she named several sources. She deposed however, that there were three individuals who spoke to her on the condition of anonymity.

[10] With respect to the significance of confidential sources, she deposed that:

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.

[11] This statement is consistent with the underlying principle often articulated by courts as the reason for protecting the identity of anonymous sources who provide information to professional journalists.

[12] Wilson seeks complete answers to five questions in an interrogatory sent to Ms. O'Connor on June 7, 2010. I set out here the questions with the answers provided:

- 28.Q Who provided you with “copy of report submitted to William Corbet, Commissioner of Canadian Elections - Elections Canada re: Wilson and campaign dated October 24, 2007”, document 135 in your list of documents?
- A. 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 confidential source.
- 29.Q Have you been provided with earlier drafts of this document? If so, please provide them.
- A. No.
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 email, please provide copies of records.
- A. As the source is confidential we will not provide details of our communications.
31. Did the authors 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?
- A. No.
34. Produce unredacted copies of documents 195, 196, 197, 198, 199, 200, 201, and 2002 of your list of documents.
- A. 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.

Issue

[13] The issue here is whether in the circumstances of this case a journalist should be required to disclose the identity of the source of information which she received subject to a promise of confidentiality.

Discussion

[14] The question of whether the Court will protect the identity of a source who provided information to a journalist subject to a promise of confidentiality has been considered recently in two cases in the Supreme Court of Canada: *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, and *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] S.C.J. No. 41 (Q.L.).

[15] *National Post* deals with this question in a criminal context. The *Globe and Mail* case deals with the question in the context of a civil litigation proceeding. In *National Post*, the journalists concerned received certain bank records which were said to implicate former Prime Minister Chrétien in a financial conflict of interest. It was later discovered those documents were forged. The police became involved and obtained a search warrant hoping to obtain the documents which they thought might lead to identification of the forger. The newspaper opposed the application.

[16] The Supreme Court of Canada ruled that in these circumstances the source's claim of confidentiality could not be maintained. The Court determined that where a source has provided physical evidence of a crime to a journalist, the public interest in investigating that crime outweighs any confidentiality claim by that source.

[17] The majority state at para. 5 that where a source provides a document deliberately to mislead the journalist, that source would no longer be worthy of protection.

[18] At para. 69, they also stated:

[...] a source who uses anonymity to put information into the public domain maliciously may not in the end avoid a measure of accountability. [...]

[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:

Lougheed Estate v. Wilson, 2010 BCSC 1318;

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;

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.

[21] Given the pleadings of malice set out above, I am satisfied that the question of the identity of the source is relevant. Indeed, it is central to that issue. I will discuss the definition of “malice” below.

[22] Having determined that the interrogatory questions concerning the identity of the source are relevant, I go on to consider the Wigmore criteria, keeping in mind that the onus rests upon the party claiming the privilege. First, I conclude, upon the basis of the affidavit evidence, that the communication between the unidentified source and O’Connor did originate in circumstances in which it was agreed that the source’s identity would not be disclosed.

[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] Third, I ask whether the relationship is one that should be sedulously fostered in the public interest? That 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.

[25] Fourth, does the public interest in protecting the identity of a source outweigh the public interest in the administration of justice and its task of getting at the truth in a civil proceeding? 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. 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.

[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 69 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.

[33] I am satisfied that if the source is an arm's length person disclosing information to a member of the media out 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.

Conclusion

[35] On the material before me, I am unable to determine into which of these two above described categories the source falls. It follows that Lougheed 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.

[37] I have reviewed the questions set out in para. 12 above. It is apparent that the two of them answered with a simple “no” (questions 29 and 31) do not need further amplification. I order that the defendant by counterclaim Elaine O’Connor shall provide complete answers to questions 28 and 30 of the interrogatories dated June 7, 2010.

[38] This may be done by way of affidavit.

[39] I decline to make the other orders sought with respect to unredacted documents (question 34). The answers to questions 28 and 30 will provide counsel with the necessary information.

[40] I make this order confident that counsel will act in accordance with the implied undertaking that information obtained by discovery in a civil action is not to be used except for the purpose of that litigation “unless and until the scope of the undertaking is varied by a Court order”: see *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157 at para. 4.

[41] Costs will be in the cause.

[42] Order accordingly.

“The Honourable Mr. Justice Williamson”