

Citation: Ferguson et al v. Ferstay et al Date: 20000802
2000 BCSC 1183 Docket: C966426
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**BRUCE FERGUSON, MARK OLSEN, H.T. SMITH,
CARL STRAND, GARY ALTING, GEORGE MARSHALL,
GORDON DAVIDSON, STEVE BRANYIK and DON BROWN**

PLAINTIFFS

AND:

GREGG FERSTAY and CHARLES SHANE

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE VICKERS

Counsel for the Plaintiffs: R.L. Edgar

Counsel for the Defendants: Both Appearing In Person
On Their Own Behalf

Date and Place of Hearing: July 24, 2000
Vancouver, BC

[1] This is an action for damages and for a permanent injunction arising out of defamatory comments alleged to have been made by the defendants of and concerning the plaintiffs. The plaintiffs now seek judgment pursuant to the provisions of Rule 18A.

[2] The plaintiff Bruce Ferguson ("Ferguson") is the elected president and appointed assistant business manager of the Specialized Workers' Union, Local 1611. The plaintiff Mark Olsen ("Olsen") is elected to the position of recording secretary of Local 1611 and he is a barrister and solicitor called to the Bar of British Columbia in May 1988. At all material times, each of the plaintiffs acted as trustees of a pension plan known as the Labourers' Pension Plan. The Labourers' Pension Plan is a group pension plan into which funds are contributed on behalf of members of four locals of the Labourers' International Union of North America ("LIUNA") In July of 1996 these four locals merged to form Construction of Specialized Workers' Union, Local 1611. The plaintiffs are nine of the twelve trustees to the Labourers' Pension Plan.

[3] The Labourers' Advancement Fund ("LAF") is a fund established by agreement and declaration of trust dated November 1, 1980. The plaintiffs Ferguson, Strand and

Davidson ("LAF Trustees") have, at all material times, acted as trustees of the LAF.

[4] In the defamatory statements published of and concerning the plaintiffs, the defendants said that the plaintiffs had misused their offices, engaged in fraud and misappropriated funds to their own purposes. In addition, Ferstay has implied that the plaintiffs have been instrumental in the death of a former union member and has said that the plaintiff Olsen was unethical in his professional obligations.

[5] In May 1996 when the Canadian Labour Congress was holding its annual meeting in Vancouver, the defendants handed out a leaflet ("Leaflet No. 1") alleging corruption, cover-up and the delivery of money to the Mafia and organized crime. Further, they said the plaintiffs were involved in fraudulent real estate transactions for their own enrichment and had improperly delivered money to the New Democratic Party. The leaflet was delivered to delegates and members of the public.

[6] I find the statements contained in Leaflet No. 1 were defamatory and that they were published by the defendants of and concerning the plaintiffs. I conclude that the natural and ordinary meaning of those words and the meaning intended by the defendants was as follows:

- (a) that the plaintiff pension trustees are corrupt;
- (b) that the plaintiff pension trustees have committed fraudulent and criminal acts;
- (c) that the plaintiff pension trustees have conspired with politicians to engage in criminal activities;
- (d) that the plaintiff pension trustees have benefited personally from their fraudulent and criminal activities;
- (e) that the plaintiff pension trustees have committed a criminal breach of trust in relation to the Labourers' Pension Plan;
- (f) that the plaintiff pension trustees are engaged in a cover-up of their criminal and illegal activities; and
- (g) that the plaintiff pension trustees belong in jail due to their criminal activities in relation to the Labourers' Pension Plan.

[7] A second leaflet ("Leaflet No. 2") was distributed in May 1996 to delegates of the Canadian Labour Congress Convention and to members of the public. This document alleges criminal activity, corruption and cover-up by LAF Trustees. I find that the natural and ordinary meaning of the words contained

in Leaflet No. 2 and the meaning intended by the defendants was as follows:

- (a) that the plaintiff LAF Trustees have engaged in fraudulent and criminal activities;
- (b) that the plaintiff LAF Trustees have engaged in a cover-up of their illegal and criminal activities;
- (c) that the plaintiff LAF Trustees are criminals who are being protected from discovery and prosecution;
- (d) that the plaintiff LAF Trustees are corrupt;
- (e) that the plaintiff LAF Trustees are deserving of criminal prosecution; and
- (f) that the R.C.M.P. is actively engaged in a criminal investigation of the plaintiff LAF Trustees.

[8] On or about September 25, 1996 Ferstay wrote the following in a memorandum:

You will likely be contacted by this member of the R.C.M.P. regarding inter-office memos in regards to the disbursement of funds by the advancement fund.

According to Heidi: the R.C.M.P. still have not concluded their investigation into the death of John Norton. This information goes to the coroner who makes the final report.

[9] The business card of an R.C.M.P. constable was attached to the memorandum. Norton was the former president of Tunnel and Rock Workers' Union, Local 168, one of the local unions which merged to form Local 1611.

[10] I conclude that the words contained in the Norton letter were defamatory of the plaintiff LAF Trustees in that they were meant, and were understood to mean, and the defendants understood them to mean, that the LAF Trustees were engaged in criminal activities and, in particular, may have caused the death of Norton.

[11] On or about October 12, 1996, the defendant Ferstay wrote a letter to the Law Society of British Columbia Ethics Committee in which he alleged that the plaintiff Olsen was "possibly involved in the cover-up of the Advancement Fund". I conclude that the ordinary meaning of the words contained in that letter and what Ferstay intended them to mean was that:

- (a) the plaintiff Olsen is unethical;
- (b) that Olsen, a lawyer, was involved in fraudulent and criminal activities;
- (c) that Olsen is corrupt;

- (d) that Olsen is engaged in a cover-up of criminal and illegal activities; and
- (e) Olsen is deserving of professional discipline from the Law Society of British Columbia.

[12] The defendants stated repeatedly over the last four years that the plaintiffs were criminals, connected with the Mafia, involved in fraudulent real estate transactions and corrupt. Shane repeated similar unfounded assertions in the course of this trial. The defendants filed no affidavit material to support the defences raised in their statement of defence. Rather, they invited the court to read affidavit material filed in another action, Vancouver Registry C973926. That is an action brought by them as plaintiffs for defamation and for breach of fiduciary duty. The claim for breach of fiduciary duty was dismissed by Tysoe J. on December 11, 1997. In his reasons for judgment, Tysoe J. points out that Shane and Ferstay were really seeking an accounting that they believed ought to be provided by the trustees. The action is not an action in which an accounting was requested.

[13] In this action, Master Doolan was faced with a similar situation on a motion by the defendants for production of documents. In dismissing the motion, he said, at p. 5 of his reasons:

It seems to me that what they really want is not only, of course, a defence to the defamation action, but an accounting by the trustees of monies they collect and the particulars of the assignment of those funds to particular accounts, and what monies have been paid out of those accounts, to whom, when, and why. All of this they demand because they firmly believe that there has been wrongdoing on behalf of the union executive and some trustees or the administrators of the fund. But these are not issues that are raised in this defamation action. Those are issues that could be raised if the defendants, as plaintiffs, had instituted an action against the proper parties claiming an accounting.

[14] Master Doolan, recognizing that this was an action in defamation, denied the production of documents which might have to be produced on an action for an accounting. Tysoe J. did the same thing in the related action, Vancouver Registry C973926. As well, in that action Oppal J. dismissed a similar motion on April 21, 1998.

[15] At the request of the defendants, I did read some affidavits and unproven material filed in action C973926. All of it was irrelevant to the proceedings before me in this action. None of the material which I was invited to read assisted the defendants in establishing their defence.

[16] The defendants allege they are unable to prove the truth of their unfounded statements until they are given documents in the possession and control of the plaintiffs. They have brought no action for an accounting or for the production of

those documents. They have received all of the audited financial statements and are unprepared to accept the truth of those documents. They are convinced that what they are saying about the plaintiffs is true. Their only difficulty is that they cannot prove the truth of those outrageous statements.

[17] I find that what was said by the defendants on each occasion was defamatory and was said with malice. There is no evidence to support the truth of what has been alleged by the defendants, the remarks cannot be justified, nor were they said under qualified privilege. I find that each of the plaintiffs has been damaged by the publication of these statements. The allegations against trade union representatives who are trustees of funds that they are corrupt and have misappropriated money to their own use are extremely serious. The allegations against Olsen in his professional capacity are equally extremely serious. The defendants show no understanding of the nature of their actions and indicate their clear intention to continue.

[18] I find the defendants' conduct to be particularly high handed or offensive and motivated by malice. This is an appropriate case for aggravated and punitive damages: **Hill v. Church of Scientology of Toronto**, [1995] 2 S.C.R. 1130.

[19] I am advised the defendants are persons without financial resources and it is unlikely there will be any recovery of the damage award. Ferstay was involved in all four defamatory publications. Shane was involved in only two. Little turns on this fact. Olsen was and remains a barrister and solicitor and Ferguson was and remains the president of Local 1611. I take that into account in assessment of damages.

[20] The plaintiffs Smith, Strand, Alting, Marshall, Davidson, Branyik and Brown are entitled to recover the sum of \$20,000 each, jointly and severally from the defendants for general and aggravated damages.

[21] The plaintiffs Ferguson and Olsen are entitled to recover the sum of \$25,000 each, jointly and severally against the defendants for general and aggravated damages.

[22] This is a proper case for punitive damages. Bearing in mind the impecuniosity of the defendants, I award each of the plaintiffs an additional sum of \$2,500 for punitive damages.

[23] The defendants are entitled to speak openly and freely concerning issues relating to their trade union. They are entitled to seek answers and to voice reasoned opposition to the union leadership and policies advanced by that leadership. They are not entitled to make defamatory remarks or to publish

defamatory documents. No part of legitimate public debate involves defaming one's opponent. Accordingly, I conclude that the plaintiffs are entitled to an injunction restraining the defendants from the further publication of defamatory statements of and concerning the plaintiffs.

[24] The plaintiffs are entitled to recover their costs of this action. The outrageous comments of the defendants have continued over four years and have consistently been repeated throughout the course of these proceedings. Their conduct has been reprehensible and, accordingly, I make an order that the plaintiffs are entitled to recover special costs.

"D.H. Vickers, J."
The Honourable Mr. Justice D.H. Vickers