

COPY**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Date: 20120228
Docket: S107214
Registry: Vancouver

Between:

Edward Norman (Ted) Hughes, Q.C.

Plaintiff

And

William (Bill) Vander Zalm

Defendant

Before: The Honourable Madam Justice Gerow

**Oral Reasons for Judgment
Re: Costs**

In Chambers

Counsel for the Plaintiff: G.B. Gomery, Q.C.

Counsel for the Defendant: T.J. Delaney

Place and Date of Trial: Vancouver, B.C.
January 30 and 31, February 1-3
and 6-9, 2012

Place and Date of Judgment: Vancouver, B.C.
February 28, 2012

[1] **THE COURT:** Mr. Hughes sued Mr. Vander Zalm for libel resulting from statements made in a book published in 2008. On February 9, 2012, a jury found that certain of the statements complained about had libeled Mr. Hughes and awarded \$60,000 in damages to Mr. Hughes. Judgment was entered in that amount on the same day. Mr. Hughes applied for double costs of this action from January 24, 2012 on the basis that Mr. Vander Zalm had not accepted an offer to settle of that date.

[2] The relevant portions of Rule 9-1 provide:

(1) In this rule, "offer to settle" means

....

(c) an offer to settle made after July 1, 2008 under Rule 37B of the former Supreme Court Rules, as that rule read on the date of the offer to settle, or made under this rule, that

(i) is made in writing by a party to a proceeding,
(ii) has been served on all parties of record, and
(iii) contains the following sentence: "The[party(ies)].....,[name(s) of party(ies)]....., reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

....

(4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

(5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:

....

(b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle

....

(6) In making an order under subrule (5), the court may consider the following:

(a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;

- (b) the relationship between the terms of settlement offered and the final judgment of the court;
- (c) the relative financial circumstances of the parties;
- (d) any other factor the court considers appropriate.

[3] The parties exchanged offers in December 2011 and January 2012, the last of which was Mr. Hughes' offer of January 24, 2012.

[4] Mr. Vander Zalm made an offer to Mr. Hughes on January 20, 2012, which provided:

1. Our client will pay to the plaintiff the sum of \$25,001.
2. Our client shall pay to the plaintiff costs as may be agreed upon or costs at Scale B to the date of this offer.
3. Our client shall provide an apology and retraction in writing to Mr. Hughes in the form attached to this letter. Mr. Hughes would be free to make whatever use of the apology and retraction he so chooses.

[5] The proposed apology provided:

Apology from Bill Vander Zalm to Ted Hughes.

In November 2008 I published my autobiography *Bill Vander Zalm: For The People*. The book makes reference to the sale of the property known as Fantasy Gardens that I and my wife owned until 1990. In 1991, Ted Hughes conducted an inquiry at my request into the sale of the Fantasy Gardens property. He wrote a report dated April 2, 1991. A number of references are made to Mr. Hughes in my book.

It has been suggested to me that certain comments in my book could be taken to suggest Mr. Hughes was self-interested, biased and politically partisan. That was not my intention. The point I was trying to make was I felt the process followed at the time was unfair and flawed. I sincerely apologize if some of the comments in my book would cause a reader to think otherwise. To the extent any comments could be taken to suggest Mr. Hughes was self-interested, biased and politically partisan, I hereby retract them.

[6] There was no time limit on Mr. Vander Zalm's offer to settle.

[7] On January 24, 2012, Mr. Hughes responded with the following counter offer:

1. The defendant will apologize to the plaintiff in the terms set out in the attached draft apology (the 'Apology').

2. The defendant will pay to the plaintiff \$25,000 in general damages.
3. The defendant will consent to an order enjoining the further publication of the book *Bill Vander Zalm: For The People* and the republication or repetition of the statements concerning the plaintiff identified in the amended notice of civil claim or words to the same or similar effect.
4. The terms of the settlement will be made an order of the court and the Apology will be read aloud in open court. The action will be concluded by the entry of an order containing the terms of settlement.
5. The plaintiff may publish the Apology in newspapers as follows:
 - (a) The Apology will be published on a weekend in February 2012 in the first section of the *Victoria Times Colonist*, the first section of the *Vancouver Sun* and the first section of the *Province* and the first section of the *Globe and Mail*.
 - (b) The Apology will occupy a box of approximately 5 inches by 9 inches.
6. The defendant will pay to the plaintiff costs to be agreed or assessed at Scale B to the date of the acceptance of this offer, provided that the plaintiff's cost of publishing the Apology as set out above will be included as agreed disbursements in the plaintiff's bill of costs.

This offer will be open for acceptance until January 26, 2012, at 4:00 p.m. The plaintiff reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding.

[8] The apology which was attached to the letter reads as follows:

Apology from Bill Vander Zalm to Ted Hughes.

In November 2008, I published my autobiography *Bill Vander Zalm: For The People*. In the book, I refer to the property known as Fantasy Gardens which was sold by me and my wife in 1990. In 1991, Ted Hughes conducted an inquiry at my request into the sale of Fantasy Gardens. He wrote a report dated April 2nd, 1991. I refer to Mr. Hughes' inquiry and his report in my book.

I impugned the character and integrity of Ted Hughes in the preface to the book and subsequently portrayed him as self-interested, biased and politically partisan. My statements were unjustified. I sincerely apologize to Mr. Hughes, withdraw my offensive references to him and record that in carrying out the assignment relating to the Fantasy Gardens at my request, he conducted himself throughout in an honourable, reputable and credible manner.

I have ceased the sale and distribution of my autobiography.

Bill Vander Zalm.

[9] Mr. Hughes takes the position that the jury award he received was greater than his offer to settle and Mr. Vander Zalm ought reasonably to have accepted the offer to settle of January 24, 2012.

[10] While Mr. Hughes asserts that the jury award is greater than the offer to settle, it is unclear as to the amount that he offered to settle for. There was not only the amount of \$25,000 in general damages, but also the cost of the advertising in the four newspapers on the weekend. The fact that the offer is ambiguous was confirmed by the application on behalf of Mr. Hughes to adjourn the application for double costs so that further evidence could be adduced regarding the cost of the advertisements.

[11] As well, the apology and requirement that Mr. Vander Zalm agree to cease the sale and distribution of his autobiography altogether go beyond what the jury found. The jury found that certain of the statements in the book libelled Mr. Hughes. Mr. Hughes and Mr. Vander Zalm subsequently agreed to an injunction that Mr. Vander Zalm not distribute any copies of the book containing the statements the jury found libelled Mr. Hughes. The jury did not find that all of the statements complained about in the amended notice of civil claim libelled Mr. Hughes.

[12] In my view, given the uncertainty of the amount of the offer, the broad nature of the apology including the complete restriction on Mr. Vander Zalm in distributing the book regardless of whether he removed the statements found to be defamatory, and the very limited time that the offer was open, the offer is not one that ought reasonably to have been accepted.

[13] Accordingly, I have concluded that it is not appropriate to exercise the court's discretion to make an award of double costs from the date of Mr. Hughes' offer of January 24, 2012. Mr. Hughes is entitled to his costs at Scale B.

[14] Anything else, counsel?

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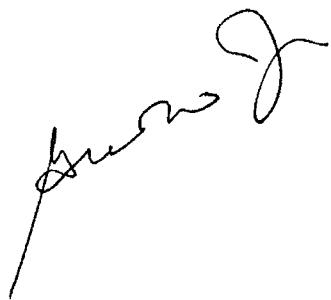
[15] MR. GOMERY: It is Gomery here. No, My Lady.

[16] MR. DELANEY: No, My Lady. Tim Delaney speaking.

[17] THE COURT: Thank you.

[18] MR. DELANEY: Thank you.

[19] MR. GOMERY: Thank you, My Lady.

A handwritten signature in black ink, appearing to read "Tim Delaney". The signature is fluid and cursive, with a long, sweeping line on the right side.