

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Malak v. Hanna*,
2023 BCSC 1337

Date: 20230802
Docket: S133981
Registry: Vancouver

Between:

**Raoul Malak, Ansan Traffic Group Ltd., Ansan Industries Ltd.
d.b.a. Ansan Traffic Control, Lanetec Traffic Control Inc.,
Western Traffic Ltd. d.b.a. Flaggirls Traffic Control, and
Island Traffic Services Ltd.**

Plaintiffs

And

**Remon Hanna, Philip Keith Jackman, Valley Traffic Systems Inc.,
John Doe, Jane Roe, Richard Roe, Chris Sloe,
and Trevor Paine**

Defendants

Before: The Honourable Justice Mayer

Reasons for Judgment

Counsel for the Plaintiffs:

R.D. McConchie
A. McConchie

The Defendant, Remon Hanna:

No appearance

Counsel for the Defendants, Valley Traffic
Systems Inc., Philip Keith Jackman and
Trevor Paine:

T.J. Delaney
J.R. Pollard
J. Chohan

Place and Date of Trial:

Vancouver, B.C.
January 9-13, 16-20, 23-27, 30-31,
February 1-3, 6-8, and
March 20-22, 2023

Place and Date of Judgment:

Vancouver, B.C.
August 2, 2023

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INTRODUCTION

[1] This case concerns a campaign of defamation carried out by one of the largest traffic control services companies in British Columbia against its main competitor.

[2] Throughout most of 2012 and early 2013 the plaintiff companies (the “Ansan Group”) and the defendant Valley Traffic Systems Inc. (“VTS”), were competitors in a request for proposals involving a lucrative multi-year contract to provide traffic control services to BC Hydro (the “RFP”).

[3] The Ansan Group was controlled by the plaintiff Raoul Malak. VTS was owned by the defendant Philip Jackman, who was also the company president and the defendant Trevor Paine was vice-president. The defendant Remon Hanna, who had previously worked for the Ansan Group and left on bad terms, worked with VTS in preparing a response to the RFP and later in its traffic control services business.

[4] In June 2012, Ansan Group staff discovered a series of defamatory publications made about Mr. Malak and the Ansan Group. Steps were taken to shut down the campaign of defamation, but additional defamatory publications were made through until December 2012. It was eventually determined that the author of the publications was Mr. Hanna.

[5] The defamatory publications were posted to various internet sites, on Telus’ ethics complaint line (the “Telus Ethics Line”) and set out in correspondence sent to then Premier Christy Clark and Rich Coleman, the minister responsible for BC Hydro. The publications targeted Mr. Malak, suggesting that he engaged in money laundering, received kickbacks, and was involved in bribery and other criminal activity. The publications also impugned the Ansan Group and third parties.

[6] In February 2013, BC Hydro awarded the BC Hydro contract to VTS. In May 2013, Mr. Malak and the Ansan Group commenced a defamation action, alleging that Mr. Jackman, Mr. Paine and Mr. Hanna were responsible for the defamatory publications. The plaintiffs claimed that the publications had damaged their

reputations and resulted in one or more of the Ansan Group's companies not obtaining the BC Hydro contract.

PROCEDURAL HISTORY

[7] This is the second trial of this matter. In the first trial (indexed as *Malak v. Hanna*, 2017 BCSC 1739 [*Malak BCSC*]), which dealt with liability only, the trial judge found that the defendants had engaged in “a common design of ‘destroying, diminishing, or undermining’ the reputation of Mr. Malak and the Ansan Group” through the publication of various defamatory materials to third parties: at paras. 296-303. He found VTS to be directly and vicariously liable for defaming the plaintiffs: *Malak BCSC* at paras. 337–338. He also found that the defendants engaged in this conduct with the intent of achieving an unfair competitive advantage over the Ansan Group: *Malak BCSC* at para. 269. The defendants appealed.

[8] The defendants did not appeal the findings of the trial judge that Mr. Hanna was the author defamatory publications, including an article posted on the internet targeting Mr. Malak and the Ansan Group (the “Uncovered Article”), a poem posted on the internet about Mr. Malak (the “Poem”), the complaint posted on the Telus Ethics Line and an email sent to the offices of Premier Clark and Minister Coleman (collectively, the “defamatory publications”). In addition, the defendants did not appeal the finding that Mr. Malak had been defamed by the defamatory publications.

[9] In reasons released April 1, 2019 (indexed as *Malak v. Hanna*, 2019 BCCA 106 [*Malak BCCA*]), Justice Frankel set out the conclusions of the Court of Appeal, which included the issues to be dealt with at a new trial (underlined below), as follows:

- [126] For the reasons set out above, I have concluded that:
- (a) Mr. Hanna is liable for the publication of the defamatory material listed in para. 261 of the trial judge's reasons under the headings “Websites”, “Blogs”, “YouTube”, “Telus Ethics Line”, and “Premier C. Clark/Minister R. Coleman Email”;
 - (b) the findings of liability against Messrs. Jackman and Paine on the basis they participated in a common design with Mr. Hanna to vilify Mr. Malak and the Ansan Group must be set aside and that issue remitted for a new trial;

- (c) the finding of liability against Mr. Hanna for publishing the poem by means of the email he sent to Messrs. Jackman and Paine on August 6, 2012, must be set aside and that issue remitted for a new trial;
- (d) the finding of liability against VTS must be set aside and that issue remitted for a new trial;
- (e) Messrs. Hanna and Jackman are liable for the publication of the poem that occurred by means of the email Mr. Jackman sent to Ms. Kanester on August 7, 2012;
- (f) Mr. Hanna is liable for the publication of the article that occurred by reason of the hyperlinks Mr. Jackman sent to Ms. Shannon on June 18, 2012, Messrs. Litster and Smith on June 21, 2012, and Mr. Storie on June 21, 2012; and
- (g) Mr. Hanna is liable for the publication of the poem that occurred by reason of the hyperlink “Mike Flagger” sent to the City of Maple Ridge on September 19, 2012;

[10] On November 15, 2019, a case plan order was made ordering that the issues remitted back to trial by the Court of Appeal and any “remaining issues” be tried at the same time. The remaining issues concern the nature and quantum of the plaintiffs’ damages.

[11] In this second trial Mr. Malak and the Ansan Group companies seek a finding that the defendants participated in a common design to defame them and seek substantial damages. In addition to general and aggravated damages they seek an order requiring VTS and Mr. Hanna to disgorge profits they earned as a result of obtaining the BC Hydro contract—which they estimate are in the range of \$6.9 million – or alternatively punitive damages. They contend that, as a result of participating in the common design, the defendants are jointly and severally liable to pay damages. Finally, Mr. Malak and the Ansan Group seek a permanent injunction preventing Mr. Hanna from defaming them in the future.

SUMMARY OF ISSUES

[12] The issues to be addressed in this judgement, being the issues remitted by the Court of Appeal and the remaining issues on damages, are:

- a) Did Mr. Jackman, Mr. Paine and Mr. Hanna participate in a common design to defame the plaintiffs?

- b) If the answer to the first question is yes, is VTS vicariously liable for the actions of Mr. Jackman and Mr. Paine?
- c) What are the nature and quantum of damages to be awarded to Mr. Malak and the Ansan Group companies?

[13] I will also address the issues of whether Mr. Hanna is liable for publishing the Poem by sending it to Mr. Jackman and Mr. Paine and whether an injunction is required in this case.

ISSUE #1 – DID Mr. Jackman, Mr. Paine AND Mr. Hanna PARTICIPATE IN A COMMON DESIGN TO DEFAME THE PLAINTIFFS?

[14] Mr. Malak and the Ansan Group seek a finding of joint liability against all defendants for defamation carried out pursuant to a common design amongst Mr. Hanna, Mr. Jackman and Mr. Paine.

[15] For the reasons that follow, I find that Mr. Jackman, Mr. Paine and Mr. Hanna participated in a common design to defame the plaintiffs.

Common Design – Applicable Legal Principles

[16] In the context of the tort of defamation, the leading authority regarding the liability of joint tortfeasors is *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, 1995 CanLII 60, where at para. 74 the Court quotes John G. Fleming, *The Law of Torts*, 8th ed (Sydney: Law Book Company, 1992) at 255:

A tort is imputed to several persons as joint tortfeasors in three instances: agency, vicarious liability, and concerted action. The first two will be considered later. The critical element of the third is that those participating in the commission of the tort must have acted in furtherance of a common design. . . . Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong, though it is probably not necessary that they should realise they are committing a tort. [Emphasis added by Cory J.]

[17] The agreement to pursue a common design implies an authority for each party to speak or act for the others in furtherance of the common design. A person who conspires with others to commit unlawful acts may be liable for the consequences of acts instigated by a single conspirator: *General Motors*

Corporation v. Transcast Precision Inc., 2009 CanLII 62078 at para. 32, 2009 CarswellOnt 6944 (S.C.J.), citing *Golden Capital Securities Limited v. Rempel*, 2004 BCCA 565 at para. 74 and *R. v. Gray* (1994), [1995] 2 Cr. App. R. 100 (Eng. C.A.).

[18] It is irrelevant if only one of the participants in a common design carries out the defamatory acts. A party does not need to specifically approve of or repeat defamatory statements to be found jointly and severally liable: *Rutman v. Rabinowitz*, 2018 ONCA 80 at paras. 36–37, leave to appeal to SCC ref'd, 38048 (9 August 2018).

[19] With respect to the plaintiffs' onus, as was stated by Justice Lowry at para 47 of *Golden Capital*: “[a] defendant must be shown to have agreed in the sense of having combined or conspired with one or more others to carry out a common design or a means of achieving a common objective, which is then implemented with resulting injury to the plaintiff.”

[20] It is often necessary to establish a common design through circumstantial evidence. This is because it is difficult, if not impossible in most instances, for plaintiffs to obtain direct evidence of a conspiracy, which are often entered into secretly: *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, 1991 CanLII 5884 at para. 12, 1991 CarswellAlta 134 (Q.B.) [*Ed Miller*]:

[21] An agreement to pursue a common design may be established by inference arising from the conduct of the parties in consideration of a number of “isolated doings” *Ed Miller* at para. 13, citing *Paradis v. The King*, [1934] S.C.R. 165 at 168, 1933 CanLII 75:

[22] Sometimes acts so obviously contribute to the alleged unlawful result that it suggests they must have arisen from an agreement to achieve that result: *Ed Miller* at para. 14, quoting Justice Fauteux in *The Queen v. Gagnon*, [1956] S.C.R. 635 at 638, 1956 CanLII 81. Furthermore, each party in the agreement adopts the others as their conspirator to carry out the agreement; as such, the general doctrine of principal and agent provides that any act done for the purpose of the agreement by

any one of them may be admissible as evidence against the principal: *Ed Miller* at para. 14 citing *Gagnon* at 365.

[23] The question is not whether there has been participation in acts, but whether there was a common design. The acts are links in a chain of collateral circumstances from which the common design may be inferred—“[t]hey are merely incidental to the object or means of effecting it; the external manifestation of the intent and purpose of each conspirator”: *R. v. Miller*, [1940] 3 D.L.R. 293 at 295, 1940 CanLII 401 (C.A.); *Ed Miller* at paras. 58, 61–62, 64–65; *R. v. Fellowes*, 19 U.C.Q.B. 48 at 57–58, 1859 CarswellOnt 370.

[24] A trier of fact may draw factual inferences from the evidence but the inferences must logically and reasonably flow from established facts: *ICBC v. Atwal*, 2012 BCCA 12 at para. 40.

[25] It is not necessary, before drawing an inference, that the requisite inference be easily drawn. What is required is that the inference is reasonably and logically drawn from established facts: *R. v. Katwaru*, 52 O.R. (3d) 321, 2001 CanLII 24112 at para. 40 (C.A.) per Justice Moldaver; *R. v. Widdifield*, 2018 BCCA 62 at para. 35, leave to appeal to SCC ref'd, 37417 (13 April 2017).

Summary of The Parties' Positions

[26] Mr. Malak and the Ansan Group contend that in 2012 Mr. Hanna, Mr. Jackman and Mr. Paine participated in common design to defame them, so that VTS would obtain the BC Hydro contract and other traffic services work. They submit that as a result, the defendants should be found jointly and severally liable.

[27] Mr. Jackman and Mr. Paine contend that they did not conspire with Mr. Hanna to defame the plaintiffs. They admit that they worked with Mr. Hanna to obtain the BC Hydro contract and other work, and had a common interest in obtaining this work, but deny that they had agreement with him to engage in a campaign to vilify the plaintiffs. They say that Mr. Hanna was acting on his own when he carried out the campaign of defamation.

[28] There is no direct evidence that Mr. Jackman, Mr. Paine and Mr. Hanna agreed to participate in a common design to defame Mr. Malak and the Ansan Group. Mr. Malak and the Ansan Group ask this Court to infer, in consideration of all of the evidence that Mr. Paine, Mr. Jackman and Mr. Hanna did so. They contend when considered together, a number of circumstances allow this Court to draw this inference.

[29] The circumstances raised by Mr. Malak and the Ansan Group include, in summary, the following: there is no innocent explanation why VTS began working with Mr. Hanna as a “strategic partner” in January 2012; Mr. Jackman and Mr. Paine knew that Mr. Hanna had, in the plaintiffs’ submission, a visceral hatred for Mr. Malak; Mr. Jackman, Mr. Paine and Mr. Hanna worked as a team from January 2012 until the BC Hydro contract was awarded to VTS in February 2013; Mr. Jackman sought to downplay his role and his interest in obtaining the BC Hydro contract; the timing of the publication of various defamatory publications by Mr. Hanna and forwarding of hyperlinks to defamatory websites by Mr. Jackman; and the large sums paid to Mr. Hanna by VTS after the BC Hydro contract was awarded were grossly disproportionate to the value of his contribution to VTS’s work on this contract.

[30] Mr. Malak and the Ansan Group contend that the evidence of Mr. Jackman and Mr. Paine regarding the reason they began working with Mr. Hanna, their knowledge of his role in disseminating defamatory publications, the reason Mr. Jackman forwarded links to defamatory publications and their explanation for paying Mr. Hanna large sums of money, is not credible.

Summary of Evidence Relevant to Common Design

[31] Mr. Hannah did not appear at this trial despite being notified of the requirement that he attend for cross-examination. As a result, in respect of Mr. Hanna’s evidence, the plaintiffs rely on the findings of fact determined at the first trial and not disturbed on appeal and Mr. Hanna’s discovery evidence.

[32] Justice Frankel set out the relevant background in *Malak BCCA* at paras. 3-54. Rather than repeating this background I have reproduced it verbatim in Appendix A to these reasons. I set out additional relevant evidence below, which includes some of the evidence set out in the Court of Appeal decision for ease of reading.

Mr. Hanna's Background, Experience and Commencement of Work with VTS

[33] At his examination for discovery Mr. Hanna testified that he did not have any degrees or diplomas from any institution. In 2010 Mr. Hanna started working in the traffic control industry with Mr. Malak. Prior to 2010 he had no experience in the industry.

[34] In December 2010, Mr. Hanna's relationship with Mr. Malak deteriorated and they ceased working together. At that time his company, Advanced Traffic, did not have any equipment, employees or assets. Mr. Hanna tried unsuccessfully to obtain financing in order to acquire assets to carry on a traffic control business, but did not work in any capacity until he started working on the RFP with VTS in or about January 2012.

[35] Mr. Hanna first met with Mr. Jackman and Mr. Paine at VTS's offices in Langley, British Columbia. At the meeting they discussed business opportunities and approximately one week later decided to jointly pursue the BC Hydro contract and traffic control work from Telus. He dealt with VTS in his personal capacity and his company, Advanced Traffic, was not involved in any way in pursuit of the BC Hydro contract.

[36] Mr. Hanna started using office space at VTS's offices in Langley in August or September 2012, to allow him to work with Mr. Paine in putting together a response to the RFP. He initially shared an office with Mr. Jackman and was provided with his own office in February or March 2013 after VTS moved offices. In late 2012 he was provided with business cards describing his title with VTS as "senior contracts

manager". Mr. Jackman arranged to have the business cards prepared and VTS paid for them.

[37] Although Mr. Hanna was working with VTS and Island Traffic to obtain the BC Hydro contract in early 2012, he did not start getting paid until approximately January 2013, when he says VTS obtained a preliminary contract from BC Hydro. After the BC Hydro contract was secured by VTS he was personally paid a percentage of the amount paid by VTS to subcontractors hired to perform traffic control services for BC Hydro. He testified that this was an oral agreement and was, in place by May 2012.

[38] Both Mr. Jackman and Mr. Paine provided evidence at their examinations for discovery and at trial regarding their first interactions with Mr. Hanna in early 2012.

[39] Mr. Hanna reached out to Mr. Jackman by telephone in late December 2011 or January 2012, and later followed up with Mr. Paine. Mr. Jackman testified that he was initially suspicious why Mr. Hanna had reached out to him, given that he had previously worked for Mr. Malak, but Mr. Paine encouraged him to meet with Mr. Hanna. A meeting occurred in January 2012 at VTS's old offices in Langley. At this time Mr. Jackman knew Mr. Malak, who had tried to purchase VTS in 2010. He also knew that the Ansan Group were doing most of the BC Hydro traffic control work in the Lower Mainland and Vancouver Island, were doing the Telus work throughout British Columbia and were doing traffic control work for the City of Langley, where VTS was based, that had previously been done by VTS.

[40] Mr. Jackman testified that at the January 2012 meeting, he, Mr. Paine and Mr. Hanna discussed working on a joint response to the RFP. He testified that Mr. Hanna said he could assist in finding subcontractors to perform BC Hydro work in other parts of the province, including in northern British Columbia. He testified that Mr. Hanna had essentially proposed a partnership with VTS.

[41] Mr. Jackman did not recall seeing a CV from Mr. Hanna and did not know if Mr. Paine asked Mr. Hanna to provide a history of his work experience. He could not

recall any details regarding Mr. Hanna's work experience with the Ansan Group and knew that Mr. Hanna did not have any employees or equipment. His explanation for not asking for this type of information was that he was dealing with a number of personal issues, including family illness. He testified that he left it to Mr. Paine to decide if he wished to deal with Mr. Hanna.

[42] Mr. Paine testified that he did not know anything about Mr. Hanna before the January 2012 meeting. He said that they discussed the possibility of jointly pursuing traffic control services contracts with utility companies, including BC Hydro and Telus. He did not know if Mr. Hanna's company, Advanced Traffic, had any employees. He said that Mr. Hanna suggested he could line up subcontractors to provide traffic control services outside of the lower mainland, including northern British Columbia and Vancouver Island. He confirmed that Mr. Hanna did not provide any references and was not asked by him or Mr. Jackman to provide a CV or written history of his work experience.

[43] The January 2012 meeting resulted in the preparation and execution of a confidentiality and non-solicitation agreement, in the form of a five-page letter dated January 17, 2012. This agreement was signed by Mr. Hanna on behalf of Advanced Traffic and Mr. Paine on behalf of VTS. It is noteworthy that this is the only written agreement entered into between VTS and Mr. Hanna—despite the fact that they allege that they later agreed to share profits earned from work performed under the BC Hydro contract. I will address this topic later in my reasons.

[44] During his cross-examination at trial Mr. Paine agreed that Mr. Jackman had experience in preparing responses to requests for proposals. He also agreed that when he and Mr. Jackman met with Mr. Hanna in January 2012, that he knew nothing about Mr. Hanna's experience in preparing responses to requests for proposals. It is unclear what additional value Mr. Hanna added to the preparation of a response to the RFP.

[45] Mr. Paine and Mr. Jackman were aware that Mr. Hanna's relationship with Mr. Malak did not end well. Mr. Paine testified that at some point in early 2012

Mr. Hanna told him about the history of his dealings with Mr. Malak, that their relationship ended on bad terms and that they were still involved in litigation. Further, Mr. Paine confirmed that when speaking about Mr. Malak, Mr. Hanna used colourful language or nasty words and would generally demonstrate his negative feelings about Mr. Malak and the Ansan Group.

[46] Similarly, during his cross-examination Mr. Jackman testified that Mr. Hanna had mentioned a few times, including around May 2012, that he had an ongoing dispute with Mr. Malak and that it was clear that Mr. Hanna did not like Mr. Malak, however, he was not sure what went on between them. Mr. Jackman confirmed that in May 2012 he received an email from Mr. Hanna listing various law suits involving Mr. Malak, which Mr. Paine confirmed were forwarded to him by Mr. Jackman.

Work on the RFP

[47] Mr. Hanna began working closely with VTS in February 2012. This work included arranging a meeting with BC Hydro, during which Mr. Hanna expressed an interest, on behalf of VTS and Advanced Traffic, in performing BC Hydro traffic control services work. In addition, Mr. Jackman, Mr. Paine and Mr. Hanna met with Greg Smith, a principal of Island Traffic, to discuss working together on a response to the RFP. Mr. Hanna forwarded contact information for two Vancouver Island MLAs to Island Traffic for the purpose of contacting the MLAs about the impending RFP.

[48] On February 29, 2012, Mr. Hanna sent an email to the office of his MLA, Mary McNeil, which he copied to Mr. Jackman. In this email Mr. Hanna described a partnership with VTS and Advanced Traffic and requested a meeting to discuss the impending RFP. Later that same day Mr. Hanna sent an email to Mr. Jackman confirming that Minister Coleman was the minister responsible for BC Hydro and that he sat next to Mary McNeil in the provincial legislature. In reply emails sent February 29 and March 1, 2012, Mr. Jackman responded “unbelievable” and “well done”.

[49] Starting in March and into April 2012, meetings were held between Mr. Jackman, Mr. Paine, Mr. Hanna, Mr. Smith and Brian Litster, another principle of

Island Traffic, to further discuss preparation of a joint response to the impending RFP. The intention, to begin with, was that VTS would continue to perform traffic control services in the lower-mainland, Island Traffic would perform this work on Vancouver Island, partially by themselves and partially using subcontractors, and Advanced Traffic would perform this work, through subcontractors, in other parts of British Columbia. There was no formal agreement to carry out this plan.

[50] During his direct examination Mr. Jackman testified that he considered Mr. Hanna's contribution included his experience working on bigger projects, such as for Telus, and his relationship with potential subcontractors in parts of British Columbia where VTS typically did not work, including on Vancouver Island. During his cross-examination Mr. Jackman agreed that VTS (or one of its related companies) sold signs to various traffic services companies in Vancouver Island and the Okanagan. This evidence suggests that VTS already had a relationship with, or were at least aware of, potential subcontractors in those locations.

[51] In around April 2012, Mr. Malak contacted Mr. Jackman to determine whether he was interested in disposing of his traffic control businesses—both VTS and a related company Dinamac. They had previously discussed such a purchase in 2010, but for various reasons the transaction did not proceed at that time. Negotiations took place during the months of April and early May 2012, involving Mr. Malak, his CFO Ed Young, Mr. Jackman and Mr. Paine. Ultimately the parties were unable to negotiate a deal.

[52] In May 2012, BC Hydro convened a series of town hall meetings throughout British Columbia with members of the traffic control services industry. Mr. Hanna, accompanied by either Mr. Jackman or Mr. Paine, attended at town hall meetings in Nanaimo, Surrey and Kamloops. Mr. Litster and/or Mr. Smith attended at the meetings in Kamloops and Nanaimo. Mr. Jackman agreed during his cross-examination that he wanted to ensure that VTS participated in each of these meetings. Mr. Malak also attended at, or sent representatives to, each of the BC Hydro town hall meetings.

[53] The defendants' evidence was inconsistent with respect to Mr. Jackman's role in the preparation of a response to the RFP. Mr. Jackman testified that he did not work on preparing a response with Mr. Hanna, but left this to Mr. Paine. During his examination for discovery Mr. Paine testified that in the summer of 2012 Mr. Hanna was in fairly frequent communication with Mr. Jackman in relation to the RFP. Mr. Hanna testified that he shared an office with Mr. Jackman until the spring of 2013.

[54] Somewhat at odds with Mr. Jackman's and Mr. Paine's evidence that one of the reasons VTS began to work with Mr. Hanna was because of his relationships with subcontractors, Mr. Litster testified that during the summer of 2012 he was working to line up subcontractors in northern Vancouver Island in case the group was successful in the RFP. He testified that Island Traffic knew all of the subcontractors after working in the traffic control services business for years. As already stated, Mr. Jackman testified that VTS already had a relationship with a number of subcontractors as a result of the company's sign manufacturing business.

[55] On May 5, 2012, Mr. Hanna emailed Mr. Jackman a list setting out lawsuits involving Mr. Malak or the Ansan Group which Mr. Jackman emailed to Mr. Paine a few minutes after receipt and then to himself at his home email address. This email was sent right around the time that negotiations concerning a potential purchase of VTS by the Ansan Group fell apart.

Stella Hubert Complaint to Telus

[56] On June 4, 2012, Stella Hubert, an ex-VTS employee, exchanged emails with Bob Atchison, a vendor manager with Telus, expressing interest in performing traffic control work for Telus. In this exchange Mr. Atchison advised that Telus would be continuing to work with the Ansan Group and suggested that Ms. Hubert contact them if she wished to do this work. On June 11, 2012, Ms. Hubert sent a follow up email to Mr. Atchison's boss, Jordon Young, requesting that Telus initiate an RFP process for its traffic control work. In an email dated June 12, 2012, Mr. Hanna, who

it appears had been provided with a copy of Ms. Hubert's email to Mr. Young, sent a copy to Mr. Smith and Mr. Litster.

Issuance of the First Defamatory Publications

[57] In mid-June 2012, the Uncovered Article was posted on a variety of websites, with a variety of titles and domain names, including "raoulmalak" and "ansan". In addition, someone using the pseudonym "Jim Arthur" posted the Uncovered Article on several blogs. It was not disputed that Mr. Hanna circulated messages under this pseudonym.

[58] On June 18, 2012, Mr. Jackman sent emails including a link to a website on which the Uncovered Article had been posted, first to Mr. Paine and then to Kelly Shannon, an account manager at VTS. Mr. Jackman's email to Ms. Shannon stated "I was told Ansan had a new web page so I googled it and this is what came up..." (emphasis added). Mr. Jackman was extensively questioned during his examination for discovery about this comment. In my view, his discovery answers were vague and inconsistent and included, in rough sequence, the following: he was told during a phone call by "a couple flaggers", two or three, whose names he could not remember and who did not work for VTS; that "[he] had an office staff tell [him] about it, that the flaggers saw it or whatever"; he was told when he was "walking through the parking lot and somebody [said] something"; that Mr. Paine and Mr. Hanna told him about the web page; and that he may have initiated the discussion concerning the web page with Mr. Hanna or Mr. Paine, or both.

[59] In her June 18, 2012 email responding to Mr. Jackman's message Ms. Shannon queried "I wonder who posted that??" . The Court was not taken to any evidence that Mr. Jackman responded to this question.

[60] A flurry of messages containing links to, and in some cases, discussion concerning, defamatory publications were exchanged on June 21, 2012.

[61] On June 21, 2012, at 6:58 a.m., Mr. Jackman sent an email to Mr. Smith and Mr. Litster with the subject "Ansan Traffic Exposed" and attaching a link to a website

on which defamatory publications had been posted. At 8:05 a.m. Mr. Smith responded stating “I saw it yesterday ... Got to figure out someway to make sure Telus and Hydro see it ...”.

[62] At 7:17 a.m. Mr. Jackman sent an email to Bill Storie with the City of Langley with the subject “Ansan Traffic Exposed” attaching a link to a website on which defamatory publications had been posted.

[63] At 8:57 a.m. Mr. Paine sent an email to Mr. Jackman with the subject “new link” enclosing a link to a blog entitled “raoul-malak-uncovered” which contained defamatory publications. At 2:09 p.m. Mr. Jackman forwarded this email to Nicole Biernaczyk, assistant business manager for IBEW Local 258, a flagging union, and two minutes later, at 2:11 p.m., forwarded the email to Tammy Kanester, health and safety officer for VTS. In a reply email Nicole Biernaczyk noted that the blog was posted by Jim Arthur and asked if Mr. Jackman knew who this was, to which Mr. Jackman responded “no idea”.

[64] Mr. Jackman acknowledged that in the summer of 2012 he had discussions with a number of employees concerning the defamatory publications. One employee expressed curiosity about the identity of the person posting defamatory publications and both he and this employee suspected that the poster was Mr. Hanna. He testified that “Darlene in dispatch ... asked me about ... [a]nd she asked about Remon because there was – I’m trying to think of the – because Remon knew Mr. Malak and had whatever previous relationship that – you know, obviously, I thought the same thing.”

[65] On June 22, 2012, at 10:10 a.m., Mr. Paine emailed Mr. Atchison, with a copy to Mr. Jackman, inquiring whether Telus would be issuing an RFP for traffic control services. On June 26, 2012, Mr. Atchison responded, advising that Telus intended to keep working with Ansan and suggested that Mr. Paine contact them. Mr. Paine then circulated this email response to Mr. Hanna, Mr. Jackman, Mr. Litster and Mr. Smith, to which Mr. Hanna responded “Prick!”.

[66] Also, on June 22, 2012, at 2:23 p.m., Mr. Jackman sent an email to Ms. Hubert attaching a link to some of the defamatory publications. During his examination for discovery Mr. Jackman said that he knew Ms. Hubert, who he described as a traffic control person who had been in the industry for some time and had worked for VTS before leaving to set up her own traffic control services company. Mr. Jackman testified that he didn't recall why he sent the email attaching a link to defamatory publications to Ms. Hubert on that day. As noted above, Ms. Hubert had made a complaint to Telus ten days earlier, of which Mr. Hanna was aware, regarding their decision not to issue an RFP for traffic control services work.

[67] On or about June 21, 2012, with the assistance of legal counsel Veronica Rossos, Ansan commenced the process of trying to take the various defamatory websites and blogs down. Ms. Rossos testified at trial that in addition to removing defamatory information, another goal was to have Mr. Malak's name "repatriated" to him so no one could use his name on the internet.

Events from July 2012 to December 2012

[68] On June 27, 2012, Mr. Malak's employee Ed Young met with Mr. Paine to discuss, amongst other things, Mr. Malak's continuing interest in purchasing VTS's traffic control services business. Mr. Young testified that he told Mr. Paine that Mr. Hanna had "burned Ansan in the past" and that he was trying to convey a message that VTS should be careful in their dealings with him.

[69] In late July 2012, Mr. Hanna sent emails to Mr. Smith and Mr. Litster forwarding links to the Telus Ethics Line.

[70] In August 2012 a series of emails were sent attaching the Poem. This included an email sent by Mr. Hanna to Mr. Jackman and Mr. Paine on August 6, 2012, which included the Poem. In the body of his email Mr. Hanna wrote "Just came across this on a blog ... Make sure you put down your drink before reading it, you will fall down laughing." On August 7, 2012, Mr. Jackman forwarded this email to a number of VTS employees.

[71] On August 14 and 16, 2012, Mr. Jackman sent emails including a hyperlink to a website containing certain defamatory publications to VTS employees, a friend and to Kelly McCormick, the owner of a small flagging company. The emails sent to VTS employees on August 14 were all sent separately at 6:52 a.m. and included only a hyperlink with no text. Mr. Jackman's email to Mr. McCormick was sent on August 14 at 6:54 a.m. and included the hyperlink and comment "I just saw this this morning, Unreal!". During his examination for discovery Mr. Jackson could not remember why he wrote "I just saw this this morning".

[72] BC Hydro formally issued the RFP for traffic control services work on August 29, 2012, with a deadline for responses of October 5, 2012. Just over two weeks later, on September 19, 2012, at 7:45 a.m., Mr. Jackman received an email from "Mike Flagger" with the message "Here is the new private email address". Mr. Jackman testified that he did not know who Mike Flagger was at the time that he received this email. At 8:32 a.m. on September 19, 2012, Mike Flagger sent separate emails to the townships of Maple Ridge and Langley attaching a link to a defamatory website. It is not in dispute that messages sent by "Mike Flagger" were authored by Mr. Malak.

[73] On or about September 23, 2012, Mr. Smith or Mr. Litster contacted VTS and advised them that Island Traffic had been purchased by Mr. Malak and that they would no longer be working with VTS on the RFP. Both Mr. Jackman and Mr. Paine testified that after Island Traffic was purchased by Mr. Malak, VTS's plans changed. They testified that Mr. Hanna would now be responsible for managing the provision of traffic control services under the BC Hydro contract on Vancouver Island. Mr. Jackman testified that after VTS obtained the BC Hydro contract in February 2013, Mr. Hanna looked after this work on both Vancouver Island and the Sunshine Coast, including arranging for subcontractors and obtaining necessary permits for road closures.

[74] On September 27, 2012, at 9:18 a.m., a defamatory email concerning Mr. Malak and Ansan Group, which had been written by Mr. Hanna under the

pseudonym “Jim Arthur”, was sent to Premier Clark and Minister Coleman. This email was blind copied to Mr. Paine, and included the subject line “Urgent: Private and Confidential”.

[75] Mr. Paine’s evidence concerning whether he read the September 27 email was inconsistent. During his direct examination at trial Mr. Paine testified that although he did recall seeing this email during this litigation, he did not recall how it came into his possession. During his cross-examination Mr. Paine first testified that he could not say if he had read the email. After being taken to his responses to questions during his examination for discovery, he agreed that he opened the email and read it in its entirety at that time.

[76] Mr. Paine testified that he did not recall speaking to Mr. Jackman about the September 27 email—which I note included very serious allegations against VTS’s chief competitor, Ansan Group. During his cross-examination Mr. Paine denied that he was blind copied on this email by Mr. Hanna to keep him informed about continuing efforts to derail Ansan Group’s bid for the BC Hydro contract. Mr. Jackman testified that he did not recall if he received a blind copy of this email.

[77] On October 29, 2012, another defamatory email was sent by Mr. Hanna, again under the pseudonym Jim Arthur, to Premier Clark and Minister Coleman.

[78] On November 13, 2012, Mr. Hanna posted an anonymous written complaint on the Telus Ethics Line, concerning Telus’ earlier decision to extend Ansan Group’s exclusive traffic control services contract.

[79] On November 23, 2012, Mr. Jackman received formal notification from BC Hydro that VTS was selected as a lead proponent in the RFP. The other lead proponent was Lanetec Traffic Control Inc., one of the Ansan Group companies.

[80] In mid-December, Mr. Jackman, Mr. Paine and Mr. Hanna together drafted a letter to Minister Coleman requesting his support in their efforts to obtain the BC Hydro contract. This letter was sent on or about December 14, 2012.

[81] On December 20, 2012, Mr. Hanna posted a revised anonymous complaint to the Telus Ethics Line to include the following allegation:

It has come to our attention through discussions with other traffic control companies that Ansan Traffic Control's owner is allegedly involved with organized crime along with a scheme to launder money through his companies. Googling Raoul Malak or the Ansan Group will list some of these allegations. While we do not have the resources and ability to investigate this any further we feel that Telus does and should.

There are also allegations that some companies' purchasing agents are involved in kick back schemes to extend contracts without tendering them thereby depriving the market and their employer of the advantages of a competitive environment. We feel that there is some truth to these allegations and it would explain the extension that was granted after the initial contract was awarded.

On the same day, Mr. Hanna sent an email to Mr. Jackman attaching a copy of the revised complaint. The subject line to Mr. Hanna's email was "FYI". Mr. Jackman could not recall if he had read this email from Mr. Hanna and did not have any recollection of discussing its contents with anyone.

The WIPO Decision

[82] On February 11, 2013, and as a result of steps taken by the Ansan Group, the World Intellectual Property Organization ("WIPO") confirmed that a number of domain names, including those which had been used to post defamatory statements, had been transferred to the Ansan Group.

[83] On February 12, 2013, Mr. Hanna emailed Mr. Jackman and Mr. Paine, attaching a document named "Decision 2012-2249-1.docx". In his email Mr. Hanna referred to the WIPO decision and stated "Guess need new ones! Lol". Mr. Jackman testified that he did not recall receiving this email from Mr. Hanna, but agreed that he did receive it. Mr. Paine testified that he did not recall reading this email. It is noteworthy that at this time VTS was still awaiting the decision from BC Hydro on the RFP.

BC Hydro Contract

[84] On February 27, 2013, BC Hydro made its decision awarding the BC Hydro contract to VTS. It does not appear that any new defamatory publications were created after this date.

Alleged Profit-sharing Arrangement - The Yellow Sticky Note

[85] Mr. Paine testified that at some point VTS agreed to a profit-sharing arrangement with Mr. Hanna. The profits, being the difference between amounts paid to subcontractors who performed some of the work for VTS under the BC Hydro contract and the amount charged by VTS to BC Hydro for this work, would be divided 25% to VTS and 75% to Mr. Hanna (the “Profit-sharing Arrangement”).

[86] Mr. Paine testified that under the Profit-sharing Arrangement, which was not reduced to writing, Mr. Hanna’s role in servicing the BC Hydro contract included coordinating with BC Hydro, reviewing subcontractor invoices and time sheets for completeness and accuracy and, basically, doing dispatching work at a high level. He testified that he did not have the Profit-sharing Arrangement set out in a written agreement because he was too busy.

[87] Mr. Paine testified that he made notes regarding the Profit-sharing Arrangement on a yellow sticky note, which he has not been able to find. Mr. Paine speculated that the yellow sticky note may have remained on files which were given to Mr. Hanna. Mr. Jackman testified that he knew something was written down but does not recall anything else and has never seen the yellow sticky note. As set out above, Mr. Hanna’s evidence was that the Profit-sharing Arrangement was agreed to orally.

[88] It is unclear when the alleged Profit-sharing Arrangement was made and who at VTS negotiated it. During his examination for discovery Mr. Paine testified that he was present when Mr. Jackman and Mr. Hanna discussed what compensation Mr. Hanna would receive for his involvement in preparing a response to the RFP. This suggests that the discussion took place prior to the award of the BC Hydro

contract in February 2013. However, Mr. Paine also testified at discovery that the Profit-sharing Arrangement was not finalized until after the contract was awarded.

[89] Somewhat different than Mr. Paine's evidence, Mr. Jackman's testimony suggested that Mr. Paine negotiated the Profit-sharing Arrangement with Mr. Hanna.

[90] During cross-examination at trial Mr. Paine testified that discussions regarding a Profit-sharing Arrangement started after mid-September 2012, but there had been earlier oral assurances that if everything worked out well, there would be money in it for Mr. Hanna. This conflicts with Mr. Hanna's evidence that the profit-sharing Arrangement was agreed to by May 2012.

Payments to Mr. Hanna by VTS

[91] Mr. Hanna was paid approximately \$2.4 million by VTS between January 2013 and 2018 when he ceased working with VTS. That is, approximately \$500,000 per year.

[92] Mr. Malak and the Ansan Group contend that the compensation paid to Mr. Hanna under the Profit-sharing Arrangement is completely disproportionate to the value of work said to have been performed by Mr. Hanna. They submit, as a result, that this Court should infer that the payments to Mr. Hanna were in furtherance of the defendants' common design to defame the plaintiffs.

[93] Mr. Paine and Mr. Jackson provided limited testimony regarding the work actually performed by Mr. Hanna for VTS, both before and after the BC Hydro contract was awarded. As set out earlier, Mr. Paine testified that one of Mr. Hanna's functions was supposed to include reviewing bills submitted by subcontractors hired by VTS to perform work under the BC Hydro contract in locations including Vancouver Island and outside of the lower mainland. Mr. Paine agreed that no invoices were sent by subcontractors to Mr. Hanna's company, Advanced Traffic, but rather invoices were sent to VTS's staff who inputted requests for payment to BC Hydro under BC Hydro's Ariba billing system.

[94] Although Mr. Jackman testified that Mr. Hanna was supposed to look after subcontractors, set up meetings, obtain necessary approvals for things such as lane closures, deal with safety issues and be hands-on with dispatching, there was no evidence called at trial establishing the extent of this work actually carried out by Mr. Hanna.

[95] At approximately \$500,000 per year, Mr. Hanna earned substantially more than the annual salary paid to VTS's staff and senior management. During his cross-examination Mr. Jackman testified that Mr. Paine, VTS's senior employee, earned between \$76,000 and \$85,000 per year between 2012 and 2018. VTS dispatchers earned approximately \$48,000 per year and some accounting staff working under Mr. Paine earned between \$40,000 and \$55,000 per year.

[96] VTS continued to pay Mr. Hanna after the decision from the first trial was released in September 2017, in which Mr. Hanna was found to be the author of the defamatory publications and Mr. Jackman, Mr. Paine and VTS were found jointly liable for defamation. VTS paid Mr. Hanna approximately \$1.5 million in early 2018. The plaintiffs contend that this suggests that they were complicit in Mr. Hanna's campaign of defamation.

[97] During his cross-examination Mr. Jackman testified that he sat down with Mr. Hanna after the decision from the first trial was released. He said that he expressed his dissatisfaction about the defamation campaign, but cannot recall the details of their discussion, including whether he made any comments about the attacks on BC Hydro and Telus procurement staff included in some of the defamatory publications. He testified that he told Mr. Hanna that he found his conduct appalling.

[98] In addition, Mr. Jackman testified that at some point after September 2017, VTS was called into BC Hydro's offices and that BC Hydro was "disgusted and wanted to end the contract as soon as possible"—however the contract continued to run until July 31, 2018, as a result of one or more extensions by BC Hydro.

[99] Mr. Jackman testified that at some point, likely shortly after the trial judgement was issued in September 2017, he realized it was necessary to end VTS's relationship with Mr. Hanna. He testified that he did not realize that after this time, Mr. Hanna issued invoices and was paid by VTS in respect of profit-sharing amounts on subcontracting charges going back to 2016. His evidence was that he trusted Mr. Paine and when Mr. Paine asked him to sign cheques for Mr. Hanna he simply did so.

[100] Mr. Jackman denied that VTS continued paying Mr. Hanna, after VTS had been notified that BC Hydro was effectively firing the company, because he and Mr. Paine had authorized Mr. Hanna to carry out a campaign of defamation against Mr. Malak and his companies. His evidence was that VTS paid Mr. Hanna the additional \$1.5 million, because it was owed to him.

Analysis on Common Design

[101] The onus is of course on Mr. Malak and the Ansan Group to prove a common design. This requires them to prove on a balance of probabilities that Mr. Hanna, Mr. Jackman and Mr. Paine agreed, in the sense of having combined or conspired with one another, to the common design of defaming the plaintiffs. Further they must prove that these defendants knew, or should have known, that the implementation of the common design would result in injury. It is not necessary that they prove that Mr. Jackman and Mr. Paine were directly involved in the preparation and dissemination of the defamatory publications.

[102] Given the defendants' denials and a lack of direct evidence, to find the defendants liable the Court will have to infer, based on circumstantial evidence, that Mr. Jackman, Mr. Paine and Mr. Hanna acted pursuant to a common design to defame the plaintiffs. The credibility of Mr. Jackman and Mr. Paine—with respect to why they commenced working with Mr. Hanna to obtain the BC Hydro contract, whether they were aware of his defamatory publications and when, and why they paid him \$2.4 million—is a central issue in this case.

Law on Assessment of Credibility

[103] Evaluating the accuracy of a witness' evidence involves consideration of factors including the witness' ability and opportunity to observe events, the firmness of their memory, their objectivity, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his pre-trial evidence by the time of trial or their testimony at trial during direct and cross-examination, whether the witness' testimony seems implausible, and the demeanor of a witness generally: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013). Credibility will be in doubt when a witness' explanation defies business logic or common sense: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at para. 92, citing *Wang v. Wang*, 2017 BCSC 2395 at paras. 45–46, 89–90.

[104] For the reasons set out below, I find that some of the testimony of Mr. Jackman and Mr. Paine is not credible. In some cases, their discovery testimony was not consistent with their testimony at trial. In some cases, their testimony defies business logic or common sense.

Mr. Jackman and Mr. Paine's Relationship with Mr. Hanna

[105] As I have stated above, Mr. Jackman's evidence is that when Mr. Hanna first contacted him in December 2011, he was suspicious of the reason for his call. Despite this, Mr. Jackman and Mr. Paine met with Mr. Hanna in January 2012 and very quickly decided that they would work with him. Mr. Jackman and Mr. Paine say, in summary, that this was because Mr. Hanna brought skills that they thought might be useful in working on a response to the RFP.

[106] The RFP concerned the largest traffic control services contract ever put out for bid in British Columbia. Common sense suggests that Mr. Jackman and Mr. Paine would have tried to build a qualified team to prepare a response. Instead Mr. Jackman and Mr. Paine decided to work with Mr. Hanna as a "strategic advisor"

when, in my view, the evidence suggests that he had limited experience and training for this role.

[107] I find it noteworthy that Mr. Jackman and Mr. Paine did not make any inquiries into Mr. Hanna's experience or qualifications, including asking him about his experience preparing responses to requests for proposals. Mr. Jackman had experience in preparing responses to requests for proposals. In addition, VTS had existing relationships with flagging companies outside of the lower mainland as a result of their business selling signs and other equipment to flagging companies. Mr. Hanna did not bring any capital, equipment or employees. This evidence suggests that Mr. Hanna did not bring skills or resources that did not already exist "in-house" with VTS.

[108] The Ansan Group companies were VTS's main competitors for traffic control services work in the lower mainland. Mr. Jackman and Mr. Paine knew that Ansan had obtained traffic control services work in Maple Ridge and Langley, right in VTS's back-yard, was doing all of the traffic control services work for Telus and most of this work for BC Hydro. In addition, both Mr. Jackman and Mr. Paine knew, by early 2012, that Mr. Hanna had an axe to grind with Mr. Malak.

[109] On its own, the decision of Mr. Jackman and Mr. Paine to start working with Mr. Hanna in January 2012, despite a dearth of qualifications or resources, is merely suspicious. This particular "isolated doing" must be considered in light of the other circumstances.

[110] The evidence establishes that starting in February 2012 and continuing through until the BC Hydro contract was awarded to VTS, Mr. Jackman, Mr. Paine and Mr. Hanna worked together on preparing a response to the RFP. At trial and during his examinations for discovery, Mr. Jackman sought to distance himself from being an active participant in this work or from working closely with Mr. Hanna. The evidence outlined above suggests the opposite. In particular, Mr. Jackman was involved in key meetings with Mr. Paine and Mr. Hanna with BC Hydro and Island

Traffic, and was involved with Mr. Hanna in the preparation of letters to public officials. He shared an office with Mr. Hanna until VTS moved locations in May 2013.

[111] A possible inference is that Mr. Jackman sought to minimize his interactions with Mr. Hanna to distance himself from Mr. Hanna's campaign of defamation.

[112] I find Mr. Jackman's evidence that he left the decision whether to work with Mr. Hanna to Mr. Paine to be contrary to business logic, despite Mr. Jackman's evidence that he did so because he was preoccupied dealing with family issues. Again, the RFP was in respect of the largest traffic control services contract ever put out for bid. I find it illogical that Mr. Jackman, as owner and president of VTS, would have turned over responsibility for deciding whether to bring Mr. Hanna in as a strategic partner on this important initiative solely to Mr. Paine.

[113] I find Mr. Jackman's evidence that he was not sure what had happened between Mr. Hanna and Mr. Malak when they ended their business relationship not to be credible. In my view what is more likely is that when Mr. Jackman was first contacted by Mr. Hanna, an ex-employee of VTS's largest competitor, Mr. Jackman would have wanted to find out everything he could about why Mr. Hanna had left Ansan Group.

The Timing of Commencement of the Defamation Campaign

[114] The commencement of the defamation campaign, in mid-June 2012, followed closely behind two significant events. First, in May 2012 the second attempt by Ansan Group to purchase VTS's traffic control business fell through. It is noteworthy that Mr. Hanna sent Mr. Jackman a list of lawsuits involving Mr. Malak within a few days of this event occurring.

[115] Second, in early June 2012, Ms. Hubert unsuccessfully complained to Telus regarding their failure to issue a request for proposals for its traffic control services work. By this time VTS was aware that BC Hydro intended to issue the RFP. Mr. Hanna's awareness of Ms. Hubert's complaint is established by evidence that after Mr. Atchison wrote Ms. Hubert advising her that Telus did not intend to issue a

request for proposals, Mr. Hanna received a copy of this correspondence, which he immediately forwarded to Mr. Smith and Mr. Litster. Mr. Jackman's ongoing relationship with Ms. Hubert, who was an ex-VTS employee, is established by the fact that he forwarded a link to a defamatory website to her later in June 2012. One possibility is that Mr. Jackman (or perhaps Mr. Paine) introduced Mr. Hanna to Ms. Hubert and were aware of the preparation of her complaint to Telus.

Whether it is likely Mr. Jackman and Mr. Paine did not know that the defamatory publications were made by Mr. Hanna

[116] I find that Mr. Jackman's evidence regarding who first told him about the issuance of the Uncovered Article on or about June 18, 2012, not to be credible. As set out above, Mr. Jackman's evidence at discovery on this point was vague and inconsistent. Mr. Jackman does not appear to have responded to the inquiry from Ms. Shannon regarding who might have posted the first defamatory publication. By this time, Mr. Jackman knew that Mr. Hanna did not like Mr. Malak.

[117] I conclude that Mr. Jackman was purposefully not being forthright about the source of information concerning the Uncovered Article, because he knew the source was actually Mr. Hanna, and saying so would have suggested his complicity in the issuance of this "hit piece".

[118] Mr. Jackman and Mr. Paine's evidence at trial and discovery regarding when they realized that Mr. Hanna was the author of the defamatory publications was inconsistent. Both Mr. Jackman and Mr. Paine testified that they did not realize until the first trial in 2016 that Mr. Hanna was the author. Mr. Jackman also testified that by mid-June 2012, he suspected that the defamatory publications were published by Mr. Hanna. He also testified that in 2012 he asked Mr. Hanna whether he was the author and Mr. Hanna denied it.

[119] The June 2012 Uncovered Article included specific details regarding Mr. Malak's past and his flagging business, including Ansan Group's clients. These details suggest that the author was someone who knew Mr. Malak and his businesses well—a logical conclusion being that Mr. Hanna was the writer.

Mr. Jackman and Mr. Paine knew that Mr. Hanna did not like Mr. Malak. There was no evidence at trial that any other person, who may have had a motive to defame Mr. Malak and the Ansan Group, knew as much about Mr. Malak's personal background and business dealings as Mr. Hanna. If, as they testified, Mr. Jackman and Mr. Paine suspected but did not know for certain that Mr. Hanna was the author of the defamatory publications circulated in June 2012, surely the publication of additional defamatory publications later in the summer, fall and winter of 2012 would have made his authorship clear.

[120] I note, in particular, the September 27, 2012 email to Premier Clark and Minister Coleman, which had been blind copied to Mr. Paine. As I have already stated, Mr. Paine's evidence as to whether he read this email was inconsistent—which impacts his credibility. Ultimately at trial, Mr. Paine conceded that he had read the email, but did not recall speaking to Mr. Jackman about it. If Mr. Paine was not involved in the campaign of defamation, common sense and business logic would suggest that he would have discussed this inflammatory email with Mr. Jackman and with Mr. Hanna. There is no evidence that this happened.

[121] I find Mr. Jackman and Mr. Paine's testimony that they did not know that Mr. Hanna was the author of the defamatory publications not to be credible. I find it more likely that they knew that Mr. Hanna was the author and did not take steps to stop the publication of these materials, because the dissemination was part of the defendants' common design to defame the plaintiffs.

[122] The defendants ask this Court to consider Mr. Hanna's email to Mr. Jackman sent August 6, 2012, in which he sent the Poem stating "just came across this on a blog ...". The defendants query why Mr. Hanna would use these words in an email to Mr. Jackman, if Mr. Jackman was a participant in the campaign of defamation. In my view, one explanation for why Mr. Hanna used these words in his email to Mr. Jackman is that he did not want to create a paper trail implicating the defendants. I note that Mr. Jackman used similar language in emails he sent in June and August 2012 such as "I was told Ansan had a new web page", "I just saw this

this morning” and “[j]ust came across this in a blog”. As will be addressed further below, a possible inference is that Mr. Jackman used this language to create the impression that he did not have a role in the creation of the defamatory publications.

[123] In addition, as was noted by the Court of Appeal in its reasons, Mr. Jackman deleted information from the one series of emails he forwarded that would have identified Mr. Hanna as the sender of the original email enclosing this defamatory publication: *Malak BCCA* at para. 32. A possible inference is that Mr. Jackman purposefully removed Mr. Hanna’s name from the emails he forwarded to maintain a degree of separation between him and the creation of the defamatory publications.

Mr. Jackman’s Emails Attaching Links to Defamatory Websites

[124] The defendants submit that Mr. Jackman did not take the defamatory publications which he sent to third parties seriously, but rather treated them as gossip or a joke. The defamatory publications linked to in the emails sent by Mr. Jackman included serious and specific allegations of impropriety by Mr. Malak and the Ansan Group. I consider it unlikely that a reasonable business person in a position such as Mr. Jackman’s, would have so broadly circulated links to such material as a form of gossip or joke.

[125] The defendants also submit that Mr. Jackman did not direct employees who had received his emails to circulate them to customers and did not emphasize the seriousness of the allegations contained within the defamatory publications he forwarded to third parties. The defendants contend that this does not suggest that Mr. Jackman was participating in a campaign of defamation against Mr. Malak and the Ansan Group. In my view, if Mr. Jackman was seeking to mask his role in purposefully distributing defamatory publications, he may well have avoided openly suggesting that his staff forward his emails to customers and avoided making specific allegations of defamation.

[126] I find that Mr. Jackman’s issuance of a number of separate emails containing links to defamatory websites on June 21, 2012, to VTS staff, the City of Langley, and a union official, to be more consistent with a purposeful dissemination of links to

defamatory websites, rather than simply unprofessional gossip. Sending these emails to such a broad group is not consistent with an innocent and ill-conceived exercise in gossip or joke-telling amongst close friends or associates. Mr. Jackman, as president and owner of VTS, likely hoped that the links included with his emails would be opened and read by the recipients, and a logical inference is that he hoped that the defamatory content of the imbedded links would be disseminated further.

[127] I find the timing of Mr. Jackman's June 22, 2012 email to Ms. Hubert enclosing a link to a defamatory website to be telling. This email was sent within ten days of Ms. Hubert's email to Telus regarding their failure to issue an RFP for traffic control services and within a few hours of Mr. Paine being notified by Mr. Atchison that if VTS wanted to perform flagging services for Telus, they should contact Ansan.

[128] Similar to my findings concerning the June 21, 2012 emails of Mr. Jackman, I also find that his issuance of a number of separate emails on August 14 and 16, 2012, to VTS staff and a flagging contractor Kelly McCormick, this time enclosing the Poem, to be telling. This series of emails is also more consistent with a purposeful dissemination of defamatory publications rather than simply unprofessional gossip.

[129] At trial Mr. Jackman suggested that he had innocently discovered a website containing the Poem when searching the internet. In my view, Mr. Jackman did not provide a satisfactory explanation at trial concerning why he used the words "I just saw this this morning" in his email to Kelly McCormick, which was sent at 6:54 a.m., two minutes after he sent emails including a link to a defamatory website to various staff members. I find it unlikely that Mr. Jackman simply found the Poem as a result of internet searches, but rather, find it more likely that Mr. Hanna provided it to him for dissemination.

The September 19, 2012 Email from Mr. Hanna to Mr. Jackman

[130] The September 19, 2012 email sent by Mr. Hanna to Mr. Jackman advising of a new private email address for Mike Flagger, a few minutes before Mr. Hanna sent defamatory publications to officials with the townships of Maple Ridge and Langley, suggests that Mr. Hanna was keeping Mr. Jackman informed of these activities. Why

else would Mr. Hanna have sent advice to Mr. Jackman about a new email address for Mike Flagger if Mr. Jackman was not aware of the impending defamatory publications under this pseudonym? I find that Mr. Jackman's testimony that he did not know who "Mike Flagger" was not to be credible.

Email to Premier Clark and Minister Coleman

[131] I find that Mr. Paine's inconsistent evidence, concerning whether he read the September 27, 2012 email sent by Mr. Hanna to the Premier and Minister Coleman under the pseudonym Jim Arthur, impacts the credibility of his testimony concerning whether he knew that the email was published by Mr. Hanna. I have set those inconsistencies out above.

[132] I find it difficult to accept Mr. Jackman's testimony that he did not recall if he received a copy of this email. The email included as a subject line "Urgent: Private and Confidential". The allegations of corruption involving Mr. Malak, the Ansan Group and procurement officers with Telus were explosive. It seems unlikely that Mr. Jackman would not have had an interest in communication to senior elected officials. He had participated in the preparation of other non-defamatory communication to such officials. As stated earlier, I also find it hard to believe that Mr. Paine would not have discussed the contents of this email with Mr. Jackman, if in fact he and Mr. Jackman had not been involved or otherwise sanctioned its creation.

[133] There is no evidence that Mr. Jackman and Mr. Paine had been copied in on the follow up email sent to Premier Clark and Minister Coleman in October 2012.

Postings to the Telus Ethics Line

[134] I find it noteworthy that Mr. Hanna emailed Mr. Jackman the text of the revised complaint he posted to the Telus Ethics Line on December 20, 2012. As was a consistent theme at trial, Mr. Jackman could not remember reviewing this email, although he agreed that he had received it. I find it unlikely that Mr. Jackman would not have remembered this message given that it contained serious allegations of

criminality against Mr. Malak and the Ansan Group and corruption by Telus purchasing agents.

Email After the WIPO Decision

[135] I find Mr. Jackman and Mr. Paine’s evidence that they did not recall reading Mr. Hanna’s email sent on February 12, 2013, in which he referenced the February 11, 2013 WIPO decision repatriating various websites to Mr. Malak, to be lacking in credibility. In February 2013, VTS was waiting for the award of the BC Hydro contract. The subject line on Mr. Hanna’s email read “Decision...” which common sense suggests would have made the message of interest. I conclude that Mr. Jackman and Mr. Paine read this email when they received it.

[136] In addition, Mr. Hanna’s message “Guess need new ones!” clearly suggests that Mr. Hanna was referring to the requirement, as a result of the WIPO decision, to obtain new websites in order to publish further defamatory publications concerning the plaintiffs. The timing of this email and the lack of response from Mr. Jackman and Mr. Paine suggests that they knew what Mr. Hanna meant when he sent this email. I find this to be the case.

The Alleged Profit-Sharing Arrangement

[137] The defendants evidence concerning the alleged Profit-sharing Arrangement is problematic in several respects.

[138] First, the evidence of Mr. Hanna and Mr. Paine, with respect to when this arrangement was made was not consistent. Mr. Hanna said at his discovery that this arrangement was negotiated by May 2012, whilst Mr. Paine’s evidence suggests that the arrangement was not finalized until late September 2012 or after February 2013.

[139] Second, Mr. Jackman and Mr. Paine’s evidence regarding who negotiated the Profit-sharing Arrangement was not consistent. Mr. Jackman’s evidence suggests that negotiation of the lucrative 75/25% Profit-sharing Arrangement in favour of Mr. Hanna was handled by Mr. Paine. Mr. Paine indicated that discussions

concerning what compensation Mr. Hanna would receive if VTS obtained the BC Hydro contract took place in front of Mr. Jackman.

[140] Third, the fact that the lucrative Profit-sharing Arrangement was not put in writing does not accord with business logic. Mr. Paine's evidence was that he was too busy to put the agreement in writing. This is difficult to believe given the significance of this arrangement. In addition, this is not consistent with how VTS initially dealt with Mr. Hanna in January 2012 when they required him to sign a detailed non-disclosure agreement.

[141] It is possible that the alleged Profit-sharing Arrangement was a complete fabrication, meant to mask the true reason for payments made by VTS to Mr. Hanna, being compensation for carrying out a campaign of defamation to harm the business reputation of the plaintiffs, thereby benefitting VTS and by extension, Mr. Jackman, Mr. Paine and Mr. Hanna.

The Amounts Paid to Mr. Hanna by VTS

[142] The evidence establishing that VTS paid Mr. Hanna approximately \$2.4 million for his role in helping VTS obtain and then manage the BC Hydro contract is also problematic. This amount is far out of proportion to the compensation VTS paid to its senior staff, including Mr. Paine. In addition, the evidence at trial suggests that Mr. Hanna did not bring much to the table in the preparation of VTS's response to the RFP. For example, he did not have extensive qualifications or educational credentials. In addition, some of the necessary leg work on the RFP was carried out by others. For example, Island Traffic sought to find subcontractors on Vancouver Island until it was purchased by Ansan Group in September 2012.

[143] With respect to the amounts paid to Mr. Hanna, the defendants contend that if Mr. Malak had not "swooped in" and purchased Island Traffic in September 2012, on the eve of the deadline for submission of responses to the RFP, that Island Traffic would have done work under the BC Hydro contract on Vancouver Island—and therefore kept all the profits from this work. They suggest that the amounts VTS paid to Mr. Hanna were justified because he was required to do the work which VTS had

previously expected would be done by Island traffic on Vancouver Island. There are two problems with this submission.

[144] First, Mr. Hanna's evidence was that he had negotiated the 75/25% Profit-sharing Arrangement in May 2012, well before Island Traffic was purchased by Ansan Group. If in fact the alleged Profit-sharing Arrangement had been negotiated, under this arrangement Mr. Hanna would have expected to receive a 75% share of profits on work outside of Vancouver Island and the Lower Mainland—that is, in areas where significantly less traffic control work was available and therefore would have earned far less than \$2.4 million.

[145] Second, with respect to the argument that Mr. Hanna ended up performing work worth \$2.4 million, the evidence does not establish that this was the case. Once the BC Hydro contract was awarded, one of Mr. Hanna's key tasks in managing BC Hydro work on Vancouver Island was to be reviewing subcontractor invoices; in actuality, this task was carried out by VTS employees at their offices in Langley. Although Mr. Jackman testified that Mr. Hanna was to carry out other management functions on traffic control work on Vancouver Island there was a dearth of evidence at trial concerning what Mr. Hanna actually did.

[146] In summary, the evidence does not establish, in consideration of business logic, that the work carried out by Mr. Hanna, both before and after the BC Hydro contract was awarded to VTS, justified the payments that were made to him.

[147] I have considered the defendants' submission that it does not make sense that VTS would go through the exercise of paying Mr. Hanna pursuant to the Profit-sharing Arrangement if the parties had not agreed to this as the method of compensating Mr. Hanna for his work on the BC Hydro contract. The defendants submit that if the payments to Mr. Hanna was compensation for his role in the defamatory campaign they could simply have agreed to some lump sum payment. I do not find this argument compelling. A logical inference is that VTS was seeking to create the impression of legitimacy by paying Mr. Hanna in accordance with the alleged Profit-sharing Arrangement. A lump sum payment would have amounted to a

“smoking gun”, with respect to the parties’ agreement to advance the defamatory campaign, which Mr. Jackman and Mr. Paine likely wished to avoid.

[148] Further, Mr. Jackman did not satisfactorily explain why VTS continued to pay Mr. Hanna approximately \$1.5 million after the first trial decision in this matter was issued—in which Mr. Hanna was found to be directly responsible for the creation and dissemination of the defamatory publications. Mr. Jackman testified that he met with Mr. Hanna after the first trial judgment was released in September 2017 and told him that his conduct was appalling. In addition, Mr. Jackman testified that BC Hydro was disgusted by the defamation campaign.

[149] Despite these events, Mr. Jackman continued to sign the cheques payable to Mr. Hanna put before him by Mr. Paine. Mr. Jackman and Mr. Paine say that the payments were made, for services apparently provided up to three years before, because they were owed to Mr. Hanna pursuant to the Profit-sharing Arrangement—which I note is allegedly an oral agreement, of unclear terms, for which no supporting documents exist.

[150] I find it more likely than not that VTS continued to pay Mr. Hanna approximately \$1.5 million after the first trial decision to ensure that he did not seek to implicate Mr. Jackman and Mr. Paine in the appeal.

Conclusion on Common Design

[151] I find that the evidence of Mr. Jackman and Mr. Paine on matters, including the reason why they first became involved with Mr. Hanna, the negotiation of the alleged Profit-sharing Arrangement, and their awareness of the campaign of defamation carried out by Mr. Hanna, to be lacking in credibility. That is, I do not find their evidence that Mr. Hanna was brought in solely as a strategic partner to be believable.

[152] In consideration of all of the “isolated doings” in this case, as outlined above, I find that on a balance of probabilities, these three individuals agreed to, and did, participate in the common design of carrying out a campaign of defamation against

Mr. Malak and the Ansan Group. Further, I find it more likely than not that the emails sent by Mr. Jackman to a number of persons in June and August of 2012, forwarding either defamatory publications or links to defamatory publications, was part of the campaign of defamation.

[153] It is not necessary for me to find that Mr. Jackman and Mr. Paine were directly involved in the preparation and dissemination of defamatory publications by Mr. Hanna, including under pseudonyms.

[154] In addition, I find that Mr. Jackman, Mr. Paine and Mr. Hanna intended to harm the reputation of Mr. Malak and the Ansan Group for the purpose of putting VTS in a better position to obtain the BC Hydro contract and other traffic control services work from entities, including Telus and the townships of Langley and Maple Ridge. I also find that Mr. Jackman, Mr. Paine and Mr. Hanna knew that Mr. Malak and the Ansan Group would suffer injury as a result of their actions.

[155] As a result of this finding I do not find that Mr. Hanna is liable for sending an email to Mr. Jackman and Mr. Paine on August 6, 2012, which contained the Poem in its body. As was stated by the Court of Appeal, in the 2019 appeal of this case:

[87] If, as Mr. Malak alleged, Messrs. Hanna, Jackman, and Paine acted in concert to defame him and the poem posted by Mr. Hanna was in furtherance of their joint action, then Mr. Hanna's August 6, 2012 email cannot amount to a publication of the poem. As Justice LeBel stated in *Breeden v. Black*, 2012 SCC 19 at para. 20, [2012] 1 S.C.R. 666, "the tort of defamation occurs upon publication of a defamatory statement to a third party." *Vis-à-vis* Mr. Hanna, Messrs. Jackman and Paine would not be third parties. For example, if Mr. Hanna had provided them with a draft of another version of the defamatory article that was never posted on the Internet, Mr. Hanna could not be found to have published that article. For the same reason, even if the email Mr. Paine sent to Mr. Jackman had contained defamatory content it would not constitute publication.

[156] Pursuant to the reasons of the Court of Appeal, and given my findings above, it cannot be said that Mr. Hanna published the Poem to a third party.

ISSUE #2 - IS VTS VICARIOUSLY LIABLE FOR THE ACTIONS OF MR. JACKMAN AND MR. PAINE?

[157] The plaintiffs claim that VTS is vicariously liable for Mr. Jackman, Mr. Paine and Mr. Hanna’s actions.

[158] An extensive analysis is not required to determine that vicarious liability for Mr. Jackman and Mr. Paine’s actions as participants in the common design naturally flows to VTS. Mr. Jackman and Mr. Paine participated in the common design in their capacity as president and vice-president of VTS to eliminate the Ansan Group as a VTS competitor and thereby advance VTS’s economic interest. Given my findings, I am satisfied that finding VTS vicariously liable in these circumstances is consistent with the principles for vicarious liability set out in *Bazley v. Curry*, [1999] 2 S.C.R. 534, 1999 CanLII 692.

[159] Given my conclusion that Mr. Hanna, Mr. Jackman and Mr. Paine were involved in a common design to defame the plaintiffs and that VTS is vicariously liable for Mr. Jackman and Mr. Paine’s involvement, it is not necessary to consider whether VTS should be found vicariously liable for the actions of Mr. Hanna.

[160] I find that VTS is vicariously liable for damages resulting from the participation of Mr. Jackman and Mr. Paine in the common design. As a result, the defendants are jointly and severally liable for the plaintiffs’ damages.

ISSUE #3 - WHAT ARE THE NATURE AND QUANTUM OF DAMAGES TO BE AWARDED TO MR. MALAK AND THE ANSAN GROUP?

Overview of Damages Sought by the Plaintiffs

[161] Mr. Malak and the Ansan Group seek damages payable by the defendants, on a joint and several basis.

[162] Mr. Malak seeks general damages of \$1,000,000, aggravated damages of \$500,000 and punitive damages of \$1,000,000.

[163] Ansan Industries Ltd., Lanetec Traffic Control Inc. and Western Traffic Ltd., each seek an award of \$500,000 in general damages, unless disgorgement of profits (or a similar amount as punitive damages) are awarded.

[164] Finally, Ansan Industries Ltd., Lanetec Traffic Control Inc. and Western Traffic Ltd. collectively seek disgorgement of \$6.9 million in profits they say were earned by VTS and Mr. Hanna in providing traffic control services under the BC Hydro contract—payable by VTS and Mr. Hanna proportionate to the amount of profit they received. Alternatively, these companies seek punitive damages in an amount approaching \$6.9 million, less an amount to be determined by the Court to avoid duplication for the amount awarded to these parties for general damages—payable by all of the defendants on a joint and several basis.

[165] I find that Mr. Malak and the Ansan Group companies are entitled to both general damages and punitive damages and that Mr. Malak is entitled to aggravated damages—payable by the defendants on a joint and several basis.

Internet Defamation Law – General Comments

[166] The claims brought by Mr. Malak and the Ansan Group relate to electronic publications on or via the Internet, through posting to an online complaint platform and by email.

[167] The most broadly circulated publications were made on websites and blogs. It is arguable that defamation carried out over the Internet may be more damaging to reputation than defamation carried out by other means because of the possibility that the publications will be seen by a broader audience. This applies to the publication of the Uncovered Article and the Poem.

[168] In *Barrick Gold Corp. v. Lopehandia*, 2004 CanLII 12938, 239 D.L.R. (4th) 577 (Ont. C.A.) [*Barrick Gold*], the Ontario Court of Appeal explained that communication via the Internet is instantaneous, seamless, interactive, blunt, borderless and far-reaching and the nature of such communication may itself create

a greater risk that the defamatory remarks are believed: *Barrick Gold* at paras. 32–34.

[169] In *Crookes v. Newton*, 2011 SCC 47, the Supreme Court, referring to *Barrick Gold*, recognized the Internet's "tremendous power" to harm reputation: *Crookes* at paras. 37–38.

Damages Available to Mr. Malak and the Ansan Group

[170] Before turning to my assessment of damages, I will outline the approach that I have taken in assessing the damages of the various plaintiffs.

[171] I will assess Mr. Malak's general damages apart from those of the Ansan Group. There is no question that the basis of a general damages award in favour of Mr. Malak is different than such an award for the Ansan Group. His personal and professional reputation was damaged by the campaign of defamation and is distinct from the reputational harm caused to the Ansan Group.

[172] It is settled law in Canada that the law of defamation protects not only the reputation of an individual, but also the reputation of a corporation: see e.g., *Hiltz and Seamone Co. Ltd. v. Nova Scotia (Attorney General)*, 164 N.S.R. (2d) 161, 1997 CanLII 542 (S.C.), aff'd 1999 NSCA 22; *Walker v. CFTO Ltd.*, 37 D.L.R. (4th) 224 per Justice Robins at 233, 1987 CanLII 126 (Ont. C.A.). False and defamatory statements concerning the people who are responsible for supervising and conducting the affairs of a corporation "must inevitably affect the business reputation of the corporation, as well as that of the individuals": *Barrick Gold* at para. 47.

[173] While each of the Ansan Group companies seeks a separate award of general damages, in my view, it is not possible to assess the impact of the defamatory campaign brought against the companies on an individual basis. I note that the Court of Appeal upheld the findings of the trial judge at the first trial that the Ansan Group, as a collective, were defamed. All of the Ansan Group companies were under common management—although Ansan Industries Ltd. and Flaggirls

Traffic Control were owned or controlled by Mr. Malak and Lanetec Traffic Control Inc. was owned by Mr. Malak's partner, Ms. Chun.

[174] I find it appropriate to assess general damages for the Ansan Group companies on a global basis— that is, with one award for the Ansan Group for general damages.

[175] Counsel for the plaintiffs' submitted that while the Ansan Group companies would be content to receive a global award in their favour for disgorgement of profits, or alternatively for punitive damages, Mr. Malak seeks a separate award of punitive damages against the defendants. Mr. Malak submits that the basis of his claim for punitive damages is different than the claims for disgorgement of profits and the alternative claim for punitive damages brought by the Ansan Group, because the object of a punitive damages award in his case is to deter the type of defamatory conduct against him personally.

[176] As outlined later in these reasons, the purpose and policy considerations underpinning punitive damages do not support a separate punitive damages award for the personal and corporate plaintiffs in these circumstances. I will assess disgorgement, or, in the alternative, punitive damages, collectively among the plaintiffs.

General Damages

Law Concerning General Damages for Defamation

[177] In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 164, 1995 CanLII 59, Justice Cory stated that “general damages in defamation cases are presumed from the very publication of the false statement and are awarded at large”.

[178] The expression “at large” is explained in *Cassell & Co. Ltd. v. Broome*, [1972] 1 All E.R. 801 at 824, [1972] W.L.R. 645 (H.L.), where Lord Hailsham stated, *inter alia*, that actions for defamation

... may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground,

emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge ...

... Quite obviously, the award must include factors for injury to feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matter complained of, or the malice of the defendant.

[179] In *Leenen v. Canadian Broadcasting Corp.* (2000), 48 O.R. (3d) 656, 2000 CanLII 22380 at para. 205 (S.C.J.), Justice Cunningham listed the following factors which might be considered in assessing the appropriate level of compensation:

- (a) the seriousness of the defamatory statement;
- (b) the identity of the accuser;
- (c) the breadth of the distribution of the publication of the libel;
- (d) republication of the libel;
- (e) the failure to give the audience both sides of the picture and not presenting a balanced review;
- (f) the desire to increase one's professional reputation or to increase ratings of a particular program;
- (g) the conduct of the defendant and defendant's counsel through to the end of trial;
- (h) the absence or refusal of any retraction or apology;
- (i) the failure to establish a plea of justification.

[180] In *Brown v. Cole*, 61 B.C.L.R. (3d) 1 at para. 107, 1998 CanLII 6471 (C.A.), leave to appeal to SCC ref'd, 27046 (8 July 1999), Justice Southin explained that the objects of an award for compensatory damages include providing a remedy for insult offered and pain given, vindication of reputation, social damage and possible economic damage which may result, but which cannot be expressly proven—which is particularly important in defamation in the mass media.

[181] Harm to reputation is presumed from the mere publication of a defamatory falsehood. Such harm arises even though it is not shown that a single person familiar with the plaintiff has read the defamatory words or, if they read them, did not believe that they were true, or, if accepted as true, did not alter their regard for, or opinion of, the plaintiff. No proof of special damage or actual injury is required: Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia*,

United States, 2nd ed. (Toronto: Carswell, reissued October 2021) at §25:16–§25:17, §25:21; *WeGo Kayaking Ltd. v. Sewid*, 2007 BCSC 49 at paras. 117–118.

[182] For a corporate plaintiff, damages are to compensate for the harm to the corporation's goodwill and business reputation. It may be difficult to quantify the damages, but that does not mean that a corporate plaintiff is not entitled to general damages for defamation: *Dover Investments Limited v. Transpacific Petroleum Corp.*, 2009 BCSC 1620 at paras. 19, 22.

[183] In assessing general damages, a court may also look to the impact to the plaintiff, resulting from the impact of the defamation on others: *Vogel v. Canadian Broadcasting Corporation*, 35 B.C.L.R. 7 at 66–67, 1982 CanLII 801 (S.C.).

[184] In *Mann v. International Association of Machinists and Aerospace Workers*, 2012 BCSC 181 at paras.131–132, citing *Hill* at paras. 168, 182, Justice Masuhara stated that there is no cap placed on general damages for defamation and listed the following factors may be relevant in assessing such damages: the plaintiff's conduct, position and standing; the nature of the defamation; the mode and extent of publication; the absence or refusal of any retraction or apology; and the whole of the defendant's conduct from the time of publication to the end of trial.

[185] Although the posting of a hyperlink to defamatory publications does not render the defendant liable in defamation, where the evidence establishes that a defamatory publication has been circulated to a broader audience through the use of hyperlinks, such evidence is relevant to assessment of damages: *Pineau v. KMI Publishing and Events Ltd.*, 2022 BCCA 426, at paras. 70–71.

Assessment of General Damages

[186] In consideration of the authorities referred to above, I find that the appropriate factors in assessing Mr. Malak and the Ansan Group's general damages include the following:

- a) the nature and seriousness of the defamation;

- b) their conduct, position and standing;
- c) the mode and extent of publication;
- d) injury to pride and self-confidence;
- e) the impact of the defamation, resulting from the impact of the defamation on third-parties;
- f) the absence or refusal of any retraction or apology;
- g) the whole of the defendants' conduct from the time of publication to the end of trial; and
- h) social and possible economic damage which may result but which can not be expressly proven.

[187] I will consider each of these factors in light of the facts of this case.

The Nature and Seriousness of the Defamation

[188] In my view the defamatory publications in this case involved extremely serious accusations, both in their literal meanings and their inferential meanings.

[189] The Uncovered Article conveyed, *inter alia*, the following literal meanings: Mr. Malak is involved in corruption, bribery and money-laundering; Mr. Malak used the Ansan Group for his money laundering and other corrupt activities; Mr. Malak was involved with gangsters; Mr. Malak was involved in kick-back schemes with purchasing agents; Mr. Malak is guilty of tax evasion; Mr. Malak illegally obtains confidential bid information concerning competitors; Mr. Malak was fired for fraud and embezzlement; Mr. Malak was a pimp; and Mr. Malak obtained an internet mail order bride.

[190] The Poem conveyed, *inter alia*, the following literal meanings: Mr. Malak cheats and scams people; Mr. Malak was a pimp; Mr. Malak procured an internet

mail order bride; Mr. Malak bribes and corrupts people; Mr. Malak is a liar; and Mr. Malak uses the Ansan Group to accomplish his illegal activities.

[191] The serious impact of these allegations is not diminished by the use of cartoonish images (including those showing Mr. Malak in prison garb or handing kick-back money under a table) or publishing defamatory publications in the form of a poem.

[192] The September 27, 2012 email to Premier Clark and Minister Coleman accused Mr. Malak of the following: being a criminal who engages in illegal conduct on behalf of organized crime; collaborating with convicted cocaine trafficker and money launderer Martin Chambers; and while serving as a member of the parole board, corruptly conspiring with fraudster Brian Slobogian to obtain Mr. Slobogian's early release from imprisonment.

[193] The September 27, 2012 email conveyed the following defamatory meanings concerning Mr. Malak and the Ansan Group: that they corruptly secured several contract extensions from BC Hydro by committing the criminal offence of paying illegal kickbacks and secret bribes to a BC Hydro official who managed the procurement process for the contract; that they unlawfully and corruptly obtained from a BC Hydro official confidential commercial information contained in competing bids by other potential suppliers to BC Hydro; that they perverted the BC Hydro bid process by unethically exploiting a personal relationship with a BC Hydro official and by unethically procuring political interference which prevented the contract from being awarded to a lower bidder; that they publicly boasted about their unethical relationship with the a BC Hydro official and openly flaunted their unethical relationship with that BC Hydro official, including by parking their motor vehicles in BC Hydro staff parking at a recent town hall meeting held at BC Hydro offices in Langley for the purpose of ostentatiously demonstrating their power and influence over BC Hydro for all to see; and that they engaged in such scandalous and disreputable misconduct that they deserve to be treated as pariahs by Crown

corporations and government entities, including the Office of the Premier and the Office of the Deputy Premier.

[194] The Telus Ethics Line complaints defamed the plaintiffs by conveying, *inter alia*, that: that Mr. Malak is a criminal who engages in illegal conduct on behalf of organized crime; that Mr. Malak and the Ansan Group have each committed criminal offences related to money laundering; that Mr. Malak has committed criminal offences by paying illegal kickbacks and secret bribes to purchasing agents in order to obtain improper benefits in the form of unwarranted and/or unlawful extensions to contracts; that Mr. Malak paid illegal kickbacks to a Telus employee in order to obtain an unwarranted and/or unlawful extension of a contract with Telus; that Mr. Malak and the Ansan Group unlawfully and routinely mistreated and abused a large number of their subcontractors by maliciously refusing to pay valid claims for reimbursement of expenses and mileage; and that Mr. Malak and the Ansan Group routinely bullied, threatened, intimidated and coerced a large number of their subcontractors into acquiescing in predatory business practices.

The Plaintiffs' Conduct, Position and Standing

[195] There is no evidence, nor do the defendants contend, that the plaintiffs, nor anyone on their behalf, acted in a way that somehow justified the defendants' defamation campaign.

[196] Mr. Malak was sole director and owner of Ansan Industries and the public face of the Ansan Group. The evidence establishes that his role was integral to the operation of these companies and he was well known to customers and other actors in the traffic control services sector. His personal reputation and reputation as a business leader was essential to his success.

[197] Ansan Group's customers were cities, municipalities and utilities companies. At the relevant time it was one of the largest traffic control services providers in British Columbia, performing the bulk of the traffic control services work in a number of lower-mainland municipalities and most of the traffic control services work for both Telus and BC Hydro. Ninety percent of the Ansan Group's work was contractual

pursuant to bidding process and involved long-term commitments. As a result, losing a contract could have significant long-term consequences.

[198] I take judicial notice of the fact that public or quasi-public bodies generally wish to avoid public controversy. The Ansan Group’s customers would likely be particularly sensitive to public controversy and therefore reluctant to being associated with alleged criminals or criminal groups, and particularly to allegations of corruption and money laundering. This finding is supported by, for example, the requirement of Telus made in the fall of 2012 that Mr. Malak sign a document agreeing to adhere to Telus’ code of ethical conduct.

[199] In addition, the Ansan Group relied on its reputation to attract and retain flaggers and flagging subcontracting companies on which they needed to perform traffic control services work.

The Mode(s) and Extent of Publication

[200] The breadth and distribution of the Uncovered Article (variously titled “Ansan Traffic Group Exposed”, “Ansan Group and Raoul Malak Uncovered” or “Raoul Malak Uncovered”) was significant. The Uncovered Article was published on ten websites with domain names including “ansangroup”, seven websites with domain names including “raoulmalak”, and four websites with domain names including “moneylaunderer”. The WIPO decision in early February 2013 resulted in the transfer to the plaintiffs of control over 17 websites which included either “ansangroup” or “raoulmalak” in the domain name.

[201] The versions of the Uncovered Article were also posted on numerous blogs, including: <ansantraffic.wordpress.com>; <ansantraffictruth.wordpress.com>; <ansangrouptruth.wordpress.com>; <http://raoulmalak.blogspot.ca>; and <http://raoulmalak.wordpress.ca>.

[202] A version of the Uncovered Article was also published on <http://forumscanada.com/thread-ansan-traffic-group-uncovered>. The Poem appeared on YouTube.

[203] The serious nature of the defamatory attacks resulted in the plaintiffs taking special countermeasures. Almost immediately after Mr. Malak first learned of the defamation he hired Veronica Rossos with Singleton Urquhart, to communicate with the internet facilities and demand they take down and/or cease and desist hosting the defamatory publications. Ms. Rossos' work continued from mid-June into August and early September 2012.

[204] In addition, in August 2012, the plaintiffs hired a reputation management firm, 6S Marketing, to take various measures intended to depress the prominence of the defamatory publications and increase the prominence of the plaintiffs' own web presence.

[205] Finally, the plaintiffs made a complaint to ICANN (the Internet Committee for Assigned Names and Numbers—a non-profit organization that oversees the use of internet domains) to have the domain names employing “ansangroup” or “raoulaalak” transferred. This process involved a four-month delay before the favourable decision was issued by WIPO in February 2013.

[206] Word about the defamatory websites had spread in the flagger community even before Mr. Malak learned about them. Mr. Malak provided evidence at trial that the Ansan Group employed approximately 15–16 people in its Richmond office and utilized between 250–270 flaggers in the lower mainland and 80–90 flaggers on Vancouver Island. It can be assumed that flaggers would have had an interest in the defamatory publications and circulated them to their colleagues. Although it is not known how many members of the flagging community read the defamatory publications, the Court is able to assume that they had a wide audience.

[207] The findings made by the trial judge at the first trial concerning the scope of publication, sustained in the Court of Appeal, and the evidence at this trial demonstrate that defamatory publications authored by Mr. Hanna were seen by at least 25 individuals working at other traffic control services businesses, by a representative of a flagger's union, by a number of corporate and municipal

customers, by the Ansan Group and VTS staff, by staff in Minister Coleman's office and by the Ansan Group's lawyers, insurance and financial advisors.

[208] There is ample authority for the proposition that although there is no presumption of publication on the Internet, publication to persons who are not specifically identified and are therefore never called to testify can be inferred: see *Bernstein v. Poon*, 2015 ONSC 155 at paras. 92–95 [*Bernstein*], citing *Gaskin v. Retail Credit Co.*, [1965] S.C.R. 297 at 300, 1965 CanLII 8. This inference considers the modern realities of information dissemination via the Internet: *Hudson v. Myong*, 2020 BCSC 517 at para. 112, citing *Bernstein* at para. 94; *Hee Creations Group Ltd. v. Chow*, 2018 BCSC 260 at paras. 74–85; *Holden v. Hanlon*, 2019 BCSC 622 at paras. 59–66.

[209] I am satisfied that many people other than those called to testify had either themselves read, or been made aware of, the defamatory publications about Mr. Malak and the Ansan Group.

Injury to Pride and Self-confidence

[210] Mr. Malak testified concerning his initial reaction to the defamatory campaign. Some examples of this testimony are as follows:

...we are under attack and we've just lost the potential BC Hydro tender that is coming up ...I knew BC Hydro is very politically influenced. I knew an [Provincial] election was coming up in 7, 8 months, and I knew these particular accusations will be taken quite seriously by government institution.

I was very angry ...I remember I had to control myself, but I was exceptionally angryI knew this is going to harm us for a long time to come ...I suggested to the team the first thing we're going to do is get some legal advice to try to put a stop to this.

[I had] never encountered anything like this .. [i]t was certainly an attack on the companies and on myself individually and it was difficult to handle at the time.

[211] Mr. Malak found the accusation of kickback schemes to be shocking and was worried that readers might take the accusation seriously. He testified that:

[w]hen I read it, it was absolutely shocking. I'm still shocked by this allegation because it has no truth whatsoever ... I mean, some people at the time said

if it's written, it must be true. I think that's assumption that we were dealing with, that we were very worried that some procurement managers or director - directors would be influenced by something like that.. that they might take a back seat.

[212] Mr. Malak testified that:

when you are accused of being a drug dealer or a money launderer or a pimp, it's no joke. These are very serious allegations ... It's not junk. To me it's personal. To me somebody is attacking my integrity and the integrity of my companies. Somebody is trying to get the message across to current client and potential future clients to keep away from us ... I can tell you from my perspective I took it very serious because it was a very serious allegation.

[213] Mr. Malak said that his initial reaction when he saw the defamatory publications on the internet was that it made him angry about the allegations about himself, but he was also angry that his wife was dragged into it. He said that he is still angry about the defamation campaign and that "I think on a regular basis I do check under my name and up to a couple of moths ago, there was still ...it was still out there on page 2 of my profile. So it's still lingering, it's still out there."

[214] Mr. Malak's partner, Ms. Chun, testified as follows with respect to the impact of the defamation campaign on her and Mr. Malak:

It was extremely stressful time for us. It wasn't life as normal. He was very consumed by this case every day. He - he liked to socialize during the weekend with his friends, invite people, but I think we were very exhausted with this case. And we have stopped socializing for I think many months. We didn't want to talk about this and what if they know and how do we reply, and it was - he was distressed, and sometimes I see him, like he's up and he's next door, and he can't go to bed. And I think it was - it was very, very stressful.

I think - I think at least a year we were spending time on this every day. And it got better, I think, with time certainly when we start finding some evidence and when we had a lot of support from legal counsel and all that. But you can imagine like at one time, one point of time, we were using like, five, six counsels, in Canada, in the States, trying to take these things down, whether we were suing Google, Facebook, GoDaddy and all that, and I think it was personally and financially, it was difficult. Because it was just not the emotion that we were dealing with. It cost us a lot too every month that we were dealing with cash flows. And I think he got better with time, but I think the first year he was extremely consumed with this case.

[215] Mr. Young, the Ansan Group CFO, testified as follows concerning Mr. Malak's demeanour after he became aware of the defamation publications:

[Mr. Malak was] [c]ompletely different. So, you know, I would see it as more angry, agitated, focused on the not the business of Ansan, but more focused on having to do damage control or to -- or to have to manage through what was happening on the internet. I would say daily throughout most of 2012 and if not daily in 2013 and 2014, you know, at least multiple times during the week.

Impact of the Defamation on Third-parties and the Resulting Impact on Mr. Malak

[216] Ms. Chun testified when she read the Uncovered Article she was shaking and shocked. She also testified that she felt speechless and didn't know what to say. She testified that she was angry and distressed and felt ashamed when she read the reference to her as a mail order bride in one of the posts.

[217] Mr. Malak was aware of the impact of the defamatory campaign on Ms. Chun. When asked if he had discussions with her, he testified:

Of course. I mean, we live together. We worked together and we deal with things together. And that was certainly challenging time that we had to stick together and deal with it ... [i]t was very stressful for her. She was relatively new to business in general. She was not accustomed to that sort of vicious attack, and she was quite worried. And my job was to assure her that we will deal with it the right way.

[218] Mr. Atchison testified that the postings made on the Telus Ethics Line, alleging that he was involved in a kickback scheme, almost ended his career as a vendor manager with Telus. He testified that he stopped being invited to contract negotiations with Telus VPs, his performance ratings dropped significantly and he never received share bonuses again.

[219] I find that knowledge of the impact of the defamation campaign on third parties, including Ms. Chun and Mr. Atchison, would likely have exacerbated the feelings of shame and embarrassment experienced by Mr. Malak.

The Absence or Refusal of any Retraction or Apology

[220] Mr. Malak and the Ansan Group submit that Mr. Jackman and Mr. Paine should have apologized to the plaintiffs, but have never done so. They contend that even after the court verdict in September 2017, VTS paid Mr. Hanna \$1.5 million, pursuant to the alleged Profit-sharing Arrangement. Further, Mr. Malak and the Ansan Group submit that these defendants have never expressed any remorse for their involvement with Mr. Hanna or any sympathy for the troubles which resulted from the defamation campaign.

[221] I agree that none of the defendants have issued a retraction or made an apology. Despite this, in the circumstances of this case, I do not consider that this justifies a higher award of general damages. This litigation was commenced relatively quickly in 2013 and proceeded to trial in 2016 and then to an appeal heard in 2019. It is not surprising that given the ongoing litigation, and the legal position taken by Mr. Jackman, Mr. Paine and VTS that they were not part of a common design to defame the plaintiffs, that they did not issue a retraction or apology.

The Defendants' Conduct

[222] The plaintiffs contend that the conduct of Mr. Hanna through to the end of trial has been reprehensible and calculated to increase the damages to the plaintiffs. In particular, they say that despite being served with a notice requiring him to attend trial to be cross-examined as a party, he made no appearance at this second trial.

[223] The plaintiffs do not identify how this conduct justifies a higher award of general damages. There is no evidence that Mr. Hanna's failure to appear delayed the trial or created more difficulty for the plaintiff in proving its liability and damages case. In fact, Mr. Hanna's non-appearance probably substantially shortened the trial. I do not consider that Mr. Hanna's failure to appear at trial or other conduct of any of the defendants during trial justifies a higher award of general damages.

Social and Possible Economic Damage

[224] There was no evidence adduced at trial that Mr. Malak was socially ostracized as a result of the campaign of defamation. As set out above, his relationship with Ms. Chun, including the amount of time the couple spent socializing with friends, was impacted by the campaign significantly for one year and this impact likely continued to a lesser extent for a few years.

[225] As stated above, after Telus became aware of the publication of defamatory publications concerning Mr. Malak and the Ansan Group they required Ansan to sign a contract amending document committing to ethical behaviour.

[226] Significant evidence was adduced from Marlene Tompkins, who worked in procurement with Telus, regarding her perception of the Ansan Group after she became aware of defamatory publications concerning Mr. Malak and the Ansan Group. Ms. Tompkins testified that she was told about the Uncovered Article by one of her neighbours who was in the paving industry during a discussion about flagging and flagging services. She testified that “obviously this really flagged up and made it more concerning to me, so therefore it prompted me to bring this forward to my director's attention.” After reviewing the Uncovered Article she was very upset, concerned for her safety and concerned about any interactions that she may have with the Ansan Group or with Mr. Malak. She was worried that by reducing traffic control services work for the Ansan Group that she might be putting herself in harms way.

[227] The evidence at trial demonstrates the pervasiveness of the campaign of defamation and the actual reputational harm sustained by Mr. Malak and the Ansan Group as a result. The defamatory publications would have had an impact on Mr. Malak’s personal reputation and reputation as a business leader, and the reputation of the Ansan Group with customers and other actors in the traffic control services sector, including employees and potential employees, resulting in the possibility of economic damage.

Relevant Authorities on General Damages

[228] With respect to Mr. Malak's general damages, I find that the below referenced decisions involving defamation against professionals or business leaders provide some guidance with respect to an appropriate award. I am conscious of the fact that every defamation case is unique, and that general damages must be assessed on a case by case basis.

[229] In *Mirzadegan v. Mahdizadeh*, 2022 ONSC 6082, the Ontario Superior Court of Justice awarded the individual plaintiff and his company, Mirzadegan Immigration and Citizenship Services Inc., \$200,000 general damages and \$50,000 aggravated damages over a series of negative reviews and complaints which appeared online. In that case, "many of [those] posts ended up cross-posted to multiple sites on the internet...The posts appeared weekly or sometimes daily": *Mirzadegan* at para. 3. The defendants were held to have posted over 60 such reviews plus many more comments and responses associated with the reviews. The titles and content of the posts stated and implied that the plaintiffs are guilty of criminal misconduct.

[230] In *Sommer v. Goldi*, 2022 ONSC 3830, the Ontario Superior Court of Justice awarded the plaintiff lawyer \$300,000 in general damages, \$100,000 in aggravated damages, and \$50,000 in punitive damages for a campaign of very serious and prolonged Internet defamation and harassment.

[231] In *Muzik v. Worthington*, 2021 MBQB 263, the Manitoba Court of Queen's Bench (as then it was) awarded the plaintiff investment advisor general damages of \$400,000, aggravated damages of \$400,000, and punitive damages of \$250,000 after publication of two different news stories broadcasted on television and six website articles published between 2012 and 2016 imputing dishonest and deceitful conduct on the part of the plaintiff.

[232] In *Rutman*, the Ontario Court of Appeal upheld a trial judge's award of \$200,000 in general damages, \$200,000 in aggravated damages and \$300,000 in punitive damages against a defendant who had conducted an internet defamation campaign against the accountant plaintiff's personal and professional reputations,

claiming he was engaged in tax fraud and was a thief and cheat. The parties were former business associates, and the defendants were unsatisfied with their settlement of a business dispute. The defendants maliciously spread the defamatory comments widely in an attempt to maximize harm to the plaintiff. It was also determined that the defamation was used as a bargaining chip in parallel settlement negotiations. The trial judge specifically referenced that the defendants engaged in “serious misconduct undertaken to obtain profit or gain” and that this was done to benefit the defendants in a parallel litigation strategy: *Rutman v. Rabinowitz*, 2016 ONSC 5864 at paras. 270–272 [*Rutman SC*].

[233] With respect to the Ansan Group’s general damages, I find that the below referenced decisions are helpful.

[234] In *Midwest Amusement Park, LLC v. Cameron Motorsports Inc.*, 2018 ONSC 4549 [*Midwest*], the Ontario Superior Court of Justice awarded the plaintiff companies damages at large of \$500,000 and punitive damages of \$500,000 over “an outrageous and egregious attack on their reputation”: *Midwest* at paras. 99, 108. The Court was satisfied that their business suffered financially and that their principals and representatives suffered from the abuse, threats, slanders and hate mongering of the defendant Cameron, a fraudster.

[235] In *Barrick Gold* the Ontario Court of Appeal held that the corporate plaintiff, a gold mining company, was entitled to \$75,000 general damages and \$50,000 punitive damages for “a systematic, extensive and vicious campaign of libel”: *Barrick Gold* at para. 3. That campaign was conducted over the Internet and involved the postings of hundreds of false and defamatory statements concerning the plaintiff on various websites.

Conclusion on General Damages

[236] General damages for defamation are at large. Determining damages in these circumstances involves an assessment and not a calculation.

[237] Mr. Malak is entitled to general damages in a substantial amount to reflect the significant impact of the multi-pronged, personal defamatory campaign on his reputation, self-esteem and social life. I consider that that impact was most severe in the first few years after the publications first appeared in June 2012, but that the severity decreased over time.

[238] I award Mr. Malak general damages of \$500,000, payable by the defendants on a joint and several basis.

[239] The Ansan Group, collectively, are also entitled to general damages to reflect the reputational impact, and inferred business losses, and likely impact on their ability to operate in the flagging industry (as a result of reputational loss with union officials, external flagging personnel, subcontractors and staff). My assessment does not include any amount for alleged financial loss resulting from not obtaining the BC Hydro contract, as I intend to address such loss in the portion of my reasons dealing with disgorgement of profits and/or punitive damages.

[240] I award the Ansan Group, collectively, general damages of \$300,000, payable by the defendants on a joint and several basis.

Aggravated Damages

Law Concerning Aggravated Damages for Defamation

[241] Aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high-handed, spiteful, malicious or oppressive, resulting in the plaintiff experiencing increased mental distress, humiliation, indignation, anxiety, grief or fear: *Hill* at paras. 188–189.

[242] Like general or special damages, aggravated damages are compensatory in nature. Their assessment requires consideration of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant. *Hill* at para. 189.

[243] There must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff. Malice may be established by intrinsic evidence derived from the defamatory statements themselves or the surrounding circumstances which demonstrate that the defendant was motivated by an unjustifiable intention to injure the plaintiff: *Hill* at para. 190.

[244] Aggravated damages are generally assessed on the particular malice of each joint tortfeasor: *Hill* at para. 176. However, aggravated damages, as well as punitive damages, may be assessed jointly and severally against wrongdoers who each demonstrate malice while acting in concert: see *Dhillon v. Dhillon*, 2006 BCCA 524 at paras. 96–107.

[245] There are a number of factors that may properly be considered in assessing aggravated damages. Relevant factors set out in *Hill*, include the following: whether there was a withdrawal of the defamatory statements made by the defendant and an apology tendered; whether the defamatory statements were made repeatedly; and whether the defamatory statements were clearly aimed at obtaining the widest possible publicity in circumstances that were the most adverse possible to the plaintiff: *Hill* at para. 191.

Analysis - Aggravated Damages for Defamation

[246] Mr. Malak seeks aggravated damages payable by Mr. Hanna, Mr. Jackman and Mr. Paine on a joint and several basis. Payment of aggravated damages on a joint and several basis is justified as a result of the participation of Mr. Hanna, Mr. Jackman and Mr. Paine in the common design of defaming Mr. Malak.

[247] There has been no effort to retract any of the relevant defamatory statements in this case.

[248] The nature of the allegations set out in the defamatory publications and the breadth of circulation demonstrate that the defamation was spiteful. Without

repeating all of direct and inferred accusations in the defamatory publications, which I have set out in detail above, they included allegations of fraud, corruption, various criminal conduct, association with gangsters, dishonesty and improper business conduct—by both Mr. Malak and the Ansan Group.

[249] As well, the nature of the allegations and the breadth of circulation strongly suggests actual malice on the part of Mr. Jackman, Mr. Paine and Mr. Hanna. The fact that VTS and the Ansan Group were competitors in the traffic control services industry and were both leading contenders for award of the BC Hydro contract assists in inferring that the defamatory publications were made with the unjustifiable intention of damaging the reputation of Mr. Malak and the Ansan Group, thereby providing VTS with an opportunity to obtain more traffic control services work in the province. This intention was inherently malicious and clearly aimed at adversely impacting Mr. Malak.

Conclusion on Aggravated Damages

[250] In my view, Mr. Malak is entitled to aggravated damages in a substantial amount to reflect the particularly high-handed, spiteful, malicious conduct of Mr. Hanna, Mr. Jackman and Mr. Paine and the resulting distress, humiliation, indignation and anxiety experienced by him.

[251] I award Mr. Malak aggravated damages of \$200,000, payable by the defendants on a joint and several basis.

Disgorgement of Profits

[252] As I have already stated, the Ansan Group companies seek as a remedy disgorgement of the profits earned by VTS and Mr. Hanna as a result of VTS obtaining the BC Hydro contract. They submit that disgorgement of these profits is a gain-based remedy that ought to be awarded in this case to remove the benefits acquired by the defendants resulting from the campaign of defamation.

[253] The defendants contend that disgorgement of profits is not available in defamation cases. They submit damages for defamation are focused on losses to

the plaintiff, and disgorgement would inappropriately shift the focus to the gains of the defendant. Further, they submit that even if disgorgement is available in defamation, they say that it should only be available where other damages, such as special damages, are inadequate. They submit that here, the plaintiffs are attempting to avoid the burden of proof of special damages sustained as a result of the loss of the BC Hydro contract by pursuing a rare alternative remedy.

[254] In addition, the defendants say there is no requisite causal connection between the wrongful conduct and the defendant's financial gain to warrant disgorgement. That is, they say that the evidence does not establish that the campaign of defamation resulted in VTS obtaining the BC Hydro contract.

[255] Finally, the defendants say that the Ansan Group companies are not entitled to disgorgement because they have failed to waive their claim to general damages.

[256] Although I do not find that there is a principled basis to conclude that disgorgement of profits is not available in a defamation case, I do not consider that this remedy is available in this case.

The Law on Disgorgement

[257] Disgorgement developed from the concept of waiver of tort, a term used to describe a remedy in which a victim of a tortious wrongdoing sought to recover the profits secured by the tortfeasor as a result of that wrongdoing, rather than compensatory damages: John D. McCamus "Waiver of Tort: Is there a Limiting Principle" (2014) 55:3 Can Bus LJ 333 at 334.

[258] As was recently confirmed by the Supreme Court of Canada, disgorgement is an exceptional, gain-based remedy calculated with reference to a defendant's wrongful gain, rather than the damages suffered by the plaintiff: *Atlantic Lottery Corp. Inc., v. Babstock*, 2020 SCC 19 at para. 23 [*Babstock*]. It is an alternative remedy and not an independent cause of action, therefore requiring that the constituting elements of one or more causes of action must be made out prior to considering disgorgement: *Babstock* at paras. 25, 27. Unlike restitution, the

availability of disgorgement does not rest on the plaintiff suffering any damage, unless damage is an element of the underlying cause of action: *Babstock* at paras. 23–27.

Is disgorgement available in defamation?

[259] There is no clear authority on the question of what torts give rise to the alternative remedy of disgorgement and the academics appear to be divided on the issue. Disgorgement of profits has been considered in various types of claims, including those set out below.

[260] In *Babstock*, the Supreme Court of Canada considered disgorgement’s availability as a remedy for breach of contract. The Court noted that the availability of disgorgement for a breach of contract is a fairly new development to the law limited to exceptional circumstances, including situations where the remedies of damages are not appropriate: *Babstock* at paras. 51–54, referring to, amongst other authorities, *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.).

[261] *Babstock* makes it clear that disgorgement is only available for breach of contract where other remedies are inadequate—for example when the plaintiff’s loss is impossible to calculate or where the plaintiff’s interest in performance is not reflected by a purely economic measure: *Babstock* at para. 59. In addition, a plaintiff cannot simply elect to pursue disgorgement of profits to obviate matters of proof of their own damages: *Babstock* at para. 61. Finally, disgorgement is not available if a plaintiff lacks a legitimate interest in the defendant’s profit-making activity: *Babstock* at paras. 59–61.

[262] Disgorgement of profits is available in a claim for breach of fiduciary duty even without proof of damage: *Babstock* at para. 32. In these types of cases this remedy has significant deterrence value, which is necessary given the unique policy goals underlying fiduciary relationships: *Nova Chemicals Corp. v. Dow Chemical Co.*, 2022 SCC 43 at para. 142, per Justice Cote dissenting in part [*Nova*], citing *Hodgkinson v. Simms*, [1994] S.C.R. 377 at 453, 1994 CanLII 70.

[263] In *Babstock*, the Court also left open the possibility of disgorgement being available in some cases of negligence; however, it did not consider the issue as the plaintiffs had not adequately pleaded a claim in negligence: *Babstock* at para. 36.

[264] Disgorgement, or an accounting of profits, is also available as a remedy in the infringement of intellectual property rights. However, the remedy in this context has unique statutory considerations. In patent infringement, the remedy of accounting for profits must serve the purpose of the *Patent Act*, R.S.C. 1985, c. P-4, which is designed to encourage research and development. An infringer must disgorge to the patentee the “portion of the infringer’s profits which as causally attributable to the invention”: *Nova* at paras. 43, 46, quoting *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34 at para. 101 [emphasis added in *Nova*].

[265] In the case of copyright infringement, s. 35(1) of the *Copyright Act*, R.S.C. 1985, c. C-42, expressly allows for an award of both compensatory damages and a portion of an infringers profits “to the extent that such profit is caused by the infringement”: *Cinar Corporation v. Robinson*, 2013 SCC 73 at para. 77. In copyright cases, the disgorgement remedy serves the two purposes of preventing unjust enrichment and deterrence, and are not intended to compensate the plaintiff: *Cinar Corporation* at para. 86.

[266] As is the case in patent infringement cases, disgorgement of profits for a copyright infringement “goes no further than is necessary to prevent each individual defendant from retaining a wrongful gain”: *Cinar Corporation* at para. 87.

[267] I conclude that, in general, there is no principled basis to exclude consideration of the alternative remedy of disgorgement of profits in determining an appropriate award of damages for defamation. The circumstances under which this remedy may or may not be found appropriate will vary from case to case.

[268] In my view, the remedy of disgorgement of profits may be appropriate in defamation cases where the defamatory publication was made with the object of obtaining a financial gain. In situations where the defamatory publication was not

made for this purpose it may not be appropriate to award disgorgement of profits, for policy reasons, if doing so would have a chilling effect on freedom of speech.

Should Disgorgement of Profits be Ordered in this Case?

[269] The remedy of disgorgement of profits is subject to limiting principles, including the unavailability of other remedies and a causal connection between the profits sought to be disgorged and the wrongful conduct at issue.

[270] The requirement in breach of contract cases that other remedies must be found ineffective before the extraordinary remedy of disgorgement should be considered, is also appropriate when disgorgement is sought in tort: see *Spring v. Goodyear Canada Inc.* 2021 ABCA 182 at para. 54; *The Insurance Corporation of British Columbia v. Teck Metals Ltd.*, 2022 BCSC 374 at para. 17.

[271] There can be no doubt that a causal connection is required between the wrongful conduct and the profits sought to be disgorged in cases involving infringement of intellectual property rights. Similarly, a “sufficient nexus” is required in cases involving a breach of fiduciary duty: *Pirani v. Pirani*, 2021 BCSC 1530 at paras. 61–62, 69, rev’d on other grounds 2022 BCCA 65. In breach of contract cases, this requirement was described in *Babstock* as a “legitimate interest in the defendant’s profit-making activity”, which I consider to be a different way of describing a requirement for a causal connection: *Babstock* at para. 55. The extent, or degree, of that causal connection will be dependent upon the unique facts of each case.

[272] A number of academics have suggested that when disgorgement is sought in a tort claim, the amount sought to be disgorged must arise from the tortious conduct.

[273] Professor McInnes writes that unjust enrichment by wrongdoing (disgorgement in tort) extends “to every benefit that the defendant obtained as a result of violating the obligation that was owed to the plaintiff”: Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, 2nd ed (Markham, ON: LexisNexis, 2022) at 1.01(2)(a)(iii).

[274] Graham Virgo writes that “[w]herever the defendant has obtained a benefit as the result of the commission of a tort the claimant should be able to elect a restitutionary remedy whereby the defendant is required to disgorge to the claimant any benefit obtained by the commission of the tort.”: Graham Virgo, *The Principles of the Law of Restitution*, 2nd ed (Oxford: Oxford University Press, 2006).

[275] Craig Jones writes that “[i]n order to make out a claim [for waiver of tort] it would be necessary for the plaintiff to show a wrongdoing of the defendant (predicate wrong), and a profit that has accrued to the defendant from the activity that was unlawfully conducted”: Craig Jones, “Panacea or Pandemic: Comparing “Equitable Waiver of Tort” to “Aggregate Liability” in cases of Mass Torts with Indeterminate Causation” (2016) 2(1) CJCL 301 at 313.

[276] In addition, relevant caselaw supports a requirement that a causal link is required between profit sought to be disgorged and the tortious conduct at issue.

[277] In *Reid v. Ford Motor Company et al.*, 2006 BCSC 712 at para. 14, Justice Gerow stated that “a wrongdoer should not be permitted to keep the gains acquired through the wrongful conduct”.

[278] In *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 [*Strother*], the Court stated at para. 77:

... Where, as here, disgorgement is imposed to serve a prophylactic purpose, the relevant causation is the breach of a fiduciary duty and the defendant’s gain (not the plaintiff’s loss). Denying Strother profit generated by the financial interests that constituted his conflict teaches fiduciaries that conflicts of interest do not pay. The prophylactic purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary.

[Emphasis added.]

[279] In *Indutech Canada Ltd. v. Gibbs Pipe Distributors Ltd.*, 2011 ABQB 38 at para. 512, aff’d 2013 ABCA 111, the Court stated that “[d]isgorgement requires that the defendant give up a benefit that it has wrongfully acquired ...”.

[280] In *Heward v. Eli Lilly & Co.*, 45 C.P.C. (6th) 309, 2007 CanLII 26607 (O.N. S.C.J.), Justice Lederman stated at para. 26 that for disgorgement of profits to be awarded

there be proof of a “wrongful gain” that will be subject to disgorgement or a constructive trust. Generally speaking, a gain is a “wrongful gain” only if it is attained through “wrongful conduct”; i.e. the wrongful conduct must cause the gain... [Emphasis in original.]

[281] On appeal, in *Heward v. Eli Lilly & Company*, 295 D.L.R. (4th) 175 at para. 21, 2008 CanLII 32303 (O.N. Div. Ct.), the Court stated that “[a]rguably, waiver of tort is available whenever [tortious] conduct has produced a profit”.

[282] In *Evans v. The Bank of Nova Scotia*, 2014 ONSC 2135, at paras. 59–61, the court found that the wrongful conduct must cause financial gain for a claim in waiver of tort to succeed.

[283] In *Tucci v. Peoples Trust Company*, 2017 BCSC 1525, rev’d in part on other grounds 2020 BCCA 246, Masuhara J. declined to certify the portion of a class proceeding in which the plaintiff sought to advance a waiver of tort claim against a bank—whom the plaintiff alleged did not adequately store his personal information. Of relevance, Masuhara J. stated as follows in reference to the claim for waiver of tort (disgorgement):

[174] Nonetheless, it is my view that this claim is bound to fail whether it is a remedy or a cause of action. As a cause of action, it would require a legal wrong by the defendant and a benefit flowing to the defendant as a result: *Koubi CA* at para. 41. Here, the plaintiff has not pleaded that a benefit flowed to the defendant as a result of its failure to secure the personal information. The fees, service charges, etc. collected by Peoples Trust are not connected to the legal wrong. As a remedy, the plaintiff would recover the benefit the defendant obtained from the underlying wrong. But again, the underlying wrong is unconnected to the benefits that the plaintiff asserts.

[Emphasis added.]

[284] Justice Karakatsanis, dissenting in part in *Babstock*, confirmed that disgorgement for a breach of fiduciary duty “is only available where the breach of the duty is linked to the gain”: *Babstock* at para. 155, citing *Strother* at para. 77.

Conclusion on the Availability of the Remedy of Disgorgement of Profits

[285] I find that the exceptional remedy disgorgement of profits is not available in this case.

[286] The plaintiffs adduced no evidence at trial, nor did they make submissions on, the inadequacy of other remedies, including special damages. Special damages arising from the loss of the BC Hydro contract, if proven, would have been available in this defamation action: see *Botiuk* at paras. 109–111; *Hill* at para. 169. In my view, this is a circumstance in which the plaintiffs appear to be seeking disgorgement as a means of obviating the requirement to prove special damages. *Babstock* makes it clear that this is not appropriate: at para. 61.

[287] Even considering that one of the main objects of making an award of disgorgement of profits in a defamation cases is deterrence, the plaintiffs have offered no submissions on why punitive damages are inadequate to achieve this goal.

[288] Further, the plaintiffs' have failed to show a sufficient causal connection between the defendants' campaign of defamation and VTS' success in obtaining the BC Hydro contract. Profits from the BC Hydro contract would only become potentially subject to disgorgement, if they were earned as a result of wrongful conduct.

[289] The plaintiffs appear to acknowledge that disgorgement of profits requires that the profits relate to or result from the wrongful action. In Part 2 subparagraph d of the plaintiffs fourth amended notice of civil claim, the plaintiffs seek the following relief:

- (d) special damages, or alternatively, an Order that each defendant account for and disgorge the profits resulting from the defamatory expression in respect of which each defendant is found to be liable, relating to or arising from the BC Hydro Contract.

[Emphasis added.]

[290] The plaintiffs ask this Court to infer that BC Hydro was “either consciously or unconsciously, influenced” by the campaign of defamation carried out by the defendants. I decline to make this inference. I do not find that the plaintiffs have proven that VTS obtained the BC Hydro contract as a result of the defendants’ campaign of defamation.

[291] The evidence does not establish that the defamatory publications influenced BC Hydro’s decision to award the BC Hydro contract to VTS. Walter Sorto and Adele Neuman, BC Hydro employees involved in the RFP, testified that they had viewed the defamatory publications prior to the commencement of the RFP process. Ms. Neuman testified that she considered the publications to be nonsense and that it was her view that it should be given no bearing whatsoever in the bid evaluation for the RFP. Mr. Sorto testified that it was obvious to him that the defamatory publications he had seen were not credible.

[292] Further, Mr. Sorto testified that he wanted to find out who had sent defamatory publications to BC Hydro so that he could disqualify them from the procurement process. He said that if he had found the defamatory publications to be credible, he would have terminated the existing Ansan Group contracts to provide traffic control services to BC Hydro, as opposed to continuing to use their services.

[293] Shelly MacKenzie, who assisted Mr. Sorto in the evaluation of responses to the RFP, testified that she was not aware of the defamatory publications until she was called to testify at the first trial of this matter in 2016, well after the BC Hydro contract was awarded.

[294] Both Mr. Sorto and Ms. Mackenzie testified that although the Ansan Group companies scored well in the RFP on certain evaluation criterion, VTS scored significantly better on price—which was given the biggest weighting. They testified that this was the primary reason why VTS obtained the BC Hydro contract and not one of the Ansan Group companies. Mr. Sorto denied that he was influenced in any way by the defamatory publications he had seen.

[295] I accept the evidence of the BC Hydro employees and therefore conclude that the campaign of defamation did not result in BC Hydro awarding the BC Hydro

contract to VTS. As a result, there is no causal link between the campaign of defamation and the profits earned by VTS or Mr. Hanna from the BC Hydro contract.

[296] As a result of this finding it is not necessary to consider the defendants submission that the plaintiffs cannot seek disgorgement because it is an alternative remedy to special damages and the plaintiff failed to elect between these two alternative remedies.

[297] Although the defendants conduct is clearly worthy of rebuke, punitive damages are the more appropriate remedy in this case.

Punitive Damages

Law Concerning Punitive Damages for Defamation

[298] Punitive damages are not compensatory in nature but rather, as is apparent from the name, intended to punish a wrongdoing party. As set out by the Supreme Court in *Hill*:

196 Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant ...

[299] Further, an award of punitive damages must serve a rational purpose. Again, as set out in *Hill*:

197 Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

...

199 Punitive damages can and do serve a useful purpose. But for them, it would be all too easy for the large, wealthy and powerful to persist in libelling vulnerable victims. Awards of general and aggravated damages alone might simply be regarded as a licence fee for continuing a character assassination. The protection of a person's reputation arising from the publication of false

and injurious statements must be effective. The most effective means of protection will be supplied by the knowledge that fines in the form of punitive damages may be awarded in cases where the defendant's conduct is truly outrageous.

[300] The BC Court of Appeal confirmed in *McKnight v. Hutchinson*, 2022 BCCA 27 that the decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, remains the seminal authority on punitive damages: *McKnight* at para. 161.

[301] The considerations in determining an award for punitive damages, as set out at para. 94 of *Whiten*, include the following:

- a) Punitive damages are the exception rather than the rule, imposed only if there has been high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour;
- b) Punitive damages are generally awarded only where the misconduct would otherwise be unpunished or where other penalties are unlikely to achieve the objectives of retribution, deterrence, and denunciation;
- c) Punitive damages are awarded only if compensatory damages (which to some extent are punitive in nature) are insufficient to accomplish these objectives, and the amount awarded is no greater than necessary to rationally accomplish their purpose;
- d) The purpose of punitive damages is not to compensate the plaintiff, but to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened;
- e) Punitive damages should be assessed in an amount reasonably proportionate to the harm caused, the degree of the misconduct, the plaintiff's relative vulnerability, and any advantage or profit gained by the

defendant, having regard to any other fines or penalties suffered by the defendant; and

- f) Moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[302] In the context of defamation, punitive damages are most applicable where an award of solely compensatory damages would result in nothing more than a license fee to continue the defamation: *Newson v. Kexco Publishing Co.*, 17 B.C.L.R. (3d) 176 at para. 35, 1995 CanLII 1182 (C.A.) [*Newson*].

[303] Given that punitive damages focus on punishing the conduct of the defendant, not compensating the plaintiff, in circumstances where the conduct against several plaintiffs is sufficiently similar, it is not necessary to assess punitive damages awards for each plaintiff: *H.O. v. MacDougall*, 2006 BCSC 180 at para. 21; *Rumley v. British Columbia*, 2001 SCC 69 at para. 34.

Are Punitive Damages Justified?

[304] In my view, the principles enunciated in *Whiten* justify an award for punitive damages in this case. There can be no doubt that the campaign of defamation carried out by the defendants pursuant to the common design was malicious. It was carefully planned and designed to impact Mr. Malak and the Ansan Group companies' reputations with the object of improving the chances of VTS of obtaining traffic control services work previously done, or potentially obtained in the future, by the Ansan Group companies.

[305] Although, with respect to the BC Hydro contract, the defendants conduct did not result in taking this contract away from the plaintiffs, the defendants' attempt to do so is deserving of rebuke by way of an award of punitive damages. Such an award, beyond that made under the heads of general and aggravated damages, is justified for the purpose of denouncing the conduct of the defendants and deterring the defendants and others from seeking a competitive advantage by intentionally defaming a competitor.

[306] The September 27, 2012 email to Premier Clark and Minister Coleman, in addition to defaming the plaintiffs, included a veiled threat that if the politicians did not take steps to intervene in the RFP process the writer would “go public”. The inference is that political fallout would result if politicians failed to respond. This type of coercive threat makes the defamation even more egregious. Equally egregious are the defamatory publications impugning the reputations of employees of Telus which included accusations of fraud and corruption. These circumstances add a further rational basis for an award of punitive damages—that is to punish the defendants for their conduct in seeking to impugn the reputations of third parties.

Quantum of Punitive Damages

[307] *Whiten* at paras. 111–126 lists the following considerations in assessing both whether punitive damages should be awarded and the quantum of the award: the level of blameworthiness of the defendant’s conduct; the degree of vulnerability of the plaintiff; the harm or potential harm directed specifically at the plaintiff; the need for deterrence; other penalties that have been or are likely to be imposed on the defendants for the same misconduct; and the advantage wrongfully gained by a defendant from the misconduct.

[308] I will address each of these considerations below.

The Blameworthiness of The Defendant’s Conduct

[309] A non-exhaustive list of factors which may be considered in assessing the blameworthiness of the defendants include: whether the misconduct was planned and deliberate; the intent and motive of the defendant; whether the defendant persisted in the outrageous conduct over a lengthy period of time; whether the defendant concealed or attempted to cover up its misconduct; the defendant’s awareness that what he or she was doing was wrong; whether the defendant profited from its misconduct; and whether the interest violated by the misconduct was known to be deeply personal to the plaintiff or damages a thing that was irreplaceable: *Whiten* at para. 113.

[310] In my view, all of the circumstances listed above, aside from the issue of profit, are present in this case, which add to the justification for a significant award of punitive damages. In summary, the defendants carried out a planned, and deliberate defamation campaign over an extended period of time, which was advanced for the purpose of profit and eliminating competition. The defendants concealed their misconduct, and were well aware that it was wrong.

[311] Although I have found that the defendants' campaign of defamation was not the cause of the plaintiffs' failure to obtain the BC Hydro contract, this was not for want of trying on the part of the defendants. The fact that their efforts were ultimately unnecessary to obtain the BC Hydro contract does not detract from the moral blameworthiness of their conduct.

The Degree of Vulnerability of the Plaintiff

[312] Under this dimension of proportionality, "[t]he financial or other vulnerability of the plaintiff, and the consequent abuse of power by a defendant, is highly relevant where there is a power imbalance: *Whiten* at para. 114.

[313] In my view, the evidence shows that Mr. Malak was a successful businessperson. The Ansan Group and VTS were on even footing as commercial competitors, and the defendants, though acting wrongfully, did not abuse any power imbalances between themselves and the plaintiffs.

[314] This factor does not add to the justification for an award of punitive damages.

The Harm or Potential Harm Directed Specifically at the Plaintiff

[315] This factor requires the court to consider both the actual harm, as well as potential harm, of the defendants conduct in relation to the specific plaintiff.

[316] Here, the conduct of the defendants targeted both Mr. Malak and the Ansan Group. The misconduct undoubtedly risked damaging their reputations and could have had far reaching business consequences. Further, the defamatory statements

resulted in personal harm to Mr. Malak. This factor weighs in favour of a higher award of punitive damages.

The Need for Deterrence

[317] Deterrence is one of the objectives of punitive damages. An award must be sufficient to deter the defendant from continuing the behaviour. In assessing deterrence, the court may look to the financial circumstances of the defendant in several circumstances including “where it may rationally be concluded that a lesser award against a moneyed defendant would fail to achieve deterrence”: *Whiten* at para. 119. As it is put in *Whiten*, “it takes a large whack to wake up a wealthy and powerful defendant”: *Whiten* at para. 118.

[318] The plaintiffs rely on *Newson*, which specifically references the need for deterrence in defamation cases:

[35] Punitive damages are most applicable in libel cases where an award of compensatory damage would be regarded by the wrong-doer merely as a license fee to continue a course of conduct of consistent defamation. ...

[319] I note that in *Newson*, the Court of Appeal found that the \$15,000 of general damages awarded by the trial judge were sufficient, and did not constitute a “license fee” for defamation: *Newson* at paras. 33–34. This is in stark contrast to *Hill*, where the defamation against the plaintiff persisted even after the trial and where, in granting an injunction to enjoin the Church of Scientology from publishing further defamatory statements, the chambers judge had found that “no amount awarded on account of punitive damages would have prevented or will prevent the Church of Scientology from publishing defamatory statements about the plaintiff”: *Hill* at para. 201.

[320] Unlike in *Hill*, there is no indication in this case that the defendants have continued after 2013, or will continue after trial, to defame the defendants. However, the defendants appeared to employ Mr. Hanna for the specific purpose of the defamation for commercial advantage. This is precisely the behaviour the court should seek to deter through punitive damages.

[321] Deterrence, both specific and general, weigh heavily in this case in favour of a significant award for punitive damages.

Other Penalties

[322] Other forms of retribution, denunciation or deterrence, in both the civil and criminal context, must be taken into account when assessing the proportionality of an award for punitive damages; “[t]he question is whether more punishment is rationally required”: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 82; *Whiten* at para. 123. This is because punitive damages are awarded “if, but only if” all other penalties have been found to be inadequate to accomplish the objectives of punitive damages: *Whiten* at para. 132.

[323] The resources of a defendant may be considered when assessing the anticipated impact of the award for compensatory damages to determine whether a punitive purpose has already been achieved: *Nazerali v. Mitchell*, 2018 BCCA 104 at para. 93, leave to appeal to SCC ref’d, 38113 (9 August 2018).

[324] I have awarded Mr. Malak general damages of \$400,000 and aggravated damages of \$200,000, and the Ansan Group general damages of \$300,000, for a total award against the defendants of \$900,000. I take these awards into consideration in determining the quantum of punitive damages to be awarded in this case.

Relevant Caselaw - Punitive Damages Awards in the Business Context

[325] I find the below cases cited by the plaintiffs, in which the parties either had a business relationship or a party’s business reputation was impacted, to be of assistance.

[326] In *Nutritec Inc. v. Gagné et Lévesque*, 2022 NBBR 188, the plaintiffs brought a defamation action against the defendant and sought a summary judgement. The defendant published internet articles and Facebook posts alleging that the plaintiff’s manufacturing plant was partially responsible for deaths and serious health problems, in violation of the *Criminal Code*: *Nutritec* at paras. 9–10. The plaintiffs

lost customers and major business opportunities, were the subject of an investigation by the Ministry of the Environment, and had to rebuild its credibility, reputation, and clientele: *Nutritec* at para. 16. The Court granted the summary trial application, awarded \$50,000 for economic loss and damages to the credibility and reputation of the plaintiff: *Nutritec* at para. 86. The Court also awarded \$50,000 in punitive damages based on the content of the defamatory statement and general deterrence: *Nutritec* at para. 84.

[327] In *Pride Real Estate Inc. v. 5610550 Manitoba Lid*, 2022 MBQB 51, the plaintiff brought an action in defamation against the defendant who had distributed notices to the plaintiff's tenants that the plaintiffs were engaged in "illegal operations" and stealing rent: *Pride Real Estate* at para. 96. The court awarded \$150,000 in general damages, \$150,000 in aggravated damages, and \$50,000 in punitive damages. In awarding punitive damages, the Court did not reference the *Whiten* factors, but focused on the defendant's lack of defences and absence of remorse: *Pride Real Estate* at para. 115.

[328] In *Muzik v. Wothington*, 2021 MBQB 263, the Court found that the defendant, CBC, defamed the plaintiff, an investment advisor, in two different news stories broadcasted on television and published on its news website: *Muzik* at paras. 1, 10, 206. The defamatory statements suggested that the plaintiff was a dishonest person, was guilty of misconduct, and lacked integrity. The Court found that CBC "acted with malice in a desire to injure" the plaintiff: *Muzik* at para. 144. The attack on his integrity was a "devastating blow" to his professional reputation: *Muzik* at para. 105. The Court awarded \$400,000 for general damages, \$400,000 for aggravated damages, \$609,403 for special damages and \$250,000 for punitive damages, for a total award of \$1,659,403: *Muzik* at para. 206. In assessing punitive damages, the Court noted the harm, and lasting harm, inflicted on the plaintiff: *Muzik* at para. 181. Further, the Court specifically referenced that CBC has "considerable resources", and that the award "will serve as a deterrent to the CBC and make it reconsider not only how it goes about broadcasting and publishing reports about financial advisors

or other professionals, but also how it conducts itself in any later claim for defamation that might emerge”: *Muzik* at para. 181.

[329] In *United Ventures Fitness Inc. v. Twist*, 2019 ONSC 3613, the Court found that the plaintiff, a company engaged in selling exercise and fitness related equipment, had been defamed by the defendant, an exclusive distributor of BOSU exercise equipment in Canada from whom the plaintiff had previously purchased BOSU products: *United Ventures Fitness* at paras. 8, 15. The defendant published a letter to members of the fitness community that suggested the plaintiffs were an unauthorized dealer engaged in questionable business practices, which impacted the plaintiff’s long standing business reputation: *United Ventures Fitness* at paras. 37, 46. The defamation occurred after the plaintiff had refused to adhere to a minimum advertised price policy implemented by the defendant, which the plaintiff believed was unlawful: *United Ventures Fitness* at paras. 17–19. The Court awarded \$100,000 in general damages and \$25,000 in punitive damages. In assessing punitive damages, the Court noted that the defendant had “weaponized” his reputation in the industry to effect greater harm on the plaintiffs and that the “most disturbing” aspect of the defamation was the defendants intention; the Court found that the defendants’ conduct was spurred by the plaintiffs’ refusal to engage in an unlawful pricing policy and that “it was not sufficient to the [defendants] to cut off the Plaintiffs’ supply of BOSU products, they had to take the additional step of making baseless allegations aimed at reducing their profitability or even putting them out of business”: *United Ventures Fitness* at paras. 51, 53.

[330] In *Emeny v. Tomaszewski*, 2019 ONSC 3298, the defendant, a female comedian, accused the plaintiff, a male comedian, of being a sexual predator and committing illegal acts: *Emeny* at paras. 1–7. The defendant did not respond to the plaintiff’s defamation action, and the Court awarded \$250,000 in general damages, \$100,000 in special damages and \$100,000 in punitive damages. While the Court characterized the defamation as a “sustained attempt to damage [the plaintiff’s] personal and professional reputation”, the Court had no insight into the defendant’s motive nor whether the defendant profited from the defamation, and so found that

punitive damages ought not be awarded on the “highest” end of the scale: *Emeny* at paras. 51–56.

[331] In *Rutman* (summarized above) the Ontario Court of Appeal upheld a trial judge's award of \$300,000 in punitive damages.

Conclusion of Punitive Damages

[332] Assessing the quantum of punitive damages is highly contextual: *Airbus Helicopters S.A.S. v. Bell Helicopter Textron Canada Limitée*, 2019 FCA 29 at para. 50; *Industrial Alliance Insurance and Financial Services Inc. v. Brine*, 2015 NSCA 104 at para. 217, leave to appeal to SCC ref'd, 36809 (12 May 2016). Formulaic approaches are to be avoided: *Bowen Contracting Ltd. v. B.C. Log Spill Recovery Co-operative Association*, 2009 BCCA 457 at para. 23(7).

[333] The circumstances in *Rutman*, where the Ontario Court of Appeal upheld the trial judge's punitive damages award of \$300,000, are similar to the circumstances of the case before me in terms of the nature and impact of the defamatory campaign carried out. As in *Rutman*, the defamation in this case impacted Mr. Malak's personal and professional reputation, as well as harmed the business reputation of the Ansan Group. The defendants acted with malice and sought to obtain a profit or benefit. What is different in this case from the circumstances in *Rutman* is that the campaign of defamation carried out by the defendants was motivated primarily by a desire to obtain a competitive advantage over the Ansan Group, for the purpose of taking business away from them. A significant punitive damages award will send a message that defamation carried out for this purpose will attract significant damages.

[334] As noted above, I do not consider separate punitive damages awards for Mr. Malak and the Ansan Group to be appropriate. My award for punitive damages is intended to punish the conduct of the defendants in general—not to punish the impact of their conduct on Mr. Malak as an individual and the Ansan Group. In my view, Mr. Malak and Ansan Group were targeted together by the defendants for primarily the same reason—to obtain the BC Hydro contract and other traffic control

services work. The defamation against them was inextricably entwined and part of a common design. While the general damages awards are justifiably different for Mr. Malak and the Ansan Group based on the harm they have experienced, punitive damages focus on the conduct of the defendant. That conduct was not sufficiently distinct to warrant separate awards of punitive damages.

[335] I award punitive damages, collectively for all plaintiffs, in the amount of \$500,000, payable by the defendants on a joint and several basis.

CONCLUSION

[336] I find as follows:

- a) Mr. Hanna is not liable for publishing the Poem by means of the email he sent to Mr. Jackman and Mr. Paine on August 6, 2021, on the basis that his doing so did not constitute publication;
- b) Mr. Jackman and Mr. Paine participated in a common design with Mr. Hanna to defame the plaintiffs;
- c) VTS is vicariously liable for the conduct of Mr. Jackman and Mr. Paine;
- d) VTS, Mr. Jackman, Mr. Paine and Mr. Hanna are jointly and severally liable for the plaintiffs' damages.

[337] I award the plaintiffs damages as follows:

- i. I award Mr. Malak general damages of \$500,000 and aggravated damages of \$200,000;
- ii. I award the Ansan Group general damages of \$300,000; and
- iii. I award the plaintiffs punitive damages of \$500,000.

[338] There is no basis to grant the plaintiffs' application for a permanent injunction prohibiting Mr. Hanna from further defamatory publications. No such publications have been made since approximately February of 2013.

[339] The parties are at liberty to make submissions with respect to costs.

“Mayer, J.”

Appendix A

Factual Background Extract from the Reasons of Justice Frankel in *Malak v. Hanna*, 2019 BCCA 106

[3] All the key actors in this case were involved in the business of providing traffic control services, more commonly referred to as “flagging services”. Those actors are:

- (a) Raoul Malak: principal of Ansan Traffic Group Ltd. and related companies known collectively as the “Ansan Group”, i.e., Ansan Industries Ltd. d.b.a. Ansan Traffic Control, Lanetec Traffic Control Inc., Western Traffic Ltd. d.b.a. Flaggirls Traffic Control, and Island Traffic Services Ltd. (“Island Traffic”);
- (b) Philip Keith Jackman: owner of Valley Traffic Control Systems Inc. (“VTS”);
- (c) Trevor Paine: vice-president of VTS;
- (d) Remon Hanna: principal of Advanced Traffic Solutions Inc. (“Advanced Traffic”); and
- (e) Brian Litster and Greg Smith: principals of Island Traffic before it was acquired by the Ansan Group.

[4] In June 2010, the Ansan Group entered into an agreement to provide flagging services throughout British Columbia for Telus Corporation. The agreement was for two years, with a third-year option. Telus advised VTS that if it wished to continue to provide Telus with traffic control services, then it would have to deal directly with the Ansan Group as a third-party contractor.

[5] Mr. Malak and Mr. Hanna met in Vancouver in the 1990s and socialized over the years. Mr. Malak became involved with the Ansan Group in 2002, when he purchased one of the Ansan Group. In 2010, Advanced Traffic, worked as a subcontractor for the Ansan Group. Near the end of that year, Mr. Malak and Mr. Hanna had a bitter falling out and the Ansan Group terminated its relationship with Advanced Traffic. In early 2011, Advanced Traffic commenced litigation against the Ansan Group.

[6] In January 2012, Advanced Traffic and VTS entered into a confidentiality and non-solicitation agreement in connection with preparing a tender for an anticipated request for proposal (“RFP”) by B.C. Hydro. Under this agreement, neither Mr. Hanna nor Advanced Traffic would receive any financial benefit other than Mr. Hanna’s use of some office space, unless VTS’s tender was accepted. Mr. Hanna was given business cards showing him to be VTS’s “Senior Contract Manager”, with a VTS telephone number and email address.

[7] Messrs. Jackman, Paine, Litster, Smith, and Hanna, discussed Island Traffic participating in a joint bid for the B.C. Hydro contract, to be submitted under VTS's name.

[8] In April 2012, the Ansan Group began discussions with VTS with respect to the Ansan Group acquiring VTS or its assets. On the morning of May 1, 2012, the Ansan Group sent an email to VTS terminating those discussions.

[9] On the afternoon of May 1, 2012, Mr. Hanna sent Mr. Jackman an email with the subject line "Raoul's lawsuits". The body of the email contained a list of actions in Small Claims Court and in the Supreme Court of British Columbia involving Mr. Malak and his companies dating back to 1993. Mr. Jackman forwarded that email to Mr. Paine a few minutes later, without comment.

[10] In mid-June of 2012, an article the trial judge aptly described as a "hit piece" was posted on the Internet. The introduction of that article read:

The following is the story of Raoul Malak the owner of the Ansan Traffic Group which includes Ansan Traffic Control, Lane Tec, BC Traffic Systems, Flag Girls and Alliance Traffic. This should serve as a precaution to anyone that has any business or personal dealings with him.

[11] Over time the article was posted on numerous websites, the majority of which had domain names that included "raoulmalak" or "ansan". The article was titled in various ways including, "Ansan Group and Raoul Malak Uncovered", "Ansan Traffic Group Exposed", and "Raoul Malak Uncovered". Among other things, it alleged Mr. Malak to be corrupt, a liar, a pimp, and someone who engages in criminal activity, including money laundering and tax evasion. It also alleged he was involved in "kickback schemes" to ensure his companies received preferential treatment in bidding for contracts. In one version, the opening page contained a graphic depicting Mr. Malak in a prison cell dressed as an inmate. In addition, someone using the pseudonym "Jim Arthur" posted the article on several blogs.

[12] Although each version of the article was not identical, the differences are not material. For example, some versions did not contain the graphic of Mr. Malak in prison garb. The trial judge described the different versions of the article as: (a) "Undercover Article (Tax Evasion)"; (b) "Undercover Article (w/o Tax Evasion)"; and (c) "Undercover Article (w/o Jail Scene and Tax Evasion)".

[13] On the afternoon of June 18, 2012, Mr. Jackman emailed <raoulmalak.wordpress.co/> to Darlene Hibbs, a VTS employee. He did so using Google Toolbar, i.e., a toolbar that allows Internet users to share search results easily. The email's subject line read "Raoul Malak Uncovered | Find out the truth about Raoul Malak owner of Ansan Traffic Control". The body of the email contained only the hyperlink.

(Note: In the paragraphs that follow relating to emailing hyperlinks, unless otherwise indicated, the hyperlink was to the defamatory article and the body of the email contained only the hyperlink.)

[14] Also on the afternoon of June 18, 2012, Mr. Jackman, using Google Toolbar, emailed <ansantraffic.wordpress.com/tag/raoul-malak-richmond> to Mr. Paine. The subject line read “Raoul Malak Richmond « Ansan Traffic Control”. Later that afternoon, Mr. Jackman, using Google Toolbar, emailed <raoulmalak.wordpress.com/2012/06/14/6/> to Kelly Shannon, an account manager at VTS. The subject line read “Raoul Malak Uncovered | Raoul Malak Uncovered”. In the email exchange that followed, Ms. Shannon, after reading the article, stated:

Shut up!

Juicy Stuff!!

Mr. Jackman replied:

I was told Ansan had a new web page so I googled it and this is what came up. Pretty funny!

[15] On or about June 20, 2012, an official with a union representing Ansan Group employees told Mr. Malak that Mr. Malak and the Ansan Group were being attacked on the Internet. Mr. Malak instructed Edward J. Young and R. Flynn Marr to investigate. Mr. Young was the chief financial officer of one of Ansan Group. Mr. Marr was employed by the Ansan Group as a contractor. Their investigation included conducting Internet searches to identify websites on which the article was posted. For example, Mr. Young conducted Internet searches using terms such as “Ansan”, “Ansan Traffic”, “Ansan Group”, and “Raoul Malak” and identified multiple websites on which the article had been posted. A firm involved in reputation management on the Internet was hired to assist.

[16] At about the same time, Mr. Malak retained a law firm to assist in the investigation and to take steps to have the defamatory material removed from the Internet. That firm assigned the file to Veronica S.C. Rossos. Ms. Rossos’s involvement included conducting Internet searches.

[17] On the morning of June 21, 2012, Mr. Jackman, using Google Toolbar, emailed <ansantraffic.wordpress.com/> to Messrs. Smith and Litster. The subject line read “RE: Ansan Traffic Exposed”. After accessing the website, Mr. Smith replied:

I saw it yesterday. Holy shit!

Got to figure out someway to make sure Telus and Hydro see it...

[18] Mr. Jackman also emailed <ansantraffic.wordpress.com/> to William Storie, the manager of the Township of Langley’s bylaw department. The subject line read “Re: Ansan Traffic Exposed”. The body of the email read:

Here is your laugh of the day, A little write up about Brian’s new flagging company.

Mr. Storie replied:

All I can say is Wow

“Brian” refers to the Township’s Superintendent of Traffic and Roads.

[19] Later that morning, Mr. Paine emailed <raoulmalak.blogspot.ca/2012/06/raul-malak-

undercover.html#!/2012/06/Raoul-malak-undercover.html> to Mr. Jackman. The subject line read “new link”. Mr. Jackman forwarded that email to Tammy Kanester, a VTS employee, and separately to Nicole Biernaczyk, an assistant business manager with the union representing VTS’s employees. The subject line of the forwarded emails read “FW: new link”.

[20] Ms. Biernaczyk did not click on the hyperlink as she had already read the article. She read the article after being told by two Ansan Group employees to google Mr. Malak’s name. When she did so using “Raoul Malak”, the first search result was a hyperlink to the article. She did not click on any other search results.

[21] On June 22, 2012, Mr. Paine emailed Bob Atchison of Telus asking about the status of Telus’s traffic control contract with the Ansan Group.

[22] Later that day, Mr. Hanna sent Messrs. Jackman and Paine an email with the subject line “Friday Funnies!” which contained the hyperlink <www.vancouverforum.com/threads/you-dont-want-to-work-with-ansan-traffic-control.2707/> (the “Forum Vancouver hyperlink”). The body of that email read:

Just spoke to Greg and he came across this! Almost fell on my ass laughing so hard!

[23] Mr. Jackman forwarded Mr. Hanna’s email together with the hyperlink to Ms. Shannon with the subject line “FW: Friday Funnies”. The body of Mr. Jackman’s email read “Laugh of the day!”

[24] Mr. Jackman emailed the Forum Vancouver hyperlink to Ms. Kanester and several other VTS employees together with the “Laugh of the day!” comment. The subject line of that email read “You don’t want to work with Ansan Traffic Control”.

[25] Using Google Toolbar, Mr. Jackman emailed the Forum Vancouver hyperlink to Ms. Biernaczyk. The subject line of that email read “You don’t want to work with Ansan Traffic Control”.

[26] In mid-June of 2012, Mr. Atchison, in the course of his duties at Telus, searched the Internet and came across the article on two websites.

[27] On June 25, 2012, Stephanie Turner, an Ansan Group employee, noticed <www.raoulmalak.com> posted on the Facebook page of the B.C. Flagging Association for Traffic. She clicked that hyperlink and accessed the article. She searched the Internet and came across several other websites with the article. As Ms. Turner did not know whether Mr. Malak was aware of the article, she emailed Shirley Wilson, another Ansan Group employee, asking her to draw the matter to Mr. Malak’s attention. Ms. Wilson accessed <www.raoulmalak.com> and read the article.

[28] On June 26, 2012, Ms. Atchison emailed Mr. Paine stating Telus was pleased with the level of service the Ansan Group was providing and did not see “putting out a new RFQ [i.e., request for quotation] in the near or mid-term of the existing contract.” Mr. Atchison advised Mr. Paine to contact the Ansan Group if VTS wished to do work for Telus. Mr. Paine forwarded Mr. Atchison’s reply to Messrs. Jackman, Hanna, Smith, and Litster. Mr. Hanna’s one-word response was “Prick!”

[29] On June 27, 2012, Mr. Jackman, using Google Toolbar, emailed the Forum Vancouver hyperlink to Ms. Hibbs and another VTS employee, Denise Clark.

[30] In August or September of 2012 a defamatory poem concerning Mr. Malak and the Ansan Group was posted on the Internet. It was also posted on YouTube in the form of a video made up of a number of slides.

[31] On August 6, 2012, Mr. Hanna sent an email with the subject line "Very Funny!" to Messrs. Jackman and Paine. The body of the email contained the following message below which was the poem:

Just came across this on a blog (
<http://ansantrafficgroup.wordpress.com/ansan-group-corruption-poetry/>), Make sure you put down your drink before reading it, you will fall down laughing.

[32] On August 7, 2012, Mr. Jackman forwarded Mr. Hanna's email to Mr. Clark, Ms. Hibbs, and Ms. Kanester, and separately to two other VTS employees, Gay Froescher and Brent Jacobi. The subject line of those emails read "FW: Very Funny!" Mr. Jackman deleted information that would indicate the original email had been sent to him by Mr. Hanna. These were the only emails Mr. Jackman sent that contained defamatory material rather than just a hyperlink. Ms. Kanester replied:

That is very funny !!! Good one.

[33] On August 14, 2012, Mr. Jackman, using Google Toolbar, separately emailed <raoulmalak.com/> to Ms. Kanester, Ms. Froescher, Sarah Koper (another VTS employee), and Darrell Unger (a friend). The subject line of those emails read "Raoul Malak Uncovered". Mr. Jackman also emailed this hyperlink to Kelly McCormick, the owner of a small flagging company. The subject line of that email read "Raoul Malak Uncovered". In the body of the email, Mr. Jackman wrote:

I just saw this this morning.

Unreal!

[34] On August 29, 2012, B.C. Hydro announced an RFP for province-wide traffic control services. Under the RFP, the winning bidder would provide traffic control services directly for the Lower Mainland and Vancouver Island. Other areas of the Province would be undertaken by subcontractors approved by B.C. Hydro. The deadline for tenders to be submitted was October 5, 2012.

[35] On September 19, 2012, someone using the pseudonym "Mike Flagger" sent an email to Mr. Jackman with the subject line "new email". The body of the email read "Here is the new email address". Later that day, "Mike Flagger" sent an email to a general email account belonging to the City of Maple Ridge with the subject line "Something you should read." The body of the email contained the <www.ansangroup.com> hyperlink to the article along with the message:

I thought you should be made aware of who you are potentially doing business with. Check out this link. Its [*sic*] sad, but true.

[36] Nathan Hearts, a Maple Ridge employee, viewed the email and clicked on the hyperlink. After reading the article, Mr. Heart forwarded Mike Flagger's email to Dimitri Kapouralis, who works for the Ansan Group.

[37] On September 21, 2012, Island Traffic was purchased by Joanne Chun, Mr. Malak's wife, and became part of the Ansan Group. After this Island Traffic did not participate in VTS's tender plans with respect to the B.C. Hydro RFP.

[38] On September 27, 2012, an email signed "Anonymous" was sent by "Jim Arthur (<jimarthur042@gmail.com>)" with the subject line "URGENT...PRIVATE AND CONFIDENTIAL" to British Columbia Premier Christy Clark and Minister of Energy Rich Coleman—the minister responsible for B.C. Hydro—regarding the B.C. Hydro RFP. The email was blind-copied to Mr. Paine. The body of the email begins with "I write to you today to blow the whistle on a potential scandal of a very large magnitude." It then goes on at some length to disparage Mr. Malak alleging, among other things, that he has ties to organized crime. The email was read by persons in Minister Coleman's office.

[39] On September 27, 2012, Ms. Turner searched the Internet and found the article on four websites: <ansangrouptruth.wordpress.com>, <ansangroup.com>, <raoulmalak.com>, and <raoulmalak.co>. She also found the derogatory poem posted on <youtube.com>. Ms. Turner emailed that information to Ms. Wilson.

[40] On October 5, 2012, tenders for B.C. Hydro's RFP closed. Both the Ansan Group and VTS submitted bids.

[41] On October 9, 2012, an email with the subject line "Raoul Malak – Ansan Traffic Group" was sent from <ansangroupinc@live.com> to two B.C. Hydro employees involved in procurement. The email contained the hyperlink <ansangroup.com> along with the following message:

I invite you to check the above link, which outlines the history of the owner of Ansan Traffic Group. Thought you would want to know what kind of person that BC Hydro is currently doing business with. The website was taken down previously before due to an injunction filed by Raoul Malak, obviously concerned about everyone seeing the truth about him. You can check the facts, is this the kind of person BC Hydro wants to do business with.

Both B.C. Hydro employees read the article.

[42] On October 29, 2012, "Jim Arthur" sent another email to Premier Clark and Minister Coleman with the subject line "URGENT...PRIVATE AND CONFIDENTIAL". The email described Mr. Malak's business practices as "anti-competitive" and "predatory". It was read by persons in Minister Coleman's office.

[43] On November 13, 2012, an anonymous written complaint with respect to the Ansan Group was made to Telus's online ethics line regarding Telus's traffic control contract. The writer refers to having been in contact with Mr. Atchison in June 2012 to determine whether Telus would be exercising

it's third-year option with the Ansan Group or issuing an RFQ. This complaint was read by persons within Telus.

[44] On November 14, 2012, Mr. Marr initiated a complaint with the World Intellectual Property Organization (“WIPO”) on behalf of Mr. Malak and Ansan Industries Ltd. with respect to 12 domain names on which the article had been posted. The complaint sought to have those domain names transferred to Mr. Malak and Ansan Industries Ltd.

[45] “Jim Arthur” emailed the WIPO opposing the complaint and objecting to Mr. Marr’s standing to bring it. That email was sent using “Uncover The Truth uncoverthecrook@gmail.com”.

[46] In November 2012, Mr. Young contacted a firm of accountants in Vancouver with a view to retaining that firm to prepare year end financial statements and other documents for the Ansan Group. As part of the firm’s normal business practice, one of the accountants googled Mr. Malak’s name and found several websites with the article. He advised Mr. Young of this.

[47] On December 20, 2012, “Follow-Up Notes” were added to the anonymous Telus complaint, alleging Mr. Malak was involved in organized crime and launders money through his companies. Those notes were read by persons within Telus. That same day, Mr. Hanna sent the “Follow-Up Notes” to Mr. Jackman in an email with the subject line “FYI”.

[48] On February 7, 2013, the WIPO issued a decision requiring the disputed domain names to be transferred to Mr. Malak and Ansan Industries Ltd: Case No. D2012-2249. On February 11, 2013, the WIPO emailed its decision as an attachment labeled “Decision D2012-2249-1.doc” to a number of parties, including <undercoverthecrook@gmail.com>, i.e., an email address used by “Jim Arthur”.

[49] On February 12, 2013, Mr. Hanna sent an email without a subject line to Messrs. Jackman and Paine to which was attached the WIPO decision. The body of the email read “Guess need new ones! lol”.

[50] The Ansan Group posted information about the WIPO decision on its website.

[51] On or about February 27, 2013, B.C. Hydro accepted VTS’s bid.

[52] In early May of 2013, Marlene J. Tompkins, a Telus employee, was told by a neighbour to search Mr. Malak’s name on the Internet. The results of that search included at least two websites with articles accusing Mr. Malak and the Ansan Group of being involved in criminal activity. Ms. Tompkins emailed her manager a hyperlink to one of the websites—<moneylaunderer.net>—expressing concern about the allegations.

[53] On May 31, 2013, Mr. Malak and the Ansan Group commenced the within action.

[54] At the trial, Messrs. Hanna, Jackman, and Paine testified and denied any involvement with the defamatory material.