IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pineau v. Glacier Media Inc.,*
2024 BCSC 4

Date: 20240102
Docket: S170597
Registry: Vancouver

Between:

Stephen B. Pineau

Plaintiff

And

Glacier Media Inc., Business in Vancouver And Tyler Orton

Defendants

Before: The Honourable Justice E. McDonald

Reasons for Judgment

The Plaintiff, appearing in person:	S.B. Pineau
Counsel for the Defendants:	J. Yamashita
Place and Date of Trial/Hearing:	Vancouver, B.C. July 17-18, 2023 and by Written Submissions on July 25 and 28, 2023.
Place and Date of Judgment:	Vancouver, B.C. January 2, 2024

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Introduction

[1] This summary trial application arises from a claim for defamation (the "Claim"). The Claim concerns a subject piece that mentions the plaintiff, namely, the January 2015 *Business in Vancouver* article (the "Subject Piece").

[2] The defendants admit to the publication of the Subject Piece. They also admit that the Subject Piece refers to the plaintiff and that it is defamatory of the plaintiff.

[3] The only issue for determination is the quantum of damages payable to the plaintiff for the defamation of him by the Subject Piece.

Facts

The Parties

[4] The plaintiff, Stephen Pineau, is presently 61 years old. For many years, Mr. Pineau worked as a businessperson in the area of security systems. He is university educated and he has many years of experience working in the area of security systems.

[5] The defendant, Glacier Media Inc., is incorporated under the *Canada Business Corporations Act* ("Glacier"). BIV Media Limited Partnership, a division of Glacier, ("LP") publishes a business newspaper entitled "Business in Vancouver" ("BIV")

[6] The defendant, Tyler Orton, is a journalist employed by LP. Mr. Orton has a university education and he holds a certificate in journalism. Mr. Orton has worked as a journalist since 2011. Since March 2014, Mr. Orton has worked as a full time reporter for BIV.

Mr. Pineau's Background

[7] Mr. Pineau's employment background is described in the context of a decision rendered in another action for defamation involving the plaintiff that is

indexed as *Pineau v. KMI Publishing and Events Ltd.*, 2022 BCCA 426 [*Pineau* (BCCA)]:

> **The Appellant's Employment at Viscount**
>
> [5] The appellant first became employed with Viscount Systems Inc. ("Viscount") in 1991. Viscount was then owned by BC Tel (now known as Telus). Viscount was in the business of manufacturing and installing building entry and security systems. In 1992, the appellant left Viscount and, with some partners, established a start-up company called Blue Mountain Technologies ("Blue Mountain"). The partners included Stephen Leach, a long-time friend of the appellant.
>
> [6] In 1997, the Blue Mountain partners purchased Viscount from Telus. The appellant then became president of Viscount. In 2001, when Viscount was taken public, he became the president and chief executive officer ("CEO").
>
> [7] In 2011, there was a change in the board of directors of Viscount. A new chair was appointed. The appellant initially remained the CEO after the new board was in place. However, the appellant's relationship with the new chair deteriorated. In February 2014, the appellant was terminated from his position without cause. Nine months later, in November 2014, Viscount commenced a civil proceeding against the appellant (the "Viscount Action").
>
> [8] ...In the action, Viscount alleges that after the appellant's termination, it was discovered that the appellant had used Viscount's corporate TD Visa account to cover expenses that did not have a clear business connection. The notice of civil claim alleged that the appellant had breached the terms of his employment contract, his common law duties as an employee, and his fiduciary duties to Viscount by improperly using Viscount's corporate TD Visa account for unauthorized expenses.
>
> [9] On January 2, 2015, the appellant filed a response to civil claim denying the allegations. He also filed a counterclaim seeking damages for wrongful dismissal and breach of employment contract.

The Subject Piece

[8] On January 20, 2015, the Subject Piece that is the subject of the present Claim was published in BIV. It stated:

> '**Lack of protection' keeps Canadian whistleblowers at bay**
>
> Con Buckley, senior partner at Buckley Dodds Parker LLP Chartered Accountants, says companies must have an independent whistleblower system set up to protect both employees and employers.
>
> The highest reward paid to corporate whistleblowers by the U.S. Securities and Exchange Commission was US$30 million.

> Meanwhile, Canada Revenue Agency's Offshore Tax Informant Program, which pays informants for information on tax evasion, has paid out no rewards since it was launched more than a year ago.
>
> The "lack of protection" offered to Canadian whistleblowers relative to the rest of the developed world is the main reason the country is trailing other jurisdictions, according to a 2012 report from the B.C. auditor general's office.
>
> For instance, Burnaby's Viscount Systems filed suit against its former CEO in November 2014, claiming Stephen Pineau had made more than $67,000 worth of charges to his corporate expense account that had nothing to do with business.
>
> Pineau had been with Viscount Systems for 17 years, but no one at the company raised the issue with him until a month after he was terminated without cause, according to the lawsuit.
>
> Con Buckley, a senior partner at Buckley Dodds Parker LLP Chartered Accountants, said there are plenty of regulations in place designed to prevent corporate mishandling of funds.
>
> "But people don't follow them," he said, adding that external auditors uncover only a small portion of fraud.
>
> Most of it is discovered by chance or through whistleblowers, who Buckley said need "an independent whistleblower system where you can phone up somebody that is not your immediate boss." He added that a lawyer or designated contact in upper management is ideal.
>
> But a 2012 report from former B.C. auditor general John Doyle cited serious concerns over whistleblower protection in B.C.
>
> "…While our audit process offers whistleblowers anonymity, it does not prevent them facing potential reprisals should those individuals be identified inside their organization", the report said.

[9] The Subject Piece was published in Business in Vancouver's January 20-26, 2015 print edition. The Subject Piece was also posted online on the BIV website on January 20, 2015. The text of the Subject Piece was the same in the print and online editions.

Other Publications Concerning the Plaintiff

[10] Besides the Subject Piece, there were other publications concerning the plaintiff that provide context for the Claim. These other publications are described in *Pineau* (BCCA) by Horsman J.A. as follows:

> **The *Business in Vancouver* Articles**
>
> …

> [11] The first *Business in Vancouver* article was published on the *Business in Vancouver* website in early December 2014 (the "First BIV Article"). This was before the appellant had filed his response to civil claim and counter claim. The First BIV Article simply summarized the allegations in Viscount's civil claim. It concluded with a statement that the allegations had not been proven in court, and that the appellant had not filed a response by press time. The appellant took no legal action in relation to this article.
>
> [12] The second article was published on the *Business in Vancouver* website on January 20, 2015, under the headline "'Lack of protection' keeps Canadian whistleblowers at bay" (the "Second BIV Article"). The article cited the facts alleged in the Viscount Action as an example of the difficulty in detecting the mishandling of corporate funds.
>
> …
>
> [13] This article did not reference the appellant's response to civil claim and counterclaim. …

[11] Justice Horsman also provides the background concerning the plaintiff's prior employment:

> [19] The Viscount Action was settled out of court in September 2015 on terms that contemplated the appellant's potential return as the CEO. A consent order dismissing the proceeding was entered on April 8, 2016. Although the appellant did not return to Viscount as CEO, as the trial judge notes (at para. 20), the fact that his return was even contemplated tends to indicate that by September 2015 the company was no longer concerned about the subject matter of the Viscount Action.
>
> [20] During 2015 and 2016, the appellant continued to actively seek out employment opportunities in his specialized field, but was unsuccessful in securing a new position. On at least two occasions he was told (verbally) that he was the successful candidate, subject to a security and background check, only to have the opportunity inexplicably withdrawn thereafter.
>
> *Pineau* (BCCA), at paras. 19-20.

[12] On November 19, 2014, Viscount had commenced an action against the plaintiff alleging breach of fiduciary and employment duties (the "Viscount Action"). The Viscount Action alleged, among other things, that the plaintiff had been terminated without cause on February 17, 2014 and that from 2011 onwards, the plaintiff had spent in excess of $67,000 on personal expenses using Viscount's corporate visa account.

[13] On January 2, 2015, the plaintiff responded to the Viscount Action denying the allegation. He also commenced a counterclaim against Viscount. In the

counterclaim, the plaintiff sought, among other things, damages for breach of contract and repayment of debt.

[14] The Viscount Action was covered in BIV, December 2-8, 2014 edition, in a section entitled “Who’s Getting Sued”. This is the “First BIV Article” mentioned in the above excerpt from *Pineau* (BCCA).

[15] On December 2, 2014 and January 8, 2015, Mr. Orton posted on Twitter concerning, respectively, the First BIV Article and the plaintiff. The December 2, 2014 post from Mr. Orton stated, “Lawsuit alleges Burnaby-based @ViscountSystems’ fired CEO lived on the company dime”. The post contained a link to the First BIV Article. The January 8, 2015 post from Mr. Orton stated, “I give this fired CEO points for honesty on his @LinkedIn profile.”

[16] The January 8, 2015 post on Twitter also contained a link to the First BIV Article and it showed a screenshot of the plaintiff’s LinkedIn profile. The LinkedIn profile screenshot included the following text:

> Steve Pineault
> Seeking New Opportunity
> Vancouver, Canada Area | Computer Software
> Current Bored at Home
> Past Ousted CEO at Viscount Systems Inc.

[17] The plaintiff’s evidence is that in January or February 2015 he received more calls about the First BIV Article and he was “fed up” and he cut the calls short. The plaintiff now believes these calls were actually about the Subject Piece.

[18] While neither the First BIV Article, nor Mr. Orton’s posts on Twitter, are alleged to be defamatory, they provide background that is relevant, for example, to the plaintiff’s request in the Claim for aggravated and punitive damages.

The KMI Action

[19] While searching the internet in December 2016, the plaintiff also found another article mentioning him with the same headline, namely, “Lack of Protection

Keeps Canadian Whistleblowers at Bay". That second article was published on January 21, 2015 on the Human Resources Manager (HRM) Canada website (the "KMI Article"). In other words, one day after the publication of the Subject Piece, the KMI Article was published.

[20] In 2021, Mr. Pineau successfully brought a defamation action in respect of the KMI Article (the "KMI Action"). In submissions for the present application, both parties referred to the KMI Article and the reasons for judgment concerning the KMI Action.

[21] The KMI Article appeared as follows:

> Lack of protection keeps Canadian whistleblowers at bay
>
> Along with the recent disappearance of HR manager Jia Lining, the issue of whistle-blowing has attracted international attention – but does corporate Canada favour the corrupt? A report from the B.C. auditor general's office revealed that Canadian whistleblowers are afforded much less protection than those in other parts of the developed world.
>
> Even with Canada Revenue Agency's offshore Tax Informant program – which pledges to pay informants for information on tax evasion – the country is still trailing other jurisdictions. And, somewhat worryingly, the program has not paid out any rewards since it was launched over a year ago.
>
> In November of last year, Burnaby's Viscount Systems filed suit against Stephen Pineau – its former CEO. Pineau, who has been with the B.C. based company for 17 years, was accused of making $67,000 worth of fraudulent claims on his corporate expense card.
>
> So why had no one raised the issue earlier? According to the lawsuit, nothing was said until a month after he was terminated without cause.
>
> Con Buckley, senior partner at Buckley Dodds Parker LLP, says Canadian companies need to step up and provide better channels for sharing in-house information.
>
> There may be plenty of rules and regulations in place designed to prevent corporate misconduct, said Buckley, but people don't always adhere to them.
>
> External auditors often only uncover only a small portion of fraud – the majority is usually detected by accident or revealed by a whistleblower, said Buckley. That's why companies need "an independent whistleblower system where you can phone up somebody that is not your immediate boss."
>
> Leading employment lawyer Richard Charney agrees, he says "Businesses need to adopt a proactive approach to managing allegations or disclosures that point to misconduct within their organisation.["]

> "Not understanding the law surrounding whistle-blowing can be costly for businesses in terms of potential claims as well as damage to reputation," he warned.

[22] On January 19, 2017, the plaintiff commenced the KMI Action against Nicola Middlemiss and KMI Publishing and Events Ltd. alleging he was defamed by the KMI Article. The KMI Action proceeded to trial in two stages.

[23] At the initial summary trial stage of the KMI Action, Justice Winteringham determined that the KMI Article was defamatory of the plaintiff. Justice Winteringham's reasons for judgment are indexed as *Pineau v. KMI Publishing and Events Ltd*., 2021 BCSC 1268 [*Pineau* #1].

[24] In *Pineau* #1, the text of the Subject Piece is reproduced because it was allegedly relied on in writing the KMI Article. However, the issue of whether the Subject Piece was defamatory was not before the court.

[25] At the second stage, Justice Kirchner assessed damages for defamation of the plaintiff by from the KMI Article. Ultimately, Kirchner J. assesses general damages of $60,000 for the defamation of the plaintiff in the KMI Article.

[26] Justice Kirchner's reasons for judgment are indexed as *Pineau v. KMI Publishing and Events Ltd*., 2021 BCSC 1952 [*Pineau* #2]. At para. 29, Kirchner J. observes that there were striking similarities between the KMI Article and the Subject Piece. At para. 133, Kirchner J. found that Ms. Middlemiss appears to have plagiarized the Subject Piece.

[27] The plaintiff appealed from the order assessing damages in *Pineau* #2. In *Pineau* (BCCA), the Court of Appeal allows the appeal in part and varies the assessment of general damages to increase the award from $60,000 to $120,000.

[28] There is no suggestion that the decisions rendered in respect of the KMI Article are determinative of the issues that are before me. The court is clear to say in those decisions that no findings are being made as to whether the Subject Piece is defamatory of the plaintiff. However, because of various submissions made

regarding those reasons and the KMI Article, I have reproduced the text of the KMI Article and referred to relevant parts of the decisions.

Preliminary Issue

Suitability for Summary Trial

[29] There is a preliminary issue concerning the suitability of this matter for summary trial.

[30] On July 18, 2023, at the conclusion of the hearing, I issued oral reasons for judgment on the issue of whether the matter was appropriate for determination by summary trial. As indicated in the reasons, I was satisfied I could find the facts necessary to decide the issues of fact and law and that it would not be unjust to decide the issues summarily.

[31] When I considered the amounts at issue, along with the absence of any and significant or complex issues, I found that any conflicts in the evidence were resolvable by reference to admissible evidence, including, documentary evidence.

[32] As for the remaining issues raised by the application, I reserved judgment. These are my reasons in respect of the remaining issues which concern the assessment of damages for the defamation of the plaintiff.

Analysis

[33] Again, the only issue for determination is the quantum of damages payable for the defamation of the plaintiff in the Subject Piece.

Legal Principles of Damages for Defamation

[34] In *Pineau* (BCCA), at paras. 51-58, Horsman J.A. sets out the applicable general principles of damages for defamation:

> ***General Damages***
>
> [51] The primary remedy for defamation is an award of general damages. The purpose of an award of general damages is to compensate the plaintiff for the loss of reputation and injury to the plaintiff's feelings, to console the plaintiff, and to vindicate the plaintiff so their reputation may be re-

established: *Bent v. Platnick*, 2020 SCC 23 at para. 148 [*Bent*], quoting Peter A. Downard, *The Law of Libel in Canada*, 4th ed. (Toronto: LexisNexis, 2018) at §14.2.

[52] In a libel action, general damages are presumed from the publication of a false statement, and are awarded "at large": *Hill v. Church of Scientology of Toronto* [1985] 2 S.C.R. 1130 at para. 164 [*Hill*]. In *Cassell & Co Ltd. v. Broome*, [1972] A.C. 1027 at 1071, Lord Hailsham explained the concept of damages being at large:

> In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitutio in integrum has necessarily an even more highly subjective element. Such actions involve a money award which 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. As Windeyer J. well said in *Uren v. John Fairfax & Sons Pty Ltd*. (1967), 117 CLR 118 at 150:
>
> > "It seems to me that, properly speaking, a man defamed does not get compensation *for* his damaged reputation. He gets damages *because* he was injured in his reputation, that is, simply because he was publicly defamed. For this reason, compensation by damages operates in two ways — as a vindication of the plaintiff to the public, and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."
>
> That is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries. Quite obviously, the award must include factors for injury to the 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. The bad conduct of the plaintiff himself may also enter into the matter where he has provoked the libel, or where perhaps he has libelled the defendant in reply. What is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being "at large".

[53] In *Hill* at para. 182, the Supreme Court of Canada set out a list of factors that are relevant to the assessment of general damages for defamation: the conduct of the plaintiff, the plaintiff's position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of a retraction or apology, and the conduct of the defendant. General damages may be awarded not only for the loss of the plaintiff's reputation, but also to compensate the plaintiff for any stress, embarrassment, humiliation, mental anguish and emotional distress, or personal hurt or injured feelings that the defamation may have caused: Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, United States*, 2nd ed.

(Toronto: Carswell, reissued October 2021) [*Brown on Defamation*], at §25:3 and §25:17.

Aggravated Damages

[54] Aggravated damages may be awarded in defamation cases in circumstances where the defendant's conduct has been "particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement": *Hill* at para. 188. Aggravated damages are compensatory in nature. They take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct: *Hill* at para. 189. There must be a finding that the defendant was motivated by actual malice, which increased the injury by spreading the damage to the plaintiff further afield or by increasing the plaintiff's distress and humiliation: *Hill* at para. 190. Malice for the purpose of defamation law may be established by proof that the defendant was recklessly indifferent to the truth: *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at paras. 96-97 [*Botiuk*].

[55] As reviewed by this Court in *Nazerali*, there is some controversy in the law as to whether there should be a separate award of aggravated damages for defamation given the significant overlap in the criteria that governs awards of aggravated, general, and punitive damages. While it is not an error of law to make a separate award of aggravated and general damages, it would be an error of law if the awards included double counting: *Nazerali* at para. 76, citing *Brown v.* Cole (1998), 1998 CanLII 6471 (BC CA), 61 B.C.L.R. (3d) 1 (C.A.) [*Brown*].

Punitive Damages

[56] Punitive damages may be awarded where the defendant's conduct is so malicious and high-handed that it offends the court's sense of decency. Punitive damages are not compensatory, but rather are in the nature of a fine that is meant to deter the defendant and others from engaging in similar conduct: *Hill* at para. 196. Punitive damages are only awarded where the amount of general and aggravated damages is insufficient to achieve the objectives of punishment and deterrence: *Nazerali* at para. 91.

Special Damages

[57] In addition to general damages, a plaintiff may also recover special damages for defamation that have been pleaded and proved. This includes the plaintiff's actual pecuniary loss that is caused by the defamatory publication. The recoverable pecuniary loss may include business losses: *Botiuk* at paras. 109-111. Special damages for pecuniary loss in defamation cases are "rarely claimed and often exceedingly difficult to prove": *Hill* at para. 169.

[58] Even where a plaintiff cannot specifically prove actual pecuniary loss, an award of general damages may include compensation for possible economic damages that result from the defamation but cannot be specifically proven. This includes compensation for business losses, and for lost employment opportunities and earning capacity: *Brown* at para. 107; *Pressler v. Lethbridge and Westcome TV Group Ltd.*, 2000 BCCA 639 at paras. 93-94;

> *Vogel v. Canadian Broadcasting Corp.* (1982), 1982 CanLII 801 (BC SC), 35 B.C.L.R. 7 (S.C.) at paras. 227-231.

The Parties' Positions

[35] The plaintiff seeks general, aggravated, punitive and special damages. However, he does not specify any particular award amount under these various heads of damage. The plaintiff submits that the seriousness of the statements in the Subject Piece and that the defendants' conduct justifies an "elevated level" of damages.

[36] As mentioned, the defendants admit liability and agree that general damages are presumed. They submit that the award of general damages ought to be in the range of $40,000 to $60,000. The defendants deny that aggravated, punitive and special damages are appropriate in the circumstances.

Quantifying Damages for Defamation

[37] To assess damages, the authorities such as *Hill* and *Nazareli* provide a non-exhaustive list of the factors that courts may consider. I will now address the relevant factors that apply in this case:

The Plaintiff's Position and Standing

[38] A plaintiff's "reputation, prominence and professional standing" have been described as important factors in the assessment of damages and courts recognize that certain individuals, such as lawyers and persons holding public roles, are particularly vulnerable to charges against their reputation: *Holden v. Hanlon*, 2019 BCSC 622 at para. 296 [*Holden*].

[39] The defendants acknowledge that the plaintiff enjoys a good reputation professionally and personally. The evidence indicates that the plaintiff's background included a history as a successful investor and executive in the field of security systems. The plaintiff had a long and successful tenure as the CEO of Viscount until approximately 2012 when certain personnel changes ultimately led to the plaintiff's

dismissal without cause. I have no difficulty finding that the plaintiff enjoyed a good personal and professional reputation.

[40] In my view, the defamation of the plaintiff must be considered in the context of the plaintiff's reputational background. Just as integrity and ethical standards are described by the court in *Holden*, at para. 315, as crucial to the reputation of a plaintiff who worked as a private investigator, I find these standards are equally crucial to the plaintiff due to his long-history working at the executive level of a security-systems corporation.

[41] The defendants also submit that while the plaintiff enjoyed a good reputation, his reputation had been shaped by the Viscount Action. I will address that submission later in these reasons when I discuss the factors that may mitigate damages.

Nature and Seriousness of Defamatory Statement

[42] Again, there is no dispute by the defendants that the Subject Piece was defamatory of the plaintiff.

[43] In the Claim, the meanings, including inferential meanings, of the words in the Subject Piece are alleged by the plaintiff to be as follows:

> 12. In their natural and ordinary meaning the words and headline contained in the article and the article in context were meant and were meant to mean or in the alternative could be inferred to mean one [sic] the following meanings that the Plaintiff:
>
> a) is corrupt, dishonest, dangerous, without integrity and or not be trusted
>
> b) represented a danger to the employees of Viscount or other individuals and/or that the employees live in fear of retaliation or intimidation including dismissal, demotion, public humiliation, career destruction, isolation, threats, legal prosecution and physical violence.
>
> c) committed fraud and misappropriation of company funds.
>
> d) had committed criminal and civil violations of the law including the US Sarbanes-Oxley Act.

[44] As part of assessing the nature and seriousness of the defamatory statement, I must find the defamatory meaning, or "sting", of the Subject Piece.

[45] In *Taseko Mines Ltd. v. Western Canadian Wilderness Committee*, 2017 BCCA 431, the court explains that the defamatory meaning must be one which an ordinary and reasonable person would understand:

> [42] The applicable test of whether words are defamatory has been stated in a variety of terms. The defamatory meaning must be one which would be understood by reference to an ordinary and reasonable person, and not a meaning by someone who may be naturally inclined to attribute the best or worst meaning to words published about the plaintiff. The impugned words must be construed in their natural, normal, ordinary, plain, usual, fair, obvious, and commonly accepted sense. This is not an exhaustive list of appropriate adjectives, but an illustration of the applicable test: Raymond E. Brown, *Brown on Defamation – Canada* (Toronto: Thomson Reuters, 1994) (loose-leaf updated 2017, release 4), ch. 5 at 3, 16-23.
>
> [43] An inferential meaning is the impression an ordinary, reasonable person would infer from the allegedly defamatory material. An inferentially defamatory meaning excludes any special knowledge that the recipient may have. The court is not limited to meanings offered by the parties, but the meaning offered by the plaintiff is to be treated as the most injurious meaning the words are capable of conveying: *Brown on Defamation*, ch. 5 at 26-27.
>
> [44] Furthermore, the meaning of the words must generally be understood in the context of all of the circumstances and the publication as a whole: *Brown on Defamation*, ch. 5 at 3, 153.
>
> …
>
> [47] At the end of the day, the basic test to apply when discerning whether an "inferential" meaning is defamatory is based on the natural and ordinary meaning that a reasonable person would infer from the entirety of the publication.

[46] The plaintiff points out that allegations of fraud cast a serious pall over a person's reputation: *Pineau #1,* para. 86. The plaintiff submits that the natural and ordinary meaning of the Subject Piece is evident from the content of the KMI Article, where Ms. Middlemiss understood and reported based on the Subject Piece that the plaintiff had been sued for fraud.

[47] The plaintiff submits an ordinary reader of the Subject Piece would connect the plaintiff to fraud, just as Ms. Middlemiss had done. According to the plaintiff, the seriousness of the allegations in the Subject Piece is very similar to the KMI Article.

However, the plaintiff also submits the Subject Piece has allegations of a more serious nature because BIV is "overwhelmingly Vancouver targeted" and it refers to the BC Auditor's General Report.

[48] The plaintiff's evidence, in addition to his own understanding of the Subject Piece, also includes, for example, the affidavits of Mr. Leach and Mr. Corcoran. Those affiants set out their impressions and understanding of the Subject Piece. For example, Mr. Leach states that the Subject Piece infers the plaintiff "had participated in some illegal or dishonest activities related to his BC Government dealings during his time at Viscount".

[49] The defendants submit, and I agree, that such extrinsic evidence is inadmissible to the extent it is relied on to establish the inferred meaning of the Subject Piece: *Hodgson v. Canadian Newspapers Co. Ltd.*, 2000 CanLII 14715 (Ont. C.A.) at paras. 40-41. If that were not the case, the court would be required to consider whether each witnesses' evidence aligns with the defamatory meaning that would be understood by reference to an ordinary and reasonable person.

[50] The defendants acknowledge that the Subject Piece does not refer to Mr. Pineau's pleaded denial of the Viscount Action. It also fails to state that the allegations in the Viscount Action had not been proven. However, the defendants point out that the Subject Piece frames the allegations in the Viscount Action as having been made in a recently filed lawsuit at the time of publication. The Subject Piece also attributes the allegations to the pleading and notes that Mr. Pineau had been terminated without cause.

[51] According to the defendants, a reasonable and informed reader of the Subject Piece seeing, in mid-January 2015, the words "Burnaby's Viscount systems filed suit against its former CEO in November 2014" would not have concluded that the allegations were proven or resolved. Further, the defendants submit that by using the words "claiming" and "according to the lawsuit" in the Subject Piece, it conveyed that the statements about Mr. Pineau were allegations made but not the court's findings. The defendants also point out that unlike the defendants who authored the

KMI Article, they did not falsely state in the Subject Piece that Viscount alleged Mr. Pineau had made “fraudulent claims”.

[52] While *Pineau* #1 does not decide whether the Subject Piece is defamatory or determine the “sting”, that decision makes certain findings that I find appropriate to consider in the present application. I say this because the Subject Piece is largely incorporated into the KMI Article that was considered in *Pineau* #1.

[53] The defendants submit that because the Subject Piece does not refer to the allegation of $67,000 being “fraudulent claims”, and instead states that the charges to the corporate expense account “had nothing to do with business”, the seriousness of the defamatory statement is lessened.

[54] In the Subject Piece, I note that the discussion of the Viscount Action is introduced as an “instance” of the “lack of protection” for whistleblowers discussed earlier in the Subject Piece. As well, while the charges the plaintiff made to his corporate expense account are not described as “fraudulent claims”, they are described as having “nothing to do with business”. Later in the Subject Piece, there are references to regulations meant to prevent “corporate mishandling of funds” which are not followed and to external auditors uncovering only a “small portion of fraud”.

[55] I find that reasonable people reading the Subject Piece would think and understand that Viscount had accused Mr. Pineau of dishonest, but not fraudulent, conduct. They would also think and believe that lack of whistleblower protection or failure to follow regulations meant to prevent mishandling of funds contributed to Mr. Pineau’s actions not being found out sooner. The Subject Piece does not include a disclaimer that the claims made by Viscount were unproven in court.

[56] In assessing damages in *Pineau* #2, Kircher J. found that the nature of the libel in the KMI Article was significant, including because it involved allegations of fraud and there was innuendo about of being able to escape detection.

[57] I have no difficulty finding that the nature of the libel was also significant in the Subject Piece including because it implies dishonest conduct by the plaintiff and that employees of Viscount potentially feared reprisals from coming forward to report the wrongdoing earlier. However, I do not find that the Subject Piece contains more serious allegations than the KMI Article.

[58] I am supported in my finding about the seriousness of the libel in the Subject Piece being equivalent to the seriousness in the KMI Article by the decision in *Pineau* (BCCA). At para. 98, Horsman J.A. observes that it is reasonable to assume that the Subject Piece and the KMI Article had a similar impact on the plaintiff's general reputation.

Impact on the Plaintiff

[59] The plaintiff's evidence is that the defamation of him in the Subject Piece had far-reaching and significant impact on him.

[60] The plaintiff's close relatives, namely, his sons and his ex-wife, confirm that once the plaintiff learned of the Subject Piece, he became depressed and anxious, especially about his lack of employment. The plaintiff's ex-wife states that she observed the plaintiff fall into a deep depression and express feelings of guilt and hopelessness especially when there was a refusal to remove the Subject Piece.

[61] The plaintiff's sons described that when the plaintiff learned of the Subject Piece, he changed from being a positive and light-hearted person to sad, anxious and agitated. They describe the plaintiff as often being apologetic to them for his low mood and lack of employment. They also noticed that the plaintiff began to adopt poor lifestyle habits, such as unhealthy eating, physical inactivity and weight gain.

[62] I have no difficulty finding that the harm to the plaintiff's reputation from the defamation of him in the Subject Piece was serious and far-reaching.

Economic Loss / Loss of Economic Opportunity

[63] The plaintiff's evidence is that from 2015 to 2016, he actively sought employment without knowing of the existence of the Subject Piece. The plaintiff now believes the Subject Piece is a main reason he failed to secure employment in his area of expertise and why he says he had no choice but to take a number low paying jobs.

[64] The plaintiff and Mr. Leach provide evidence concerning an opportunity that the plaintiff had in December 2016 to potentially work with Mr. Leach's company. That opportunity involved pursuing government and commercial security system projects. However, during their negotiations, Mr. Leach discovered the Subject Piece and he told the plaintiff about it.

[65] Once he knew of the Subject Piece, the plaintiff said he felt shocked and confused. However, he also describes having an "epiphany" by suddenly understanding that the Subject Piece was the reason he had come so close on many employment opportunities only to receive no employment offer after the final interview or background check. The plaintiff states there was "at least two employment offers that had been made and then cancelled at the last minute and without explanation", however, he does not say what those missed opportunities were.

[66] The plaintiff states that the Subject Piece and the defamation he suffered destroyed his life. The plaintiff's ex-wife states that she believes the Subject Piece affected the plaintiff's employment prospects. She recalls the plaintiff receiving tentative offers of employment in 2015 and 2016 that were later withdrawn without explanation but she also does not specify what the missed opportunities were.

[67] Mr. Leach's evidence is that he planned to offer the plaintiff the opportunity to partner with him in the company that Mr. Leach operated and to have the plaintiff in place by January 2017. Mr. Leach did not mention his plan to partner with the plaintiff to the plaintiff. Mr. Leach anticipated that the plaintiff would make in excess of $150,000 each year but probably less in the first year.

[68] Mr. Leach states that he intended to consult a lawyer “to discuss the issues involved including the share structure I was contemplating, the valuation of the company in issuing new shares, payment for those shares, and the salary structure”. However, before Mr. Leach met a lawyer or made the plaintiff a “formal” offer, he conducted an internet search on Viscount and the plaintiff.

[69] Mr. Leach found the Subject Piece and stated he felt he had no choice but to put the offer to the plaintiff “on hold”.

[70] I find that as a result of the defamation of the plaintiff in the Subject Piece, the plaintiff suffered a loss of pride and self-confidence, as well as social and economic damage, including difficulty securing new employment. I further find that the defamation from the Subject Piece was particularly damaging in light of the plaintiff’s expertise and focus in the field of security-systems. It is reasonable to infer that persons working in this area are expected to be extremely trustworthy.

Mode and Extent of Publication

[71] The defendant has provided evidence concerning the mode and extent of publication of the Subject Piece. Again, the Subject Piece was published in the January 20-26, 2015 print edition of BIV and posted on the BIV website on January 20, 2015. The only difference in the online edition of the Subject Piece was that it included a photo of Mr. Buckley with an accompanying caption, otherwise, the text was the same.

[72] Mr. Orton’s evidence is that the total print run of the January 20-26, 2015 issue of BIV was 12,913 copies.

[73] Kirk LaPointe, in his affidavit made June 6, 2022, states that they are the vice president, editorial, at Glacier and the publisher and editor-in-chief of BIV. Both Tyler Orton and Kirk LaPointe states that on July 13, 2021, BIV removed the online edition of the Subject Piece.

[74] However, two subsets of the three subscription categories of paid subscribers to BIV had access to electronic PDF copies of past issues of BIV, including the issue in which the Subject Piece appeared.

[75] Subscribers for print-only access to BIV did not have access to electronic PDF copies of past issues of BIV. As of May 26, 2022, the defendant have removed the electronic copy of the BIV issue containing the Subject Piece with the result that it could not longer be accessed by the subsets of paid subscribers.

[76] I find that the defendant intended to remove all versions of the Subject Piece and to make it unavailable to the public after July 13, 2021. I further find that the defendant failed to remove an electronic PDF copy of BIV that contained the Subject Piece due to inadvertence. Upon learning that the PDF electronic copy remained available, the defendant immediately removed it.

[77] Mr. LaPointe attaches data to his affidavit concerning the platform through which BIV makes electronic PDFs copies of BIV back-issues available to the subsets of paid subscribers. The Subject Piece appeared at page 25 of the PDF electronic copy of the January 20-26, 2015 issue of BIV.

[78] According to the data provided by Mr. LaPointe in his affidavit, the January 20-26, 2015 issue of BIV containing the Subject Piece and the data indicates 100 publication “reads” of the issue, 75 of which occurred between January 5, 2015 and February 3, 2015. There were no further publication “reads” or “impressions” from October 26, 2016 to April 28, 2022, except for a small number that the defendants attribute to the parties reading the Subject Piece in advance of preparing the application materials.

[79] In Chris Johnson’s affidavit made May 6, 2022, he states he is an employee of Glacier and currently the senior product manager at Glacier who manages the websites of over 40 community newspapers and specialty publications, including BIV. Mr. Johnson describes having used Google Analytics since its release fifteen years ago and using it frequently and extensively at Glacier Media Inc. to track traffic

and user behaviour on websites owned by Glacier, including the BIV website. Mr. Johnson describes using data from Google Analytics to understand, for example, to determine “page views”, that is, how many times a particular page on the website is viewed.

[80] Mr. Johnson describes that when an article is deleted from the BIV website, the webpage is removed from the website and navigating to the webpage URL will deliver the error message “page not found”. Despite deleting a webpage, a cached version may remain in a user’s web browser and the cached version may appear again even after the webpage is deleted. Sometimes archival organizations and third party sites, that the defendants do not control, may download copies of webpages and retain copies even after a webpage is deleted.

[81] The defendant also relies on expert evidence from Brandon Ellis. The plaintiff did not oppose the admissibility of Mr. Ellis’ report. The plaintiff also submitted that that the Google Analytics for the Subject Piece was reasonably accurate although he disagreed that it provides the exact number of people who viewed the Subject Piece online.

[82] Mr. Ellis prepared a report that is attached as Exhibit B to his affidavit made June 12, 2023. For his current role, Mr. Ellis utilizes his training and experience in the areas of internet traffic, search engine optimization and analytics.

[83] Mr. Ellis is the co-founder and chief technology officer of Cuboh, a company involved in the business of online ordering for the restaurant industry. Mr. Ellis has completed post-secondary education in business, economics and software engineering and he holds university degrees and certifications in those areas. Mr. Ellis’ resume indicates that he has extensive experience in the technology field including by working for many years as the senior director and chief technology officer with a focus on software development, IT, privacy, security and product growth. Mr. Ellis’ experience includes working for in excess of ten years in the web development industry.

[84] Based on Mr. Ellis' training and experience, I find he is qualified as an expert in the web development industry with a focus on knowledge of internet traffic, search engine optimization and analytics. I find Mr. Ellis is qualified to provide an opinion concerning the reliability and meaning of Google Analytics data, including the Google Analytics data captured for the Subject Piece that is in evidence before me.

[85] In his report, Mr. Ellis sets out that he understands his opinion is sought to assist with assessing the scope of the online publication of the Subject Piece and the number of people who read the Subject Piece online. Mr. Ellis provides his opinion on three items: (1) the reliability of Google Analytics data for a webpage; (2) to explain factors that might cause Google Analytics data for a webpage to suggest higher/lower numbers of views, visits or reads of that webpage; and (3) the reliability of the Google Analytics data report for the webpage of the Subject Piece.

[86] Regarding the issue of reliability, Mr. Ellis' opinion is that Google Analytics "provides valuable insight into web traffic, user behaviors and other performance metrics – like geo-location and how long the average user spent on the page or website". Mr. Ellis states that the standard version of Google Analytics is a reliable, tool and the "#1 source" for websites helping them to understand the customer journey and improve marketing return on investment.

[87] Mr. Ellis points out that Google Analytics has been extensively tested and that it has been on the market for many years which helps to maintain the data integrity that it captures. It also offers customizable reports and he describes it an "ever-evolving product backed by one of the largest internet companies in the world".

[88] Mr. Ellis describes the large range of industry standard tracking metrics provided by Google Analytics including, for example, the number of "page views" – which is the number of times that a web page is viewed by all visitors over a period of time and "unique page views" - which is the number of times different users load the page. Importantly, Mr. Ellis notes that Google Analytics service "provides highly adopted industry standard metrics that are employed throughout the field of digital marketing".

[89] However, Mr. Ellis notes that despite the extreme reliability of Google Analytics, "there is likely no software tool available that is entirely glitch-free". Mr. Ellis identifies some of the issues that may cause misinterpretation of data, such as: visits from "automated bots or crawlers" which can artificially inflate the numbers of visitors, and "caching" which occurs when a webpage is cached by a user's browser, leading to undetected recurring visits to the webpage and decreased traffic recorded.

[90] Regarding factors that might cause Google Analytics data for a webpage to suggest higher/lower numbers of views, visits or reads of that webpage, Mr. Ellis' opinion is that it is best practice when using any analytical or reporting product, to interpret the data "in conjunction with other metrics to properly consider discrepancies".

[91] Regarding reliability of the Google Analytics data report for the webpage of the Subject Piece, Mr. Ellis verified that Google Analytics was correctly installed. Mr. Ellis notes the defendant uses the premium paid-service called "Google Analytics 360". He describes the data reported within it as "the most accurate representation of these page view metrics historically possible". Mr. Ellis explains that beyond Google Analytics 360, there is no other data source for comparison.

[92] Using the access he was provided, Mr. Ellis extracted reports from Google Analytics 360 for the defendant showing overall web traffic of people visiting www.biv.com as a whole as well as the web traffic for any article containing the search term "lack of protection". For the website as a whole, there were 36 million page views during the period of January 1, 2015 to May 1, 2022.

[93] The data Mr. Ellis captured for the "lack of protection" search term produced page views in regard to the article "'Lack of protection' keeps Canadian whistleblowers at bay". Mr. Ellis states that this data is highly reliable for analysing the page views or unique page views. The data generated for the Subject Piece for the period January 1, 2015 to May 1, 2022, indicates 539 page views and 466

unique page views. This is the same as the data that Mr. Johnson states he downloaded from Google Analytics for the Subject Piece on May 3, 2022.

[94] Mr. Ellis describes the visits recorded to the Subject Piece, in comparison to the overall pages available on the BIV website, as ranking near the lowest in terms of traffic received, being more than none but close to 0.0% of the percentage of page views. Mr. Ellis concludes that the data regarding the Subject Piece represented in Google Analytics 360 is appropriately captured and that it is reliable and indicative of viewership.

[95] The plaintiff appears to agree that approximately 600 people viewed the online version of the Subject Piece. However, he emphasizes that it would be an error to ignore the tweets by Mr. Orton about the Subject Piece when assessing damage: *Pineau* (BCCA), para. 76. The plaintiff also refers to *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416, 2004 CanLII 12938 (ON CA) at para. 31 for the proposition that defamatory content on the internet can cause additional damages due to internet's pervasive, instantaneous and far-reaching nature.

[96] There is evidence presented by the defendants, including expert evidence, which I accept, concerning the Google Analytics data and I find it provides me with a reliable inventory of the full scope of viewership of the Subject Piece. The expert evidence and the other evidence that I have accept provides me with the ability to assess the mode and extent of publication of the Subject Piece. In doing so, I have also specifically taken into account Mr. Orton's tweets.

[97] I find that the mode and extent of publication of the Subject Piece was a print run of 12,913 copies and online there were 539 page views and 466 unique page views. I also find there was also an electronic PDF of the BIV issue containing the Subject Piece that received 43 "publication reads" of the page where the Subject Piece appeared and a total of 100 "publication reads" of the issue itself, with none occurring from October 26, 2016 to April 27, 2022.

[98] I further find that while the online Subject Piece was removed on July 13, 2021, the electronic PDF was inadvertently not removed until May 26, 2022 and I accept the data presented by the defendants that the electronic PDF version was not read since October 2016 until May 2022 and the reads at that time were more likely than not by the parties as part of their preparations for this summary trial application.

[99] Given my findings about the circulation and viewership of the Subject Piece, and while keeping in mind the particular nature of the internet, I conclude that overall, the mode and extent of publication at issue here is considerably lower than it was for the KMI Article at issue in *Pineau* (BCCA).

Conduct of the Defendants

[100] The plaintiff seeks, in addition to general damages, an award for special aggravated and punitive damages.

[101] In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1995 CanLII 59 at 1205 [*Hill*], the Court states that aggravated damages may be awarded to compensate a plaintiff where the impugned conduct "has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libelous statement". However, to award aggravated damages, the plaintiff must show the defendant was motivated by actual malice that may be established by intrinsic evidence, i.e. coming from the statement itself, or extrinsic evidence, i.e. pertaining to the surrounding circumstances: *Hill* at 1206.

[102] In *Hill*, at 1208, the Court states that 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". Their aim is not to compensate the plaintiff, but to punish the defendants and punitive damages are in the nature of a fine.

[103] Mr. Orton states that in early December 2014, he was asked to write an article for an upcoming Business in Vancouver human resources supplement.

He provides details about how decided on a topic and the research he did in writing the Subject Piece.

[104] Mr. Orton states that he attempted to telephone the plaintiff at a phone number he located on Google. He said it was usual practice to leave a message asking the source to call him back. Mr. Orton states that he received no telephone call back from the plaintiff.

[105] On January 2, 2015, the plaintiff filed a response to the Viscount Action and a counterclaim. Mr. Orton states that as part of his research for the Subject Piece, he read the claim filed by Viscount. He does not state that he searched for, or read the response that the plaintiff filed to the Viscount Action, as part of his research. I find that none of the defendants, prior to publishing the Subject Piece, searched for or read the plaintiff's pleadings.

[106] Mr. Orton states that he saw the plaintiff's LinkedIn Profile while he was conducting research for the Subject Piece. He was surprised that the plaintiff was so open and candid in the LinkedIn forum. Mr. Orton took a screenshot of the plaintiff's profile and on January 8, 2015, he posted on Twitter about it while including a link to the Subject Piece. Mr. Orton states that he did not contact the plaintiff over LinkedIn because he did not have a paid-for LinkedIn account.

[107] In his affidavit #1, the plaintiff states that on January 9, 2015, he was alerted to Mr. Orton's January 8, 2015 post on Twitter by an associate. At that point, the plaintiff discovered the December 2nd post.

[108] The plaintiff states that on January 9 or 10, 2015, he contacted Mr. Orton to discuss his concerns. While the plaintiff could not remember the exact conversation, he recalled that Mr. Orton acted arrogantly and never offered to remove the posts on Twitter.

[109] Whether the plaintiff contacted Mr. Orton in January 2015, is a matter of dispute. In his affidavit #2 made June 6, 2022, Mr. Orton denies ever speaking with the plaintiff in January 2015. Mr. Orton's evidence is that he had no communication

with the plaintiff until December 2016. In December 2016, there is evidence that the plaintiff and Mr. Orton corresponded after the plaintiff wrote to him about the subsequent BIV article that is Subject Piece of this defamation action.

[110] Mr. Orton believes that had the plaintiff contacted him in January 2015, he would have remembered it because it would have provided an opportunity to get the plaintiff's comment on the Subject Piece that he was working on.

[111] The plaintiff's evidence is that once he learned of the Subject Piece, he emailed the defendants on December 20, 2016. He provided a letter stating his objections to the Subject Piece. The next day, Mr. Orton responded to the plaintiff stating, among other things, that before publishing the Subject Piece, he had tried without success to reach the plaintiff to obtain his comment. Mr. Orton asked the plaintiff to provide him with any further updates about the Viscount lawsuit. At that point, the plaintiff supplied Mr. Orton with a copy of a without prejudice settlement proposal from Viscount's lawyer.

[112] The plaintiff filed the notice of civil claim in this action and following service of the claim, Mr. LaPointe called the plaintiff on January 23, 2017. The parties have different versions of some, but not all, of the things discussed during the January 23, 2017 conversation.

[113] The main point of difference concerns whether the plaintiff was told that in order to do something about the Subject Piece, he had to drop his lawsuit. In his affidavit made May 24, 2022, the plaintiff states the January 23rd call, Mr. LaPointe offered to modify the Subject Piece if the plaintiff would drop the lawsuit.

[114] The defendants point out that is not what the plaintiff stated during his discovery. At discovery, the plaintiff did not state that Mr. LaPointe's offer to modify the Subject Piece was subject to the plaintiff dropping the lawsuit. Mr. LaPointe denies asking the plaintiff to drop or withdraw his lawsuit during this conversation or any other conversation.

[115] On January 24, 2017, the plaintiff emailed Mr. LaPointe about their prior conversation. In this email, the plaintiff asks to confirm if Mr. LaPointe had stated that he could update the Subject Piece to clarify the outcome of the Viscount lawsuit.

[116] Mr. LaPointe's evidence is that sometime from January 24 to January 29, he again called the plaintiff and had a conversation with him about updating the Subject Piece to explain the resolution of the Viscount lawsuit.

[117] On January 29, 2017, the plaintiff emailed Mr. LaPointe to state that he did not accept Mr. LaPointe's offer to update the Subject Piece. He said the offer did not address the plaintiff's concerns. At no time did the defendants update the Subject Piece. I do not find that Mr. LaPointe ever told the plaintiff that he must drop or withdraw his Claim.

[118] The plaintiff relies on *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, 1995 CanLII 60 at paras. 98-99, 102 and 103 [*Botiuk*], to support his submission that because Fiona Anderson was the editor-in-chief of the Business in Vancouver Media Group at the relevant time and because she was a practising lawyer in the past, it means the defendants' carelessness ought to be considered reckless. However, Mr. Orton's evidence is that at the relevant time, Ms. Anderson was not a practising lawyer and she did not hold herself out to be one. There is also no admissible evidence in the record directly from Ms. Anderson. In my view, the mere involvement of someone who was previously a practising lawyer, such as Ms. Anderson, does not make the present situation akin to *Botiuk*.

[119] I accept Mr. Orton's evidence that he attempted to contact the plaintiff prior to publishing the Subject Piece but he received no response from the plaintiff. The defendants acknowledge that they should have reviewed the plaintiff's pleadings and made reference to them in the Subject Piece. However, they say their failure to do so amounts to carelessness and is not the sort of recklessness that would be required to support a finding of aggravated damages.

[120] In *Camporese v. Parton* (1983), 150 D.L.R. (3d) 208, 1983 CanLII 499 (B.C.S.C.) at paras. 50-51, the Court concluded that an article written by a journalist in extreme haste and without adequate research was not conduct so unreasonable as to constitute express malice. Similarly, I conclude that while the defendants' research for the Subject Piece was inadequate, in the sense that the defendants did not search for and read the plaintiff's pleadings in response to the Viscount Action, there is no evidence that they were indifferent as to the truth. I so conclude, because, for example, Mr. Orton had an honest belief in the facts and opinions in the Subject Piece and he did attempt to contact the plaintiff for comment by telephoning him.

[121] While the defendants ought to have searched for the plaintiff's pleadings in the Viscount Action, I accept the evidence that Mr. Orton did attempt to contact the plaintiff to obtain his comment prior to publishing the Subject Piece. In my view, the evidence does not demonstrate that Mr. Orton or the defendants were motived by malice.

[122] There is insufficient evidence to demonstrate that the defendant did not consider or care whether the statements about the plaintiff in the Subject Piece were true. I understand that the plaintiff believes the defendants were high-handed by failing to remove the Subject Piece when the plaintiff raised with them the settlement with Viscount. However, while Viscount's letter to the plaintiff offering to settle should have prompted the defendants to ask whether that offer was accepted, I do not find that the defendants' conduct was high-handed or malicious.

[123] In short, after considering all of the circumstances, while I agree that the defendants are knowledgeable and experienced in the business of journalism, I do not find that their conduct at issue here amounts to more than carelessness or that it rises to the sort of recklessness that justifies an award of aggravated damages.

Absence or Refusal of a Retraction or Apology

[124] On June 7 and June 13, 2022, BIV published an apology to the plaintiff online and in print. Mr. Orton's evidence is that the words "Apology to Stephen Pineau"

were displayed as #1 on a list of “Top Stories” on the BIV website. The apology stated as follows:

> **Apology to Stephen Pineau**
>
> June 7, 2022, 3:57 pm
>
> On January 20, 2015, we published an article which referred to Stephen Pineau, the former CEO of Viscount Systems Inc.
>
> The article inaccurately connected him to unproven allegations of financial misconduct. *Business in Vancouver* regrets its error and apologizes to Mr. Pineau for any distress our publication has caused.

[125] The defendants’ evidence is that the online apology received a total of 634 page views and 607 unique page views from the date of posting until May 8, 2023. In addition, there were 8,295 printed copies of BIV ordered for the BIV issue containing the apology and the electronic PDF version of the issue registered 191 publication reads. The plaintiff’s evidence is that in Google search results for his name, the apology appears as the third link.

[126] I find the fact that the defendants provided an apology to the plaintiff is a relevant factor for quantification of general damages.

Damages

General Damages

[127] Having considered all of the evidence and the particular circumstances at issue, as well as the authorities referred to by the parties, I find an appropriate award of general damages is $120,000. This award of general damages is subject to the defendants’ claim of mitigation, which I consider later in these reasons.

Special Damages

[128] The defendants submit that the plaintiff has failed to make out the basis for award of special damages because the plea for special damages is not particularized in the Claim and there is no evidence to establish, for example, that but-for the Subject Piece, Mr. Leach would have hired the plaintiff.

[129] The Claim specifically seeks, under relief sought, an award for special damages, among other things. The Claim states that the defamatory material about the plaintiff in the Subject Piece caused others to shun or avoid him and that it impeded his ability to find employment. The Claim also states that BIV is widely read and the Subject Piece "continues to be easily searched by any potential employer doing reference and background searches".

[130] The Claim also states in several places that defamation of the plaintiff in the Subject Piece impeded, and continues to hinder, the plaintiff in his efforts to find employment. Finally, the plaintiff alleges in the Claim that he told the defendants that the defamatory material in the Subject Piece was impeding his ability to find employment.

[131] On this point, the question comes down to whether the plaintiff is precluded from claiming special damages because the Claim does not state, for example, that the Subject Piece caused the plaintiff to lose an employment opportunity with Mr. Leach in 2017.

[132] In *Botiuk*, at para. 108-112, Justice Cory considers what must be pled and proven to succeed on a claim for special damages:

> 108 It will be remembered that the trial judge awarded Botiuk special damages for the loss of income from his practice occasioned by the libellous publications. However, the Court of Appeal held that since Botiuk had not specifically claimed special damages, they should not have been awarded. A portion of the special damages was then added to the award as an element of the general damages. With the greatest respect, I cannot agree with that position.
>
> 109 It is true that proof relevant to special damages may be admissible for the purpose of supporting general damages. However, unlike general damages, actual pecuniary loss is not presumed. Therefore, special damages must be specifically pleaded and proved in court. See *The Law of Defamation in Canada*, *supra*, at p. 25-75.
>
> 110 In my view, the loss of business was sufficiently pleaded to warrant the award of special damages. In his amended fresh statement of claim, Botiuk pleaded that, by reason of the defamatory statements made against him, he suffered, among other things, a "loss in his practice of his profession as a barrister and solicitor" and "suffered injury to his career". A lump sum for damages was claimed to compensate for these injuries.

> 111 Special damages may arise from a general falling of business, a loss or decline of patronage and a loss of custom. If the libellous words are in their nature intended, or are reasonably likely to produce, or actually do produce, such a loss, the plaintiff may recover. See *Gatley on Libel and Slander*, *supra*, at pp. 94-100.
>
> 112 This is one of those rare cases in which it was possible to adduce the necessary evidence to prove actual pecuniary loss. There was ample evidence presented upon which the trial judge could properly base his decision to award and arrive at his assessment of the special damages. It follows that neither the finding that all of the appellants are jointly and severally liable for the compensatory damages, nor the assessment of special damages, should have been disturbed by the Court of Appeal. I would, therefore, restore the special damages award made by the trial judge.

[133] In my view, the request for special damages related to loss of employment is sufficiently pleaded in the Claim to allow for an award under that head of damage. In *Botiuk*, at para. 111, the Court notes that special damages may arise from a general falling of business and a loss of patronage. If the libelous words are likely to produce such a loss, then a plaintiff may recover.

[134] The defendants submit there is no evidence establishing that but-for the Subject Piece, Mr. Leach would have hired the plaintiff. Mr. Leach's evidence is that upon discovering the Subject Piece, he concluded for the reasons he explains, that it was too great a risk to proceed with his plan to offer employment to the plaintiff while the Subject Piece was online and so he put the offer on hold.

[135] Mr. Leach said he found the reference to the BC Auditor General's report in the Subject Piece to be particularly important because his intended offer to the plaintiff was related to pursuing business opportunities with government agencies or other bodies regulated by the government. Mr. Leach said that although he did not want to believe it, the Subject Piece caused him to question the plaintiff's integrity.

[136] Mr. Leach states that he could not risk investing in the plaintiff in case competitors or prospective customers learned of the Subject Piece and they might avoid doing business with his company. Mr. Leach states that he told the plaintiff that as long as the Subject Piece remained online "I could not hire him to pursue

government business". It is important to note that the Subject Piece remained online for significantly longer than the KMI Article.

[137] Mr. Leach states that the plaintiff eventually started doing largely unpaid marketing work for his company. Mr. Leach said this arrangement at least allowed the plaintiff to fill a long gap in his resume and it meant Mr. Leach could provide a reference to the plaintiff for employment opportunities. In 2021, Mr. Leach states that he has been able to increase the plaintiff's hours and pay for his work at the company. Mr. Leach also states that he is funding the research and development of a new technology that the plaintiff is inventing.

[138] Mr. Leach's evidence is that the position he intended to offer the plaintiff "would be heavily sales oriented" but with some project management responsibilities. He wanted to make the plaintiff a "partner" which would involve issuing new shares, receiving payment for the shares, and devising a salary structure. Mr. Leach states that based on his projections, he anticipated the plaintiff "would make $150,000+ per year but probably less in the first six months due to sales cycles". There is no explanation for the basis for Mr. Leach's projections or the sales cycles he refers to.

[139] The plaintiff states that Mr. Leach told him he could not offer him formal employment while the Subject Piece was online.

[140] I find based on all of the evidence, including that of the plaintiff and Mr. Leach, that the libelous words at issue in the present case did actually produce a loss for the plaintiff. Again, Mr. Leach is clear that he intended to make an offer and to have the plaintiff in place by early 2017.

[141] I find that the evidence of the plaintiff and Mr. Leach provides me a basis to assess special damages from and after 2017, which is the date when Mr. Leach planned to offer the plaintiff employment. The amount of the loss is not specifically stated in the evidence. After the first six months, there was the prospect of earning $150,000 or more each year, depending on sales, and there was also some

unspecified costs associated with the plaintiff acquiring shares in Mr. Leach's company.

[142] In my view, after considering that this opportunity involved a new division, the uncertainty of sales performance, and some costs for acquiring shares, I conclude that the special damages for the loss of this opportunity in the years since 2017 is appropriately assessed at $180,000.

[143] This assessment of loss takes into account the evidence that as of 2020, the plaintiff began working with Mr. Leach and receiving pay for that work. By 2021, Mr. Leach states that he increased his working relationship with the plaintiff including by investing in the research and development of the plaintiff's new technology.

[144] I am aware that in *Pineau* #2, Kirchner J. concludes that the plaintiff failed to make out a claim for special damages. Horsman J.A. considers the plaintiff's appeal from that finding in *Pineau* (BCCA) and finds no error in respect of it:

> [113] … In accordance with well-settled law, a plaintiff in a defamation action may pursue compensation for pecuniary loss through two alternative paths: (1) a claim for special damages where the plaintiff has pleaded and proved actual pecuniary loss, or (2) as part of the general damage award where actual pecuniary loss is a possibility on the evidence but cannot be proven with specificity.
>
> [114] In the present case, the trial judge did not conclude that the appellant had to prove loss of employment to a standard of "certainty". Rather, the trial judge found that the appellant had not proven a loss relating to his inability to secure work that was sufficiently specific to the [KMI] Article to establish a claim to special damages. The trial judge also found that the [KMI] Article was a contributing factor to the appellant's professional struggles given "the potential effect it had on his ability to find work in his field of expertise": at para. 86. He accepted that it was plausible that the appellant had lost employment opportunities due to the [KMI] Article. The trial judge noted that he could consider "economic damage that cannot be expressly proven" as part of the assessment of general damages: at para. 109. He considered the appellant's potential opportunity to work with Blue Mountain to be a lost opportunity deserving of particular weight.
>
> [115] In summary, the trial judge held that the appellant had not proven a claim for special damages in relation to lost employment opportunities, but that the possibility of such lost opportunity should be factored into the assessment of general damages. I see no legal error in this analysis, which appears to me to be entirely consistent with the record and the governing authorities. There is no merit to this ground of appeal.

[145] However, for all of the reasons that I have explained, I find that the plaintiff has made out a claim for special damage arising from the loss of a job opportunity to work with Mr. Leach at his company that is sufficiently specific to the publication of the Subject Piece.

Aggravated/Punitive Damages

[146] As I have found that the defendants did not act maliciously or in a high-handed fashion in publishing the Subject Piece, I do not find an award of aggravated or punitive damages is appropriate in view of all of the circumstances before me.

Mitigation

Reputational Issue

[147] As mentioned earlier, while the defendants do not take issue with the plaintiff's good character and standing generally, they do submit that before the Subject Piece was published, the plaintiff's reputation had already been damaged. They say the damage arose from the serious allegations made by Viscount. They submit this damage is demonstrated by the plaintiff's evidence that he received numerous calls inquiring about the claim that Viscount commenced.

[148] The defendants also submit that the plaintiff's reputation in the business community was also negatively shaped by the plaintiff's own description of himself on his LinkedIn profile as an "Ousted CEO". There is evidence the plaintiff used LinkedIn to apply for jobs. The defendants submit that prospective employers and contacts could view the plaintiff's LinkedIn profile.

[149] In *Casses v. Canadian Broadcasting Corporation*, 2013 BCCA 200, at paras. 45-48 [*Casses*], Justice Smith describes the common law pleadings rule on mitigation of damages in libel actions as it relates to the plaintiff's general reputation. As long as the mitigating factors relied on are particularized in the statement of defence, supported by the evidence and directly connected to the subject matter of the defamatory publication, then they are to be considered in the assessment of damages: *Casses*, at para. 48.

[150] I do not find that the allegations made by Viscount against the plaintiff or his LinkedIn profile had any appreciable negative impact on the plaintiff's reputation prior to the publication of the Subject Piece. Neither source refers to the plaintiff as an example of "the dangers of a lack of effective corporate whistleblower protection" and the actual context of the Viscount Action includes the plaintiff's response and counterclaim, which was entirely absent from the Subject Piece. In my view, these sources did not shape the plaintiff's reputation in a way that mitigates the damage to the plaintiff from the defamation in the Subject Piece.

[151] While I have reached this conclusion based on my review of the evidence as a whole, I am supported in my finding about the effect of, for example, the Viscount Action by the following observations of Horsman J.A. in *Pineau* (BCCA):

> [88] The trial judge found that the Viscount Action, and the publicity it received through the *Business in Vancouver* articles, had already tarnished the appellant's reputation. …
>
> …
>
> [91] The external factors cited by the trial judge are only relevant in mitigating damages if they directly relate to the damage the appellant's reputation suffered as a result of the publication of the Defamatory Article. *It cannot be said, in my view, that the mere existence of the Viscount Action "tarnished" the appellant's reputation in the same manner as the Defamatory Article.* The Viscount Action did not allege that the appellant had engaged in fraudulent activity, and it did not hold the appellant up as an example of the dangers of a lack of effective corporate whistleblower protection. Furthermore, the context for the Viscount Action included the appellant's filed response to civil claim and counterclaim which denied the allegations that were advanced. This context is wholly missing from the Defamatory Article.
>
> [Emphasis added.]

The Apology

[152] As mentioned earlier, on June 7 and June 13, 2022, BIV published an apology to the plaintiff. The defendants submit that the authorities are clear that even a late apology will have a mitigating effect on the assessment of damages: *Tait v. New Westminster Radio Ltd.* (1984), 58 B.C.L.R. 194, 1984 CanLII 356 (C.A.); *Hunter v. Fotheringham*, [1986] B.C.J. No. 2279 (S.C.); *Grassi v. WIC Radio*, 2000 BCSC 185 rev'd on costs 2001 BCCA 376.

[153] The plaintiff submits that the defendants' apology was too late since it was made not at the earliest opportunity and instead, it came only after the finding that the KMI Article was defamatory and some five years after this Claim was commenced. The plaintiff also submits the apology is inadequate and it was done without consultation or notice to him. The plaintiff denies the apology has the effect of mitigating damages.

[154] The plaintiff relies on a number of cases where courts conclude that the effect of a late apology was an aggravating factor: *Vogel v. Canadian Broadcasting Corporation* (1982), 35 B.C.L.R. 7, 1982 CanLII 801 (B.C.S.C.) [*Vogel*]; *Pineau #2* at para. 118; *Brown* at para. 102, leave ref'd, [1998] S.C.C.A. No. 614.

[155] When I consider the apology in the overall context, I find that it is a mitigating factor that ought to be taken in account in the assessment of damages. I do not find that the timing or wording of the apology means that it ought to be treated as an aggravating factor. In my view, the apology and the circumstances as a whole, do not make the present case akin to *Vogel* or *Brown*, where there were findings that a defendant was motivated by actual malice or the apology lacked an all-encompassing nature.

[156] I find that the apology received more online attention than the Subject Piece and that it was full, frank and non-ambiguous. As such, the apology will be considered as a factor mitigating general damages and demonstrating an absence of actual malice.

Damages Recovered from KMI

[157] The defendants rely on ss. 11 and 12 of the *Libel and Slander Act,* R.S.B.C. 1996, c. 263 [*LSA*] to avoid double recovery of damages that relate to the KMI defendants' publication of the KMI Article. Section 11 states:

> **Damages recovered in another action, or compromise**
>
> **11** At the trial of an action for a libel contained in a newspaper or other periodical publication or in a broadcast, the defendant may give in evidence in mitigation of damages that the plaintiff has already recovered, or has brought action for, damages, or has received or agreed to receive

> compensation in respect of a libel to the same effect as the libel for which the action has been brought.

[158] The defendants submit that the content of the Subject Piece and the KMI Article are substantially similar but the damage is the same and the plaintiff has already received an award for that damage. They submit that the plaintiff's evidence concerns the same reputational impact as between the Subject Piece and the KMI Article.

[159] The defendants also submit, and I agree, that the relevant statutory requirements of the *LSA* in s. 12 have been met, such as qualifying as a "public newspaper or other periodical publication" and having stated the publisher's name and publication address at the head of the editorials section.

[160] In *Pineau* #2, Kirchner J. found that KMI was not entitled to rely on the possibility of a judgment against Glacier Media Inc. as potential mitigation under s. 11 of the *LSA*. However, the circumstances before me are that the defendants have met the requirements of the *LSA* and there has actually been a judgment in favour of the plaintiff against KMI. As well, the content of the Subject Piece and the KMI Article are described by Horsman J.A. in *Pineau* (BCCA) at para. 93 as "substantially similar … minus the express statement that the appellant had been accused of fraud."

[161] In *Pineau* (BCCA), the award of general damage was increased including because Horsman J.A. concluded that it was an error to measure only the damage from the additional statements contained in the KMI Article that were not included in the Subject Piece:

> [95] The trial judge found that the respondents could not claim the benefit of s. 11 of the *Libel and Slander Act*. The respondents do not challenge this finding on appeal. That being the case, it was not open to the respondents to lead evidence of the Second BIV Article in mitigation of the appellant's damages. In addressing s. 11 of the *Libel and Slander Act*, the trial judge stated that the quantum of damages he had assessed were "specific to the [KMI Article], the circumstances of its publication, and its effect on Mr. Pineau": at para. 183. However, that statement has to be read in light of the trial judge's earlier findings that other factors that had "unfairly" shaped the

> appellant's reputation—specifically the Second BIV Article—had to be accounted for in the quantification of damages.
>
> [96] Read as a whole, the reasons suggest that the trial judge perceived his task as measuring only the reputational impact of the additional statements in the [KMI] Article—particularly the characterization of the Viscount Action as including an allegation of fraud—that were not contained in the Second BIV Article. In my view, that is not the proper approach to the assessment of general damages in defamation. The publisher of a defamatory article cannot lead evidence in mitigation of damages to show that they merely plagiarized content that had already been published by others. The trial judge erred in reducing damages to account for the harm to the appellant's reputation arising from the Second BIV Article despite finding that the respondents could not claim the benefit of s. 11 of the *Libel and Slander Act*.

[162] The defendants submit that nothing in *Pineau* #2 or *Pineau* (BCCA) precludes them from relying on s. 11 of the *LSA* especially now that there has been a judgment against KMI (which they submit appears to have measured reputational damage to the plaintiff from *both* the Subject Piece and the KMI Article), and where they say the KMI Article was *more* defamatory of the plaintiff than the Subject Piece.

[163] I find that s. 11 of the *LSA* applies in the present circumstances. I further find that the damages awarded to the plaintiff in the KMI Action were in respect of a libel to the same effect as the libel for which the present action has been brought. I am supported in that finding by Horsman J.A.'s observation in *Pineau* (BCCA), at para. 98, that it is reasonable to assume that the defamation in the Subject Piece and the KMI Article had a similar impact on the plaintiff's general reputation.

[164] The defendants submit that after taking the various mitigating factors into account, the appropriate award of damages should be in the range of $40,000 to $60,000. As mentioned, the plaintiff has not suggested any specific amount or range of damages. Based on the authorities cited by the plaintiff, it is clear the plaintiff's position is that a much higher damages award is warranted in all of the circumstances. However, in my view, the cases relied on by the plaintiff involve substantially different defamatory content and factual circumstances from the case at bar.

[165] After considering all of the mitigating factors and the application of s. 11 of the *LSA*, I find that a 40% reduction to the $120,000 award general damages should be assessed, meaning that general damages are $72,000.

Disposition

[166] For the reasons explained, the defendants shall pay the plaintiff general damages in the amount of $72,000 and special damages in the amount of $180,000. I make no award to the plaintiff for aggravated or punitive damages.

[167] The parties seek the opportunity to address me on the matter of costs. If the parties cannot otherwise reach an agreement as to costs, I grant the parties leave to make further written submissions on the matter of costs on the following schedule:

a) the defendants may deliver to the plaintiff a written submission on costs, not to exceed five pages in length, by no later than 30 days following the date of this judgment;

b) the plaintiff shall, by no later than seven days following service of the defendants' submissions, deliver his response to the defendants, not to exceed five pages in length;

c) the defendants may deliver a reply to the plaintiff by no later than three days following delivery of the plaintiff's submissions; and

d) the parties shall file their respective written submissions with SC Scheduling for forwarding to my attention by no later than 45 days following the date of this judgment.

"E. McDonald J."