

B.C. appeal court upholds largest defamation award for a corporation

By **James R.G. Cook**

Law360 Canada (December 4, 2024, 2:26 PM EST) -- While defamation claims are often made to compensate individuals for personal distress caused by harm to their personal reputations, corporations may also seek damages for defamation when harmed by a business competitor. Such claims generally focus on the corporation's economic losses. In *Valley Traffic Systems Inc. v. Malak*, 2024 BCCA 370, the Court of Appeal for British Columbia upheld the largest sum ever awarded to a corporation in B.C. for a defamation claim.

The defamation action was commenced by five corporations known as "The Ansan Group" and their owner (Raoul Malak), against a competitor, Valley Traffic Systems (VTS) and its president and vice-president. The defamatory statements at issue were authored by a former employee of The Ansan Group (Remon Hanna) who had a bitter falling out with Malak and his companies in 2011.



James R.G. Cook

In late 2011, BC Hydro intended to request proposals for a large traffic control services contract in BC. Following Hanna's fallout with The Ansan Group, he approached VTS while the two competitors awaited BC Hydro's announcement of the tender process for the contract.

Hanna and VTS entered into a confidentiality and non-solicitation agreement to prepare a proposal for the BC Hydro work. VTS prepared business cards describing Hanna as a senior contracts manager and paid him \$2.4 million over the next five years.

In 2012, a series of defamatory publications about Malak and his companies were posted on various Internet sites. The posts suggested that Malak had engaged in money laundering, received kickbacks and was involved in bribery and other criminal activity. The publications were made known to, amongst others, the provincial minister responsible for BC Hydro.

Malak took steps to shut down the defamation campaign, but similar defamatory publications continued to surface until the end of 2012.

While the defamation campaign was ongoing, BC Hydro issued its request for proposals. VTS was awarded the contract by BC Hydro in February 2013.

Malak and The Ansan Group commenced a defamation action against VTS, its president and vice-president, alleging that they were responsible for the defamatory publications. Two trials ensued in the Supreme Court of British Columbia.

At the first trial, Hanna was found to be the author of the publications. The president and vice-president of VTS were found to have engaged in a common design with Hanna of destroying, diminishing or undermining the reputation of Malak and The Ansan Group through the publication of various defamatory materials to third parties: *Malak v. Hanna*, 2017 BCSC 1739. VTS was held to be directly and vicariously liable for the defamation.

The VTS defendants appealed the finding that they were liable but did not challenge the conclusion that Hanna was the author of the defamatory publications and that those publications defamed

Malak. The Court of Appeal for British Columbia allowed the appeal in part, setting aside most liability findings against VTS, its president and vice-president and ordering a new trial: *Malak v. Hanna*, 2019 BCCA 106.

After a second trial, in which Hanna did not participate, VTS's president and vice-president were found to have agreed to and participated in a common design with Hanna of carrying out a campaign of defamation against Malak and The Ansan Group: *Malak v. Hanna*, 2023 BCSC 1337. The defendants were found to have intended to harm the reputation of Malak and The Ansan Group through a campaign that was carried out in part through emails that forwarded or hyperlinked the defamatory publications.

The Ansan Group did not establish actual economic loss and did not prove that they lost the BC Hydro contract due to the defamation campaign. Nevertheless, the trial judge awarded general damages of \$300,000 to The Ansan Group to address "inferred business losses." The amount awarded was the largest sum ever made to a corporation in B.C. for defamation at the time.

Malak was awarded general damages of \$500,000 and \$200,000 in aggravated damages to compensate him for the malicious nature of the defendants' conduct. Lastly, the trial judge awarded Malak punitive damages of \$500,000, finding they were necessary to denounce the defendants' conduct and deter them and others from seeking a competitive advantage by intentionally defaming a competitor. Damages were ordered payable on a joint and several bases.

The defendants appealed the second trial decision, arguing in part that the trial judge erred in finding that they engaged in a common design to defame Malak and his companies. While they acknowledged that the judge identified the correct framework for determining liability of joint tortfeasors, they contended that he erred by failing to find that each joint tortfeasor must have assisted in some substantial way in the commission of the tort and by intermingling elements of unlawful means conspiracy. They pointed to the trial judge's reasoning that it was not necessary to find that the vice-president and president of VTS were "directly involved" in the preparation and dissemination of defamatory publications.

The Court of Appeal for British Columbia rejected this argument, noting that at common law, there are three paths to joint liability: agency, vicarious liability and concerted action. "Concerted action" is a term used interchangeably with "common design" while "concerted action liability" may be imposed when the wrongdoers acted in furtherance of a common design.

The appellate court pointed to a decision of the Court of Appeal for Ontario, *Rutman v. Rabinowitz*, 2018 ONCA 80, at paragraph 35, leave to appeal to SCC refused, 2018 CanLII 73625, which affirmed that concerted action liability is a "fact-sensitive" concept that should not require an attempt to define the necessary amount of connection.

In the present case, it was not necessary for a joint tortfeasor in a common design to directly create or publish the defamatory content. Knowingly assisting, encouraging or even being present as a conspirator at the commission of the wrong could suffice. Assistance such as paying someone to engage in, or help disseminate, a defamatory campaign could satisfy the participation requirement.

The appellants were found to have paid Hanna \$2.4 million to carry out a campaign of defamation against Malak and The Ansan Group. This ground of appeal was, therefore, rejected.

The appellants also challenged the damages awarded, arguing that The Ansan Group should not receive damages for loss of reputation unless it proved actual economic loss or the loss of any contracts

In the Court of Appeal's view, however, the trial judge did not err in inferring that The Ansan Group would likely suffer economic harm. Damages for a corporate plaintiff are intended to compensate for the harm to the corporation's goodwill and business reputation. The Ansan Group's reputation was essential for its business as its customers were cities, municipalities and utility companies that would generally wish to avoid public controversy. The defamatory publications raised allegations of money laundering, obtaining contracts through illegal kickbacks, secret bribes and other corrupt and illegal activities. The damages were therefore not inordinately high.

In the result, the defendants were affirmed to be jointly and severally liable to Malak and The Ansan Group for all damages awarded. The decision reflects the court's condemnation of the deployment of a defamation campaign to smear the reputation of a corporate business rival.

James R.G. Cook is a partner at Gardiner Roberts LLP and has been with the firm since he articulated there in 2002. As a litigator in the firm's dispute resolution group, he has experience in a broad range of commercial, real estate and professional liability litigation.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the author's firm, its clients, LexisNexis Canada, Law360 Canada or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Interested in writing for us? To learn more about how you can add your voice to Law360 Canada, contact Analysis Editor Richard Skinulis at Richard.Skinulis@lexisnexis.ca or call 437-828-6772.

All Content © 2003-2024, Law360 Canada