

Defendant business competitors liable for defamation campaign based on common design (Valley Traffic Systems Inc. v. Malak)

British Columbia | Defamation | Litigation | Litigation & Dispute Resolution

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Defamatory publications that are intended to harm a business competitor may give rise to substantial damages, as shown by the decision of the Court of Appeal for British Columbia in *Valley Traffic Systems Inc. v. Malak*, 2024 BCCA 370 (CanLII).

The defamation action was commenced by five corporations known as “The Ansan Group” and their owner (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 (Hanna) who had a bitter falling out with Mr. Malak and his companies in 2011.

In late 2011, BC Hydro intended to request proposals for a large traffic control services contract in BC. Following his fall out with The Ansan Group, Mr. Hanna approached VTS, as the two competitors awaited BC Hydro’s announcement of the tender process for the contract.

Mr. 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 Mr. Hanna as VTS’s senior contracts manager. VTS paid him \$2.4 million over the next five years pursuant to an agreement that was never recorded in a formal contract.

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

Mr. 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 and eventually awarded the contract to VTS in February 2013.

Mr. 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, Mr. 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 Mr. Hanna of destroying, diminishing, or undermining the reputation of Mr. 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 Mr. Hanna was the author of the defamatory publications and that those publications defamed Mr. 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.

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

After a second trial, in which Mr. Hanna did not participate, VTS's President and Vice-President were found to have agreed to and participated in a common design with Mr. Hanna of carrying out a campaign of defamation against Mr. Malak and The Ansan Group: *Malak v. Hanna*, 2023 BCSC 1337 (CanLII), at paragraph 152. The defendants were found to have intended to harm the reputation of Mr. Malak and The Ansan Group through a campaign that was carried out in part through emails that forwarded or hyperlinked the defamatory publications. The breadth and distribution of the articles were significant and they published them online using domain names that included "ansangroup."

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.

Mr. 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 Mr. 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 basis.

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 Mr. 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, which was not pleaded. 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 (paragraph 18).

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 Mr. Hanna \$2.4 million to carry out a campaign of defamation against Mr. Malak and The Ansan Group. Although forwarding a link without more does not amount to publication (citing *Crookes v. Newton*, 2011 SCC 47 at paragraph 42), it can amount to assistance in the common design to defame. This ground of appeal was therefore rejected.

The appellants also challenged the damages awarded, arguing with respect to The Ansan Group that it should not receive large awards for loss of reputation unless economic loss is also shown since corporations do not have feelings and cannot receive damages for personal distress (citing *Walker v. CFTO Ltd.*, 1987 CanLII 126 (ONCA) and other cases). Here, The Ansan Group did not prove 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 and The Ansan Group relied on its reputation to attract and retain flaggers and flagging subcontract trucking companies needed to perform traffic control services. The defamatory publications raised allegations of money laundering, obtaining contracts through illegal kickbacks, secret bribes, and other corrupt and illegal activities. The Ansan Group's customers were cities, municipalities, and utility companies that would, as judicially noticed by the trial judge, generally wish to avoid public controversy. The damages were therefore not inordinately high.

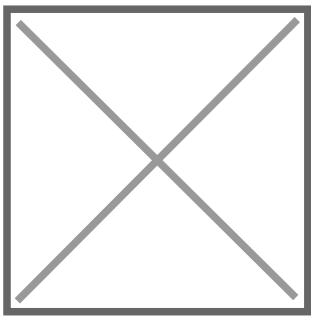
Similarly, the general and aggravated damages awarded to Mr. Malak were appropriate based upon the vicious personal attacks and harm to his reputation. The aggravated damages were justified by the finding that VTS, its President and Vice-President hired and paid Mr. Hanna a significant sum of money to engage in a widespread and malicious smear campaign in order to damage and weaken a commercial competitor. Their conduct was malicious based on the evidence. There was no double-counting or overlapping of the heads of damages.

With respect to punitive damages, the appellate court referred to the Supreme Court of Canada's statement in *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), at paragraph 199, that without punitive damages, "awards of general and aggravated damages alone might simply be regarded as a license fee" for the wealthy to defame, which applies with particular force to those who expect to gain from a competitor's reputational downfall.

In the result, the defendants were affirmed to be jointly and severally liable to Mr. Malak and The Ansan Group for all damages awarded. The decision is a cautionary tale about using or condoning a defamation campaign to smear the reputation of a business rival for commercial advantage. A PDF version is available for download [here](#).

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Author



James R.G. Cook

Partner

416.865.6628

jcook@grllp.com