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Disgorgement of profits could be a potential remedy in a defamation action

By Stephen Thiele

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Remedies are an important aspect of any case. In the law of defamation, the usual remedy sought by most plaintiffs is general damages for reputational harm. In a defamation case, general damages are granted at-large and are not subject to a maximum limit, unlike a general damages award in a personal injury action. Plaintiffs in defamation actions also sometimes seek an injunction to prevent a party from continuing to either physically distribute material or post defamatory statements online, or special damages which is the actual pecuniary loss suffered as a result of a defamatory comment.

However, as demonstrated in the recent case of [Malak v. Hanna, 2021 BCSC 115](#), the remedy of disgorgement of profits may also be available to a plaintiff in the proper case.

Here, the plaintiffs sued the defendants for defamatory statements on internet sites and emails which allegedly caused the plaintiffs to lose profitable traffic control services contracts. Given that the plaintiffs and the defendants were competitors in the traffic control services

industry and that the defendants had been awarded a certain BC Hydro contract which the plaintiffs believed they would have received but for the defamation, the plaintiffs sought special damages, "...or alternatively, an Order that each defendant account for and disgorge the profits resulting from the defamatory expression in respect of which each defendant is found to be liable, relating to or arising from the BC Hydro contract."

The defendants objected to the pleading and sought summary judgment under [r. 9-6\(5\)\(c\)](#) of British Columbia's [Supreme Court Civil Rules](#). Relying on the Supreme Court of Canada decision in [Atlantic Lottery Corp. v. Babstock, 2020 SCC 19](#), the defendants contended that the remedy of disgorgement of profits was unavailable in tort actions and thereby unavailable in the plaintiffs' defamation claim.

[Babstock](#) involved a class action in which the plaintiffs sought, among other things, damages for waiver of tort, breach of contract and unjust enrichment in connection with the



defendant's operation of purportedly dangerous and deceptive video lottery terminal games. One of the issues that required determination by the Supreme Court of Canada was whether disgorgement of profits was a novel cause of action.

The majority of the court found at [paragraph 27](#) that disgorgement was to be viewed as an alternative remedy for certain forms of wrongful conduct. It was not an independent cause of action.

With respect to breach of contract claims, the majority determined that disgorgement of profits was an exceptional remedy that was only available where, at a minimum, other remedies were inadequate and where the circumstances warranted such an award. In dissent, Justice Karakatsanis agreed that disgorgement was an exceptional remedy that was available "where a plaintiff has shown that the ordinary remedies of contract law are inadequate to protect and vindicate" the plaintiff's contractual rights. Her Honour explained that disgorgement of profits might be appropriate for the purposes of deterrence. Justice Karakatsanis also noted that whether disgorgement of profits should be granted was for the trial judge to decide.

With respect to negligence, the majority chose not to make a definitive ruling on the availability of the remedy because the plaintiffs' negligence claim was inadequately pleaded.

The issue of whether disgorgement of profits was or was not available in a defamation case was not considered by the Supreme Court of Canada. Accordingly, [Babstock](#) was not authoritative on this issue.

Justice Mayer found the dissenting reasons of Justice Karakatsanis to be instructive and that there was no reason why in the context of a

defamation case disgorgement should not be available where granting such relief might deter a wrongdoer from doing so in the future. The remedy prevents a profit motive.

As well, Justice Mayer found that the issue could not be resolved based on the pleadings alone and that it would be up to the trial judge to decide whether the circumstances of the alleged defamation by the defendants, including their motivation for their alleged conduct, constituted exceptional circumstances justifying the remedy of disgorgement of profits. It was not plain and obvious to Justice Mayer that a claim for disgorgement of profits as an alternative form of relief would not succeed.

This case suggests that plaintiffs in defamation actions should carefully assess their potential remedies. In cases where the defendant profits from making defamatory statements about a plaintiff, a remedy like disgorgement of profits might be available. This remedy could greatly exceed any potential at-large damages award that might be available and would avoid the need for a plaintiff to actually prove special damages.

Contact us

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