COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Malak v. Hanna,*
2019 BCCA 106

Date: 20190401
Dockets: CA44856; CA44858

Docket: CA44856

Between:

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

Respondents
(Plaintiffs)

And

Philip Keith Jackman, Valley Traffic Systems Inc.,
and Trevor Paine

Appellants
(Defendants)

And

Remon Hanna

Respondent
(Defendant)

Docket: CA44858

Between:

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

Respondents
(Plaintiffs)

And

Remon Hanna

Appellant
(Defendant)

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Goepel
The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated September 28, 2017 (*Malak v. Hanna*, 2017 BCSC 1739, Vancouver Docket S133981).

Counsel for the Appellants, P.K. Jackman, Valley Traffic Systems Inc., and T. Paine	T.J. Delaney M.B. Stainsby
Counsel for the Appellant, R. Hanna:	D.W. Burnett, Q.C.
Counsel for the Respondents:	R.D. McConchie R.A. McConchie
Place and Date of Hearing:	Vancouver, British Columbia June 11 and 12, 2018
Place and Date of Judgment:	Vancouver, British Columbia April 4, 2019

Written Reasons by:
The Honourable Mr. Justice Frankel

Concurred in by:
The Honourable Mr. Justice Goepel
The Honourable Madam Justice Griffin

Summary:

Appeal by four defendants—three individuals and one company—from liability findings in a defamation action. H. authored numerous defamatory statements with respect to M., most of which H. posted on the Internet. J. and P. were found to have engaged in a common design with H. to vilify M. to gain a competitive advantage over M. and his companies. VTS, a company controlled by J. and P. was found both directly and vicariously liable. Held: Appeals allowed in part; some liability findings upheld and a new trial ordered on several liability issues. The trial judge did not err in finding a poem to be defamatory and in finding that it and other statements defamed both M. and his companies. Further, the judge did not err in finding publication occurred when persons instructed by M. to find defamatory material posted on the Internet located and read that material. However, the judge erred in finding that sending only a hyperlink to defamatory material constitutes publication. The finding that J. and P. engaged in a common design must be set aside as it cannot be said with confidence that the judge did not conflate credibility findings with factual findings. J.'s liability upheld only with respect to an email he sent to a third party which contained the defamatory poem. As VTS's liability is inextricably connected to that of J. and P. it must be set aside. New trial ordered on the liability of J., P., and VTS, and for H. with respect to an email containing the poem he sent to J. and P.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

[1] These appeals are brought by four defendants—three individuals and one company—from a finding of joint and several liability for defamation. Most of the statements were posted on the Internet. The trial judge, Justice Funt of the Supreme Court of British Columbia, found the defendants had engaged in a campaign of vilification against the individual plaintiff and his companies for the purpose of destroying their reputations and eliminating them as business competitors. In brief, the issues are whether the judge erred in finding: (a) the defendants participated in a common design; (b) publication to third parties; (c) some of the statements to be defamatory, particularly with respect to the corporate plaintiffs; and (d) the defendant company liable.

[2] For the reasons that follow, I would allow these appeals in part. I would set aside some of the liability findings and order a new trial on certain liability issues.

Factual Background

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

(a) Raoul Malak: principal of Ansan Traffic Group Ltd. and related companies known collectively as the "Ansan Group", i.e., Ansan Industries Ltd. d.b.a. Ansan Traffic Control, Lanetec Traffic Control Inc., Western Traffic Ltd. d.b.a. Flaggirls Traffic Control, and Island Traffic Services Ltd. ("Island Traffic");

(b) Philip Keith Jackman: owner of Valley Traffic Control Systems Inc. ("VTS");

(c) Trevor Paine: vice-president of VTS;

(d) Remon Hanna: principal of Advanced Traffic Solutions Inc. ("Advanced Traffic"); and

(e) Brian Litster and Greg Smith: principals of Island Traffic before it was acquired by the Ansan Group.

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

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

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

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

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

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

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

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

[11] Over time the article was posted on numerous websites, the majority of which had domain names that included "raoulmalak" or "ansan". The article was titled in various ways including, "Ansan Group and Raoul Malak Uncovered", "Ansan Traffic Group Exposed", and "Raoul Malak Uncovered". Among other things, it alleged Mr. Malak to be corrupt, a liar, a pimp, and someone who engages in criminal

activity, including money laundering and tax evasion. It also alleged he was involved in "kickback schemes" to ensure his companies received preferential treatment in bidding for contracts. In one version, the opening page contained a graphic depicting Mr. Malak in a prison cell dressed as an inmate. In addition, someone using the pseudonym "Jim Arthur" posted the article on several blogs.

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

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

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

> Shut up!
> Juicy Stuff!!

Mr. Jackman replied:

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

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

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

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

> I saw it yesterday. Holy shit!
>
> Got to figure out someway to make sure Telus and Hydro see it…

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

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

Mr. Storie replied:

> All I can say is Wow

"Brian" refers to the Township's Superintendent of Traffic and Roads.

[19] Later that morning, Mr. Paine emailed <raoulmalak.blogspot.ca/2012/06/raul-malak-undercover.html#!/2012/06/Raoul-malak-undercover.html> to Mr. Jackman. The subject line read "new link". Mr. Jackman forwarded that email to Tammy Kanester, a VTS employee, and separately to Nicole Biernaczyk, an assistant business manager with the union representing VTS's employees. The subject line of the forwarded emails read "FW: new link".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> That is very funny !!! Good one.

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

> I just saw this this morning.
> Unreal!

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

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

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

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

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

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

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

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

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

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

Both B.C. Hydro employees read the article.

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

[43] On November 13, 2012, an anonymous written complaint with respect to the Ansan Group was made to Telus's online ethics line regarding Telus's traffic control contract. The writer refers to having been in contact with Mr. Atchison in June 2012 to determine whether Telus would be exercising it's third-year option with the Ansan Group or issuing an RFQ. This complaint was read by persons within Telus.

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

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

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

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

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

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

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

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

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

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

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

Trial Judge's Reasons and Formal Order
(2017 BCSC 1739)

[55] The trial judge found the article and other publications defamatory of Mr. Malak and the Ansan Group companies. He found Messrs. Hanna, Jackman and Paine not credible and rejected their respective denials of involvement. Based, in part, on expert evidence concerning the various websites, the judge found Mr. Hanna was responsible for creating those websites and their contents and was "Jim Arthur". He found Mr. Hanna acted in furtherance of a common design with Messrs. Jackman and Paine and VTS to defame Mr. Malak and the Ansan Group to gain a competitive advantage. The judge held the defences of qualified privilege, fair comment, and justification did not apply. He held VTS vicariously liable for the actions of Messrs. Hanna, Jackman, and Paine. With respect to Island Traffic, defamation occurred after it became part of the Ansan Group in September 2012.

[56] The trial judge was unable to make a finding with respect to the identity of "Mike Flagger": para. 236.

[57] In dealing with the issue of publication, the trial judge structured his findings based on how those allegations had been pleaded in the notice of civil claim:

> c) Publication to at Least One Person Other Than the Plaintiffs
>
> [260] Where there is a flotilla of websites with defamatory materials surrounding the legitimate websites of the target of a hit piece, publication could easily be inferred. It is common experience that employers may check the internet for information on a potential employee as it is that a purchaser may check the reputation of a supplier on the internet. Based on the law, I am not confident that I am allowed to draw such an inference. There is not the deeming of publication as there is for a "broadcast": *Libel and Slander Act*, R.S.B.C. 1996, c. 263, ss. 1 and 2; *Crookes v. Newton*, 2011 SCC 47 at paras 14, 108-109. Accordingly, I will not infer that a third party accessed a particular website.
>
> [261] The plaintiffs were able to establish publication to at least one person other than one of the plaintiffs for each as set forth below:

Third Amended Notice of Civil Claim	**Form of Publication**	**Proven Publication**

	WEBSITES	
18.i,19	http://www.ansangroup.com/	Uncovered Article (w/o Jail Scene and Tax Evasion)
18.a.i,19	http://www.ansangroup.com/	Uncovered Article (w/o Tax Evasion)
18.a.i,19	http://www.ansangroup.com/	Uncovered Article (Tax Evasion)
18.a.ii,19	http://ansangroup.info/	Uncovered Article (Tax Evasion)
18.a.iii,19	www.ansangroup.biz	Uncovered Article (Tax Evasion)
18.a.iv,19	www.ansantraffic.biz	Uncovered Article (Tax Evasion)
18.a.v,19	www.ansantraffic.co	Uncovered Article (Tax Evasion)
18.a.vi,19	www.ansantraffic.info	Uncovered Article (Tax Evasion)
18.a.vii,19	www.ansantraffic.mobi	Uncovered Article (Tax Evasion)
18.a.viii,19	www.ansantraffic.net	Uncovered Article (Tax Evasion)
18.a.ix,19	www.ansantraffic.org	Uncovered Article (Tax Evasion)
18.a.x,19	www.ansantraffic.ws	Uncovered Article (Tax Evasion)
18.a.xii, 19	www.moneylaunderer.net	Uncovered Article (Tax Evasion)
18.a.xvi	www.raoulmalak.co	Uncovered Article

		(Tax Evasion)
18.a.xvii	www.raoulmalak.com	Uncovered Article (Tax Evasion)
18.a.xvii	http://raoulmalak.com	Uncovered Article (w/o Tax Evasion)
18.a.xviii	www.raoulmalak.info	Uncovered Article (Tax Evasion)
18.a.xx	www.raoulmalak.org	Uncovered Article (Tax Evasion)
	BLOGS	
18.c.i	Ansantraffic.wordpress.com	Uncovered Article (w/o Jail Scene and Tax Evasion)
18.c.ii	Ansantraffictruth.wordpress.com	Uncovered Article (w/o Jail Scene and Tax Evasion)
18.c.iii	Ansangrouptruth.wordpress.com	Uncovered Article (Tax Evasion)
18.c.iv	http://raoulmalak.blogspot.ca	Uncovered Article (w/o Jail Scene and Tax Evasion)
18.c.v	http://raoulmalak.wordpress.com	Uncovered Article (w/o Jail Scene and Tax Evasion)
	YOUTUBE	
18.f.i, 42	http://www.youtube.com/watch?v =F5mb5ZvD_Oc	Poem (Exh #47, Tab 73)
18.f.ii, 42	http://www.youtube.com/watch?v =9NASMREsabs	Poem
	EMAILS	
45A	The June 18, 2012 Jackman−Shannon Email http://raoulmalak.wordpress.com	Uncovered Article (w/o Jail Scene and Tax Evasion)
46	The June 21, 2012 Jackman Email to	Uncovered Article

	Litster and Smith http://ansantraffic.wordpress.com	(w/o Jail Scene and Tax Evasion)
46H	The June 21, 2012 Jackman−Storie Email http://ansantraffic.wordpress.com	Uncovered Article (w/o Jail Scene and Tax Evasion)
46P	The June 21, 2012 Paine−Jackman Email http://raoulmalak.blogspot.ca/	Uncovered Article (w/o Jail Scene and Tax Evasion)
46X	The June 21, 2012 Jackman−Biernaczyk Email http://raoulmalak.blotspot.ca/	Uncovered Article (w/o Jail Scene and Tax Evasion)
46.nn	The August 6, 2012 Hanna−Jackman/Paine Email re http://ansantrafficgroup.wordpress.com/ansan-group-corruption-poetry-the contents of the poem	Poem
46.oo	The August 14, 2012 Jackman−McCormick Email http://raoulmalak.com/	Uncovered Article (Tax Evasion)
46.ww	The August 15, 2012 Jackman−Unger Email http://raoulmalak.com	Uncovered Article (Tax Evasion)
46.eee	The August 15, 2012 Jackman−Earle Email http://raoulmalak.com	Uncovered Article (Tax Evasion)
47	The September 19, 2012 Flagger Email http://www.ansangroup.com [sent to the City of Maple Ridge]	Uncovered Article (Tax Evasion)
49A	The November 16, 2012 Jackson [sic]−Hibbs Email http://raoulmalak.wordpress.com	Uncovered Article (Tax Evasion)
49.I	The June 18, 2012 Jackman−Paine Email http://ansantraffic.wordpress.com	Uncovered Article (w/o Tax Evasion)
49.P	The June 21, 2012 Jackman−Kanester Email http://raoulmalak.blogspot.ca	Uncovered Article (w/o Tax Evasion)

49.kkk	The First August 7, 2012 Jackman Email to Hibbs, Kanester and Clark http://ansantrafficgroup.wordpress.com	Poem
49.mmm	The Second August 7, 2012 Jackman Email to Froescher and Jacobi http://ansantrafficgroup.wordpress.com	Poem
49.ooo	The August 14, 2012 Jackman−Kanester Email http://raoulmalak.com	Uncovered Article (Tax Evasion)
49.www	The August 14, 2012 Jackman−Koper Email http://raoulmalak.com	Uncovered Article (Tax Evasion)
49.eeee	The August 14, 2012 Jackman−Froescher Email http://raoulmalak.com	Uncovered Article (Tax Evasion)
	TELUS ETHICS LINE	
49.ggggg	November/December 2012 Telus Ethics line	Schedule “D”
	PREMIER C. CLARK/ MINISTER R. COLEMAN EMAIL	
49.llllll	The September 27, 2012 JimArthur-Christy.Clark/Rich.Coleman Email letter	Schedule “C”

[262] Several of the websites with the defamatory materials were viewed by Mr. Marr, Mr. Young, or Ms. Veronica Rossos. Ms. Rossos is a lawyer who was retained by the Ansan Group to help to have defamatory materials removed from the websites and to ascertain the author of the materials.

[263] Mr. Marr and Mr. Young saw the material in the course of investigating matters on behalf of Mr. Malak and the Ansan Group. Mr. Marr also prepared the WIPO complaint.

[264] In my view, the reading of the website defamatory materials by any of these individuals satisfies the publication requirement.

[265] [Quotations from *Motoretta Inc. v. Twist & Go Power Sports Inc. (cob Vespa Burlington)*, 2014 ONSC 2469, omitted.]

[266] In the case at bar, there was not a “mutual intent” that the defamatory materials be communicated to the plaintiffs through Mr. Marr, Mr. Young, or Ms. Rossos. None of these individuals were the “alter ego of the plaintiff[s]

for the purpose of receiving" defamatory materials (such as viewing the websites). Accordingly, the publication requirement is met.

Formal Order

[58] The formal order entered to give effect to the judge's liability findings states, in part:

> THIS COURT ORDERS that:
>
> 1. The Defendants Philip Keith Jackman, Valley Traffic Systems Inc., Trevor Paine and Remon Hanna are jointly and severally liable to the Plaintiffs for the published defamatory websites, blogs, YouTube videos, emails and other internet publications complained of in the Third Amended Notice of Civil Claim which are particularized in Schedule "1" to this Order.
> 2. Schedule "1" of this Order shall be interpreted as follows:
>   a. The left-hand column headed "*Third Amended Notice of Civil Claim*" refers to the specific paragraphs in the Third Amended Notice of Civil Claim which identified each defamatory publication in respect of which the aforesaid Defendants are jointly and severally liable to the Plaintiffs;
>   b. The middle column headed "*Form of Publication*" refers to:
>   i. the domain name (also known as a "URL") corresponding to each website, blog, and YouTube video in respect of which the aforesaid Defendants are jointly and severally liable to the Plaintiffs; and
>   ii. each email in respect to which the aforesaid Defendants are jointly and severally liable to the Plaintiffs;
>   iii. the Telus Ethics Line Publication which is attached as Schedule "B" to this Order in respect of which the aforesaid Defendants are jointly and severally liable to the Plaintiffs; and
>   iv. the Premier C. Clark/Minister R. Coleman email letter which is attached as Schedule "C" to this Order in respect to which the aforesaid Defendants are jointly and severally liable to the Plaintiffs.
> 3. For the plaintiff Island Traffic Services Ltd., the defamation arises after September 21, 2012.

[59] Schedule "1" to the order is the chart in para. 261 of the reasons for judgment with the following additions: (a) "[Schedule 'A']" appears in the "Proven Publication" column in connection with each reference to a version of the "Undercover Article";

and (b) "[Schedule 'B']" appears in the "Proven Publication" column in connection with each reference to "Poem".

[60] Schedule "A" is the version of the Undercover Article which contains the graphic of Mr. Malak in prison garb and alleges he is involved in tax evasion. Schedule "B" is the poem that was posted on the Internet and on YouTube.

Grounds of Appeal

[61] In their factum, Messrs. Jackman and Paine state their grounds of appeal as follows:

> I. The trial judge erred in finding Messrs. Jackman and Paine not credible, leading to the conclusion these appellants were responsible for the defamation by Mr. Hanna.
>
> II. Even on the facts found, the trial judge erred in law in finding there was a conspiracy or common design where these appellants were working with Mr. Hanna to defame Mr. Malak.
>
> III. The trial judge erred in finding Mr. Jackman had published the defamation when he sent emails containing the hyperlink to the material to other persons.
>
> IV. The trial judge erred in finding Valley Traffic to be vicariously liable for Mr. Hanna's conduct.

[62] In his factum, Mr. Hanna states his grounds of appeal as follows:

> The trial judge erred in holding:
>
> a) that the reading of the internet posting by the plaintiffs' lawyer and employees tasked by the plaintiffs to do so constitutes publication in law;
>
> b) that the publications were of and concerning the corporate plaintiffs Lanetec Traffic Control Inc., Western Traffic Ltd. d.b.a. Flaggirls Traffic Control and Island Traffic Services Ltd.;
>
> c) that the poem which was alleged to be defamatory would have been understood literally by a reasonable reader;
>
> d) that the evidence met the test for "common design"; and
>
> e) that the test for vicarious liability was met.

Analysis

[63] As set out in *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28, [2009] 3 S.C.R. 640, a plaintiff in a defamation action must prove three things on a balance of probabilities:

> (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

All of these elements are in issue on this appeal.

[64] What is not in issue is that Mr. Hanna was the author of the defamatory material that is the subject matter of this appeal. He was responsible for posting the article and poem on the Internet (i.e., on websites, blogs, and YouTube), the Telus ethics line complaint, and the email to Premier Clark and Minister Coleman. Except for the poem, it is common ground the material Mr. Hanna authored is defamatory of Mr. Malak.

[65] As will become evident, I do not find it necessary to address every issue raised. What I will discuss is: (a) whether the poem is defamatory; (b) whether the Ansan Group companies were defamed; (c) whether emailing a hyperlink constitutes publication; (d) whether publication occurred when persons directed by Mr. Malak to find defamatory material on the Internet located and read that material; (e) the involvement of Messrs. Jackman and Paine; and (f) VTS's liability.

Is the Poem Defamatory?

[66] The trial judge said this in finding the poem defamatory:

> [250] In its literal meaning, the poem is defamatory of Mr. Malak and the Ansan Group. The literal defamatory meanings I find are:
>
> a) Mr. Malak cheats and scams people;
>
> b) Mr. Malak was a pimp;
>
> c) Mr. Malak's spouse is an internet mail order bride whom he procured;
>
> d) Mr. Malak bribes and corrupts people;

e) Mr. Malak is a liar;

f) Mr. Malak uses the Ansan Group to accomplish his illegal activities.

[251] The plaintiffs have also pleaded the inferential meanings as set forth at paragraph 30 of the Third Amended Notice of Civil Claim. I find that "a person who is reasonably thoughtful and informed" would infer the plaintiffs' pleaded defamatory inferential meanings.

[252] The text of the poem was used for the YouTube video which included "the image of a man, standing behind the bars of a prison cell, wearing prisoner's clothing with horizontal black and white lines, with a ball and chain attached to his left ankle". The inferential meaning of the image readily supports the inferential meanings pleaded with respect to the poem.

The inferential meanings pleaded in the notice of civil claim were:

a. The plaintiffs are corrupt, immoral, dishonest and untrustworthy;

b. The plaintiffs have cheated and scammed everyone in their path;

c. The plaintiff Malak is guilty of criminal offences relating to prostitution; and/or

d. The plaintiffs knowingly associate with notorious criminals.

[67] Mr. Hanna contends the trial judge erred in assigning a literal meaning to the poem. He says a reasonable reader would not take the poem, including the YouTube version, seriously and "would view it as merely someone's rhyming rant." He further says a poem is not something that would be used to assert serious allegations.

[68] A finding that words are defamatory is one of fact, subject to the palpable and overriding error standard of review: *Taseko Mines Ltd. v. Western Canada Wilderness Committee*, 2017 BCCA 431 at para. 49, 4 B.C.L.R. (6th) 223. In this case, Mr. Hanna's argument is no more than an attempt to have this Court retry the issue of whether the poem is defamatory. In effect, he asks this Court to apply a standard of correctness and come to a different factual determination. That is something we cannot do.

[69] Of note, is that Mr. Hanna does not challenge the trial judge's finding on inferential meaning.

[70] I would not accede to this ground of appeal.

Were the Ansan Group Companies Defamed?

[71] The trial judge said this in finding that both Mr. Malak and the Ansan Group companies had been defamed:

> [258] I find that the Uncovered Article, the poem, the September 27, 2012 email, and the Telus ethics line complaint (which includes the Follow-Up Notes) each referred to Mr. Malak and the corporate plaintiffs (including Island Traffic after September 21, 2012).
>
> [259] In each of the foregoing, Mr. Malak and the Ansan Group are specifically named. As noted, the evidence also established that Mr. Malak was integral to the operations of the plaintiff corporations and this was well-known.

[72] Mr. Hanna contends the trial judge erred in finding the corporate plaintiffs had been defamed. He submits the "sting" contained in the defamatory material only extends to Mr. Malak.

[73] As previously mentioned, the introduction to the article states:

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

[74] The poem, begins and ends as follows:

> There once was a man,
> Called Raoul Malak,
> Who cheated and scammed,
> Everyone in his path,
> …
>
> Today Raoul Malak,
> Is a Happy man,
> He bribes and corrupts,
> Everything he can.
> He loves to lie,
> He loves to snoop,
> All this is done through,
> Ansan Traffic Group

[75] The letter sent to Premier Clark and Minister Coleman opens with the statement, "I write to you today to blow the whistle on a potential scandal of a very large magnitude". With reference to B.C. Hydro's traffic control services it states,

"Currently this contract is handled for the most part by a company called Ansan Traffic Control that is owned by a man with ties to organized crime called Raoul Malak." It goes on to allege Mr. Malak has paid "kickbacks" to obtain contracts with B.C. Hydro.

[76] The initial complaint to Telus refers to Ansan Industries Ltd. The Follow-Up Notes contain the following statement:

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

[77] The question of whether an individual or entity has been "stung" by a defamatory statement is a question of fact. Apposite is *Weaver v. Corcoran*, 2017 BCCA 160, 95 B.C.L.R. (5th) 362, wherein Justice Dickson stated:

> [84] Once defamatory meaning is established, the plaintiff must go on to prove that the impugned words are "of or concerning" him or her. This is a factual question: *Booth v. British Columbia Television Broadcasting System* (1982), 139 D.L.R. (3d) 88 at 92 (B.C.C.A.). Where the plaintiff is not specifically named, the question is: would the statements lead reasonable people who know the plaintiff to conclude that they refer to the plaintiff? An immediate suspicion on a recipient's part is insufficient. The test is whether the recipient would, in light of the surrounding circumstances, reasonably believe that the person referred to in the defamatory statements is the plaintiff: *Butler v. Southam Inc.*, 2001 NSCA 121 at paras. 29–30, 39, *per* Cromwell J.A., as he then was; *Crookes* at para. 39.

[78] Mr. Hanna has failed to demonstrate any palpable and overriding error in the trial judge's finding that both Mr. Malak and the companies were "stung" by the defamatory statements. It is well-established that statements defaming those in control of a company can be found to have also defamed the company: *Monument Mining Ltd. v. Balendran Chong & Bodi*, 2010 BCCA 373 at paras. 13−14, 9 B.C.L.R. (5th) 289; *David Regan & Co. Pty. Ltd. v. West Australia Newspapers Ltd.*, [2007] WASCA 14 at paras. 28−35. See also: *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 at 436−437 (C.A.).

[79] There is no dispute Mr. Malak controlled the operation of the Ansan Group companies and was the public face of those companies. It was clearly open to the trial judge to find that words disparaging Mr. Malak would tend to lower the reputation of those companies in the eyes of a reasonable person. This is particularly so with respect to statements alleging Mr. Malak used the companies to commit criminal acts.

[80] I would not accede to this ground of appeal.

Does Emailing a Hyperlink Constitute Publication?

[81] As set out in para. 261 of reasons for judgment and the formal order, the trial judge found Messrs. Hanna, Jackman, and Paine liable for publishing defamatory material by means of 18 emails; the judge found each constituted a separate publication. However, except for three emails in which the poem is set out—one sent by Mr. Hanna on August 6, 2012, and two sent by Mr. Jackman on August 7, 2012—the bodies of the emails do not contain any defamatory material. Rather, they contain only a hyperlink to such material.

[82] The reasons for judgment do not contain any analysis with respect to why each email was found to be a publication. The trial judge appears to have proceeded on the basis that merely sending a hyperlink to defamatory material amounts to publication regardless of whether the recipient of the email accessed the material. I say this because some of the recipients who testified were unable to say they accessed the material and some of the persons to whom emails were sent did not testify. The following are examples:

June 21, 2012 Jackman−Kanester email	Ms. Kanester did not say she accessed the material.
August 7, 2012 Jackman−Froescher and Jacobi	Ms. Froescher did not remember receiving the email. Mr. Jacobi said he probably did not open the email.

August 14, 2012 Jackman −McCormick Email	Ms. McCormick did not testify.
August 14, 2012 Jackman−Kanester email	Ms. Kanester could not recall whether she read this email.
August 15, 2012 Jackman−Unger email	Mr. Unger did not testify.

[83] There are two other liability findings that I will mention now. The first is with respect to the August 15, 2012 Jackman−Earle email. The second is with respect to the November 16, 2012 "Jackson−Hibbs" email.

[84] The Jackman−Earle email was not tendered in evidence and Earle did not testify. The Jackson−Hibbs email is cross-referenced in para. 261 of the reasons for judgment and the formal order to para. 49A of the third amended notice of civil claim that alleges, "On or about June 18, 2012 …Jackman published an email to Darlene Hibbs". I am prepared to assume "November 16, 2012" and "Jackson" are typographical errors. The June 18, 2012 email from Mr. Jackman to Ms. Hibbs was tendered in evidence. Ms. Hibbs, however, did not testify.

[85] The question of whether a person who hyperlinks has "published" the material that can be accessed by clicking on the hyperlink was dealt with by the Supreme Court of Canada in *Crookes v. Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269. The majority reasons of Justice Abella in that case support the following propositions:

(a) the use of a hyperlink to defamatory content does not, by itself, amount to publication even if the hyperlink is followed and the content accessed: paras. 14, 44;

(b) when a person follows a hyperlink to defamatory content it is the actual creator or poster of that content who has published the libel: para. 30;

(c) "Only when a hyperlinker presents content from the hyperlinked material in a way that actually repeats the defamatory content, should that content be considered to be 'published' by the hyperlinker": para. 42.

[86] In the case at bar, the trial judge found defamatory content had been published by means of emails sent by Mr. Jackman (15), Mr. Paine (1), Mr. Hanna (1), and "Mike Flagger" (1). Those emails contained only hyperlinks except for one Mr. Hanna sent on August 6, 2012 (to Messrs. Jackman and Paine), and two Mr. Jackman sent on August 7, 2012 (one to Ms. Hibbs, Ms. Kanester, and Ms. Clark, and another to Ms. Froescher and Mr. Jacobi), in which both the hyperlink to the poem and the poem itself are in the body of the email. Accordingly, it is only those three emails that could be found to have published defamatory material, if read by a third party.

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

[88] As for the emails Mr. Jackman sent on August 7, 2012, the evidence is that only Ms. Kanester read the poem. Accordingly, she is the only person to whom the poem was published by means of those emails. Messrs. Hanna and Jackman are both responsible for that publication.

[89] Mr. Malak called many of the persons to whom Mr. Jackman sent emails. While some were unable to say whether they clicked on the hyperlink and read the article, others testified to having done so and that evidence was not challenged. Accordingly, although the trial judge made no express findings, there is no dispute Mr. Jackman's emails resulted in the article being read by a number of persons.

Their having done so constitutes publication by Mr. Hanna. In addition, Mr. Hearts used the hyperlink contained in the Mike Flagger September 19, 2012 email to access and read the article. That, too, amounts to publication by Mr. Hanna.

[90] Based on the evidence of those who testified to having accessed defamatory material by means of a hyperlink sent to them, the following emails resulted in publication by Mr. Hanna:

The June 18, 2012 Jackman−Shannon Email http://raoulmalak.wordpress.com	Uncovered Article (w/o Jail Scene and Tax Evasion)
The June 21, 2012 Jackman Email to Litster and Smith http://ansantraffic.wordpress.com	Uncovered Article (w/o Jail Scene and Tax Evasion)
The June 21, 2012 Jackman−Storie Email http://ansantraffic.wordpress.com	Uncovered Article (w/o Jail Scene and Tax Evasion)
The First August 7, 2012 Jackman Email to Hibbs, Kanester and Clark http://ansantrafficgroup.wordpress.com	Poem
The September 19, 2012 Flagger Email http://www.ansangroup.com [sent to the City of Maple Ridge]	Uncovered Article (Tax Evasion)

Publication to Messrs. Young and Marr and Ms. Rossos

[91] Although the trial judge did not specify which particular websites were viewed by Messrs. Young and Marr and Ms. Rossos, it is clear each of them viewed the article on the websites that were the subject of the WIPO complaint, as well on other websites. In addition, Mr. Young viewed the poem on two YouTube sites.

[92] Mr. Hanna contends that since Messrs. Young and Marr and Ms. Rossos were working on Mr. Malak's behalf when they accessed defamatory material on the Internet, their having done so does not constitute publication of that material. This

argument challenges the trial judge's conclusion those persons were not acting as Mr. Malak's "alter ego": para. 266.

[93] In reaching that conclusion, the trial judge cited *Motoretta Inc. v. Twist & Go Power Sports Inc.*, 2014 ONSC 2469. That case involved a defamation action between two retail vendors of motor scooters. Motoretta, believing Twist & Go had been "bad-mouthing" it to potential customers on an ongoing basis, hired investigators who went to Twist & Go's premises posing as customers. Twist & Go's principal made defamatory statements about Motoretta to the investigators. In finding in Motoretta's favour, Justice Corbett rejected Twist & Go's argument that the defamatory words had not been published because the investigators were acting as Motoretta's agents. He stated, in part:

> 58 The courts have come up with several theories to draw the distinction between publication to an agent and non-publication to an alter ego:
>
> (a) There will be no publication where the plaintiff knew or reasonably believed that the defamatory words would be communicated – in this circumstance the plaintiff is deemed to have consented to communication of the defamatory words to his agent.
>
> (b) There will be no publication where the defamatory words are communicated in confidence.
>
> (c) Solicitors are alter egos of their clients for the purpose of sending and receiving communications.
>
> …
>
> 61 I conclude that an "agent" will be an "alter ego" of a plaintiff, for the purposes of publication of a defamatory statement, only in a narrow range of circumstances, where there is a mutual intent that the statement be communicated to the plaintiff through the agent. As reflected in the cases discussed above, a person's solicitor will usually be her alter ego under this analysis; her executive assistant may be so as well, depending on the context.
>
> 62 Private investigators are not generally "alter egos" under this analysis. They do not present themselves as agents of the plaintiff, and, to the knowledge of the defendant, are not receiving communications on behalf of the plaintiff. Thus communications made to them cannot be said to be communications intended to be made to, or made to, their principal. This analysis is consistent with the longstanding principle that publication brought about by the contrivance of the plaintiff, with a view to the foundation of an action, is actionable publication.
>
> [Footnotes omitted.]

[94] Mr. Hanna relies on *Vallières v. Samson* (2009), 97 O.R. (3d) 761 (Sup. Ct. J.), a case which Corbett J. in *Motoretta Inc.* expressly declined to follow. Mary Vallières wished to qualify as a teacher's aide and her work was appraised by Caroline Samson. The two disagreed as to the contents of the appraisal Ms. Samson prepared. After Ms. Vallières received only two calls from school boards in the region, she asked her husband, Edgar Éthier and a friend, Penny Longpré, to investigate. Both contacted Ms. Samson to ask about Ms. Vallières's ability to act as a tutor. Ms. Vallières brought a defamation action against Ms. Samson in Small Claims Court based on the statements in the appraisal report and on what Ms. Samson said to Mr. Éthier and Ms. Longpré. The trial judge dismissed the action on the basis that: (a) the statements in the appraisal were not defamatory; and (b) Mr. Éthier and Ms. Longpré were acting as Ms. Vallières's agents and, therefore, Ms. Samson's statements to them did not constitute publication to a third party.

[95] Ms. Vallières appealed the dismissal of her action. In dismissing that appeal, Justice Lalonde said this:

> [22] The trial judge considered that the facts stated regarding the part played by Penny Longpré made her Mary Vallières' agent. Penny Longpré already knew that Caroline Samson was not going to recommend Mary Vallières a tutor for her child. Penny Longpré recorded her conversation with Caroline Samson because of the things Mary Vallières had told her. She may perhaps not have had authority to record the conversation, but the fact remains that she did so and reported to Mary Vallières on the conversation. By these acts, Penny Longpré made herself Mary Vallières' agent and Mary Vallières had no doubt that Penny Longpré would tell her everything that happened between her and Caroline Samson. The trial judge made no error in his conclusion.
>
> [23] There was no publication to any third party and the trial judge made no error in finding that the comments made to Penny Longpré by Caroline Samson, in the circumstances described by Penny Longpré, were in effect addressed to Mary Vallières. There was therefore no publication and so no defamation.
>
> [24 Edgar Éthier is Mary Vallières' husband. As a result of the family connection, the trial judge made no palpable and overriding error. Mr. Éthier was in fact his wife's agent in his conversation with Caroline Samson. Accordingly, there was no publication and no defamation by Caroline Samson in her conversation with Edgar Éthier.

[96] *Duke of Brunswick v. Harmer* (1849), 14 Q.B. 185, is a venerable authority dealing with a plaintiff proving publication through the actions of an agent. In that case, a newspaper article defaming the Duke of Brunswick was published in 1830. Seventeen years later, the Duke sent an agent to the newspaper's office to purchase a copy of the paper containing the article. A second copy of the article was obtained from the British Museum. The newspaper pleaded the six-year limitation period but to no avail. In that regard, Justice Coleridge stated (at 189):

> The defendant who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may have been sent for the purpose of procuring the work of that third party. So far as in him lies, he lowers the reputation of the principal in the mind of the agent, which, although that of an agent, is as capable of being affected by the assertions as if he were a stranger. The act is complete by deliver: and its legal character is not altered by the plaintiff's procurement or by the subsequent handing over of the writing to him.

[97] Mr. Hanna submits *Duke of Brunswick* should no longer be considered good law. In oral argument he said it was time to put the agency aspect of that decision "out of its misery". However, the facts in the present case are different from those in *Duke of Brunswick*. Importantly, they do not involve Mr. Malak using what can be described as an artifice to avoid a limitation period. I note that in *Dow Jones & Co. Inc. v. Jameel*, [2005] EWCA Civ 75 at para. 56, [2005] 2 W.L.R. 1614, Lord Justice Phillips M.R. opined that today what the Duke did would be condemned as an abuse of process.

[98] Putting to one side the fact that the present case involves the Internet, what Mr. Malak did is essentially no different from what was done by the plaintiff in *Rudd v. Cameron* (1912), 8 D.L.R. 622 (Ont. C.A.), aff'g (1912), 4 D.L.R. 567 (Ont. H. Ct. J. (Div. Ct.)). The plaintiff, a merchant and building contractor, learned someone was making defamatory statements about him, but did not know the source. He hired two detectives for the purpose of finding the source and bringing an action against that person. The detectives made the acquaintance of the defendant. When they mentioned the plaintiff was anxious to build a club house for them, the defendant made disparaging remarks about the plaintiff. The plaintiff's action in

defamation succeeded and the defendant unsuccessfully appealed; first to the Divisional Court and then to the Court of Appeal.

[99] On appeal the defendant argued there had been no publication. The Divisional Court, following *Duke of Brunswick*, disagreed: at 571. On further appeal, the Court of Appeal agreed there had been publication but did not find it necessary to decide whether *Duke of Brunswick* was good law. This was because the Court considered the facts before it different from those in *Duke of Brunswick*. Speaking for the majority, Justice Maclaren stated (at 623):

> The detectives were not sent by the plaintiff to the defendant. The evidence is, that the plaintiff, finding that such damaging reports were being circulated in the town, and not knowing who were circulating them, placed the matter in the hands of a detective agency, who sent two of their employees to investigate. They were not told or asked by the plaintiff to go to the defendant. In speaking of the plaintiff to the detectives as he did, the defendant, in my opinion, both in fact and in law, published the slanders he uttered; and he is not in the same position as if he had spoken the words to the plaintiff himself.

[100] In concurring reasons, Justice Meredith opined that an action would not lie in defamation if a plaintiff directly, or by means of a third party, induced a defendant by subterfuge to speak defamatory words about him merely for the purpose of bringing an action. However, he did not view the facts as involving such impermissible conduct (at 624):

> It is quite a different thing for one, who has been defamed by a secret enemy, and who, in honest and not unusual or unreasonable endeavours to discover the wrong-doer, is again defamed by one whom he suspected of the secret defamation, to bring such an action as this-even though the new slanders were published only to detectives employed by him and under false statements made by them in such an endeavour. And that is this case: and was very like the case of *Duke of Brunswick v. Harmer*, 14 Q.B. 185; see also *Griffiths v. Lewis* (1845), 7 Q.B. 61.

[101] The facts in the present case provide an even stronger basis for finding publication than those in *Rudd v. Cameron*. In that case, the action was based on a defamatory statement that did not exist until the detectives spoke to the defendant. Here, the action was based on defamatory statements Mr. Hanna posted on the

Internet for the world to see before Mr. Marr, Mr. Young, and Ms. Rossos found them.

[102] The last aspect of this issue I wish to address is the fact Ms. Rossos is a lawyer. Mr. Hanna cites *Grimmer v. Carlton Road Industries Assn.*, 2009 NSSC 169, 282 N.S.R. (2d) 159, as authority for the proposition that a communication to a solicitor is not publication for the purposes of defamation. Mr. Hanna submits there was no publication if Ms. Rossos was the only person to read the article on a particular website.

[103] The facts in *Grimmer* are far removed from those in the present case. Mr. Grimmer was suspended from his position with the association and advised by members of its board of directors of allegations against him; he was given a point-form summary of those allegations. Mr. Grimmer retained a lawyer who, on Mr. Grimmer's instructions, wrote a letter to the association in which he stated, "Furthermore, if there are allegations against [Mr. Grimmer], [Mr. Grimmer] requests that these be disclosed to him by letter which is to be sent to me as his solicitor for review and reply". The board's chairperson responded in a letter setting out the allegation. Mr. Grimmer commenced an action against the association for defamation—based on the letter—and wrongful dismissal.

[104] The association applied to strike the defamation claim on the basis there had been no publication of the letter. In the alternative, it applied for summary judgment on the basis Mr. Grimmer had consented to the letter being sent (*volenti non fit injuria*). It succeeded in both respects.

[105] On the publication issue, Justice Warner, following a review of trial decisions and academic writing, stated:

> [46] The absence of appellate decisions does not make the caselaw any less plain and obvious. The principled approach to the law of defamation; that is, the protection of reputation, in the context of other fundamental values, including the role and obligation of lawyers in the legal process, supports the proposition that communication to a lawyer, at the request of the client, of allegedly defamatory statements relating to the subject matter of the retainer, is not a publication at law.

> [47] This conclusion supports the striking of the portion of the Statement of Claim alleging defamation based upon the defendant's letter to the plaintiff's lawyer of March 18, 2008, given in response to plaintiff counsel's letter of March 17, 2008, stating that the plaintiff requested that any allegations against him respecting employment issues be forwarded to the lawyer for review and reply. The plaintiff authorized his counsel to write the March 17 letter.
>
> [Emphasis added.]

[106] This issue was also dealt with in *Monument Mining Ltd. v. Balendran Chong & Bodi*, 2012 BCSC 1769, 99 C.C.L.T. (3d) 300. That case concerned a number of defamatory letters, one of which had been sent by the defendant's solicitor to the law firm shown on the plaintiff's website as being the plaintiff's solicitor. Justice Goepel (then of the Supreme Court of British Columbia) found that letter had not been published on two bases.

[107] First, citing *State Bank of New South Wales v. Currabubula Holding Pty. Ltd.*, [2001] N.S.W.C.A. 47, 51 N.S.W.L.R. 399, Goepel J. held the law firm was an agent of the plaintiff corporation as the corporation held the law firm out as a means by which third parties could communicate with it: paras. 90−91.

[108] Second, Goepel J. held that independent of the reasoning in *Currabubula Holdings*, the letter had not been published. After referring to *Grimmer* and quoting para. 46 of that decision, he stated:

> [94] The case at bar can, on its facts, be distinguished from *Grimmer.* In this case, Monument did not specifically request Mr. Kumar to write to DuMoulin Black. The distinction is, however, in my view, one without a difference. Monument held out DuMoulin Black as its solicitors on its website. In those circumstances, Monument must have expected that individuals raising legal issues would contact its solicitors. It was entirely appropriate for Mr. Kumar to write to DuMoulin Black. For these reasons as well, I find that the First Letter was not published.

[109] What these decisions have in common is that: (1) the defendant communicated with the plaintiff's solicitor to communicate with the plaintiff; and (2) the plaintiff intended to receive the communication through its solicitor. Unless both conditions are met, the solicitor will not be treated as standing in the plaintiff's shoes. In this regard, I adopt the following statement in N. Klar, *Remedies in Tort*

(Toronto: Thompson Reuters, 1987) (loose-leaf updated to 2019, release 2), Vol. 1, Chapter 6:

> §57.4 A communication sent to a company through its agents, including its legal counsel, is a communication to the company only, and not a publication to third parties. Communication to a lawyer, at the request of the client, of allegedly defamatory statements relating to the subject matter of the retainer is not a publication at law. The cases distinguish between publication to an agent, and non-publication to a plaintiff's alter-ego. An "agent" will be an "alter ego" of a plaintiff for the purposes of publication of a defamatory statement only in a narrow range of circumstances where, as in the case of a person's lawyer, there is a mutual intent that the statement be communicated to the plaintiff through the agent.
>
> [Footnotes omitted; emphasis added.]

[110] Accordingly, the trial judge did not err in finding defamatory material had been published to Messrs. Marr and Young and Ms. Rossos.

Involvement of Messrs. Jackman and Paine

[111] The trial judge found Messrs. Jackman and Paine jointly responsible for the publication of all the defamatory material because they knew Mr. Hanna was "Jim Arthur" and, together with VTS, "had a common design of 'destroying, diminishing, or undermining' the reputations of Mr. Malak and the Ansan Group": para. 298. The judge's primary findings of fact with respect to the involvement of Messrs. Hanna, Jackman, and Paine are set out in the portion of his reasons under the main heading "5. Credibility of Mr. Hanna, Mr. Jackman, and Mr. Paine": paras. 68ff.

[112] In my view, the judge's findings that Messrs. Jackman and Paine knew Mr. Hanna was "Jim Arthur" and participated in a common design cannot stand because it cannot be said with any confidence that the judge did not conflate credibility determinations with factual findings.

[113] Disbelief of a witness is not proof of the opposite: *Haynes v. Haynes*, 2017 BCCA 131 at para. 20, 97 B.C.L.R. (5th) 63. To paraphrase Lord Justice Scrutton in *Hobbs v. C.T. Tinling & Co.*; *Hobbs v. Nottingham Journal Ltd.*, [1929] 2 K.B. 1 at 21 (C.A.), if a man testifies he did not go to Rome and is disbelieved, that is not evidence he went to Rome.

[114] The trial judge appears to have based his finding that Mr. Jackman knew Mr. Hanna was "Jim Arthur" on his rejection of Mr. Jackman's evidence that he could not remember reading the December 20, 2012 email Mr. Hanna sent him in regard to the Follow-Up Notes to the Telus complaint: paras. 132−135.

[115] The possibility of conflation with respect to Mr. Jackman is further evinced by what the trial judge said under the subheading "vii) Conclusion – Mr. Jackman":

> [154] In sum, Mr. Jackman was not a credible witness.
>
> [155] Having found that Mr. Jackman knew that Mr. Hanna was responsible for the Telus ethics line complaint, I also find that he knew Mr. Hanna was the person using the pseudonym, Jim Arthur.
>
> [156] As noted, some postings of the Uncovered Article were shown as posted by Jim Arthur. Mr. Jackman had also circulated the Uncovered Article. With Mr. Jackman's knowledge that Mr. Hanna had written the Telus ethics line complaint anonymously and the similarity of key themes between the Telus ethics line complaint and the Uncovered Article, I draw the inference and find that Mr. Jackman also knew that Mr. Hanna was Jim Arthur.

[116] With respect to Mr. Paine, the trial judge did not believe Mr. Paine when he said he could not recall whether he discussed with Mr. Jackman the blind copy of the September 27, 2012 email "Jim Arthur" sent to Premier Clark and Minister Coleman. Rather, the judge inferred Mr. Paine chose to not speak to Mr. Jackman because he knew Mr. Hanna was "Jim Arthur":

> [165] Mr. Paine testified that he could not recall discussing the email with Mr. Jackman, including asking if he knew who Jim Arthur was. Mr. Jackman says he "very well could have been" told of the email by Mr. Paine.
>
> [166] I cannot accept that Mr. Paine would not have spoken to Mr. Jackman regarding the blind copy of the September 27, 2012 email to Premier C. Clark and the Honourable R. Coleman but for very unusual circumstances. Mr. Paine was active in preparing the tender for the BC Hydro contract with the closing of tenders about a week away. The email asked that Mr. Standfield be removed "permanently from the procurement process". Mr. Paine had met Mr. Standfield in the summer of 2012 as part of the information meetings related to the BC Hydro RFP.
>
> [167] The inference I draw is that Mr. Paine did not speak with Mr. Jackman because he knew Jim Arthur was a pseudonym for Mr. Hanna. If Mr. Paine had told Mr. Jackman of the September 27, 2012 email, it is also implausible that neither has a specific recollection. From VTS's perspective, it was an exceptional email to the Premier and a Minister of our province.

[117] Once again, the possibility of conflation is further evinced by what the trial judge said under the subheading “viii) Conclusion – Mr. Paine”:

> [180] In sum, Mr. Paine was not a credible witness. I also find that he knew that Mr. Hanna was Jim Arthur.

[118] In this case, the trial judge’s reasoning is ambiguous and admits to the possibility he inferred Messrs. Jackman and Paine were involved not from proven facts, but because he disbelieved aspects of their evidence. There was no analysis in the judge’s reasons as to why he concluded Messrs. Jackman and Paine participated in a common design with Mr. Hanna with respect to the publication of defamatory material.

[119] Given that uncertainty, I would set aside the finding of liability against Messrs. Jackman and Paine based on common design. That issue must be retried.

VTS’s Liability

[120] The trial judge found VTS vicariously liable for all the defamatory material created by Mr. Hanna and for the emails by which Mr. Jackman and Mr. Paine shared or sent that material: paras. 337−338.

[121] The discussion of VTS’s vicarious liability commences at para. 311 of the trial judge’s reasons. This takes place after the judge found Messrs. Hanna, Jackman, and Paine had, together with VTS, acted in furtherance of “a common design of ‘destroying, diminishing, or undermining’ the reputations of Mr. Malak and the Ansan Group”: paras. 298, 303. In other words, the judge addressed VTS’s vicarious liability after he had already found VTS directly liable. As Justice Rosenberg stated in *Lysko v. Braley* (2006), 79 O.R. (3d) 721 at para. 90 (C.A.), “any person who participates in the publication of the defamatory expression in furtherance of a common design will be liable to the plaintiff.”

[122] Although the trial judge’s analysis of Mr. Hanna’s relationship with VTS was guided by *Bazley v. Curry*, [1999] 2 S.C.R. 534, and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, that analysis took place

in the context of the judge having already found that Mr. Jackman (VTS's owner), Mr. Paine (VTS's vice-president), and VTS participated in the attack on Mr. Malak and the Ansan Group.

[123] There can be no doubt VTS's direct liability was based on the finding that Messrs. Jackman and Paine participated in a common design to eliminate VTS's competitors. As the finding with respect to Messrs. Jackman and Paine cannot be sustained, neither can the finding that VTS is liable for either participating in that common design or on the basis it is vicariously liable for their actions.

[124] Further, in my view, it cannot be said with certainty that the trial judge would have found VTS vicariously liable for Mr. Hanna's actions had the judge not found Messrs. Jackman and Paine participated with Mr. Hanna in a common design. Given that uncertainty, I would set aside the finding of vicarious liability against VTS for the actions of Mr. Hanna.

[125] As the issue of VTS's vicarious liability is inextricably connected to the liability of Messrs. Jackman and Paine, it, too, must be retried.

Summary of Conclusions

[126] For the reasons set out above, I have concluded that:

(a) Mr. Hanna is liable for the publication of the defamatory material listed in para. 261 of the trial judge's reasons under the headings "Websites", "Blogs", "YouTube", "Telus Ethics Line", and "Premier C. Clark/Minister R. Coleman Email";

(b) the findings of liability against Messrs. Jackman and Paine on the basis they participated in a common design with Mr. Hanna to vilify Mr. Malak and the Ansan Group must be set aside and that issue remitted for a new trial;

(c) the finding of liability against Mr. Hanna for publishing the poem by means of the email he sent to Messrs. Jackman and Paine on August 6, 2012, must be set aside and that issue remitted for a new trial;

(d) the finding of liability against VTS must be set aside and that issue remitted for a new trial;

(e) Messrs. Hanna and Jackman are liable for the publication of the poem that occurred by means of the email Mr. Jackman sent to Ms. Kanester on August 7, 2012;

(f) Mr. Hanna is liable for the publication of the article that occurred by reason of the hyperlinks Mr. Jackman sent to Ms. Shannon on June 18, 2012, Messrs. Litster and Smith on June 21, 2012, and Mr. Storie on June 21, 2012; and

(g) Mr. Hanna is liable for the publication of the poem that occurred by reason of the hyperlink "Mike Flagger" sent to the City of Maple Ridge on September 19, 2012;

Disposition

[127] With respect to the order entered in the trial court, I would:

(a) allow Mr. Paine's appeal and set aside all the liability findings made against him;

(b) allow VTS's appeal and set aside all the liability findings made against it;

(c) allow Mr. Jackman's appeal in part and set aside the liability findings made against him except for the one under the heading "Emails" relating to "The First August 7, 2012 Jackman Email to Hibbs, Kanester and Clark";

(d) allow Mr. Hanna's appeal with respect to the liability findings made against him under the heading "Emails" in part and set aside those findings except for those relating to:

(i) "The June 18, 2012 Jackman−Shannon Email";

(ii) "The June 21, 2012 Jackman Email to Litster and Smith;"

(iii) "The June 21, 2012 Jackman−Storie Email";

(iv) "The First August 7, 2012 Jackman Email to Hibbs, Kanester and Clark"; and

(v) "The September 19, 2012 Flagger Email";

(e) dismiss Mr. Hanna's appeal from the liability findings made against him under the headings "Websites", "Blogs", "YouTube", "Telus Ethics Line", and Premier C. Clark/Minister R. Coleman Email"; and

(f) order a new trial on the issues of:

(i) whether Messrs. Jackman and Paine are liable on the basis they participated in a common design with Mr. Hanna;

(ii) whether Mr. Hanna is liable with respect to the August 6, 2012 email containing the poem he sent to Messrs. Jackman and Paine; and

(iii) VTS's liability.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Madam Justice Griffin"