
CANADA / JUDGMENT

Salager v. Dye & Durham Corporation

2018 BCSC 438

COURT

Supreme Court of British Columbia

DECIDED

20 March 2018

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2018 BCSC 438 Salager v. Dye & Durham Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Salager v. Dye & Durham Corporation,

2018 BCSC 438

Date: 20180320

Docket: S149765

Registry: Vancouver

Between:

Serge Salager

Plaintiff

And

Dye & Durham Corporation, OneMove Online Systems Inc.

and Matthew Proud

Defendants

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

Counsel for the Plaintiff:

N. Mitha

R. Truman

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L. Robinson

Place and Date of Trial/Hearing:

Vancouver, B.C.

December 18-21, 2017

Place and Date of Judgment:

Vancouver, B.C.

March 20, 2018

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Introduction

- [1] Serge Salager seeks damages for breach of a settlement agreement and for defamation.
- [2] Mr. Salager's claims arise from his consulting work for, and employment with, OneMove Technologies Inc. ("OTI"). In 2016, OTI was renamed Dye & Durham Corporation following a corporate transaction, the particulars of which are not relevant to this action. In this decision, I will refer:
 - (a) to the defendant Dye & Durham Corporation by its former corporate name, "OTI";
 - (b) to the defendant OneMove Online Systems Inc. as "Online"; and
 - (c) to OTI and Online, collectively, as the "OneMove Corporations".
- [3] The OneMove Corporations filed a counterclaim. It alleged that Mr. Salager's actions constituted actionable defamation and a breach of the settlement agreement.
- [4] On December 14, 2017, just before the commencement of trial, the defendants' counsel advised Mr. Salager's counsel that the defendants were not proceeding with their counterclaim. It was withdrawn on the first day of trial.
- [5] The defendants called no evidence at trial. The defendant Matthew Proud was examined for discovery as the OneMove Corporations' representative, and on his own behalf. Parts of the discovery transcript were read into the record, and the written responses he provided to outstanding questions on the discovery were filed as exhibits.

The Background to Mr. Salager's Claims

Mr. Salager's Hiring

- [6] In the spring of 2012, Mr. Salager was living and working in the Bahamas for a venture capital fund. He has an MBA from Harvard and is experienced in evaluating businesses for the purpose of mergers, sales and acquisitions.
- [7] Through mutual acquaintances, Mr. Salager was approached by Mr. Proud for advice about an offer he had received from Do Process Inc. ("DPI") for his interest in OTI. Mr. Proud was then one of OTI's largest shareholders and, between 2012 and 2014, he was a member of its board of directors. He chaired the board between the summer and December of 2012.
- [8] OTI provides legal, workload software and registry support services. It had developed and marketed internet-based software applications and services related to the transfer of real estate in Canada. OTI's online conveyancing software was marketed as "econveyance". Mr. Salager testified that OTI was publicly listed on the Toronto Stock Exchange and the market value for its shares was about \$5.5 million.
- [9] DPI had developed and marketed a product competitive with OTI's called "Prosuite".
- [10] Following Mr. Proud's initial approach, Mr. Salager provided consulting services to OTI through his personal Bahamian company. After reviewing DPI's offer, canvassing other market interest in OTI, and considering OTI's historical financial performance, Mr. Salager prepared two reports for consideration by OTI's board, a strategic plan and a proposal to take OTI private.
- [11] In about July 2012, Mr. Salager presented his reports to OTI's board. The board was pleased with Mr. Salager's work, and Mr. Proud proposed that OTI hire Mr. Salager as its CEO. Mr. Salager was hired in July or August 2012. He was to implement the strategic plan, which hinged on taking OTI private, and then focus on marketing and commercialization of OTI's products. The ultimate goal was to increase the value of OTI so that it could be sold for significantly more than DPI's original offer.
- [12] Initially, Mr. Salager worked from the Bahamas. In the summer of 2013, Mr. Salager and his family moved to Vancouver.
- [13] OTI's board established a special committee for the purpose of implementing the strategic plan and assessing bids received from potential buyers identified by Mr. Salager. DPI continued to be an interested purchaser. Information Services Corporation Inc. ("ISC") was also interested.
- [14] In furtherance of the strategic plan, OTI became a private company sometime in 2013. Mr. Proud, his brother and his father became its only shareholders, and Mr. Proud controlled it. Mr. Salager remained the CEO throughout that period.

The BIV Forty under 40 Award

- [15] At some point in the summer of 2013, Mr. Salager was approached by Business in Vancouver ("BIV") magazine about participating in its "Forty under 40" award program, which profiled 40 Vancouver business leaders under the age of 40 (the "Award").
- [16] Although BIV's selection criteria were not in evidence, it is reasonable to infer that eligibility was based on a candidate's professional accomplishments and age.
- [17] Mr. Salager testified that BIV makes a "big deal" of the Award, including publishing an online profile about the recipients' accomplishments and producing a special edition of the BIV magazine, profiling all of the recipients, which is circulated among Vancouver businesses. BIV hosts an annual reception and dinner to honour that year's Award winners. Alumni Award recipients are invited to attend the reception.
- [18] To be considered for an Award, Mr. Salager required letters in support of his nomination. He approached Paul Henry Schelfhout, who was then the Chairman of OTI's Board, and Lorie Waisberg, the Chairman of the independent committee which was set up to oversee the transaction to take OTI private. Both agreed to provide letters in support.
- [19] In his letter to BIV, Mr. Schelfhout wrote, in part:

Mr. Salager inherited a company that was in a financial distress and dire straights but that had unique opportunities that the board felt that the previous management team failed to harness. Mr. Salager's appointment as CEO follows the presentation of a detailed restructuring and turnaround plan he presented to the board last year, a plan that we are happy to have seen executed with excellence.

The results of the turnaround are outstanding. For the first time in its history, the Company has been profitable for a full quarter. Revenues grew more than 40% versus the previous quarter and costs have been reduced by more than 30%.

What is most impressive, [is] that Mr. Salager fixed the car whilst it was running and was able to execute its restructuring plan whilst working on the company's largest projects which are national (Ontario) and international (UK) expansion, both projects underway so far delivery very satisfactory results. (as written)

- [20] In his letter to BIV, Mr. Waisberg explained his role with OTI and his interaction with Mr. Salager in the efforts to take OTI private. He wrote, in part:

I worked extensively with Mr. Salager during the 6 months in which [OTI] was involved in the going-private effort.

I witnessed Mr. Salager capabilities, high standards and ethics as well as his abilities to lead his team and execute [OTI's] strategic plan. Because of [OTI's] size and limited resources as well as difficult market conditions, this was a very challenging period. Mr. Salager was exemplary in leading [OTI] through this trying time.

[21] In cross-examination, the defendants put to Mr. Salager that he had drafted both letters, and he agreed he had done so. I accept Mr. Salager's unrefuted evidence that Mr. Schelfhout and Mr. Waisberg were busy executives who asked him to draft the letters and that they would not have signed the letters if they disagreed with the contents.

[22] On September 30, 2013, Mr. Salager learned that he was a winner of a 2013 Award. BIV asked him to answer a series of questions for the purposes of creating a profile that would be published about each of the winners. He was also photographed and interviewed.

[23] On a date which is not clear, but which was before October 23, 2013, BIV profiled the 2013 Award winners on its website. BIV included a photograph of each winner together with a written profile about them which, in Mr. Salager's case, included his personal information and quoted him with respect to his accomplishments at OTI (the "Profile"). On December 10, 2013, BIV also published its special issue profiling the 2013 Award winners.

[24] Mr. Salager's online and magazine Profile stated:

Serge Salager was working at a venture capital fund based in the Bahamas when he was contacted by a group of investors who owned a struggling tech company in Vancouver.

That company, OneMove Technologies, had foundered ever since going public in 2006. Salager was originally brought in to advise the firm on a takeover offer received from a company in Ontario.

'One of my conclusions was that the company was in pretty bad shape and the board would be better off by not selling now and should go through the pain of restructuring the company, taking the company private, and then maybe sell it or re-IPO it down the road', Salager said.

The investors liked that idea - and Salager. In August 2012, they hired him as CEO of the company.

Salager set about turning the company around, a process that included refocusing the company on marketing and sales and cutting staff and expenses.

In the space of a year and a half, Salager has returned the company to profitability. The business has expanded into Alberta and plans to soon be in Ontario.

The company's product - software for the legal profession - was high quality, said Salager. He led a rebranding effort and increased the price, among other things, without losing any customers.

Selling the company is no longer an immediate priority.

'The Company is growing between 40% and 60% per year', Salager said. 'Any reasonable investor would stick with a company that is growing at such a pace.'

Over the last quarter, revenues grew by 40% and market share increased by 15%.

'There's a lot of stress involved in restructuring the company, but once you see the results afterwards, how our company looks in the market, how our financials look that's fantastic,' he said.

[25] On October 23, 2013, following BIV's publication of Mr. Salager's Profile on its website, Mr. Proud sent an email to OTI's staff advising them of the Award and congratulating Mr. Salager. At his examination for discovery, Mr. Proud acknowledged that he had read the Profile before he sent the email. The email said:

I am very proud to let everyone know that Serge was named to the 'Business in Vancouver' magazine Top 40 under 40 list this year.

This is a great personal achievement for Serge. It is also further evidence of the world class leadership we have in our Company.

It is also very important to remember that Serge has not been in Vancouver long and would not have been able to get where he is in Vancouver without the huge help that you as a team have provided!

Mr. Salager's Termination and the Wrongful Dismissal Action

[26] In the spring of 2014, OTI terminated Mr. Salager's employment, alleging cause. Mr. Proud took over as its CEO.

[27] Mr. Salager, and his two corporations, commenced a wrongful dismissal action naming as defendants the OneMove Corporations and Mr. Proud. He sought damages for wrongful dismissal and for breach of a stock option agreement.

[28] When Mr. Salager was terminated, a sale of OTI to ISC was pending. In July 2014, OTI received an offer from ISC for \$10 million, almost double its value when Mr. Salager became its CEO two years before. OTI closed the deal with ISC a few months after receiving the initial offer.

[29] Mr. Salager was concerned that proceeds from the ISC transaction would not be available to satisfy his claims in the action. He applied for disclosure of documents relating to the transaction and for a without notice Mareva injunction to require \$500,000 of the proceeds of any sale of OTI and/or Online be held in trust pending further agreement or court order.

[30] On August 14, 2014, Justice Abrioux granted both orders. Pursuant to the terms of the Mareva injunction, Mr. Salager was to serve OTI with a copy of it and to notify ISC that it had been granted.

[31] OTI applied to have the injunction set aside. Before OTI's application was argued, the parties engaged in settlement discussions and entered into a settlement agreement.

The Settlement Agreement

[32] Effective on August 28, 2014, the plaintiffs in the wrongful dismissal action, collectively defined as "Salager"; OTI and Online, collectively defined as the "OneMove Corporations"; and Mr. Proud executed a Mutual Release and Settlement Agreement (the "SA"). In submissions, Mr. Salager's counsel said that the SA was signed by Mr. Proud, as a representative of the OneMove Corporations and on his own behalf, on or about September 5, 2014. The defendants did not dispute that.

[33] The SA included the following terms:

- (a) Pursuant to Clauses 1 and 2, by September 3, 2014, OneMove (defined in the SA to include OTI, Online and Mr. Proud) was to pay Mr. Salager a settlement amount of \$243,500; and
- (b) Pursuant to Clause 4, by September 4, 2014, the parties were to instruct their respective counsel to consent to the dismissal of the action without costs and to vacate the Mareva injunction. The parties were also to execute and deliver further documents and do such further acts reasonably requested to effect the terms and intent of the SA, including OneMove submitting to the Canada Revenue Agency (the "CRA") the required forms regarding tax remittances arising from the settlement amount.

[34] In addition, the SA included the following terms which I set out as written because of their importance to the issues in this action:

- (a) Clause 11: the parties will refrain from making, publishing or disseminating any negative or disparaging, whether oral or in writing, comments or information about the other;
- (b) Clause 12: if the facts on which this Agreement is made proved to be other than or different from the facts in that connection now known or believed to be true, the Parties and each of them expressly accept and assume the risk of the facts being different and agree that all terms of this Agreement shall be in all respects effective and not subject to termination, variation, or rescission by any discovery of any differences in the facts; and
- (c) Clause 14: the OneMove Corporations will provide Salager with a completed T4 and T4A-NR forms in order for Salager to submit their own Voluntary Disclosure Program application and the OneMove Corporations shall share with Salager all documentation relevant to the OneMove Corporation's Voluntary Disclosure, subject to any lawful prohibition on copying and disclosing which may be discovered, by 2:00 p.m. on Wednesday, September 3, 2014 and will make best efforts to facilitate Salager's Voluntary Disclosure Programs application. OneMove confirms that it will remit up to \$63,000, on behalf of Salager, the amount which Canada Revenue Agency assesses is owing in respect of Salager's corporate and income taxes in relation to services rendered for OneMove, which its tax advisers currently estimates is \$63,000.

The Claims and Defences in This Action

- [35] Mr. Salager claims that the defendants have breached the terms of the SA and have engaged in the tort of defamation. In his second further amended notice of civil claim, in brief and in summary, Mr. Salager pleads that:
- (a) a September 9, 2014 letter sent by OTI's counsel to BIV (the "BIV Letter"), was defamatory;
 - (b) an April 2015 letter sent by Mr. Proud to a number of notaries public (the "Notary Letter") was defamatory;
 - (c) both the BIV and Notary Letters breached Clause 11 of the SA;
 - (d) the OneMove Corporations breached Clause 14 of the SA by failing to assist Mr. Salager to make a voluntary disclosure to the CRA and failing to pay his outstanding tax arrears to the CRA; and
 - (e) Mr. Proud is personally liable.
- [36] Mr. Salager claims: general damages for breach of the SA; general damages for defamation; damages against Mr. Proud personally; aggravated damages; punitive damages; and special costs.
- [37] In response and in brief, the OneMove Corporations plead that: the BIV and Notary Letters were not defamatory and that the OneMove Corporations did not breach Clause 11 of the SA or act in bad faith. Mr. Proud pleads that the BIV Letter was not sent on his behalf but on behalf of the OneMove Corporations. He otherwise repeats and adopts the defences of the OneMove Corporations.
- [38] As set out earlier in this decision, the OneMove Corporations filed a counterclaim against Mr. Salager but withdrew it on the eve of trial.

Breach of Clause 14 of the SA

- [39] Mr. Salager testified that, when he was terminated, the OneMove Corporations owed taxes to the CRA for income he or his personal corporations earned in 2012 and 2013. The outstanding taxes arose because, when he moved to Canada as OTI's CEO, the parties had not finalized his remuneration terms. Mr. Salager and/or his corporations received interim payments and although OTI withheld some taxes on those payments, they had not been remitted to the CRA on Mr. Salager's behalf.
- [40] In an effort to address the tax arrears problem, prior to finalizing the terms of the SA, Mr. Salager discussed with Mr. Proud and OTI's tax advisors a process by which the parties would each voluntarily apply to the CRA under the CRA's Voluntary Disclosure Program ("VDP").

- [41] Clause 14 of the SA was intended to resolve the tax arrears problem. Its terms contemplated each party voluntarily applying to the CRA under the VDP, disclosing that they had not remitted taxes for 2012 and 2013 and that each wished to bring their tax obligations up to date.
- [42] Mr. Salager testified that it was important to the success of the VDP applications that the parties provided the same information to the CRA. Discrepancies in the parties' VDP applications would be problematic and might result in penalties being assessed by the CRA. As a result, Clause 14 requires OTI to make best efforts to:
- (a) provide Mr. Salager with completed T4 and T4A-NR forms; and
 - (b) share with Mr. Salager all documentation relevant to OTI's voluntary disclosure to CRA.
- [43] As of the date of the SA, OTI's tax advisors had estimated Mr. Salager's tax liability for corporate and personal income taxes at about \$63,000 and, pursuant to Clause 14, OTI confirmed that it would remit up to that amount in respect of Mr. Salager's tax liability.

OTI's Compliance with Clause 14 of the SA

- [44] It was clear from Mr. Salager's evidence, the emails he exchanged with Mr. Proud and those subsequently exchanged between their respective counsel, that Mr. Salager repeatedly requested OTI to provide him with the completed T4 and T4A-NR forms and copies of OTI's VDP documentation.
- [45] Mr. Salager testified that these documents were at the top of his mind following execution of the SA. His efforts to obtain the documents, and to ensure compliance with Clause 14, started in September 2014 and continued until he filed his own VDP application in late November 2015. At some point in the fall of 2014, OTI provided Mr. Salager with draft T4s and T4A-NRs for 2012 and 2013. They were inaccurate and unsigned, and Mr. Salager could not file his VDP application based on them.
- [46] On Mr. Salager's unrefuted evidence, despite his and his counsel's repeated efforts to obtain the documents, OTI never provided him with completed T4 and T4A-NR forms or the documents relating to its VDP filing. Mr. Salager testified that he eventually obtained the necessary completed T4 and T4A-NR forms directly from the CRA and, with the assistance of his tax advisors, filed his own VDP application on November 26, 2015 without the benefit of OTI's documentation.
- [47] OTI's documents disclosed that, by April 22, 2015, it had prepared the amended 2012 and 2013 T4s and T4A-NRs but, inexplicably, they were never provided to Mr. Salager.
- [48] On December 21, 2015, Mr. Salager's tax advisors received notification that the CRA had accepted his VDP application and would issue Notices of Assessment for 2012 and 2013.

- [49] In March 2016, the CRA advised Mr. Salager that he owed back taxes of \$68,372.05 for 2012 and 2013 and that, to avoid additional interest charges, the arrears had to be paid before April 6, 2016. On March 31, 2016, Mr. Salager's counsel wrote to OTI's counsel advising of the taxes owed and the required payment date, and asking OTI to remit the tax arrears to the CRA pursuant to Clause 14 of the SA.
- [50] On April 18, 2017, OTI's then counsel wrote to Mr. Salager's counsel acknowledging that OTI owed at least \$53,889.94 in respect of Mr. Salager's tax arrears but indicating that it was not required to remit taxes on that part of Mr. Salager's income, which he said came from a source other than OTI.
- [51] On April 19, 2017, Mr. Salager's counsel explained that OTI's counsel was wrong; all of Mr. Salager's income was from OTI. There is now no dispute that OTI's counsel was wrong.
- [52] Despite acknowledging that a significant portion of Mr. Salager's tax arrears were owed by it, OTI did not remit any taxes to the CRA on Mr. Salager's behalf.
- [53] In para. 38 of the defendants' amended response to civil claim, in defence to the allegation that the Online Corporations failed to pay amounts owed to the CRA, the defendants plead that they sought additional supporting documents from Mr. Salager to validate his claim for remittance to the CRA pursuant to the SA. When asked to produce documents to establish that such a request had been made, the defendants were unable to produce any documents. I conclude that a request was never made.
- [54] It was not until December 5, 2017, less than two weeks before trial, that OTI's current counsel forwarded a cheque in the amount of \$65,674.77 for the outstanding taxes together with interest accruing from March 1, 2017. Even then, the interest accrual date was clearly in error as OTI was aware that Mr. Salager had received the notice of assessment from the CRA on March 31, 2016, and interest ran from 2016.
- [55] On the last day of trial, OTI's cheque had still not cleared and it was unclear whether the CRA would impose penalties as a result of Mr. Salager's late payment of taxes. However, by letter of January 15, 2018, Mr. Salager's counsel advised that OTI's cheque had cleared and the CRA would not impose penalties.

Has OTI Met Its Contractual Obligation to Make Best Efforts?

- [56] The term "best efforts" has been judicially considered. In *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.*, [1994] B.C.J. No. 493 (S.C.), Justice Dorgan extracted a number of principles from earlier cases which had interpreted "best efforts":
- [71] In summary, the principles extracted from the cases on the issue of "best efforts" are:
1. "Best efforts" imposes a higher obligation than a "reasonable effort".
 2. "Best efforts" means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned.

3. "Best efforts" includes doing everything known to be usual, necessary and proper for ensuring the success of the endeavour.
 4. The meaning of "best efforts" is, however, not boundless. It must be approached in the light of the particular contract, the parties to it and the contract's overall purpose as reflected in its language.
 5. While "best efforts" of the defendant must be subject to such overriding obligations as honesty and fair dealing, it is not necessary for the plaintiff to prove that the defendant acted in bad faith.
 6. Evidence of "inevitable failure" is relevant to the issue of causation of damage but not to the issue of liability. The onus to show that failure was inevitable regardless of whether the defendant made "best efforts" rests on the defendant.
 7. Evidence that the defendant, had it acted diligently, could have satisfied the "best efforts" test, is relevant evidence that the defendant did not use its best efforts.
- [72] The "no stone unturned" test has been applied to contracts relating to a wide variety of subject matter. Further, courts routinely imply a term in contracts that the parties will make reasonable efforts to fulfil their respective contractual obligations. Where the parties include a "best efforts" clause in a contract, as they did in the case at bar, they must surely intend that something more than "reasonable efforts" be used.
- [57] I am satisfied on Mr. Salager's unrefuted evidence that OTI did not make its best efforts to comply with Clause 14 of the SA. In fact, it made no efforts to do so. All of the efforts to obtain compliance were Mr. Salager's or his counsel's on his behalf.
- [58] Because of the defendants' failure to call any evidence, I draw an adverse inference against them that any evidence they might have led about this issue would not have been helpful to their position.

Impact of OTI's Failure to Comply with Clause 14

- [59] Mr. Salager testified about the effect on him of OTI's failure to comply with Clause 14. Its delay in providing him the VDP documentation, and his continuing efforts to obtain the documentation, caused him extreme stress and anxiety. This was followed by OTI's failure to remit the taxes after Mr. Salager's tax liability had been assessed. Mr. Salager described his situation as highly embarrassing and stressful as he was being asked to pay money which he did not have. He said he was "begging" OTI to pay the taxes.
- [60] OTI's failure to remit the taxes resulted in accruing interest payments which Mr. Salager could not pay. In February 2017, the CRA threatened Mr. Salager with legal action and in August 2018, delivered notice that it would garnish Mr. Salager's wages. He testified that the notice of garnishment "cause[d] him a heart attack". Mr. Salager testified that he scrambled to come up with the funds the CRA would have collected by garnishment in exchange for the

garnishing order being lifted, and he continued to communicate with the CRA's collections department.

- [61] Although Mr. Salager acknowledged in cross-examination that the garnishment notice had been delivered to his own start-up technology company, it remains the case that had OTI complied with the terms of the SA, no garnishment would have been threatened.
- [62] I accept Mr. Salager's unrefuted evidence that this was a very stressful time particularly because his business was in a start-up phase and he could not pay the tax arrears.
- [63] I am satisfied that the OneMove Corporations breached Clause 14 of the SA and are liable for any taxes, interest and penalties owed by Mr. Salager to the CRA. I understand that the OneMove Corporations have now satisfied this liability.

The BIV Letter

- [64] On September 9, 2014, on instructions from Mr. Proud, David Edinger, then OTI's counsel, wrote the BIV Letter regarding Mr. Salager's Profile. The BIV Letter was addressed to Paige Millar and marked without prejudice. It said:

We write with respect to the December 10, 2013 publication by Business in Vancouver ("BIV") of the article accompanying the naming of Mr. Serge Salager ("Salager") as a 2013 Top 40 Under 40 awards winner. That article remains available online at the following URL:

<http://www.biv.com/article/20131210/BIV020201/312109973/-1/BIV0203/serge-salager>

As indicated by that article, Salager was the CEO of [OTI]. However, as of March 7, 2014, Salager's employment with [OTI] was terminated, and there has been a change in management. The new management has been in the process of reviewing Salager's actions as CEO, including reviewing the above noted article.

We hasten to note that there is no on-going legal dispute between Salager and [OTI], as the parties have recently reached agreement on the terms of his departure.

Unfortunately, [OTI] has determined that your article contains many untrue and highly defamatory statements about [OTI].

These untrue and defamatory statements are actionable per se and also damage the reputation of [OTI] in the market place into which it sells its goods and services, in its relationships with its current and potential business partners, and may cause harm or at least difficulty to [OTI]'s position in on-going legal proceedings in which the facts about [OTI]'s growth and market share may be at issue.

Untrue and Defamatory Statements

The following are the untrue and defamatory statements which most concern [OTI]:

"That company, [OTI], had foundered ever since going public in 2006,"

In fact, [OTI] instructs us that it experienced significant real growth from 2004 to 2011 and was named in BIV's 'Top 100 Fastest Growing Companies' in 2008. I am sure you are aware that award is based on documented five-year revenue growth.

"In the space of a year and a half, Salager has returned the company to profitability."

In fact, [OTI] instructs us that 2012 and 2013, [OTI] was not financially successful and that during the fiscal year prior to the article's publication (fiscal 2013) [OTI] actually had losses of \$1,724,345. Furthermore, in the fiscal year following the publication (fiscal 2014) [OTI] had losses of \$1,043,147.

"One of my conclusions was that the company was in pretty bad shape" and "he was contacted by a group of investors who owned a struggling tech company."

These two statements reported to have been made by Salager are very troubling and highly defamatory.

Other untrue statements

The article makes other statements which, while they might not be perceived as defamatory of [OTI], are simply untrue and if left online in the public domain may cause difficulty for [OTI] because they may be taken or relied upon as true, as follows,

"Salager was originally brought in to advise the firm on a takeover offer received from a company in Ontario."

At no point in time did [OTI] ever receive a takeover offer from any company in Ontario,

"The company is growing between 40% and 60% per year."

In fact, [OTI]'s revenues had in fact only grown by approximately 10% per year.

"Over the last quarter, revenues grew by 40% and market share increased by 15%."

First, over the whole fiscal year 2014 (July 1 2013 to June 30 2014) [OTI]'s revenues only increased 27%. Second, during the fiscal quarter referenced in the article there was no material change in market share.

"Birthplace; Paris, France"

According to documentation submitted by Salager to the Federal Department of Citizenship and Immigration Canada, his birthplace was Merida, Venezuela not Paris, France.

Next Steps

At this stage, [OTI] does not wish to issue legal proceedings against BIV, for two main reasons.

First, [OTI] informs us that BIV and [OTI] have a good on-going business relationship, and as recently as this summer, [OTI] purchased advertising services from BIV and may do so again in the near future. Therefore, our client hopes to be able to maintain its current relationship with BIV.

Second, it is possible that BIV was deliberately misled by Salager, who we assume provided BIV with this false information, which seems designed to provide Salager with the aura of achievement where none existed and thus to enable him to qualify for BIV's Top 40 Under 40 award.

We recognize that there may be a legal issue in this case. BIV might say that all of the above information came from the then-CEO of [OTI] and there was nothing further that could have been done to fulfill BIV's obligations of responsible journalism. However, it appears that a cursory review of BIV's own records and up to June 2013, when it ceased to be a reporting issuer, would have resulted in critical questioning of Salager's statements.

In any event, we expect that BIV doesn't want to continue to appear to endorse or be party to untrue and defamatory statements.

In order to protect BIV's and [OTI]'s interests from further damage, we kindly request that BIV remove the online article in its entirety from BIV's web site and in future use its best efforts to actively monitor and delete any newly published defamatory content relating to [OTI] containing any statements about [OTI] similar to the article.

We hope you find our proposed steps for dealing with this matter satisfactory and we await your response.

[65] Mr. Salager submits that he was disparaged in breach of Clause 11 of the SA, and defamed, by the following two paragraphs of the BIV Letter:

[a] These two statements [referring to portions of the article that dealt with OTI's financial status] reported to have been made by Salager are very troubling and highly defamatory.

[b] Second, it is possible that BIV was deliberately misled by Salager, who we assume provided BIV with this false information, which seems designed to provide Salager with the aura of achievement where none existed and thus to enable him to qualify for BIV's 40 under 40 Award.

[66] Mr. Salager alleges that these paragraphs in the BIV Letter, when read in the context of the letter as a whole and other concurrent correspondence, are disparaging and defamatory. They suggest to BIV that Mr. Salager deliberately misled it during the Award selection process and interview, that Mr. Salager made defamatory statements about OTI, and that Mr. Salager did not deserve the award.

[67] As to the concurrent correspondence, Mr. Salager relies on the fact that on the same day, in advance of Mr. Edinger sending the BIV Letter, Mr. Proud emailed Rob Macquisten, a BIV marketing consultant, and said:

I wanted to provide you some advance notice of a letter you are going to be receiving from our lawyer David Edinger. It appears that some of the information that our former CEO Serge Salager provided BIV about [OTI] last year was false. We are hoping BIV can remove this incorrect content about [OTI] from its website.

[68] Mr. Proud's email also commented on the positive results from advertising OTI had recently placed with BIV and expressed an interest in placing more advertising in the near future. Mr. Proud's email makes clear that he wished BIV to remove the Profile and used as leverage OTI's advertising with BIV.

[69] Mr. Macquisten responded, "we're happy to remove any requested information on [OTI] from our website." He wrote that he was eager to continue the advertising relationship between BIV and OTI. Mr. Macquisten followed up with an email indicating that "David Edinger sent the letter this afternoon, and our President and Publisher said [it's] no problem and that he'll be taking care of this himself." Mr. Macquisten reiterated his interest in continuing the advertising relationship.

[70] The second email exchange on which Mr. Salager relies, as part of the context in which the BIV Letter should be read, is between Mr. Edinger and Fiona Anderson, then BIV's Editor in Chief. At trial, counsel agreed that this email exchange was evidence of the fact that the emails had been sent and received by the listed senders and recipients, and the emails sent by Mr. Edinger were on the instructions of, and with the approval of, the defendants.

[71] On September 11, 2014, Ms. Anderson emailed Mr. Edinger:

Your letter of Sept. 9, 2014 has been passed on to me. I would like to advise that the article has now been removed from our website. Thank you.

[72] Mr. Edinger responded:

Thank you. When I checked the other day, I noticed Mr. Salager's picture had been removed from the list of all of the winners. Was that inadvertent?

[73] Ms. Anderson responded the same day indicating that the removal of Mr. Salager's photograph was inadvertent:

On Tuesday we are launching a new website So for the new site rather than deleting the story I just deleted the body of the story and replaced it with "no story available." In that way Serge still appears as a winner but the story doesn't appear.

Given we are launching the new website on Tuesday I propose leaving it that way with Serge not mentioned as a winner on the current website but listed as a winner on our new website.

[74] Mr. Edinger responded to Ms. Anderson by email of September 17:

I searched Mr. Salager's name and found that the story to which our client had objected is back up - probably done during the re-boot.

Our client is hoping that this can be dealt with as before.

Please let me know.

[75] The same day, Ms. Anderson responded:

Thanks for noticing. What probably happened was the top 40 stories didn't import correctly the first time, hence they were in fact re-imported after I'd changed the story.

It's back to No story available.

[76] Taken as a whole, these three lines of communication between OTI and BIV are disparaging of Mr. Salager. As such, the communications breached Clause 11 of the SA. Because of the wording of Clause 12, it did not matter whether Mr. Salager had earlier communicated defamatory or incorrect information to BIV. Clause 12 makes clear that even if the parties discovered new or different facts, they remain bound by the SA terms, including the Clause 11 requirement that the parties refrain from disparaging each other. As a result, even if OTI and Mr. Proud realized after signing the SA that they wanted to address what they believed was incorrect information about OTI in the Profile, they were not entitled to do so by disparaging Mr. Salager.

[77] In any event, and tellingly, I find on the evidence that the information in the Profile, to which OTI objected in the BIV Letter, was neither untrue or defamatory of OTI as alleged in Mr. Edinger's letter nor was it as "false" or "incorrect" as alleged in Mr. Proud's email to Mr. Macquisten. The information in the Profile was true.

[78] Mr. Salager testified that all of the statements were true and many had already been made public by OTI or its representatives. A few examples will suffice:

- (a) On February 1, 2013, OTI issued a press release as a part of the strategic plan to take it private. It communicated OTI's efforts to attract a buyer, its history of operating losses, and the market challenges it was facing. The press release indicated that OTI's ability to continue as a going concern was in doubt. These statements were consistent with the content of the Profile. Mr. Salager testified that they were true.
- (b) On April 28, 2013, Mr. Proud wrote to the BC Provincial Nominee Program, communicating that OTI was "illiquid and in need of an immediate cash infusion" and that after interviewing financial advisory firms, the board "decided to retain Salager Advisors." That information was consistent with other parts of the Profile which Mr. Salager testified were true.
- (c) Mr. Schelfhout's letter, in support of Mr. Salager's Award, communicated that Mr. Salager "inherited a company that was in financial distress and dire straits" and that Mr. Salager executed a "detailed restructuring and turnaround plan" with excellence. These statements were consistent with the content of the Profile. Mr. Salager testified that they were true.

- (d) On September 19, 2013, Mr. Salager made a presentation to the OTI board which made clear that the information about OTI's improved financial performance, contained in the Profile, was accurate. He presented that OTI had achieved record revenues and was finally profitable. OTI had advertised to notaries using market share growth figures consistent with those in Mr. Salager's presentation to the board and contained in the Profile. Mr. Salager testified that the market growth figures were true.
 - (e) In the BIV Letter, OTI denied that it had received a takeover offer from an Ontario company. On December 5, 2017, the offer in question was produced by the defendants. It was the offer from DPI, an Ontario company, about which Mr. Salager had originally been consulted by Mr. Proud.
 - (f) Finally, the Financial Post published an article about Mr. Proud, shortly after Mr. Salager's termination, which indicated that OTI's sales were growing at a rate of 30% annually, which was consistent with the information in the Profile.
- [79] In fact, the only error in the Profile is with respect to Mr. Salager's birthplace. Mr. Salager testified, and I accept, that he had mistakenly stated that his birthplace was France; he thought he was being asked his citizenship, which is French. He says that he never told BIV that he was born in Paris. In response to a query by email of November 12, 2013, Mr. Salager advised BIV that he was born in Merida. In any event, that error could not have caused difficulty for OTI as suggested in the BIV Letter.
- [80] In an affidavit from Ms. Anderson filed on behalf of Mr. Salager, she deposed that in 2014, she was the managing editor of BIV and that she obtained a copy of the BIV Letter and the Profile was removed from the BIV website because of it. That information is confirmed by the email exchange between Mr. Edinger and Ms. Anderson in September 2014.

Impact of Removal of the Profile

- [81] Mr. Salager testified that he was contacted by a friend who advised him that his Profile was no longer on BIV's website. Mr. Salager called the BIV offices and asked why his Profile had been removed. He testified that he made a number of visits to the BIV offices to attempt to have the Profile restored. He had four or five face-to-face interactions with various BIV staff and formed the impression that they were embarrassed to speak about the BIV Letter.
- [82] On September 23, 2014, Mr. Salager emailed Ms. Millar to inquire about why his Profile had been removed. He eventually spoke to Ms. Anderson and, as indicated in his follow up email to Ms. Anderson, he believed that his photograph was restored as a result.
- [83] However, the Profile was not restored. As Ms. Anderson indicated in her email exchange with Mr. Edinger, when a visitor to the BIV site clicked on the link to Mr. Salager's Profile, the response was "no story available". Mr. Salager confirmed this in his evidence.
- [84] Mr. Salager's attempts to obtain a copy of the BIV Letter from BIV were unsuccessful.

[85] To date, the Profile has never been restored to BIV's website.

[86] On October 6, 2014, Mr. Proud emailed Mr. Salager:

I have been informed that you've recently been trying to reach out to me/us directly (i.e. without your lawyers). It has also come to my attention, and am saddened to hear, that you had the unpleasant experience of having to pay extortionate litigation invoices. I understand you would like to avoid some of these costs in the future, this is understandable, and as such, Tyler and I will be in Vancouver next week if you want to meet for a coffee to discuss what is on your mind.

[87] Mr. Salager responded on October 7:

Matthew, Tyler, thank you for reaching out.

If you retract the letter David sent to BIV and arrange for a meeting with Doug [OTI's tax advisor] in order to understand what he did on [OTI's voluntary disclosure proposal], I'll be happy to stop spending money in lawyers and seek a more amicable relationship for the benefit of all involved.

Both issues have been left open since 3 weeks and can't wait until next week. I have asked Naz to formalize my demands by tomorrow cob if I don't get any response from you. I'll be happy to meet next week provided the above is satisfied.

[88] Tyler Proud, Mr. Proud's brother, responded on October 8:

Serge we are not reaching out to you, you are reaching out to us.

Please rethink your email and write back appropriately.

You must be Naz's best customer by now.

[89] The reference to "Naz" in both the October 7 and 8 emails is to Mr. Salager's counsel.

[90] Mr. Salager testified about the impact of the removal of the Profile on his job search. He said that he was a newcomer to the Vancouver business scene, and because he could not rely on OTI or Mr. Proud to provide him with a reference, he mentioned the Award on his résumé and in job applications. The removal of the Profile caused him anxiety and embarrassment. He was concerned about having to answer questions about why the Profile was no longer available on the BIV website. In cross-examination, he acknowledged that he had never been asked about the removal of the Profile during his job search.

[91] Mr. Salager testified that the BIV Letter, and the removal of the Profile, impacted his relationship with BIV. Unlike other alumni, he has not been invited to the BIV annual receptions. He described the receptions as valuable networking opportunities as they involve the top businesspersons in Vancouver. He testified that he believed this impaired his ability to find alternate work.

[92] Mr. Salager has since unsuccessfully approached BIV to publish articles about his other work without success.

- [93] Mr. Salager also testified about his efforts to have the content of the Profile appear on the first page of Google search results with respect to him. He testified, and I accept, that most web searchers do not go beyond the first page of results. He had some success by re-posting the content of the Profile and then accessing it repeatedly so that it gained prominence on the first page of results from a Google search. Mr. Salager testified that a search of his name on Google still retrieves the BIV website on the first page of search results and that the BIV website continues to say that no story is currently available about him.
- [94] As the defendants called no evidence at trial, there was no explanation as to why OTI sought to have the Profile removed or the timing of the request that BIV do so. OTI sought the removal just days after the signing of the SA and after it had been publicly available for almost a year. There was no explanation of what had changed after Mr. Proud's congratulatory email about the Award.
- [95] If OTI's concern about the Profile was the information about its earlier financial difficulties, Mr. Proud acknowledged at his examination for discovery that the information was essentially the same as that contained in the press release issued by OTI on February 1, 2013. That press release remained in the public domain and no steps were taken by OTI to have it removed.
- [96] If OTI's concern was about the information in the Profile with respect to its current financial success, similar information was published by OTI in its advertisement to notaries and in the Financial Post article published in May 2014.
- [97] Finally, and importantly, despite pleading truth and justification in response to Mr. Salager's claim, and filing a counterclaim alleging that the statements in the Profile were untrue or defamatory of OTI, the defendants called no evidence.
- [98] Without any explanation from the defendants, I conclude on a balance of probabilities that it is reasonable to infer that the timing of the BIV Letter, which followed Mr. Salager commencing his wrongful dismissal action and obtaining a Mareva injunction, and only days after Mr. Proud signed the SA, evidences that the BIV Letter was retaliatory and that Mr. Proud and OTI were acting maliciously towards Mr. Salager. They knew the Award was important to him, and they wanted to damage his reputation and used both the threat of possible litigation against BIV, and the commercial leverage of future advertising, to ensure that BIV would remove the Profile.

The Notary Letter

- [99] In the fall of 2013, OTI commenced an action against the Society of Notaries Public of BC (the "Society") for, among other things, anti-competitive behaviour. Mr. Salager testified that most notaries used ProSuite, the online conveyancing software developed by DPI, which competes with OTI's econveyance software.

- [100] At the time the action was commenced, Mr. Salager was OTI's CEO, and Mr. Proud was a board member.
- [101] Mr. Salager testified that he was against starting the action as he believed it was a waste of money and not in OTI's business interests. He was concerned about OTI suing the Society while, at the same time, trying to market econveyance to its members. He expressed his concern to Mr. Proud, who was a proponent of commencing the action.
- [102] At his examination for discovery, Mr. Proud confirmed that he was in favour of commencing the action.
- [103] Mr. Salager testified that he was required to follow the board's direction. He acknowledged that he provided litigation instructions to OTI's counsel.
- [104] OTI's action against the Society was settled on the eve of trial.
- [105] Following his termination by OTI, Mr. Salager discussed with Mr. Robinson, the managing director of DPI, a then-vacant CEO position for ProSuite. Mr. Robinson and Mr. Salager had met earlier as a result of DPI's interest in purchasing OTI. Mr. Robinson told Mr. Salager that he wanted Mr. Salager to work for him.
- [106] Mr. Salager testified that he was interviewed for the ProSuite CEO position but was restricted for a year from working for a competitor of OTI.
- [107] On or before October 20, 2015, Mr. Salager testified that he learned from Mr. Robinson that, on April 20, 2015, Online sent the Notary Letter, signed by Mr. Proud, to approximately 300 notaries in BC. By email on October 20, Mr. Robinson provided him with a copy of the Notary Letter. The defendants admit that the Notary Letter was sent to approximately 300 notaries and Mr. Proud admitted writing it.
- [108] The Notary Letter said, in relevant part:
- As you may be aware, a lawsuit was filed by the former management of [Online] against The Society of Notaries Public, for among other things, anti-competitive behaviour by the society's leadership. We are pleased to inform you that [Online] has withdrawn the lawsuit altogether. The new management at [Online] does not wish for any individual notaries to suffer any personal financial loss for this suit, therefore we've gladly paid the Society's legal costs. [Emphasis added.]
- [109] Mr. Proud admitted at discovery that the reference in the Notary Letter to "former management" was to Mr. Salager and his team, and the reference to "new management" was to him.
- [110] While acknowledging that he is not expressly named in the Notary Letter, Mr. Salager submits that the publication was about him. Mr. Salager submits that the letter was designed to disparage him as unreasonable and litigious while portraying Mr. Proud as reasonable, generous and right-thinking.

- [111] To be in breach of Clause 11 of the SA, the Notary Letter must have disparaged him.
- [112] In the Oxford English Dictionary, disparage means, "represent as being of little worth; scorn." On the evidentiary record, I am unable to conclude that the Notary Letter disparaged Mr. Salager. While it is true that Mr. Salager was the CEO of Online when the action against the Society was commenced, and was therefore a member of management, he is not specifically singled out in the Notary Letter. If it had referred to the former CEO, I might have reached a different conclusion.
- [113] Mr. Salager spoke with Mr. Robinson after he had been provided with a copy of the Notary Letter, and Mr. Salager understood that he could no longer be considered for the position of CEO of ProSuite because Mr. Robinson could not hire someone who was known by the notaries to have sued them.
- [114] However, Mr. Robinson was not a notary and I heard no evidence that any notary who received the Notary Letter saw it as disparaging of Mr. Salager. As a result, I conclude that the Notary Letter did not breach Clause 11 of the SA. Later in these reasons, I will deal with whether the Notary Letter was defamatory.

The Applicable Defamation Law

- [115] In Raymond E. Brown's text, *Brown on Defamation*, 2nd ed. (Toronto: Thomson Reuters, 2017), vol. 8, at 25.2, he explains the protection afforded to a person's reputation by the law of libel and slander:

The law of libel and slander provides the principal avenue by which the reputation of a person defamed can be protected and vindicated. The damages suffered by a defamed individual can be as real and debilitating as physical injuries and they are equally worthy of compensation. Therefore, as in any action for damages, its measure is the sum of money which will put the injured plaintiff in the same position he or she would have been if the wrong had not been substantiated.

A reputation that has been built up over a lifetime can be destroyed by a single word. A defamatory statement may destroy an individual's livelihood, wreck his or her standing in the community, and seriously impair any sense of dignity and self-esteem. Therefore, apart from special or punitive damages, there are essentially three purposes served by an award of damages for defamation: consolation for personal distress and hurt feelings, reparation for harm done to personal and business reputation, and vindication of the plaintiff's reputation.

- [116] In *Weaver v. Corcoran*, 2017 BCCA 160, the Court of Appeal described the function of defamation law:
- [62] to protect and vindicate reputation from harm that is unjustified. A good reputation fosters one's sense of self-worth and, as an aspect of personality, is related to the innate worthiness and dignity of the individual, an underlying value of the Canadian Charter of Rights and Freedoms. Once tarnished, good repute is hard to regain, with sometimes devastating

consequences, particularly in a professional context. However, its protection must be balanced and reconciled with the Charter guarantee of freedom of expression, a recognised pillar of modern democracy: [Citations omitted].

[117] The parties agree that to succeed in his defamation claims, Mr. Salager must establish that the BIV Letter and/or the Notary Letter were:

- (a) defamatory in the sense that they would tend to lower his reputation in the eyes of a reasonable person;
- (b) that one or both identified him as the one being defamed; and
- (c) that one or both were "published", meaning that they were communicated to at least one person other than him.

[118] If, on a balance of probabilities, a plaintiff is able to establish these three elements, falsity and damage are presumed. The tort is one of strict liability. A plaintiff is not required to show that the defendant intended to do harm or even that the defendant was careless: *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130; *Grant v. Torstar Corp.*, 2009 SCC 61.

[119] There are many judicial definitions of defamation. When a member of the Ontario Court of Appeal, Justice Abella provided this comprehensive definition in *Color Your World Corp. v. Canadian Broadcasting Corp.*, [1998] O.J. No. 510 (C.A.), leave to appeal to the Supreme Court of Canada dismissed, [1998] S.C.C.A. No. 170:

[14] A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him [or her] in the estimation of right-thinking members of society generally and in particular to cause him [or her] to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right-thinking member of society. Hence the test is an objective one

[Citations omitted.]

[15] The standard of what constitutes a reasonable or ordinary member of the public is difficult to articulate. It should not be so low as to stifle free expression unduly, nor so high as to imperil the ability to protect the integrity of a person's reputation. The impressions about the content of any broadcast -- or written statement -- should be assessed from the perspective of someone reasonable, that is, a person who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility. A degree of common sense must be attributed to viewers.

[120] It is well-settled that the allegedly defamatory words must be considered in the context of the publication as a whole and not viewed in isolation. As stated in *Brown on Defamation*, vol. 1, at 5.3(6)(a):

generally speaking the court will consider a publication as a whole or in its entirety, and not dwell or concentrate on isolated passages or particular words, in determining whether it is defamatory. The words must be construed in the context of the entire statement or publication as a whole. The entire publication must be read and construed together in order to determine its meaning and signification. It may not be divided into segments and each portion treated as a separate unit. It must be considered in its totality.

[121] As Justice Ballance explained in *Dinyer-Fraser v. Laurentian Bank et.al*, 2005 BCSC 225 at para. 156:

The alleged defamatory words are to be given their ordinary and natural meaning which may encompass extended meanings, called innuendos, arising from inferences or implications reasonably borne by that meaning [Citations omitted].

Was the BIV Letter Defamatory?

Was It Published?

[122] Dealing first with the BIV Letter and the issue of publication, as the Court of Appeal said in *Gichuru v. Pallai*, 2013 BCCA 60 at para. 5:

a defamatory statement is actionable only if published. Publication is a threshold issue. At trial the onus is on the plaintiff to prove publication of the impugned statement: (1) by the defendant; and (2) to a third party other than the parties to the action. Absent evidence of both elements of publication, a claim in defamation will fail.

[123] I am satisfied that Mr. Salager has established that the BIV Letter was published. As the Supreme Court of Canada said in *Gaskin v. Retail Credit Co.*, [1965] S.C.R. 297, a case which involved whether credit reports sent to clients were read by the clients, if there was evidence that the customers were likely to have received and read the credit reports, a jury could reasonably find that the plaintiff had proved publication. In particular, the majority said:

In my opinion, however, the general principle is correctly stated in *Gatley on Libel and Slander*, at page 89, where it is said:

It is not necessary for the plaintiff in every case to prove directly that the words complained of were brought to the actual knowledge of some third person. If he proves facts from which it can reasonably be inferred that the words were brought to the knowledge of some third person, he will establish a *prima facie* case.

[124] In the case of the BIV Letter, which was sent to Ms. Millar, it is reasonable to infer that it was read by her. In addition, based on Ms. Anderson's affidavit, it is reasonable to infer that it was read by Ms. Anderson. She attested that she obtained a copy of the BIV Letter and acted upon it. In Exhibit B to her affidavit, she attaches her September 11, 2014 email to Mr. Edinger in which she states that his letter of September 9 had been passed on to her and advises him that the Profile had been removed from the BIV website.

Does the BIV Letter Refer to Mr. Salager?

[125] In respect of the specific content of the letter, there is no issue that the impugned words refer to Mr. Salager.

Are the Words Defamatory?

[126] The defendants argue that no reasonable person reading the BIV Letter would have cause to think less of Mr. Salager. I disagree.

[127] Allegations that a professional has engaged in dishonest conduct will generally be considered defamatory: *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at paras. 69 and 92.

[128] The words used in the BIV Letter do more than criticize the editorial practices of the BIV magazine or suggest that BIV exercised editorial licence to exaggerate Mr. Salager's accomplishments so as to justify his inclusion as an Award recipient. A reasonable person would understand that BIV would not have had any incentive to do so. If that had been the intent of the BIV Letter, it was unnecessary to include the suggestion that Mr. Salager was the source of the allegedly defamatory and harmful information.

[129] Rather, the words suggest that Mr. Salager was dishonest in his dealings with BIV, that he misled them and that he was undeserving of the Award.

[130] In my view, the BIV Letter lowers Mr. Salager's reputation in the eyes of a reasonable person. The words used suggest to a reasonable and sensible reader that Mr. Salager misled BIV during the Award selection process and interview, that he defamed OTI in doing so, and that he was undeserving of the Award.

Was the BIV Letter Written on an Occasion of Qualified Privilege?

[131] Having established the three essential elements of a defamation claim, Mr. Salager may still not be entitled to damages if the defendants are able to show that the BIV Letter was published on an occasion of qualified privilege.

[132] At its core, the defence of qualified privilege is that a defendant has a legal, social or moral interest in communicating the defamatory statements and the recipient has a corresponding duty or interest in receiving the statements. In this case, the only applicable interest that OTI could have is legal.

[133] A concise summary of the relevant aspects of the defence of qualified privilege is set out in Botiuk:

78 Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. It was explained in this way by Lord Atkinson in *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334:

a privileged occasion is an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

See also *McLoughlin v. Kutasy*, [1979] 2 S.C.R. 311, at p. 321.

79 Where an occasion is shown to be privileged, the bona fides of the defendant is presumed and the defendant is free to publish remarks which may be defamatory and untrue about the plaintiff.

[134] As *Brown on Defamation* outlines in vol. 4 at 13-2(4), the defendants must show that the circumstances surrounding the publication gave rise to a privileged occasion, and that the communication was made legitimately within the context of that occasion. The test is an objective one and the court determines whether a reasonable person, having regard to the relationship of the parties and the surrounding circumstances, should, as a matter of public policy, be entitled to speak in the way in which they did.

[135] The defendants submit that, considered as a whole and in context, the BIV Letter was an exercise in advocacy by OTI's solicitor, advocating for the protection of OTI's reputation, addressing the perceived harm caused by the Profile, and calling into question the reputation and editorial standards of BIV Magazine. They say that they had a legitimate business interest in wanting to remove negative information about OTI from the public sphere and, to the extent that there was a concern about the accuracy of the information reported in the Profile, BIV had a corresponding interest in being made aware of potential inaccuracies.

[136] They further submit that the BIV Letter is a demand letter from counsel intended to mitigate the actual, potential or perceived harm to the economic and reputational interests of OTI, which is referred to in the Profile as a company which had "foundered" and was in "pretty bad shape". The defendants submit that, having regard to the fact that the defendants were actively trying to sell the OneMove Corporations, the defendants were justified in attempting to address these statements.

[137] There is a factual difficulty with respect to the defendants' position; the defendants do not explain the timing of their attempt to address the statements. Thus, they do not explain why the occasion of the writing of the BIV Letter was one of qualified privilege.

- [138] In particular, the defendants have provided no evidence to explain why they made no earlier attempts to address the statements in the Profile, which had been online since October 2013. Nor do they explain the "occasion" that arose in September 2014 and which led to the BIV Letter.
- [139] The defendants had been aware of the statements since shortly after they were first published on the BIV website. The Profile had been available publicly for almost a year. There was no evidence of some event which had recently arisen causing them to send the BIV Letter. Efforts to sell the OneMove Corporations had been ongoing since Mr. Salager's retention as a consultant in 2012. Those efforts were ongoing when the Profile was first published in October 2013 and Mr. Proud was actively involved in those efforts when he sent his email congratulating Mr. Salager on the Award.
- [140] The sale efforts were ongoing in December 2013 when the BIV special edition was published, which included the Profile. The efforts were certainly ongoing when Mr. Salager commenced his wrongful dismissal action and obtained a Mareva injunction. Finally, they were ongoing when the SA was executed.
- [141] The occasion of qualified privilege claimed by the defendants is not clear on the face of the BIV Letter, and the lack of evidence from the defendants to explain the occasion is, in my view, fatal to their claim of qualified privilege.
- [142] If I am wrong in that conclusion, I also find that any qualified privilege was lost as a result of the defendants' motive in sending the BIV Letter.
- [143] The defence of qualified privilege can be lost in two ways, as Justice Cory explained in Botiuk:

79 However, the privilege is not absolute. It may be defeated in two ways. The first arises if the dominant motive for publishing is actual or express malice. Malice is commonly understood as ill will toward someone, but it also relates to any indirect motive which conflicts with the sense of duty created by the occasion. Malice may be established by showing that the defendant either knew that he was not telling the truth, or was reckless in that regard.

80 Second, qualified privilege may be defeated if the limits of the duty or interest have been exceeded. In other words, if the information communicated was not reasonably appropriate to the legitimate purposes of the occasion, the qualified privilege will be defeated. This was discussed at some length in Hill, supra, and there is no need to repeat it in these reasons.

Malice

- [144] In the circumstances of this case, Mr. Salager submits that the defendants were motivated by malice or ill-will towards him. Mr. Salager has the onus of proving malice to defeat the defence of qualified privilege: *Netupsky v. Craig*, [1973] S.C.R. 55 at 60-63. In particular, he must prove that the defendants published the BIV Letter:

- (a) knowing that the statements in it were false; or
- (b) with reckless indifference to whether the statements were true or false; or
- (c) for the dominant purpose of injuring Mr. Salager because of spite or animosity; or
- (d) for some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.

See *Smith v. Cross*, 2009 BCCA 259 at para. 34.

[145] As the Court of Appeal explained in *Smith* at para. 32, the term "malice" in the context of defamation is more expansive than the everyday meaning of a desire to harm another. *Brown on Defamation*, vol. 5, at 16.3(2) suggests the alternate language of "bad faith".

[146] In *Creative Salmon Company Ltd. v. Staniford*, 2009 BCCA 61 at para. 37, the BC Court of Appeal gave this definition of malice:

In *Botiuk* at para. 79, malice was defined to include "ill will" and "any indirect motive which conflicts with the sense of duty created by the occasion [in the case of qualified privilege]". The definition of malice stated by Mr. Justice Dickson in *Cherneskey* at 1099, and adopted by Mr. Justice LeBel in *WIC Radio* at para. 102, includes "spite or ill will" and "any indirect motive or ulterior purpose".

[147] The defendants submit that the BIV Letter speaks for itself and that they showed restraint in limiting publication and demonstrated thoughtfulness in arranging for the letter to be written by their solicitor. They submit that there is no basis on which to find that they were motivated by malice or were intent on injuring Mr. Salager; rather, they submit, the BIV Letter represented a legitimate attempt to protect the defendants' interests.

[148] To determine whether a defendant acted out of malice, it is necessary to examine their state of mind when the defamatory publication was made. This can be shown by examining the defendant's acts, conduct and expressions: *Brown on Defamation*, vol. 5, at 16.4(1).

[149] Evidence to prove malice may be either intrinsic or extrinsic. It may be proven from the words of the publication or by evidence apart from the words. As it relates to intrinsic evidence, the court will consider the style of publication to determine whether intemperate language was used or whether the words were couched in terms stronger than necessary to gain the object in view. Such words may give rise to an inference of malice, particularly where the intemperance is the product of deliberation: *Brown on Defamation*, vol. 5, at 16.4(3)(a).

[150] Extrinsic evidence, such as the conduct of a defendant, may also be evidence of malice. The court may, for example, consider conduct prior to publication and during the course of events, including the legal proceedings, such as correspondence between the parties, pleadings, answers at discovery and trial evidence. Malice may also be shown by submitting evidence of inconsistency between the way a defendant accurately

characterizes the plaintiff's actions on one occasion and inaccurately does so on a later occasion: Brown on Defamation, vol. 5, at 16.4(2).

- [151] A malicious state of mind may also be shown by evidence of additional publications made before or after the publication sued upon.
- [152] In this case, I am satisfied that, intrinsically, the BIV Letter does not give rise to an inference of malice. The language used in the BIV Letter is temperate. It makes suggestions rather than accusations.
- [153] However, based on the extrinsic evidence, I am satisfied that the defendants acted with malicious intent because OTI knew the content of the BIV Letter was untrue or caused it to be sent with reckless disregard for the truth of its contents.
- [154] In particular, at his examination for discovery, Mr. Proud agreed that he had made no effort to find out what Mr. Salager told BIV before instructing Mr. Edinger to write the BIV Letter. Thus, there was no foundation for the suggestion in the BIV Letter that Mr. Salager deliberately misled BIV by providing false information.
- [155] When it was announced that Mr. Salager had received a 2013 Award, Mr. Proud publicly congratulated him. Mr. Proud acknowledged that he read the Profile prior to writing his congratulatory email and did not, at the time, raise any concern about its contents.
- [156] However, on September 9, 2014, almost immediately after the SA was signed by him, Mr. Proud instructed Mr. Edinger to write the BIV Letter alleging that a number of the statements in the Profile, published almost a year earlier, were untrue and defamatory to OTI. Further, Mr. Proud emailed Mr. Macquisten on September 9, in advance of BIV receiving Mr. Edinger's letter, stating that some of the information which Mr. Salager provided to BIV about OTI was false.
- [157] As I have said earlier in these reasons, the defendants called no evidence to explain why OTI sought to have the Profile removed, or the timing of its request to do so. I have also found that the information in the Profile was accurate as to both OTI's earlier financial difficulties and Mr. Salager's role in OTI's improved financial situation. The fact that the statements in the Profile were accurate was known to the defendants. Thus, the BIV Letter was either knowingly false or was written with reckless disregard to its truth. In either event, the defence of qualified privilege is defeated.
- [158] Finally, despite pleading truth and justification in response to Mr. Salager's claim, and filing a counterclaim alleging that the statements in the Profile were untrue or defamatory of OTI, the defendants called no evidence.
- [159] Without any explanation from the defendants, I conclude, on a balance of probabilities, that it is reasonable to infer that the timing of the BIV Letter, which followed Mr. Salager commencing his wrongful dismissal action and obtaining a Mareva injunction, and was sent only days after Mr. Proud signed the SA, evidences that the BIV Letter was retaliatory

and that Mr. Proud and OTI were acting maliciously towards Mr. Salager. They knew the Award was important to him, and they wanted to damage his reputation and used both the threat of possible litigation against BIV, and the commercial leverage of possible future advertising, to ensure that BIV would remove the Profile.

Was the Notary Letter Defamatory?

- [160] The Defendants admit that the Notary Letter was sent to approximately 300 notaries public in BC but submit that there is no admissible evidence of the letter having been received or read by any person. Mr. Salager's evidence in that regard was that that he was told by Mr. Robinson, the managing director of DPI, that he received the letter from an unknown notary public.
- [161] The defendants also submit that there is no evidence from any notary public, who may or may not have received the Notary Letter, being familiar with the management of Online or knowing anything about Mr. Salager prior to April 20, 2015, the date on which the Notary Letter was sent, or any time thereafter.
- [162] I will not repeat the law on defamation discussed above with respect to the BIV Letter.
- [163] I have concluded on the evidence that the Notary Letter is not defamatory of Mr. Salager.
- [164] Mr. Salager is not specifically named in the Notary Letter nor is he identified as a member of the "former management" of Online. Where a plaintiff is not specifically named in an allegedly defamatory publication, as Justice Ballance explained in *Dinyer-Fraser* at para. 159, they must demonstrate that the reference used would reasonably be understood to refer to them. In the factual circumstances before her, Justice Ballance determined that a letter specifically addressed to the plaintiff's clients, and which referenced their agent/financial advisor, would lead the plaintiff's clients to understand that the defamatory letter referred to the plaintiff.
- [165] In determining whether the publication refers to Mr. Salager, it is useful to consider the two questions asked in *Knupffer v. London Express Newspapers Ltd.*, [1994] 1 All E.R. 495 (H.L.), as cited in *Dale's Trad'N Post Ltd. v. Rhodes*, [1987] B.C.J. No. 2096 (S.C.) and in *P.G. Restaurant Ltd. v. Northern Interior Regional Health Board et al.*, 2004 BCSC 294 at para. 126:

The first question is a question of law - can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact, namely, does the article in fact lead reasonable people, who know the appellant, to the conclusion that it does refer to him? Unless the first question can be answered in favour of the appellant, the second question does not arise

- [166] In this case, Mr. Salager must demonstrate by extrinsic evidence that the reference to "former management" in the Notary Letter would reasonably be understood, by a notary in receipt of it, to refer to him. While Mr. Proud acknowledged at discovery that the reference was to Mr. Salager, the issue is not what the writer intended, but the conclusion reached by a reasonable reader of the Notary Letter.
- [167] In my view, the language of the Notary Letter cannot be regarded as referring to Mr. Salager. In context, and based on normal usage, the term "management" refers to more than one person as opposed to a single manager. While Online's management included Mr. Salager, it also included others on his team and the board of directors. In my view, it is unlikely that any notary who received the Notary Letter would have made the link to Mr. Salager. There was no evidence that the Notary Letter was received by any notary who made the link between Mr. Salager and the "former management" of Online. In fact the only evidence which linked Mr. Salager to the former management was Mr. Salager's evidence that Mr. Robinson told him he could no longer be considered a candidate for the position of ProSuite's CEO. Mr. Robinson was not a notary and obtained the Notary Letter indirectly.
- [168] Further, the content of the Notary Letter was true. It was true that Mr. Salager was a member of the former management when the action was commenced against the Society. The lawsuit was initiated by persons, including Mr. Salager and Mr. Proud, who were then members of Online's management. While he did not endorse commencing the lawsuit, Mr. Salager testified that he acceded to the wishes of the board and instructed counsel with respect to it.
- [169] It was also true that the lawsuit was withdrawn on the eve of trial and that the withdrawal occurred after Online's management had changed at least to the extent that Mr. Salager was no longer its CEO.
- [170] As a result of all of the foregoing, I cannot conclude that the Notary Letter defamed Mr. Salager.

Damages

- [171] Mr. Salager testified that he relies on his professional reputation to make a living to support his family.
- [172] When an individual is defamed in their trade, profession or business, general damages for defamation are presumed and are "at large". The plaintiff is not required to prove specific loss or damage. In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 164, the Court said:

It has long been held that general damages in defamation cases are presumed from the very publication of the false statement and are awarded at large.

- [173] Justice Ballance explained in *Dinyer-Fraser* that the presumption of entitlement to general damages for defamation recognizes that the damage flowing from the defamation is difficult to ascertain with mathematical precision.
- [174] In a number of cases, including *Hill*, courts have said that making false statements, which are likely to injure the reputation of another, has always been regarded as a serious offence. This is particularly so when the defamation is directed at a professional, and where the defamation leaves the impression of professional incompetence or lack of judgment.
- [175] The Court in *Hill* said that although an individual's good reputation is not specifically protected by the Charter, an individual's reputation reflects their innate dignity, a concept underlying all Charter rights, and it follows that the protection of an individual's good reputation is of fundamental importance to our democratic society: para. 120. These statements apply whether the individual involved is a lawyer or another professional.
- [176] Assessing the quantum of damages for defamation is difficult. It has been variously described as speculative and an inexact science. Other cases have said that there is no objective measure, and damages need not be calculated mathematically. Even though damages are difficult to assess, courts should sensibly and rationally attempt to arrive at a monetary sum that will compensate a plaintiff appropriately, i.e., achieve *restitutio in integrum*. The award should provide "solatium, vindication and compensation": see *Brown on Defamation*, vol. 8, at 25.2.
- [177] While each defamation case is unique, and comparing awards in other cases may not be overly helpful, the following factors set out at paras. 182 and 187 of *Hill* provide a helpful analytical framework: the plaintiff's conduct, position and standing; the nature of the libel; the mode and extent of the publication; the possible effects of the statement upon the plaintiff's life; the absence or refusal of a retraction or apology; the motivation and conduct of the defendant prior to and throughout the action; and evidence of aggravation or mitigation of damages.
- [178] Mr. Salager submits that he should be entitled to general damages in the range of \$150,000. The defendants submit that any award of general damages should be in an amount of less than \$5,000.
- [179] In this case, and applying the circumstantial factors, it is of note that Mr. Salager was a relative newcomer to the Vancouver business scene. He was particularly vulnerable as his only local work history had been with OTI, and his employment there had ended badly. He relied heavily on his educational background and professional reputation. He described the Award as the highlight of his business career and one he coveted, and said that in the context of his termination, allegedly for cause, the Award assisted in his job search. Without a reference from OTI or from Mr. Proud, he was able to point to the Award as a significant recognition of the work he had done at OTI.

- [180] The libel suggested that Mr. Salager was a fraud who took undeserved credit for turning around OTI's performance and misled BIV into giving him an award he did not deserve. Those are very serious allegations about a businessman.
- [181] With respect to the mode and extent of the publication, the BIV Letter was not published on a website or broadcast by other means. Its circulation appears to have been limited to as few as two people in senior positions at BIV. The BIV Letter did not result in BIV revoking the Award or publishing a retraction of the Profile either on its website or in a hard copy of the magazine. BIV's response was to remove the online Profile, and briefly and inadvertently, Mr. Salager's picture. Mr. Salager's picture was restored. BIV replaced the Profile with a note that no story was available. This would not necessarily suggest anything nefarious to an individual searching for Mr. Salager's Profile. I heard no evidence in that regard.
- [182] Through Mr. Salager's efforts, the Profile continued to be available on the web and it appeared on the first page of results in a Google search of his name.
- [183] As to the effects on Mr. Salager's life, I accept his unrefuted evidence that, during his job search, he was worried about having to explain the absence of his Profile on the BIV website. However, he was not asked about it. I also accept that he has been unable to benefit from the networking opportunities that would otherwise have been available to him as an alumni Award winner and that despite his requests BIV has not published anything about his other activities.
- [184] Mr. Salager has gone on to found a start-up technology company, which employs him. He did not testify that his business has been adversely affected by the lack of networking opportunities or BIV's failure to publish other articles about him. There was no evidence that he has suffered any psychological or health related effects.
- [185] The defendants have not apologized or withdrawn the BIV Letter, and Mr. Salager's Profile continues to be unavailable on BIV's website.
- [186] As to the defendants' conduct throughout the litigation, the defendants pled the justification defence of truth and the OneMove Corporations filed a counterclaim. The defendants chose not to call any evidence in support of their defence, including on the issue of qualified privilege, and the OneMove Corporations withdrew their counterclaim on the eve of trial.
- [187] Mr. Salager took all reasonable steps to mitigate his damages including trying to persuade BIV to restore the Profile and, through his own efforts, ensuring that the Profile was otherwise available to web searchers.
- [188] Taking into account all of these factors, I conclude that an appropriate award for Mr. Salager's general damages for the defamation related to the BIV Letter is \$25,000.

Aggravated Damages for Defamation

[189] Mr. Salager seeks aggravated damages in the range of \$50,000.

[190] Aggravated damages represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant. Like general or special damages, they are compensatory in nature: Hill at para. 189.

[191] In Hill at para. 188, the Supreme Court said that aggravated damages may be awarded in circumstances where a defendant's conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from a libelous statement. At para. 189, the Court said that aggravated damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Their assessment requires consideration of the entire conduct of the defendant prior to the libellous publication and through to the conclusion of trial.

[192] At para. 190, the Court said:

190 If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff. See, for example, Walker v. CFTO Ltd., supra, at p. 111; Vogel, supra, at p. 178; Kerr v. Conlogue (1992), 65 B.C.L.R. (2d) 70 (S.C.), at p. 93; and Cassell & Co. v. Broome, supra, at pp. 825-26. The malice may be established by intrinsic evidence derived from the libellous statement itself and the circumstances of its publication, or by extrinsic evidence pertaining to the surrounding circumstances which demonstrate that the defendant was motivated by an unjustifiable intention to injure the plaintiff. See Taylor v. Despard, supra, at p. 975.

[193] At para. 191, the Court set out the following factors which should be taken into account in assessing aggravated damages:

191 There are a number of factors that a jury may properly take into account in assessing aggravated damages. For example, was there a withdrawal of the libellous statement made by the defendants and an apology tendered? If there was, this may go far to establishing that there was no malicious conduct on the part of the defendant warranting an award of aggravated damages. The jury may also consider whether there was a repetition of the libel, conduct that was calculated to deter the plaintiff from proceeding with the libel action, a prolonged and hostile cross-examination of the plaintiff or a plea of justification which the defendant knew was bound to fail. The general manner in which the defendant presented its case is also relevant. Further, it is appropriate for a jury to consider the conduct of the defendant at the time of the publication of the libel. For example, was it clearly aimed at obtaining the widest possible publicity in circumstances that were the most adverse possible to the plaintiff?

[194] To make an award of aggravated damages, I must find that the defendants were motivated by malice, which increased the injury to Mr. Salager.

[195] As I said earlier in these reasons, malice may be established by intrinsic evidence arising from the libelous statement itself and the circumstances of its publication, or by extrinsic evidence arising from the surrounding circumstances which demonstrate that the defendants were motivated by an unjustifiable intention to injure Mr. Salager.

[196] For the reasons already given, I have concluded that the defendants acted with malice in respect of Mr. Salager.

[197] Damages may be aggravated by an unsuccessful attempt at justification. In *Brown on Defamation*, vol. 7, at 22.3(8)(c)(iii), the author states:

Damages may be aggravated by an unsuccessful attempt at justification, even if the defendant offers no proof in its support or withdraws the plea at or before trial. A justification, particularly where it is offered in bad faith, is relevant to the damages awarded. Reaffirming the defamation by putting it on the record by way of justification aggravates the original wrong.

[198] Similar principles were stated in *Hill* at paras. 185, 191-192.

[199] In this case, the defendants did not withdraw the defamatory statement or apologize for it. They have aggravated Mr. Salager's damages by pleading justification and failing to call any evidence to prove it, and by making a counterclaim for defamation and withdrawing it at the start of the trial. The only reasonable inference that can be drawn from this litigation conduct is that the defendants were acting in bad faith.

[200] Because there was no evidence of an attempt by the defendants to spread the damage to Mr. Salager's reputation or to increase his mental distress or humiliation, and because there was no prolonged or hostile cross-examination of Mr. Salager, I have concluded that Mr. Salager should be awarded aggravated damages in the amount of \$25,000.

Aggravated Damages for Bad Faith

[201] In addition to aggravated damages for defamation, Mr. Salager seeks aggravated damages for the defendant's bad faith in complying with its contractual duties under the SA.

[202] In *Bhasin v. Hrynew*, 2014 SCC 71, the Supreme Court of Canada recognized the duty of honesty in contractual performance. This duty was recognized as part of an "organizing principle of good faith" which underlies all contractual relations in Canada. The new duty means that parties must not lie, or otherwise knowingly mislead each other, about matters directly linked to the performance of a contract: *Bhasin* at para. 73.

[203] Mr. Salager relies on two employment cases in which courts have applied the duty of good faith with respect to a contract of employment. In *Price v. 481530 B.C. Ltd.*, 2016 BCSC 1940, the court determined that the plaintiff had been constructively dismissed while he was battling cancer. The defendant made false accusations of theft and other unfounded allegations of dishonesty. The court awarded \$50,000 in aggravated damages for breach of the duty of good faith.

- [204] In *Karmel v. Calgary Jewish Academy*, 2015 ABQB 731, the court determined that the defendant has acted in bad faith by papering a path to the plaintiff's termination to avoid paying severance pay. The plaintiff was awarded \$200,000.
- [205] I did not find either Price or Karmel of particular assistance in the circumstances of this case.
- [206] Mr. Salager submits that the defendants acted in bad faith concerning the SA as it related to Clause 14 and the tax arrears issue and with respect to the BIV and Notary Letters, and that I should award aggravated damages arising from the breach of the SA separately from the aggravated damages arising from the defamation. He submits that an appropriate award is in the amount of \$25,000.
- [207] I have determined that the BIV Letter breached Clause 11 of the SA and that the OneMove Corporations failed to comply with their obligations under Clause 14 of the SA.
- [208] I am of the view that to award Mr. Salager aggravated damages for the breach of Clause 11 would amount to a double recovery as I have also found that the BIV Letter was defamatory.
- [209] However, as I have said, the failure of the OneMove Corporations to comply with Clause 14 was inexplicable. They made no efforts until the very last moment to comply with Clause 14. They disregarded their contractual obligation to use their best efforts to cooperate with Mr. Salager's VDP application and then refused to pay his tax arrears when they knew, and admitted, that amounts were owing to the CRA on his behalf.
- [210] In my view, aggravated damages must flow from this breach of the duty of good faith and I award Mr. Salager \$25,000 in aggravated damages for this breach.

Personal Liability of Mr. Proud

- [211] Mr. Salager submits that Mr. Proud, as a director of the OneMove Corporations, should be personally liable for acting outside the scope of his authority by advancing his personal interest, contrary to the interests of the OneMove Corporations, or because he acted with malice. Such an award was made in *Martin v. International Maple Leaf Springs Water Corp.*, [1998] B.C.J. No. 1663 (S.C.).
- [212] In this case, Mr. Salager seeks damages of \$25,000 from Mr. Proud because he submits that Mr. Proud acted with personal malice in causing the OneMove Corporations failure to comply with Clause 14; in instructing OTI's counsel to write the BIV Letter; in sending the Notary Letter; and in pursuing a counterclaim without any foundation.
- [213] Mr. Salager also submits that Mr. Proud personally benefitted from the removal of Profile, in that it allowed him to portray himself as being responsible for OTI's or Online's financial turnaround in the May 28, 2014 Financial Post article, published about two months after Mr. Salager was terminated.

[214] While I agree that Mr. Proud's actions in this case appear to follow a pattern of ill will towards Mr. Salager, I am not satisfied that his actions were sufficiently outside the scope of his authority, or motivated by advancing his personal interests contrary to the interest of the corporate defendants, to result in a personal damage award.

Punitive Damages

[215] Mr. Salager seeks an award of punitive damages in the amount of \$100,000 to denounce the OneMove Corporations' breach of Clause 14 of the SA.

[216] The objective of a punitive damages award is to punish a party in order to deter future unfair conduct. Thus, unlike general and aggravated damages, punitive damages awards are not compensatory. They are an exceptional award made only when a party's conduct is deserving of punishment because it is harsh, vindictive, reprehensible and malicious. Punitive damages are generally awarded only where the general and/or aggravated damages awarded are insufficient to meet the objectives of deterrence and denunciation: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 94.

[217] In *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29 at paras. 66-69, a case involving breach of an employment agreement, the Court of Appeal cautioned against conflating the analysis of punitive damages and special costs. Generally, reprehensible conduct of parties leading to and during the course of litigation should be addressed by special costs, while punitive damages flow from a defendant's egregious conduct at the time of the breach giving rise to the claim.

[218] Punitive damages can be awarded in any case where there is an independent actionable wrong. In *Hill* at para. 199, the Court recognized that punitive damages serve a useful purpose in defamation cases:

[b]ut for [punitive damages], it would be all too easy for the large, wealthy and powerful to persist in libeling vulnerable victims. Awards of general and aggravated damages alone might simply be regarded as a license fee for continuing a character assassination. The protection of a person's reputation arising from the publication of false and injurious statements must be effective. The most effective means of protection will be supplied by knowledge that fines in the form of punitive damages may be awarded in cases where the defendants conduct is truly outrageous.

[219] In *Le Soleil Hospitality Inc. v. Louie*, 2010 BCSC 1183 at para. 376, *aff'd* 2011 BCCA 305, the court recognized that where the commercial contract involved is a settlement agreement, as opposed to an ordinary commercial contract, there is a real and substantial public and private cost associated with its breach and a public value in pressing for denunciation, deterrence and punishment by an award of punitive damages.

- [220] In this case, the defendants have, in effect, admitted breaching Clause 14 of the SA. They finally paid the CRA taxes owed by Mr. Salager over three years after the SA was signed and then only after Mr. Salager had expended significant personal and legal efforts in an attempt to gain compliance. Mr. Salager was left with no alternative but to commence an action to ensure compliance with Clause 14.
- [221] On the evidence, and without any other explanation from the OneMove Corporations, the late payment amounts to an admission that there was no basis for their continued refusal to comply with the SA.
- [222] The defendants' conduct in breach of the SA is particularly of concern. Mr. Salager described how he was reduced to begging for compliance with the SA to no avail. The fact that he incurred legal costs in attempting to enforce the terms of the SA, which he had incurred costs to negotiate, is troubling. As Justice Dickson, when a member of this Court, said in *Le Soleil Hospitality Inc.*, where there is a blatant breach of a settlement agreement, denunciation is called for by way of a punitive damages award.
- [223] I am satisfied that an award of punitive damages in the amount of \$50,000 is appropriate.

Special Costs

- [224] Mr. Salager seeks special costs of this action. In that regard, he relies in part on the defendants' conduct of this litigation and in part on their pre-litigation conduct.
- [225] In *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177, the Court of Appeal held that pre-litigation conduct cannot be considered in determining whether a special costs award is appropriate:
- [134] In the result, I am of the view that a bright line can and should be drawn so that judges will be able to exercise their discretion in like cases in a like manner. Special costs should be reserved to punish and deter reprehensible conduct in the course of litigation. Pre-litigation conduct should not be considered in determining whether such an award is appropriate. There are other suitable mechanisms to censure pre-litigation conduct.
- [226] As a result, I cannot consider the defendants' pre-litigation conduct as a basis for a special costs award.
- [227] Although Mr. Salager made extensive costs submissions at trial, the defendants elected to await this decision before making their submissions.
- [228] If, in light of this decision, the parties are unable to agree on an appropriate cost award, they may seek to appear before me by contacting Supreme Court Scheduling.

"MacNaughton J."

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