COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pineau v. Glacier Media Inc.,* 2025 BCCA 101

Date: 20250331
Docket: CA49619

2025 BCCA 101 (CanLII)

Between:

Stephen B. Pineau

Appellant/
Respondent on Cross Appeal
(Plaintiff)

And

Glacier Media Inc., Business in Vancouver and Tyler Orton

Respondents/
Appellants on Cross Appeal
(Defendants)

Before: The Honourable Madam Justice Fisher
The Honourable Mr. Justice Grauer
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court, dated January 2, 2024
(*Pineau v. Glacier Media Inc.*, 2024 BCSC 4, Vancouver Docket S170597).

Counsel for the Appellant/Respondent on Cross Appeal:	M.B. Funt A. Song, Articled Student
Counsel for the Respondents/Appellants on Cross Appeal:	R. S. Anderson, K.C. J.K. Yamashita
Place and Date of Hearing:	Vancouver, British Columbia October 10, 2024
Place and Date of Judgment:	Vancouver, British Columbia March 31, 2025

Written Reasons by:
The Honourable Mr. Justice Grauer

Concurred in by:
The Honourable Madam Justice Fisher
The Honourable Madam Justice Horsman

Summary:

Two defamatory articles with similar content were published about the appellant by two different companies, leading to his inability to find work in his field and the potential loss of a lucrative employment opportunity. The appellant filed separate suits against each company. In the first case, he was awarded $120,000 in general damages but no special damages due to insufficient evidence regarding the lost employment opportunity.

In the current case, new evidence was presented at trial. The judge awarded $120,000 in general damages, mitigated by 40% due to a published apology and the previous recovery, but did not specify how the reduction was apportioned. The judge also assessed special damages at $180,000 for the loss of the employment opportunity, without reduction for mitigating factors.

The appellant argues that the judge erred in reducing the general damage award for mitigation and improperly assessed special damages, reducing them by over 80% for contingencies. The respondents cross-appeal, claiming that the appellant's pleadings were insufficient to support the special damages claim and that any award of special damages should have been reduced due to the apology and previous award.

Held: Appeal and cross-appeal allowed in part. The judge did not err in reducing the general damages by 40% for mitigation, and it was open to her to accept the claim for special damages based on the pleadings and circumstances before her. However, her assessment of special damages at $180,000 was inordinately low. An award of $360,000 is substituted, reduced to $330,000 pursuant to s. 11 of the Libel and Slander Act to account for the recovery in the previous case.

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Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

[1] In January 2015, two articles were published that defamed the appellant, Mr. Pineau. As the second was largely plagiarized from the first, they were very much alike and defamed him in the same way, though not necessarily to the same degree.

[2] Mr. Pineau sued the publishers and authors of both articles, but did so separately. His claims were tried by summary trial. The claim arising out of the second article (the "KMI article"), against KMI Publishing and Events Ltd. and Nicola Middlemiss, went to trial first. How the result of that first suit should impact the award of damages in the second is at the root of this appeal. This is particularly so in relation to Mr. Pineau's claim for special damages resulting from loss of employment opportunity.

[3] Justice Winteringham, then of the Supreme Court of British Columbia, found that Mr. Pineau had been defamed by the KMI article. Her reasons for judgment are indexed at 2021 BCSC 1268 [*Pineau/KMI SC #1*]. In subsequent reasons for judgment indexed at 2021 BCSC 1952 [*Pineau/KMI SC #2*], Justice Kirchner assessed Mr. Pineau's general damages at $60,000. He found that a claim for special damages had not been proven, but noted at para 161 that he had factored "economic damage that cannot be expressly proven" into the award of general damages. He made no award of aggravated or punitive damages.

[4] Mr. Pineau appealed. In reasons for judgment indexed at 2022 BCCA 426 [*Pineau/KMI CA*], this Court increased Kirchner J.'s award of general damages to $120,000 and upheld his dismissal of the claim for special damages.

[5] The present appeal and cross-appeal concern Mr. Pineau's claim arising out of the first article (the "BIV article"), which was tried second. The defendants were

the publisher, Glacier Media Inc., its publication, *Business in Vancouver* (“BIV”), and the author, Tyler Orton (the “respondents”). After Kirchner J.’s reasons were issued in *Pineau/KMI SC #2*, the respondents applied for judgment dismissing this claim by way of summary trial. That application was adjourned in June 2022 pending the determination of the appeal from Kirchner J.’s decision. Ultimately, after *Pineau/KMI CA*, when the summary trial with which this appeal is concerned took place, the respondents admitted that they published the article, that it referred to Mr. Pineau, and that it was defamatory. That left the issue of damages.

[6] In reasons for judgment indexed at 2024 BCSC 4 [*Pineau/Glacier SC*], the judge assessed general damages at $120,000. She then considered mitigating factors comprising, first, an apology published by BIV on June 7 and 13, 2022, and second, section 11 of the *Libel and Slander Act,* R.S.B.C. 1996, c. 263 [*LSA*], to account for damages already recovered in *Pineau/KMI SC #2.* On the basis of these two factors, the judge reduced the general damages award by 40% to $72,000. She did not apportion the 40% reduction between the two factors.

[7] The judge further found that Mr. Pineau had proven a claim for special damages related to the loss of an employment opportunity with a business operated by one Steven Leach—a finding Kirchner J. was unable to make in *Pineau/KMI SC #2*. In *Pineau/Glacier SC*, the judge assessed these damages at $180,000, and did not reduce them on account of the mitigating factors she had applied to the award of general damages.

[8] The judge made no award for aggravated or punitive damages, resulting in a total award of $252,000. Mr. Pineau appeals, and the respondents cross-appeal.

2. ISSUES

[9] The appeal and cross-appeal require us to consider the following issues:

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1. Did the judge err in awarding special damages for lost opportunity to Mr. Pineau given the state of his pleadings, and was that claim in any event captured in the award of general damages? (Cross-appeal.)

2. If not, did the judge err in assessing Mr. Pineau's special damages, thereby under-compensating him? (Appeal.)

3. Did the judge err in reducing Mr. Pineau's award for general damages on the basis of the respondents' apology given the statutory requirements of the *LSA*, and the fact that she had already considered the apology in her assessment of the general damages? (Appeal.)

4. Did the judge err in reducing Mr. Pineau's award for general damages on the basis of section 11 of the *LSA* to take into account the award in *Pineau/KMI SC #2*? (Appeal.)

5. Did the judge err in failing to reduce Mr. Pineau's award for special damages on the same principles of mitigation she applied to the claim for general damages? (Cross-appeal.)

3. THE DEFAMATORY ARTICLES

[10] The background leading to the publication of the articles is fully set out in the four previous decisions cited above. For present purposes, I highlight the following.

[11] In 1992, Mr. Pineau and some partners, including Mr. Leach, established a start-up company called Blue Mountain Technologies. In 1997, Blue Mountain purchased Viscount Systems Inc., a company owned by Telus, with which Mr. Pineau had previously been employed. Viscount was in the business of manufacturing and installing building entry and security systems, an area in which Mr. Pineau had considerable experience. In 2001, Blue Mountain took Viscount public, and Mr. Pineau became its president and CEO.

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[12] In 2011, there was a change in the Board of Directors of Viscount and a new chair was appointed. In February 2014, Mr. Pineau's position was terminated without cause. In November 2014, Viscount sued Mr. Pineau (the "Viscount action"), alleging that he had breached the terms of his employment contract, his common-law duties as an employee, and his fiduciary duties to Viscount, by improperly using Viscount's corporate TD Visa account for unauthorized expenses, something it purported to have discovered only after his dismissal.

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[13] In December 2014, BIV published an article on its website summarizing the allegations in Viscount's civil claim. It concluded with a statement that the allegations have not been proven in court and the appellant had yet to file a response. Mr. Pineau took no legal action in relation to this first BIV article.

[14] On January 2, 2015, Mr. Pineau filed a response in the Viscount action denying the allegations, together with a counterclaim seeking damages for wrongful dismissal and breach of his employment contract.

[15] On January 20, 2015, BIV published the article that is the subject of this claim both in print (January 20–26 edition) and online:

> **'Lack of protection' keeps Canadian whistleblowers at bay**
>
> Con Buckley, senior partner at Buckley Dodds Parker LLP Chartered Accountants, says companies must have an independent whistleblower system set up to protect both employees and employers.
>
> The highest reward paid to corporate whistleblowers by the U.S. Securities and Exchange Commission was US$30 million.
>
> Meanwhile, Canada Revenue Agency's Offshore Tax Informant Program, which pays informants for information on tax evasion, has paid out no rewards since it was launched more than a year ago.
>
> The "lack of protection" offered to Canadian whistleblowers relative to the rest of the developed world is the main reason the country is trailing other jurisdictions, according to a 2012 report from the B.C. auditor general's office.
>
> For instance, Burnaby's Viscount Systems filed suit against its former CEO in November 2014, claiming Stephen Pineau had made more than $67,000 worth of charges to his corporate expense account that had nothing to do with business.

> Pineau had been with Viscount Systems for 17 years, but no one at the company raised the issue with him until a month after he was terminated without cause, according to the lawsuit.
>
> Con Buckley, a senior partner at Buckley Dodds Parker LLP Chartered Accountants, said there are plenty of regulations in place designed to prevent corporate mishandling of funds.
>
> “But people don’t follow them,” he said, adding that external auditors uncover only a small portion of fraud.
>
> Most of it is discovered by chance or through whistleblowers, who Buckley said need “an independent whistleblower system where you can phone up somebody that is not your immediate boss.” He added that a lawyer or designated contact in upper management is ideal.
>
> But a 2012 report from former B.C. auditor general John Doyle cited serious concerns over whistleblower protection in B.C.
>
> “…While our audit process offers whistleblowers anonymity, it does not prevent them facing potential reprisals should those individuals be identified inside their organization”, the report said.

[16] Less then 24 hours later, on January 21, 2015, KMI Publishing and Events Ltd. published the KMI article. Its author, Ms. Middlemiss, wrote it after reading the BIV article, which she had read online after receiving a Google alert, incorporating much of its content:

> **Lack of protection keeps Canadian whistleblowers at bay**
>
> Along with the recent disappearance of HR manager Jia Lining, the issue of whistle-blowing has attracted international attention—but does corporate Canada favour the corrupt? A report from the B.C. auditor general’s office revealed that Canadian whistleblowers are afforded much less protection than those in other parts of the developed world.
>
> Even with Canada Revenue Agency’s offshore Tax Informant program–which pledges to pay informants for information on tax evasion–the country is still trailing other jurisdictions. And, somewhat worryingly, the program has not paid out any rewards since it was launched over a year ago.
>
> In November of last year, Burnaby’s Viscount Systems filed suit against Stephen Pineau–its former CEO. Pineau, who has been with the B.C. based company for 17 years, was accused of making $67,000 worth of fraudulent claims on his corporate expense card.
>
> So why had no one raised the issue earlier? According to the lawsuit, nothing was said until a month after he was terminated without cause.
>
> Con Buckley, senior partner at Buckley Dodds Parker LLP, says Canadian companies need to step up and provide better channels for sharing in-house information.

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> There may be plenty of rules and regulations in place designed to prevent corporate misconduct, said Buckley, but people don't always adhere to them.
>
> External auditors only uncover a small portion of fraud–the majority is usually detected by accident or revealed by a whistleblower, said Buckley. That's why companies need "an independent whistleblower system where you can phone up somebody that is not your immediate boss."
>
> Leading employment lawyer Richard Charney agrees, he says "Businesses need to adopt a proactive approach to managing allegations or disclosures that point to misconduct within their organisation.
>
> "Not understanding the law surrounding whistle-blowing can be costly for businesses in terms of potential claims as well as damage to reputation," he warned.

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[17] KMI published the article in the online version of its *Human Resources Magazine Canada* (now *Human Resources Director Canada).* It also circulated hyperlinks to the article by email and through Twitter (now X) and a digital newsletter. In *Pineau/KMI SC #2*, Kirchner J., following *Crookes v Newton*, 2011 SCC 47 and *Malak v Hanna*, 2019 BCCA 106, held that the publication of hyperlinks to a libellous statement did not constitute publication of the defamation. In this case, he concluded, the publication was confined to the online version on *Human Resources Magazine Canada*. In *Pineau/KMI CA*, this Court agreed that the publication of hyperlinks did not constitute republication of the defamation but concluded that the broader circulation of hyperlinks to the defamatory article was an aspect of the mode and extent of publication, and therefore relevant to damages (at para 76).

[18] Mr. Pineau did not become aware of either article until almost two years after their publication, when Mr. Leach told him about them.

4. THE CLAIMS FOR SPECIAL DAMAGES

4.1 <u>Overview</u>

[19] As we have seen, in both trials, Mr. Pineau claimed special damages as well as general damages. While the assessment of general damages for defamation can take into account, among other things, "social damage and possible economic

damage which may result but which cannot be expressly proven" (*Brown v Cole*, [1998] BCJ No. 2464 at para 107, 1998 CanLII 6471 (CA)), the assessment of special damages in defamation requires the proof of actual pecuniary, financial or material loss (Erika Chamberlain and Karen Eltis, *Law of Defamation: Canada, United Kingdom, Australia, New Zealand, United States,* 2nd ed (Toronto: Thomson Reuters, 2025) (at 25-284–25-286).

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4.2 *Pineau/KMI SC #2*

[20] In *Pineau/KMI SC #2*, Mr. Pineau deposed that, after reading the articles, he concluded that his career was "wrecked." To him, "the existence of the articles explained why he had so much difficulty finding work and why the job opportunities that seemed in-hand had been snatched away" (at para 58). His claim for special damages related to this problem and a specific loss of opportunity to work for Mr. Leach. Justice Kirchner described the evidence in this regard as follows:

> [62] The extended period that Mr. Pineau has gone without work has patently been very hard on him both physically and mentally. I consider this part of the overall impact on Mr. Pineau in assessing general damages for defamation as discussed below.
>
> [63] In the weeks before Mr. Leach and Mr. Pineau discovered the BIV and KMI articles, they were in discussions about bringing Mr. Pineau back with Blue Mountain. By this time, Mr. Leach controlled Blue Mountain, and he was considering a potential expansion into the US security market, using Mr. Pineau's expertise and experience in that area. He testified this would have been a financial risk for the company, but it was something that he and Mr. Pineau were seriously discussing.
>
> [64] However, these discussions were put on hold after discovering the articles. Mr. Leach determined they would be a problem for securing US government business and, indeed, for just about anything that Mr. Pineau sought to do. In Mr. Leach's words, "it made you sound really bad." Mr. Leach testified that going into this new branch of business was risky, but it was made all the more so by the revelation of the two articles.
>
> [65] Mr. Pineau claims that Mr. Leach would have hired Mr. Pineau but for the articles, but this overstates Mr. Leach's evidence. The extent of his testimony was that the arrangement was under discussion at the time and those discussions were put on hold.
>
> [66] Mr. Pineau has not worked substantively in the building access and security technology business since he was forced to resign from Viscount. He has taken some occasional jobs, out of desperation, doing unskilled work (or

> at least work beneath his skills). He has also worked without pay for Mr. Leach at Blue Mountain to keep his *curriculum vitae* somewhat current. More recently, he has done some paid marketing work for Blue Mountain, but this is part time and low-paying. It could develop into more if the opportunities Mr. Pineau is pursuing pan out for Blue Mountain. Unfortunately, much of this was derailed by the COVID-19 pandemic but Mr. Leach testified that some glimmers of hope are now appearing.
>
> [67] Presently, Mr. Pineau and Mr. Leach are in discussion about developing and marketing some new technology relating to key card entry systems for secure buildings. While Mr. Pineau believes this new technology is exciting and has great potential, it is, at this point, a long way from fruition.
>
> [Emphasis added.]

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[21] Justice Kirchner concluded that there was insufficient proof of an actual pecuniary loss or loss of opportunity arising from the publication of the KMI article. Even the evidence concerning the potential opportunity to work for Mr. Leach was, in the judge's view, insufficient and too amorphous to support a claim for special damages. It was, however, worthy of being given particular weight in the assessment of general damages:

> [100] Special damages involve actual pecuniary loss, such as loss of income, profits and other financial benefits, past and future. Unlike general damages, actual pecuniary loss is not presumed and must be specifically proved by the plaintiff: *Botiuk v. Toronto Free Press Publications Ltd.,* at para. 109. In *Botiuk,* Cory J. said at para. 112 that only in "rare cases" is it possible to prove actual pecuniary loss resulting from defamation. As with general and aggravated damages, a plaintiff is entitled only to those damages that flow naturally and directly from the defamatory statement: *John v. Kim*, 2007 BCSC 1224 at para. 87.
>
> [101] I am not satisfied that Mr. Pineau has proven on a balance of probabilities the KMI Article was the cause or a materially contributing factor to his continued unemployment. Mr. Pineau argues it may be inferred that at least one of the jobs he came close to securing was lost because the prospective employer likely read the KMI Article online, and one lost job opportunity is enough to establish his loss. However, there was no evidence of Mr. Pineau specifically losing a job opportunity because of the KMI Article. Nor was Mr. Pineau ever asked by potential employers about the article or the allegations in the Viscount Action. Mr. Pineau's suggestion that potential employers are unlikely to admit they declined to hire him because of the allegations reported in the KMI Article has some merit, but I find it equally plausible that an employer who was truly interested in hiring Mr. Pineau would at least make inquiries with him about the matter before brushing him aside as a prospective employee.

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[102] Mr. Pineau relies on *Paramount v. Kevin J. Johnston,* 2019 ONSC 2910 and *Hodgson v. Canadian Newspapers Co. Ltd.* (2000), 49 O.R. (3d) 161 (C.A.) in support of his claim for special damages, but both cases included specific evidence establishing the loss. In *Paramount*, the plaintiff proved he lost a specific contract because of the defamation. In *Hodgson*, special damages of $380,000 were awarded where the plaintiff's employer, the York Region Council, dismissed him without cause because, as political actors, the Council members were afraid of a negative public reaction to defamatory stories about the plaintiff published in *The Globe and Mail*.

[103] In this case, Mr. Pineau did not lose his job because of the KMI Article, and, unlike *Paramount* and *Hodgson,* there is no specific evidence establishing the loss. Courts may draw inferences from proven facts; however, the inferences Mr. Pineau asks me to draw lack factual foundation.

[104] Further, the seriousness of the Viscount's allegations themselves would likely be a concern to a potential employer. Thus, regardless of how they were characterized in the KMI Article, the Viscount Action itself would likely be a deterrent to a potential employer.

[105] Moreover, Mr. Pineau's own circumstances were probably a factor in his inability to secure employment. He stated in his February 2014 correspondence with Viscount during his severance negotiations that, at age 52, he had "very poor prospects of finding local employment given [his] specific skill set and limited opportunities in this area." He acknowledged that factors unrelated to the KMI Article and the Viscount Action were the reasons he did not get some jobs he interviewed for.

[106] I also take into account that Mr. Pineau's efforts to find other work continued to be unsuccessful for several years after the KMI Article was removed from the internet. This suggests his challenges in finding work cannot be specifically attributed to the KMI Article. However, in this context I must also consider it is probably more difficult to find work the longer one is out of work, so the earlier years when the article was available may be more crucial.

[107] For these reasons, I find that Mr. Pineau has not established a loss relating to his inability to secure work that is sufficiently specific to the KMI Article to ground a claim for special damages.

[108] While Mr. Pineau's potential opportunity to work for Mr. Leach and Blue Mountain in late 2016 and 2017 is somewhat different, it is still insufficient to support a special damages claim. As discussed earlier, Mr. Leach and Mr. Pineau were in discussions in late 2016 about Mr. Pineau potentially joining Blue Mountain again to pursue some business in the U.S. These discussions were put on hold because of the two articles, but, even at that point, they had not advanced to the stage of any certainty. Both Mr. Pineau and Mr. Leach testified that Blue Mountain would be taking on some costs and risk by hiring Mr. Pineau to do this work, and Mr. Leach had made no decision about whether he would ultimately take this risk. I find this claim for loss of opportunity is more substantial than the claim for loss of employment; however, it is still too amorphous to support a claim for special damages.

> [109] Nevertheless, I may consider "economic damage that cannot be expressly proven" as part of an assessment of general damages: *Brown v. Cole*, para. 107. There is logic in Mr. Pineau's argument that prospective employers could well have conducted internet searches about Mr. Pineau and discovered the article on a Google search. … Nor is it unreasonable to suggest the KMI Article, given the sting of the allegations it falsely asserted, could have been a factor in Mr. Pineau's inability to obtain employment. Furthermore, the potential opportunity to work with Blue Mountain was fairly promising, and I give that lost opportunity particular weight in in assessing general damages.
>
> [Emphasis added.]

4.3 ***Pineau/KMI CA***

[22] As noted, Mr. Pineau appealed the decision in *Pineau/KMI SC #2*. In *Pineau/KMI CA,* while this Court allowed his appeal from Kirchner J.'s assessment of general damages, it dismissed his appeal from the judge's refusal to award special damages:

> [112] The appellant relies on the decision of this Court in *Ojanen v. Acumen Law Corporation*, 2021 BCCA 189 [*Ojanen*], in support of the proposition that damages for a loss of opportunity need not be proven to a certainty. While the loss of an opportunity must be proven on a balance of probabilities, the assessment of damages is then a matter of assessing the strength and weakness of various possibilities, and applying positive and negative contingencies: *Ojanen* at paras. 63 and 69. By analogy, the appellant says that in the present case, the trial judge accepted that the Defamatory Article caused the appellant to lose employment opportunities, but erred in failing to assess damages for that lost opportunity in accordance with the approach described in *Ojanen*.
>
> [113] *Ojanen* is a wrongful dismissal case in which the Court applied the principles that govern the assessment of damages for loss of opportunity in contract. It is unnecessary, and unnecessarily confusing, to attempt to directly apply those principles to the assessment of damages for defamation. In accordance with well-settled law, a plaintiff in a defamation action may pursue compensation for pecuniary loss through two alternative paths: (1) a claim for special damages where the plaintiff has pleaded and proved actual pecuniary loss, or (2) as part of the general damage award where actual pecuniary loss is a possibility on the evidence but cannot be proven with specificity.
>
> [114] In the present case, the trial judge did not conclude that the appellant had to prove loss of employment to a standard of "certainty". Rather, the trial judge found that the appellant had not proven a loss relating to his inability to secure work that was sufficiently specific to the Defamatory Article to establish a claim to special damages. The trial judge also found that the Defamatory Article was a contributing factor to the appellant's professional

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> struggles given "the potential effect it had on his ability to find work in his field of expertise": at para. 86. He accepted that it was plausible that the appellant had lost employment opportunities due to the Defamatory Article. The trial judge noted that he could consider "economic damage that cannot be expressly proven" as part of the assessment of general damages: at para. 109. He considered the appellant's potential opportunity to work with Blue Mountain to be a lost opportunity deserving of particular weight.
>
> [115] In summary, the trial judge held that the appellant had not proven a claim for special damages in relation to lost employment opportunities, but that the possibility of such lost opportunity should be factored into the assessment of general damages. I see no legal error in this analysis, which appears to me to be entirely consistent with the record and the governing authorities. There is no merit to this ground of appeal.
>
> [Emphasis added.]

4.4 ***Pineau/Glacier SC***

[23] By the time *Pineau/Glacier SC* went to trial, the evidence had evolved, and it would appear that Mr. Leach's evidence was considerably less amorphous. The judge summarized it this way:

> [63] The plaintiff's evidence is that from 2015 to 2016, he actively sought employment without knowing of the existence of the Subject Piece. The plaintiff now believes the Subject Piece is a main reason he failed to secure employment in his area of expertise and why he says he had no choice but to take a number [of] low paying jobs.
>
> [64] The plaintiff and Mr. Leach provide [*sic*] evidence concerning an opportunity that the plaintiff had in December 2016 to potentially work with Mr. Leach's company. That opportunity involved pursuing government and commercial security system projects. However, during their negotiations, Mr. Leach discovered the Subject Piece and he told the plaintiff about it.
>
> [65] Once he knew of the Subject Piece, the plaintiff said he felt shocked and confused. However, he also describes having an "epiphany" by suddenly understanding that the Subject Piece was the reason he had come so close on many employment opportunities only to receive no employment offer after the final interview or background check. The plaintiff states there was "at least two employment offers that had been made and then cancelled at the last minute and without explanation", however, he does not say what those missed opportunities were.
>
> [66] The plaintiff states that the Subject Piece and the defamation he suffered destroyed his life. The plaintiff's ex-wife states that she believes the Subject Piece affected the plaintiff's employment prospects. She recalls the plaintiff receiving tentative offers of employment in 2015 and 2016 that were later withdrawn without explanation but she also does not specify what the missed opportunities were.

> [67] <u>Mr. Leach's evidence is that he planned to offer the plaintiff the opportunity to partner with him in the company that Mr. Leach operated and to have the plaintiff in place by January 2017. Mr. Leach did not mention his plan to partner with the plaintiff to the plaintiff. Mr. Leach anticipated that the plaintiff would make in excess of $150,000 each year but probably less in the first year.</u>
>
> <u>[68] Mr. Leach states that he intended to consult a lawyer "to discuss the issues involved including the share structure I was contemplating, the valuation of the company in issuing new shares, payment for those shares, and the salary structure". However, before Mr. Leach met a lawyer or made the plaintiff a "formal" offer, he conducted an internet search on Viscount and the plaintiff.</u>
>
> <u>[69] Mr. Leach found the Subject Piece and stated he felt he had no choice but to put the offer to the plaintiff "on hold".</u>
>
> [70] I find that as a result of the defamation of the plaintiff in the Subject Piece, the plaintiff suffered a loss of pride and self-confidence, as well as social and economic damage, including difficulty securing new employment. I further find that the defamation from the Subject Piece was particularly damaging in light of the plaintiff's expertise and focus in the field of security-systems. It is reasonable to infer that persons working in this area are expected to be extremely trustworthy.
>
> [Emphasis added.]

[24] After concluding that the claim for special damages related to loss of employment was sufficiently pleaded to allow for an award (about which I shall have more to say below), the judge reviewed the evidence of Mr. Leach further:

> [134] The defendants submit there is no evidence establishing that but-for the Subject Piece, Mr. Leach would have hired the plaintiff. Mr. Leach's evidence is that upon discovering the Subject Piece, he concluded for the reasons he explains, that it was too great a risk to proceed with his plan to offer employment to the plaintiff while the Subject Piece was online and so he put the offer on hold.
>
> [135] Mr. Leach said he found the reference to the BC Auditor General's report in the Subject Piece to be particularly important because his intended offer to the plaintiff was related to pursuing business opportunities with government agencies or other bodies regulated by the government. Mr. Leach said that although he did not want to believe it, the Subject Piece caused him to question the plaintiff's integrity.
>
> [136] Mr. Leach states that he could not risk investing in the plaintiff in case competitors or prospective customers learned of the Subject Piece and they might avoid doing business with his company. Mr. Leach states that he told the plaintiff that as long as the Subject Piece remained online "I could not hire him to pursue government business". It is important to note that the Subject Piece remained online for significantly longer than the KMI Article.

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> [137] Mr. Leach states that the plaintiff eventually started doing largely unpaid marketing work for his company. Mr. Leach said this arrangement at least allowed the plaintiff to fill a long gap in his resume and it meant Mr. Leach could provide a reference to the plaintiff for employment opportunities. In 2021, Mr. Leach states that he has been able to increase the plaintiff's hours and pay for his work at the company. Mr. Leach also states that he is funding the research and development of a new technology that the plaintiff is inventing.
>
> [138] Mr. Leach's evidence is that the position he intended to offer the plaintiff "would be heavily sales oriented" but with some project management responsibilities. He wanted to make the plaintiff a "partner" which would involve issuing new shares, receiving payment for the shares, and devising a salary structure. Mr. Leach states that based on his projections, he anticipated the plaintiff "would make $150,000+ per year but probably less in the first six months due to sales cycles". There is no explanation for the basis for Mr. Leach's projections or the sales cycles he refers to.
>
> [139] The plaintiff states that Mr. Leach told him he could not offer him formal employment while the Subject Piece was online.
>
> [140] <u>I find based on all of the evidence, including that of the plaintiff and Mr. Leach, that the libelous words at issue in the present case did actually produce a loss for the plaintiff. Again, Mr. Leach is clear that he intended to make an offer and to have the plaintiff in place by early 2017</u>.
>
> [Emphasis added.]

[25] The judge then assessed the loss, taking into account Mr. Leach's evidence of the prospect of earning $150,000 per year or more after the first six months:

> [142] In my view, after considering that this opportunity involved a new division, the uncertainty of sales performance, and some costs for acquiring shares, I conclude that the special damages for the loss of this opportunity in the years since 2017 is appropriately assessed at $180,000.
>
> [143] This assessment of loss takes into account the evidence that as of 2020, the plaintiff began working with Mr. Leach and receiving pay for that work. By 2021, Mr. Leach states that he increased his working relationship with the plaintiff including by investing in the research and development of the plaintiff's new technology.

4.5 <u>This appeal</u>

[26] In their cross-appeal, the respondents maintain that the appellant failed adequately both to plead and prove actual pecuniary loss sufficient to found a claim for special damages. The appellant's economic loss, they say, must be considered to have been taken into account in the assessment of general damages, and the

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claim for special damages should have been dismissed as it was in *Pineau/KMI SC #2*.

[27] The appellant contends that the judge, having accepted that his claim was adequately pleaded and that he had proved it, and after accepting the evidence concerning the prospect of earning $150,000 per year from 2017 on, failed to assess his claim properly, greatly undervaluing it at a total of only $180,000. A yearly loss of $150,000 over a period exceeding six years, Mr. Pineau points out, yields a loss of more than $900,000 assuming no increase in income. An appropriate assessment, he submits, after accounting for contingencies, would have been in the range of $600,000.

[28] The respondents then say that, if an award of special damages was justified, it ought to have been reduced to take into account their apology and, pursuant to section 11 of the *LSA*, the award in *Pineau/KMI SC #2* as modified in *Pineau/KMI CA*.

[29] The respondents have not argued that the reduction of damages (whether general damages or both general and special damages) should have been greater than 40%.

5. PLEADING AND PROOF OF SPECIAL DAMAGES

5.1 <u>Pleading</u>

[30] The respondents object that the appellant failed to plead that, because of the BVI article, he had suffered special damage in the form of loss of income due to having to forgo the opportunity of employment with Mr. Leach and Blue Mountain. They point to authorities such as *Botiuk v Toronto Free Press Publications Ltd*, [1995] 3 SCR 3, 1995 CanLII 60, and *Wilson v HMTQ*, 2019 BCSC 1049.

[31] These authorities are instructive. In *Botiuk*, the plaintiff's claim in defamation included a claim for loss of business as a lawyer, for which the trial judge awarded

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him $325,000 as special damages though he had not specifically pleaded a claim for special damages. Justice Cory, for the majority, addressed this problem:

> [108] It will be remembered that the trial judge awarded Botiuk special damages for the loss of income from his practice occasioned by the libellous publications. However, the Court of Appeal held that since Botiuk had not specifically claimed special damages, they should not have been awarded. A portion of the special damages was then added to the award as an element of the general damages. With the greatest respect, I cannot agree with that position.
>
> [109] It is true that proof relevant to special damages may be admissible for the purpose of supporting general damages. However, unlike general damages, actual pecuniary loss is not presumed. Therefore, special damages must be specifically pleaded and proved in court. See *The Law of Defamation in Canada*, supra, at p. 25-75.
>
> [110] In my view, the loss of business was sufficiently pleaded to warrant the award of special damages. In his amended fresh statement of claim, Botiuk pleaded that, by reason of the defamatory statements made against him, he suffered, among other things, a "loss in his practice of his profession as a barrister and solicitor" and "suffered injury to his career". A lump sum for damages was claimed to compensate for these injuries.
>
> [111] Special damages may arise from a general falling of business, a loss or decline of patronage and a loss of custom. If the libellous words are in their nature intended, or are reasonably likely to produce, or actually do produce, such a loss, the plaintiff may recover. …
>
> [112] This is one of those rare cases in which it was possible to adduce the necessary evidence to prove actual pecuniary loss. There was ample evidence presented upon which the trial judge could properly base his decision to award and arrive at his assessment of the special damages. … I would, therefore, restore the special damages award made by the trial judge.
>
> [Emphasis added.]

[32] In this case, Mr. Pineau drafted his own notice of civil claim. Under Part 2, Relief Sought, he specifically included a claim for "Special Damages". He provided no particulars other than in paras 2, 16 and 17 of Part 1, Statement of Facts:

> 2. On December 20, 2015 [*sic,* 2016] the Plaintiff emailed Tyler Orton and Mark Falkenberg the Managing Editor of Business in Vancouver to discuss a retraction or apology. In particular the Plaintiff explained that the presence of the defamatory material was impeding his ability to find employment
>
> …
>
> 16. By reason of the publication and continued dissemination of the Defamatory article the Defendants recklessly exposed the Plaintiff to contempt, ridicule and hatred and cause others to shun or avoid the Plaintiff,

> impede his ability to find employment, and to lower the Plaintiff's reputation in the eyes of right thinking members of the community, all of which has occurred.
>
> 17. Business in Vancouver is a widely read publication in the business community and the article continues to be easily searched by any potential employer doing reference and background searches.
>
> [Emphasis added.]

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[33] The respondents argue that this is insufficient. These averments, they say, are consistent with a claim for general damages and give no notice about the claim for special damages the respondents ultimately faced. Nowhere is it pleaded that, because of the defamation, Mr. Pineau lost a specific employment opportunity that had been offered to him. Indeed, nowhere is it pleaded that Mr. Pineau in fact lost employment income as a result of the defamation. All that is stated is that his ability to find employment was impeded. They point to *Wilson*, where Justice McIntosh said this:

> [3] As Lord Denning, Master of the Rolls, said in *Calvet v. Tomkies*, [1963] 1 W.L.R. 1397, at 1399 (C.A.), if a plaintiff alleges special damage "he must particularize it". Our Supreme Court Rule 3-7(18) says, in part, that if particulars may be necessary, full particulars with dates and items, if applicable, must be stated in the pleading. In Volume 2 of *The Law of Defamation in Canada*, Brown, R.E.; Carswell, 1987, at page 892, the author said that, "[w]here a plaintiff claims damages for loss of business, he must supply such particulars as he can of that loss." At page 1047, he said that actual pecuniary damage or loss is not presumed, and must be pleaded and proved, even where the defamation is actionable *per se*.

[34] I observe that *Wilson* concerned a pretrial application to strike some of the plaintiff's pleadings for want of particulars, notwithstanding the plaintiff had provided considerably greater particularization of his claim for special damages than did Mr. Pineau in the present case. Justice McIntosh indeed struck some of the particulars provided as being insufficient because of a lack of details of particular economic losses. But this was different from striking a claim. At para 19, the judge gave leave to the plaintiff to amend to provide further particulars of special damages should they become known.

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[35] In the present case, as far as I am aware, the respondents did not make any application for particulars, nor did they seek an adjournment of the hearing pending the provision of an amended notice of civil claim with appropriate particulars. Instead, they raised their objection in argument. The judge had this to say:

> [128] The defendants submit that the plaintiff has failed to make out the basis for award of special damages because the plea for special damages is not particularized in the Claim and there is no evidence to establish, for example, that but-for the Subject Piece, Mr. Leach would have hired the plaintiff.
>
> [129] The Claim specifically seeks, under relief sought, an award for special damages, among other things. The Claim states that the defamatory material about the plaintiff in the Subject Piece caused others to shun or avoid him and that it impeded his ability to find employment. The Claim also states that BIV is widely read and the Subject Piece “continues to be easily searched by any potential employer doing reference and background searches”.
>
> [130] The Claim also states in several places that defamation of the plaintiff in the Subject Piece impeded, and continues to hinder, the plaintiff in his efforts to find employment. Finally, the plaintiff alleges in the Claim that he told the defendants that the defamatory material in the Subject Piece was impeding his ability to find employment.
>
> [131] On this point, the question comes down to whether the plaintiff is precluded from claiming special damages because the Claim does not state, for example, that the Subject Piece caused the plaintiff to lose an employment opportunity with Mr. Leach in 2017.

[36] After referring to the passage from *Botiuk* quoted above, the judge concluded as follows:

> [133] In my view, the request for special damages related to loss of employment is sufficiently pleaded in the Claim to allow for an award under that head of damage. In *Botiuk*, at para. 111, the Court notes that special damages may arise from a general falling of business and a loss of patronage. If the libelous words are likely to produce such a loss, then a plaintiff may recover.

[37] As I see it, the problem is not one of failing to plead a claim for special damages, but failing fully to particularize it. There is no doubt that full and proper particulars of a claim for special damages should be given in any litigation. But in the circumstances of this case, was the judge wrong to consider Mr. Pineau’s special

damages claim given the pleadings and record before her? This Court considered a similar problem in *Nazerali v Mitchell*, 2018 BCCA 104:

> [100] The judge's award of $55,000 for special damages related to the cost incurred by Mr. Nazerali to retain a search engine optimization firm for the purpose of mitigating his losses. The judge found it was appropriate for Mr. Nazerali to have done this and was satisfied the cost was reasonable.
>
> [101] The appellants say that although Mr. Nazerali pleaded that he suffered financial damages, the pleading stated that the particulars of them would be provided prior to trial, and no particulars were provided before the trial. They also say no documentary proof of these damages was introduced at the trial.
>
> [102] In my view, there is no merit in these submissions. There was a proper pleading for special damages, and <u>it was open to the judge to receive evidence of the damages even though particulars were not provided until trial</u>. While the judge could have required documentary proof of the damages, he was entitled to accept the testimony of Mr. Nazerali as satisfactory evidence of the damages.
>
> [Emphasis added.]

[38] I consider that this reasoning applies here. It points to the discretionary nature of the judge's decision. That exercise of discretion is owed deference, and this Court will not interfere unless the judge misdirected herself, erred in law or principle, failed to give weight to relevant considerations, or the result is so plainly wrong on the facts as to work an injustice: *Madadi v. Nichols,* 2021 BCCA 10 at para 41. I am not persuaded that any of those circumstances exist here.

[39] In this regard, I note that Mr. Pineau drafted the notice of civil claim himself. He claimed special damages. He alleged that, because of the defamation, he was impeded in his ability to find employment. It would have been open to the respondents to demand particulars, but they did not do so. At least some particulars of the specific opportunity in question were effectively given in *Pineau/KMI SC #2* in 2021. Full particulars were provided by the affidavits sworn by Mr. Leach and Mr. Pineau on May 23 and 24 2022, respectively. Although these were filed not long before the scheduled hearing date in June 2022, the respondents obtained an adjournment of that hearing to await the outcome of *Pineau/KMI CA*, and the hearing did not proceed until July 17 and 18, 2023. I am unaware of any cross-examination

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on those affidavits, or of any objection to them, and Mr. Pineau included further particulars in his Application Response filed June 27, 2023.

[40] The respondents assert that the affidavits did not specifically relate their content to the claim for special damages and therefore did not alert them to the claim. I do not find this objection persuasive. The affidavits were filed in support of the claim. The claim included a claim for special damages and pleaded that Mr. Pineau's ability to obtain employment had been impeded by the defamation. The affidavits provided specifics in that regard, including the loss of the opportunity to work with Mr. Leach at a projected annual salary of approximately $150,000, and the Response clearly related that loss to the claim for special damages.

[41] I conclude in these circumstances that, as in *Nazerali* and consistent with *Botiuk*, it was open to the judge, on the state of the pleadings and record before her, to receive evidence of Mr. Pineau's loss of opportunity in support of his claim for special damages. I see no basis for interfering with her exercise of discretion.

5.2 Proof

[42] As the Court observed in *Botiuk* at para 111, a claim for special damages is recoverable where the libellous words are in their nature reasonably likely to produce the financial loss claimed. The evidence of Mr. Leach was unequivocal. He intended to offer Mr. Pineau a position, with a view to having him in place by January 2017. He did not proceed with the offer, however, because in December 2016, he came across, first, the BIV article, and then the KMI article. In the circumstances described in his affidavit, he concluded that he had to put the offer on hold because of what those articles suggested about Mr. Pineau, in the context of hiring Mr. Pineau in a role that involved the pursuit of business opportunities with institutions regulated by the Government of BC. Remember also that the BIV article remained available online throughout the period in question, unlike the KMI article, which was taken down after Mr. Pineau complained to its publisher.

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[43] In the circumstances, I consider that it was open to the judge to accept this evidence as establishing that the nature of the defamatory words produced, or were reasonably likely to have produced, the loss of opportunity claimed by Mr. Pineau. It thereby supported the existence of an actual pecuniary loss, and a basis for quantifying that loss.

[44] In making the award of special damages, the judge specifically acknowledged Kirchner J.'s conclusion in *Pineau/KMI SC #2* that Mr. Pineau had failed to make out such a claim, a conclusion with which this Court found no error. The fact, of course, is that the evidence before the judge in this case was different from what was before Kirchner J. Consequently, while the evidence was too "amorphous" to support a claim for special damages before Kirchner J., the evidence in the present case was sufficient to support the claim, both as to the opportunity and its causation. I see no error in the judge's conclusion that an actual pecuniary loss had been proven.

[45] But the respondents contend that compensation for this loss of opportunity had already been taken into account in the award of general damages, resulting in double compensation: an error of law. They point to the judge's discussion under the heading "*Economic Loss/Loss of Economic Opportunity*" as one of the factors relevant to quantifying Mr. Pineau's claim for general damages. That discussion included specific reference to the Leach/Blue Mountain opportunity:

> [63] The plaintiff's evidence is that from 2015 to 2016, he actively sought employment without knowing of the existence of the Subject Piece. The plaintiff now believes the Subject Piece is a main reason he failed to secure employment in his area of expertise and why he says he had no choice but to take a number low paying jobs.
>
> [64] The plaintiff and Mr. Leach provide[d] evidence concerning an opportunity that the plaintiff had in December 2016 to potentially work with Mr. Leach's company. That opportunity involved pursuing government and commercial security system projects. However, during their negotiations, Mr. Leach discovered the Subject Piece and he told the plaintiff about it.
>
> [65] Once he knew of the Subject Piece, the plaintiff said he felt shocked and confused. However, he also describes having an "epiphany" by suddenly understanding that the Subject Piece was the reason he had come so close on many employment opportunities only to receive no employment offer after

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> the final interview or background check. The plaintiff states there was “at least two employment offers that had been made and then cancelled at the last minute and without explanation”, however, he does not say what those missed opportunities were.
>
> [66] The plaintiff states that the Subject Piece and the defamation he suffered destroyed his life. The plaintiff’s ex-wife states that she believes the Subject Piece affected the plaintiff’s employment prospects. She recalls the plaintiff receiving tentative offers of employment in 2015 and 2016 that were later withdrawn without explanation but she also does not specify what the missed opportunities were.
>
> [67] Mr. Leach’s evidence is that he planned to offer the plaintiff the opportunity to partner with him in the company that Mr. Leach operated and to have the plaintiff in place by January 2017. Mr. Leach did not mention his plan to partner with the plaintiff to the plaintiff. Mr. Leach anticipated that the plaintiff would make in excess of $150,000 each year but probably less in the first year.
>
> [68] Mr. Leach states that he intended to consult a lawyer “to discuss the issues involved including the share structure I was contemplating, the valuation of the company in issuing new shares, payment for those shares, and the salary structure”. However, before Mr. Leach met a lawyer or made the plaintiff a “formal” offer, he conducted an internet search on Viscount and the plaintiff.
>
> [69] Mr. Leach found the Subject Piece and stated he felt he had no choice but to put the offer to the plaintiff “on hold”.
>
> [70] I find that as a result of the defamation of the plaintiff in the Subject Piece, the plaintiff suffered a loss of pride and self-confidence, as well as social and economic damage, including difficulty securing new employment. I further find that the defamation from the Subject Piece was particularly damaging in light of the plaintiff’s expertise and focus in the field of security-systems. It is reasonable to infer that persons working in this area are expected to be extremely trustworthy.

[46] The respondents then point out that the judge’s assessment of general damages at $120,000 was precisely the same amount considered by this Court to be appropriate for the KMI article in *Pineau/KMI CA*. In that case, as this Court observed (see para 22 above), the award of general damages encompassed lost economic opportunity, including, as we have seen, the lost opportunity of Mr. Leach’s offer of employment at Blue Mountain (see *Pineau/KMI SC #2*, para 109: “Furthermore, the potential opportunity to work with Blue Mountain was fairly promising, and I give that lost opportunity particular weight in assessing general damages”). Consequently, the respondents argue, while a pecuniary loss may be

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claimed as part of the general damages where actual pecuniary loss is a possibility but cannot be proven, or claimed as special damages where actual pecuniary loss is proved, the plaintiff cannot have it both ways.

[47] With respect, I do not think that is what happened here. It is true that the judge did refer to the Leach/Blue Mountain opportunity in her discussion of economic factors relevant to general damages. But that opportunity was lost in January 2017. The judge begins her discussion with a reference to Mr. Pineau's position in 2015–2016 when he actively, but unsuccessfully, sought employment before he knew about the defamatory articles. She concludes at para 70 that, as a result of the defamation, "the plaintiff suffered a loss of pride and self-confidence, as well as social and economic damage, including difficulty securing new employment." As I understand her reasons, that is what she was taking into account for the purpose of assessing general damages. It is quite different from Kirchner J. giving "particular weight" to the lost Blue Mountain opportunity in his assessment of general damages in *Pineau/KMI SC #2*. In my view, it was open to the judge to consider general "social and economic damage, including difficulty securing new employment" in her assessment of general damages, while also awarding special damages for the proven pecuniary loss of a specific lost opportunity. Again, I see no error.

[48] To the extent there may be an overlap between the special damages awarded in this case and an aspect of the general damages awarded in *Pineau/KMI SC #2*, that is a matter for consideration in the application of section 11 of the *LSA.*

6. ASSESSMENT OF SPECIAL DAMAGES

[49] Mr. Pineau maintains that, based on the evidence she accepted, the judge made a wholly erroneous assessment of his special damages, awarding an amount that was therefore inordinately low, satisfying the standard of review applicable to an award of damages. He notes that on the basis of Mr. Leach's projected annual income of $150,000, the loss from 2017 to trial was in the neighbourhood of

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$1,000,000. On the evidence, the amount he actually earned over the period in question comes to approximately $120,000. He submits that taking this into account, and applying a reasonable contingency reduction of 20%, the appropriate award should have been in the range of $600,000. This does not account for any continuing losses. Yet the judge said only this:

> [141] I find that the evidence of the plaintiff and Mr. Leach provides me a basis to assess special damages from and after 2017, which is the date when Mr. Leach planned to offer the plaintiff employment. The amount of the loss is not specifically stated in the evidence. After the first six months, there was the prospect of earning $150,000 or more each year, depending on sales, and there was also some unspecified costs associated with the plaintiff acquiring shares in Mr. Leach's company.
>
> [142] In my view, after considering that this opportunity involved a new division, the uncertainty of sales performance, and some costs for acquiring shares, I conclude that the special damages for the loss of this opportunity in the years since 2017 is appropriately assessed at $180,000.

[50] The judge was, of course, faced with a good deal of uncertainty. The evidence was limited to what Mr. Leach and Mr. Pineau had to say. Nevertheless, as in *Nazerali*, the judge was entitled to accept their testimony as satisfactory evidence of the damages. I do not see this as a case like *WeGo Kayaking Ltd et al v Sewid*, et al, 2007 BCSC 49, where the claimed loss of business profit, calculated by the plaintiff on the basis of internal business records, was rejected as incomplete and unreliable. The judge in the present case expressed no difficulty with the reliability of Mr. Leach's evidence. On the other hand, as no financial statements or records were produced that might assist the judge in assessing the capacity of the business to produce the prospective income Mr. Leach projected, she was right to be cautious, like the trial judge in *Botiuk* (*Botiuk v Toronto Free Press Publications Ltd*, [1991] OJ No 925, 27 ACWS (3d) 1086).

[51] That judge faced similar difficulties. He had the advantage of expert opinion evidence, but the defence expert put the pecuniary loss at zero, while the plaintiff's expert valued it at either $1.2 or $5.1 million. Justice Carruthers said this:

> [168] Looking at the lesser position of Hodson [the plaintiff's expert witness], taking into account the fact that it is based upon certain

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> assumptions, recognizing my concern for what I have described as a lack of "hands on" testimony, realizing that no one can say with any certainty what might have occurred in any event of the defendants' actions, and recognizing the need to be reasonable, I fix special damages at $325,000.00.

[52] As noted above, that award was reversed on appeal but restored by the Supreme Court of Canada.

[53] In the present case, the only factors the judge discussed that led her to conclude that an appropriate assessment was $180,000 were those set out in para 142 of her reasons: the fact that the division where Mr. Pineau would be working was new, the uncertainty of sales performance, and some unspecified costs relevant to acquiring new shares. She also referred at para 143 to the fact that Mr. Pineau did earn some (though much less) income with Mr. Leach beginning in 2020.

[54] With respect, given the judge's findings, it is difficult to see how these factors could reduce the claim so drastically from the foundational figures the judge accepted of an opportunity commencing in January 2017 at an annual income increasing after six months to $150,000.

[55] In my view, the judge was right in her assessment to apply, in effect, a significant deduction for contingencies. But she did not explain how she arrived at the deduction she applied, or how she weighed the risks. In the result, she applied a reduction of approximately 80%, which, as I see it, cannot be justified by the factors the judge discussed, given her finding of an actual pecuniary loss. Certainly, there were real negative contingencies that supported a substantial reduction. But to apply them to reduce the claim to an amount only a little over one year's prospective income cannot, in my view, be supported by the evidence the judge accepted.

[56] It follows, in my opinion, that the judge's assessment was inordinately low.

[57] Considering the judge's findings, I do not see the appellant's proposed reduction of 20% as adequate. I would weigh the uncertainties negatively to a

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degree that reduces the foundational amount of the claim by more than 50% but considerably less than 80%. In doing so, I take into account the risks, addressed by the judge, of uncertainty in the business (a new division, sales performance and structural costs) together with the absence of financial documentation, yielding uncertainty as to the actual income Mr. Pineau would have earned. I also consider, as the judge did, the potential for other income, particularly towards the years immediately preceding the trial. I conclude that a contingency reduction of 60% is justified.

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[58] I would therefore set aside the judge's award of special damages in the amount of $180,000, and substitute for it an award of $360,000.

7. REDUCING DAMAGES

7.1 Overview

[59] As we have seen, the judge reduced her award of general damages by 40%, from $120,000 to $72,000, to take into account the apologies published by the respondents, and the duplicative effect of the previous award in *Pineau/KMI SC #2*. She applied no reduction to her award for special damages in the amount of $180,000.

[60] These reductions engage the following provisions of the *LSA*:

> **Special pleas in mitigation of damages for libel**
>
> **6** (1) In an action for libel in a newspaper or other periodical publication the defendant may plead in mitigation of damages that the libel was inserted in the newspaper or other periodical publication without actual malice and without gross negligence, and
>
> > (a) that before the commencement of the action, or at the earliest opportunity afterwards, the defendant inserted in the newspaper or other periodical publication a full apology for the libel, or
> >
> > …
>
> **Proving offer of written apology in mitigation of damages**
>
> **10** In an action for defamation if the defendant has pleaded not guilty, if judgment has been given against the defendant with damages to be assessed, or the defendant admits the defamation, the defendant may give in evidence in mitigation of damages, that the defendant made or offered a

> written or printed apology to the plaintiff for the defamation before the commencement of the action, or if the action was commenced before there was an opportunity of making or offering the apology, that the defendant did so as soon afterwards as the defendant had opportunity.
>
> **Damages recovered in another action, or compromise**
>
> **11** At the trial of an action for a libel contained in a newspaper or other periodical publication or in a broadcast, the defendant may give in evidence in mitigation of damages that the plaintiff has already recovered, or has brought action for, damages, or has received or agreed to receive compensation in respect of a libel to the same effect as the libel for which the action has been brought.

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[61] With respect to apologies, the appellant submits that the apologies offered by the respondents came far too late to entitle them to the benefit of sections 6 and 10, and in any event were already considered by the judge when she assessed general damages. The respondents argue that, notwithstanding sections 6 and 10 of the *LSA*, it is well established that an apology may be considered in mitigation of defamation at common law.

[62] With respect to the section 11 reduction, the appellant argues that the judge erred in failing to consider the full scope of the mode and extent of the BIV article as compared to the KMI article and therefore applied too great a reduction. The respondents assert that the judge erred in failing to apply the same reduction to the award of special damages as she did to the award of general damages.

7.2 The apologies

[63] In June 2022, BIV published two apologies: one online, and one in its print edition. For context, the defamatory article was originally posted in January 2015, and remained available until July 2021, while an electronic PDF copy of the print article inadvertently remained available beyond that date until removed in May 2022.

[64] The summary trial of the respondents' application to dismiss the claim was set to be argued in June 2022. On June 9, 2022, given the pending appeal of Kirchner J.'s damages award in *Pineau/KMI SC #2*, the respondents applied for, and

obtained, an order adjourning the hearing. The full trial, scheduled for 15 days commencing November 28, 2022, was also adjourned.

[65] On June 7, 2022, two days before that adjournment, BIV published an apology online and on its homepage in the following terms:

> On January 20, 2015, we published an article which referred to Stephen Pineau, the former CEO of Viscount Systems Inc.
>
> The article inaccurately connected him to unproven allegations of financial misconduct. *Business in Vancouver* regrets its error and apologizes to Mr. Pineau for any distress our publication has caused.

[66] BIV published an identically worded apology in its print edition for June 13-July 3, 2022, in rather small print, on page 2.

[67] The judge said this about the apologies:

> [152] As mentioned earlier, on June 7 and June 13, 2022, BIV published an apology to the plaintiff. The defendants submit that the authorities are clear that even a late apology will have a mitigating effect on the assessment of damages: *Tait v. New Westminster Radio Ltd.* (1984), 58 B.C.L.R. 194, 1984 CanLII 356 (C.A.); *Hunter v. Fotheringham*, [1986] B.C.J. No. 2279 (S.C.); *Grassi v. WIC Radio*, 2000 BCSC 185 rev'd on costs 2001 BCCA 376.
>
> [153] The plaintiff submits that the defendants' apology was too late since it was made not at the earliest opportunity and instead, it came only after the finding that the KMI Article was defamatory and some five years after this Claim was commenced. The plaintiff also submits the apology is inadequate and it was done without consultation or notice to him. The plaintiff denies the apology has the effect of mitigating damages.
>
> [154] The plaintiff relies on a number of cases where courts conclude that the effect of a late apology was an aggravating factor: *Vogel v. Canadian Broadcasting Corporation* (1982), 35 B.C.L.R. 7, 1982 CanLII 801 (B.C.S.C.) [*Vogel*]; *Pineau #2* at para. 118; *Brown* at para. 102, leave ref'd, [1998] S.C.C.A. No. 614.
>
> [155] When I consider the apology in the overall context, I find that it is a mitigating factor that ought to be taken in account in the assessment of damages. I do not find that the timing or wording of the apology means that it ought to be treated as an aggravating factor. In my view, the apology and the circumstances as a whole, do not make the present case akin to *Vogel* or *Brown*, where there were findings that a defendant was motivated by actual malice or the apology lacked an all-encompassing nature.
>
> [156] I find that the apology received more online attention than the Subject Piece and that it was full, frank and non-ambiguous. As such, the apology will

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> be considered as a factor mitigating general damages and demonstrating an absence of actual malice.

7.3 Did the judge err in considering the apologies in mitigation of damages?

[68] I agree with the appellant that the apologies here did not come within sections 6 and 10 of the *LSA*. They were certainly not published before the commencement of Mr. Pineau's action, nor could they conceivably be considered as having been published "at the earliest opportunity afterwards", or "as soon afterwards as the defendant had opportunity". They were published more than seven years after the defamatory publication, more than five years after Mr. Pineau commenced his action, a year after the very similar KMI article had been found defamatory, and just shortly before the intended summary trial hearing.

[69] I agree with the respondents, however, that it nevertheless remained open to the judge at common law to "consider the apology in the overall context", as potentially either a mitigating factor (if adequate apology is made), or an aggravating factor (if not).

[70] The common law has long recognized that, while an apology is no defence to an action for defamation, it may be considered in mitigation of damages. I do not accept the appellant's contention that sections 6 and 10 of the *LSA* have eliminated the court's ability at common law to consider an apology that does not meet all of the requirements those sections contain. They were modelled on the equivalent provisions in the *Libel Act*, 1843 (6 & 7 Vict), c 96 [Lord Campbell's Act], and it has been accepted both in the United Kingdom and Canada that the common law right to consider an apology in mitigation continued after the passing of the statute—see, for instance, *Gatley on Libel and Slander*, 11th ed (London: Sweet & Maxwell, 2008) at para 35.55:

> Effect of apology. Although apology is no defence to an action for libel or slander, the prompt publication of an apology can be substantial mitigation of damages. The right of the defendant to give evidence that he made or offered

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> an apology is statutorily enacted, but in practice this statute is rarely invoked as it has long been recognized that evidence of an apology is admissible in mitigation of damages. …

[71] The authors go on to note, in the same paragraph, that while the mitigating effect is greater the sooner the apology is published, it may nevertheless be put forward as mitigation even when offered very late in the day,

> The sooner an apology is published the greater its mitigating effect, but an apology offered or published after the commencement of the action, or even in the course of trial, may be put forward as mitigation.

[72] This is consistent with Canadian authority: *Tait v New Westminster Radio Ltd*, (1985), 15 DLR (4th) 115 at 120–121, 1984 CanLII 356 (BCCA); *Munro v Toronto Sun Publishing Corp. et al*, (1982), 39 OR (2d) 100 at para 65, 1982 CanLII 1758 (ON SC); *Law of Defamation* at 25–147 to 25–150 and 25–298 to 25–299 (footnote 15); and Roger McConchie and David Potts, *Canadian Libel and Slander Actions* (Toronto: Irwin Law Inc, 2004) at 170, 177–178. It is also consistent with good sense. Defendants should not be discouraged from issuing apologies even if they are late in the day, as a late apology may still mitigate harm to reputation, at least to some extent. The court will be in the best position to assess the overall context and consider whether and to what extent the timing of the apology has reduced or eliminated any mitigating effect the apology might otherwise have.

[73] Here, the judge concluded that it was appropriate to consider the apologies as a factor in mitigating general damages and demonstrating an absence of actual malice. I see no error of law in that conclusion.

[74] Unfortunately, it is impossible to say just what account the judge took of the apologies given that she did not assign a particular percentage reduction to them, but rather included their effect into the overall reduction that also encompassed the application of section 11 of the *LSA*. Without the benefit of the judge's explanation, I must assume that the apologies were accorded very little impact on the overall mitigation. I say this because, although the judge considered them "full, frank and

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non-ambiguous”, they were published so very late in the day: far too late, for instance, to have any mitigating effect on the appellant’s problems finding employment.

7.4 Did the judge double count the mitigating effect of the apologies?

[75] In reviewing the factors relevant to her assessment of general damages, the judge included this discussion relevant to the apology:

> ***Absence or Refusal of a Retraction or Apology***
>
> [124] On June 7 and June 13, 2022, BIV published an apology to the plaintiff online and in print. Mr. Orton’s evidence is that the words “Apology to Stephen Pineau” were displayed as #1 on a list of “Top Stories” on the BIV website. The apology stated as follows:
>
> > **Apology to Stephen Pineau**
> >
> > June 7, 2022, 3:57 pm
> >
> > On January 20, 2015, we published an article which referred to Stephen Pineau, the former CEO of Viscount Systems Inc.
> >
> > The article inaccurately connected him to unproven allegations of financial misconduct. *Business in Vancouver* regrets its error and apologizes to Mr. Pineau for any distress our publication has caused.
>
> [125] The defendants’ evidence is that the online apology received a total of 634 page views and 607 unique page views from the date of posting until May 8, 2023. In addition, there were 8,295 printed copies of BIV ordered for the BIV issue containing the apology and the electronic PDF version of the issue registered 191 publication reads. The plaintiff’s evidence is that in Google search results for his name, the apology appears as the third link.
>
> [126] I find the fact that the defendants provided an apology to the plaintiff is a relevant factor for quantification of general damages.
>
> [Emphasis added.]

[76] From this, the appellant argues that the judge already took the apology into account in her assessment of general damages, so that any subsequent reduction by way of mitigation would amount to double counting.

[77] I do not see it that way. The discussion quoted above immediately follows the judge’s consideration of whether the conduct of the respondents justified an award of aggravated damages, as claimed by the appellant. She concluded that it did not.

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The heading matches one of the factors this Court mentioned in *Pineau/KMI CA* as relevant to the assessment of general damages:

> [53] In *Hill* at para. 182, the Supreme Court of Canada set out a list of factors that are relevant to the assessment of general damages for defamation: the conduct of the plaintiff, the plaintiff's position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of a retraction or apology, and the conduct of the defendant. …
>
> [Emphasis added.]

[78] Viewed in the context of the whole of the judgment, I conclude that in the impugned passage, the judge is doing no more than indicating that she was taking the factor into account; as an apology was made, the factor would therefore not operate to increase the assessment of general damages. Nothing in her discussion of general damages suggested that she was reducing her assessment because of the apology. Instead, as she stated later, the apology would be considered in mitigation.

7.5 Did the judge err in her reduction of general damages on account of the result in *Pineau/KMI SC #2*?

[79] After reviewing section 11 of the *LSA*, the judge concluded that it applied, and that the damages awarded in *Pineau/KMI SC #2* were in respect of a libel "to the same effect" as the libel she was considering:

> [162] The defendants submit that nothing in *Pineau* #2 or *Pineau* (BCCA) precludes them from relying on s. 11 of the *LSA* especially now that there has been a judgment against KMI (which they submit appears to have measured reputational damage to the plaintiff from both the Subject Piece and the KMI Article), and where they say the KMI Article was more defamatory of the plaintiff than the Subject Piece.
>
> [163] I find that s. 11 of the *LSA* applies in the present circumstances. I further find that the damages awarded to the plaintiff in the KMI Action were in respect of a libel to the same effect as the libel for which the present action has been brought. I am supported in that finding by Horsman J.A.'s observation in *Pineau* (BCCA), at para. 98 [*sic*, 93], that it is reasonable to assume that the defamation in the Subject Piece and the KMI Article had a similar impact on the plaintiff's general reputation.
>
> [164] The defendants submit that after taking the various mitigating factors into account, the appropriate award of damages should be in the range of $40,000 to $60,000. As mentioned, the plaintiff has not suggested any

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> specific amount or range of damages. Based on the authorities cited by the plaintiff, it is clear the plaintiff's position is that a much higher damages award is warranted in all of the circumstances. However, in my view, the cases relied on by the plaintiff involve substantially different defamatory content and factual circumstances from the case at bar.
>
> [165] After considering all of the mitigating factors and the application of s. 11 of the *LSA*, I find that a 40% reduction to the $120,000 award general damages should be assessed, meaning that general damages are $72,000.
>
> [Emphasis added.]

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[80] As I observed above, the analysis is somewhat complicated by the fact that the judge did not indicate how much of the 40% reduction was due to the application of section 11 of the *LSA*, and how much was due to the apologies.

[81] The appellant argues that, for section 11 to apply, the respondent must prove that the libel in the KMI article was "to the same effect" as the libel in the BIV article. He submits that this was not the case because the articles were not identical, and there were significant differences in the mode, extent and geographical footprint of their respective publication: for instance, that the BIV article remained online for considerably longer than the KMI article. In the circumstances, the appellant asserts, there should have been no deduction.

[82] I disagree.

[83] In *Pineau/KMI CA*, the appellant argued that in *Pineau/KMI SC #2*, Kirchner J. had erred by reducing the general damages on the ground that the Viscount action itself and the two BIV articles had already tarnished his reputation prior to the publication of the KMI article (referred to in *Pineau/KMI CA* as "the Defamatory Article"). This Court agreed. It concluded that, while the articles were substantially similar and would have had a similar impact on the appellant's reputation, it was nevertheless an error of law for the judge to reduce the damages flowing from the KMI article because of any damage to reputation flowing from the BIV article:

> [91] The external factors cited by the trial judge are only relevant in mitigating damages if they directly relate to the damage the appellant's reputation suffered as a result of the publication of the Defamatory Article. It

cannot be said, in my view, that the mere existence of the Viscount Action "tarnished" the appellant's reputation in the same manner as the Defamatory Article. The Viscount Action did not allege that the appellant had engaged in fraudulent activity, and it did not hold the appellant up as an example of the dangers of a lack of effective corporate whistleblower protection. Furthermore, the context for the Viscount Action included the appellant's filed response to civil claim and counterclaim which denied the allegations that were advanced. This context is wholly missing from the Defamatory Article.

[92] Much the same can be said of the impact the First BIV Article had on the appellant's reputation, as it simply contained a factual summary of the Viscount Action. This article expressly noted that the allegations had not been proven in court, and that the appellant had not filed a response by press time.

[93] The Second BIV Article stands on a different footing. The content of the Second BIV Article was substantially similar to the Defamatory Article, minus the express statement that the appellant had been accused of fraud. It did not merely publicize the Viscount Action, but rather included innuendo about the appellant's conduct that mirrored the content of the Defamatory Article. Indeed, the trial judge found that Ms. Middlemiss had effectively plagiarized the Second BIV Article in writing the Defamatory Article: at paras. 133–134. It is reasonable to assume that the Second BIV Article would have had a similar impact on the appellant's general reputation as the Defamatory Article.

[94] It was not open to the trial judge to reduce damages on the basis that the appellant's reputation was already tarnished by the Second BIV Article. Doing so was contrary to the common law rule that prior publication of the same or similar libel cannot be taken into account in mitigation of damages. It is not necessary to make a finding that the Second BIV Article was defamatory to apply this principle. The respondents published the whole libel, and must pay the whole damage that flows from it. The fact that Ms. Middlemiss had copied content that had already been published elsewhere is not a factor that can properly be taken into account to mitigate damages.

[95] The trial judge found that the respondents could not claim the benefit of s. 11 of the *Libel and Slander Act*. The respondents do not challenge this finding on appeal. That being the case, it was not open to the respondents to lead evidence of the Second BIV Article in mitigation of the appellant's damages. …

[96] Read as a whole, the reasons suggest that the trial judge perceived his task as measuring only the reputational impact of the additional statements in the Defamatory Article—particularly the characterization of the Viscount Action as including an allegation of fraud—that were not contained in the Second BIV Article. In my view, that is not the proper approach to the assessment of general damages in defamation. The publisher of a defamatory article cannot lead evidence in mitigation of damages to show that they merely plagiarized content that had already been published by others. The trial judge erred in reducing damages to account for the harm to the appellant's reputation arising from the Second BIV Article despite finding

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> that the respondents could not claim the benefit of s. 11 of the *Libel and Slander Act*.
>
> [Emphasis added.]

[84] It follows that, in the present case, the judge was faced with a situation where the appellant had already been awarded damages for defamatory content that was “substantially similar”, had “a similar impact on the appellant’s general reputation”, *and* which was taken into account by this Court in its reassessment of general damages.

[85] In the circumstances, I can see no error in the judge’s application of a reduction to the appellant’s general damages pursuant to section 11 of the *LSA* on the basis of the damages awarded in *Pineau/KMI CA*. Moreover, I see nothing in the evidence concerning the mode and extent of publication, and the audience, that would suggest error by the judge. Such differences as there were could be, and no doubt were, properly taken into account in assessing the extent of the reduction. In this case, there were some significant differences beyond any aspect of the content. These include the fact that the BIV article was available online for considerably longer than the KMI article and had greater economic impact for that reason (as indicated by Mr. Leach), and the much later apology concerning the BIV article.

7.6 Did the judge err in failing to reduce special damages on account of the result in *Pineau/KMI SC #2*?

[86] This issue focuses squarely on the problem that arises from separately litigated claims involving substantially similar libels. Between the two summary trials, the evidence evolved. As we have seen, in *Pineau/KMI SC #2*, Kirchner J. found the claim for special damages “too amorphous” but nevertheless gave the opportunity to work with Blue Mountain “particular weight” in assessing general damages. In *Pineau/KMI CA*, this Court found no error in that approach. In *Pineau/Glacier SC*, the judge concluded that the evidence supported a claim for special damages based on the same loss of opportunity. Should the pecuniary damages specifically awarded

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for the loss of opportunity in *Pineau/Glacier SC* be reduced on account of the weight given to that loss of opportunity in awarding general damages in *Pineau/KMI SC #2*?

[87] The judge did not address the question of whether the mitigating factors she found should be applied to the award of special damages as well as to the award of general damages. Consequently, although she did not reduce the special damages award for mitigation, we do not know why. The respondents submit that there is nothing in section 11 that precludes its application to special damages and contend that the same 40% reduction should be applied.

[88] Section 11 is permissive. It permits the defendant, in mitigation of damages, to give evidence that the plaintiff has already recovered compensation for a libel to the same effect as the libel for which defendant has been sued. In my view, it was accordingly open to the judge in this case to consider that evidence (being the damages award arising out of the KMI article) in mitigation of the compensation she was proposing to award, whether comprised of general or special damages. The appellant has provided no authority to the contrary, nor do the principles of mitigation suggest otherwise.

[89] In this context, the pertinent question is this: to what extent has the claimant already been compensated for the same loss, so that the injury claimed is not as great as might otherwise appear?

[90] It seems to me self-evident that, if Kirchner J. had awarded special damages for the loss of the Blue Mountain opportunity in *Pineau/KMI SC #2*, he would not have factored that loss into the assessment of general damages, and that award would have been lower. It would follow in those circumstances that the higher award substituted by this Court in *Pineau/KMI CA* would also have been lower since this Court accepted that the judge had been correct in factoring the possibility of the lost opportunity into his assessment of general damages.

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[91] As I see it, then, the award of general damages in *Pineau/KMI SC #2* did include an amount referable to the loss of the same Blue Mountain opportunity that was fully assessed on different evidence in *Pineau/Glacier SC*, as adjusted above. Accordingly, a reduction of the award for special damages for mitigation is appropriate. But by how much?

[92] It seems to me that to apply a reduction of 40% to the special damages award of $380,000 as assessed above would be nonsensical. That would yield a reduction of some $152,000, greater than the total general damages awarded by this Court in *Pineau/KMI CA*. Moreover, the 40% applied by the judge took into account the apologies. As suggested above, the apologies were made far too late to have had any meaningful effect on the claim for special damages given the period of the loss.

[93] I note further that the unspecified portion of the general damages award in *Pineau/KMI SC #2/Pineau/KMI CA* referable to the loss of the Blue Mountain opportunity must necessarily have been much less than the loss proven in *Pineau/Glacier SC*. That is the comparison I must make. On the basis of the manner in which the general damages were assessed in both courts, with the errors of the judge below corrected, I conclude that a reduction of the special damages award in this case by $30,000 (equivalent to 25% of the general damages in *Pineau/KMI CA*) would be fair and reasonable in mitigation of damages the appellant has already recovered.

8. DISPOSITION

[94] For these reasons, I would allow the appeal and cross-appeal only to the extent of setting aside the judge’s award of special damages in the amount of $180,000 and substituting an award of special damages in the amount of $330,000,

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reduced for mitigation pursuant to section 11 of the *LSA* from an assessment of $360,000.

“The Honourable Mr. Justice Grauer”

I AGREE:

“The Honourable Madam Justice Fisher”

I AGREE:

“The Honourable Madam Justice Horsman”

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