File No. 33900

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

RICHARD C. BREEDEN, RICHARD C. BREEDEN & CO., GORDON A. PARIS, JAMES R. THOMPSON, RICHARD D. BURT, GRAHAM W. SAVAGE and RAYMOND G.H. SEITZ

APPELLANTS
(Appellants)

- and -

CONRAD BLACK

RESPONDENT
(Respondent)

AND BETWEEN:

RICHARD C. BREEDEN, RICHARD C. BREEDEN & CO., GORDON A. PARIS, JAMES R. THOMPSON, RICHARD D. BURT, GRAHAM W. SAVAGE and RAYMOND G.H. SEITZ

APPELLANTS
(Appellants)

- and -

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RESPONDENT
(Respondent)

(Style of cause continues inside pages)

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APPELLANTS' FACTUM

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. These cases raise the issue of "libel tourism" – forum shopping in which a plaintiff brings an action in the jurisdiction most likely to give a favourable result, even though the jurisdiction has no real and substantial connection to the matters at issue in the action. This Court must consider the circumstances in which Canadian courts should not assume jurisdiction over libel suits based on alleged defamatory statements made in foreign countries but accessed over the Internet in Canada.

2. Conrad Black ("Black") is a libel tourist. He brings these actions (the "Actions") in Ontario even though he is no longer a Canadian citizen and, as a convicted felon, cannot enter the country. Black sues in respect of statements that were made by Hollinger International Inc. ("International") in New York City and relate to a report of an American-based court-sanctioned investigation by International's directors and advisors into wrongdoing by Black in connection with his operation, as Chair and CEO, of International – a public company incorporated in Delaware, headquartered in New York and Chicago, and subject to the securities, criminal and other laws of the United States (the "Investigation Report"). The Investigation Report was filed with the United States Securities and Exchange Commission (the "SEC") and with a U.S. court in accordance with a U.S. court order. Nine of the ten defendants have no connection to Ontario. The statements at issue were published by International in New York in fulfillment of its disclosure obligations under U.S. securities laws.

3. Currently, under the common law, lower courts have accepted that a libel occurs where it is read by a third party. But in the Internet age, the reflexive application of that principle leads to Canadian courts almost invariably assuming jurisdiction when a foreign-published statement is merely downloaded in Canada, on the basis that the tort occurred here. This is inconsistent with a "restrained" approach to jurisdiction based on "order and fairness". Mere downloading of a statement cannot constitute a "real and substantial" connection between the action and the

jurisdiction, as required by this Court in *Morguard*.[1] The "place of reading" approach ignores the reality that Internet publications may be read around the world simultaneously, and therefore essentially confers jurisdiction upon any forum selected by a plaintiff.[2] Further, the current approach raises significant comity concerns as it ignores the principle of territoriality and that principle's respect for the variations in the laws of different jurisdictions discussed by this Court in *Tolofson*.[3]

4. The misguided emphasis of English courts on the place of downloading or reading has caused England to become known as the libel capital of the world,[4] and the failure to impose jurisdictional restraint has provoked Parliamentary intervention.[5] American legislators, appalled by the impact of English libel law on American free speech protections, and following the lead of U.S. Courts, have implemented federal and state legislation to protect American citizens from defamation suits abroad.[6]

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1 *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at 1103, 1108 [*Morguard*], Appellants' Book of Authorities ("**BA"**) **Tab 43**.

2 See *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 [*SOCAN*], **BA Tab 54**. There, this Court found that Internet communications occur where they are posted and read – "both here and there" (para. 59). Unlike in *SOCAN* (para. 77), however, this case squarely raises the issue of whether the Canadian courts can and should take jurisdiction over foreign defendants (here, in respect of an alleged libel) arising from actions performed wholly in a foreign jurisdiction.

3 *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 [*Tolofson*], **BA Tab 57**.

4 In the words of Deputy Prime Minister Clegg, English libel law has become "a legal farce where people and corporations with money can impose silence on others at will": quoted in Andrew Klein, "Some Thoughts on Libel Tourism" (2010) 38 Pepp. L.R. 101 at 119 [emphasis added] [Klein], **BA Tab 89**. More recently Mr. Clegg described the English libel system as " a farce and an international embarrassment": Jill Lawless, "British coalition vows to end 'embarrassing' overbroad libel laws," *The Globe and Mail* (7 January 2011), online: The Globe and Mail www.theglobeandmail.com/news/world/europe/british-coalition-vows-to-end-embarrassing-overbroad-libel-laws/article1861415, **BA Tab 90**.

5 A draft *Defamation Bill* is before the House of Lords that, if passed, will significantly transform English libel law, largely with a view to putting a stop to libel tourism: Bill 003, *Defamation Bill* [HL], 2010-11 Sess., 2010 [*HL Bill*], **BA Tab 70**.

6 U.S., *Securing the Protection of our Enduring and Established Constitutional Heritage Act* (the "*SPEECH Act*"), Bill H.R. 2765, 111th Cong., 2010, codified at Public Law 111-223 ("[n]otwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a judgment for defamation unless the domestic court determines that . . . the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and laws of the State in which the domestic court is located."), **BA Tab 77**; New York, *Libel Terrorism Protection Act*, N.Y. Sess. Laws Ch. 66, codified at NY CPLR §302(d), § 5304(b)(8) (2008) ("[a] foreign country judgment need not be recognized if . . .the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting

5. The issue of Internet defamation and libel tourism requires this Court to consider the proper balance between protection of reputation, freedom of expression and jurisdictional restraint. The proper approach to the real and substantial connection test in cases involving transnational libel is to consider whether a real and substantial connection exists between the substance of the action and the forum. This reflects the fact that a cause of action for libel arises from a series of events, including making the statement, the underlying facts and conduct which is the subject matter of the statement, publishing or disseminating it, and the reading of it by a third party. While the reading of a libel may be relevant to damages, the focus of libel actions is almost always on the defences, which requires consideration of the conduct of the defendants, and the substance and subject matter of the statements and the context in which they were made. These factors are also consistent with the core of the real and substantial connection test as recognized by Sharpe J.A. in *Van Breda* – the connection between the substance of the claim and the forum, and the connection between the defendants and the forum[7] – and as set out in the Uniform Law Conference model *Court Jurisdiction and Proceedings Transfer Act* ("*CJPTA*"), which focuses on "the facts on which the proceeding against that person is based."[8] Applying this approach, the facts of these cases – where the defendants, if necessary, will be raising many defences – lead to the inescapable conclusion that Ontario should not assume jurisdiction over these essentially American actions.

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in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York Constitutions."), **BA Tab 73**; Illinois, S.B. 2722, Illinois Public Act 95-0865 (2008), codified at 735 Ill. Comp. Stat. § 2-209(b-5) and § 12-621(b)(7) (2009) ("[a] foreign judgment need not be recognized if . . . the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless a court sitting in this State first determines that the defamation law applied in the foreign jurisdiction provides at least as much protection for freedom of speech and the press as provided for by both the United States and Illinois Constitutions."), **BA Tab 71**. Other states have passed similar laws. See, for example: Florida, H.B. 949/S.B. 1066, 2009 Leg. Reg. Sess. (Fla. 2009), codified at Fla. Statutes § 55.605(2)(h) and § 55.6055, **BA Tab 69**; California, S.B. 320, 2009-2010 Leg. Reg. Sess. (Cal. 2009), codified at Cal. Code of Civil Proc. §1716(b)(9), **BA Tab 66**; Maryland, H.B. 193, 2010 Leg. Reg. Sess. (Md. 2010), codified at Md. Code Ann., Cts. & Jud. Proc. § 6-103.3 and § 10-704(2), **BA Tab 72**.

7 *Van Breda v. Village Resorts Limited*, 2010 ONCA 84 at para. 84 [*Van Breda*], **BA Tab 61**, leave to appeal to this Court granted (S.C.C. File Nos. 33606 and 33692). See also La Forest J. in *Morguard*, *supra*, at 1103, that "it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit" [emphasis added], **BA Tab 43**.

8 Uniform Law Conference of Canada, *Uniform Court Jurisdiction and Proceedings Transfer Act* at s. 4, **BA Tab 99**.

6. The Court of Appeal for Ontario applied a test that created a presumption of taking jurisdiction when, as here, statements published abroad are downloaded in Ontario. The Court minimized the almost exclusively American facts of the cases – including the context in which the words were published in compliance with International's SEC and other U.S. legal obligations, and U.S. free speech protections preventing enforcement of any judgment Black might obtain in Canada. The Court of Appeal also seized upon the mere fact that, at the bottom of the International press releases, which form the basis of some but not all of the Actions, New York City telephone numbers (area code 212) were provided as contact information for "US/Canada" and "UK" media.[9] Based upon this reference to "US/Canada", the Court held, unreasonably, that the statements in all of the Actions were therefore "targeted" to Ontario. But even if a "targeting" approach is considered, jurisdiction must still rest upon a considered analysis of whether the connection to Canada (or Ontario) was "real and substantial", rather than upon a tenuous finding based on the provision of a contact number available to, among others, Canadian media.

7. Ontario is also clearly not the convenient forum. This is a rare case in which not even the plaintiff is in the jurisdiction. As the motions judge noted, "the main focus at trial will most likely be the truth of what was said".[10] The courts below acknowledged that "the underlying factual context of the claims involves significant connections to the [U.S.]", and that "the key witnesses and the bulk of the documentary evidence are currently located in the U.S."[11] The matters in issue in the Actions are the subject of pre-existing litigation in Illinois, and another Ontario court ruled in 2004 that those matters are more appropriately heard in Illinois, rather than duplicated in Ontario. That decision was erroneously ignored by the courts below. The motions judge was clearly wrong and acted unreasonably in exercising his discretion to find that Ontario was the appropriate forum, and the Court of Appeal erred in deferring to him. Both New York and Illinois are clearly more appropriate forums for the trial of the Actions, which will also involve consideration and application of U.S. law.

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9 See, e.g., International Press Release, Appellants' Record ("AR") Vol. VI at 41.

10 Reasons of Belobaba J. ("Motion Reasons"), AR Vol. I at 22 (para. 90).

11 Reasons of the Court of Appeal ("CA Reasons"), AR Vol. I at 55, 65 (paras. 48, 83); Motion Reasons, AR Vol. I at 22 (para. 90).

B. FACTS

i. The Nature Of The Actions: Statements Made In The United States

8. The Actions[12] brought by Black concern statements arising out of and relating to the investigation and the Investigation Report that was filed with the SEC and the United States District Court for the Northern District of Illinois (the "U.S. Court") pursuant to a January 16, 2004 consent order entered by the U.S. Court (the "U.S. Order"), an Annual Report of International, and certain International press releases, all of which were posted by International, an American company governed by U.S. securities and other laws, in New York on its website.

9. The Actions initially complained of republication in the media in the United States, the United Kingdom, Canada and elsewhere. Subsequently, Black's daughter (but not Black himself) tendered an affidavit stating that Black is "only suing" for damages in Ontario from statements downloaded and republished by newspapers in Ontario.[13] In response to the defendants' motion to challenge jurisdiction and forum, Black amended his claims to limit his complaint to damage to his reputation in Ontario.

ii. The American Context In Which The Statements Were Made

10. International is a Delaware corporation. It trades publicly in the United States. Its shares are registered with the SEC, and have never been listed on any Canadian stock exchange. Since 1997, International has had its principal executive office in either Chicago or New York.[14] International's corporate records, Board minute books and its auditors are located in Illinois. International's Audit Committee and Board meetings were usually held in Illinois or New York (or sometimes by phone), as were its annual shareholders' meetings.[15]

11. Through its operating subsidiaries, International publishes *The Chicago Sun-Times* and several community newspapers in the Chicago area. International divested most of its Canadian

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12 Amended Statements of Claim, AR Vol. I at 86-212, Vol. II and Vol. III.
13 Affidavit of Alana W.E. Black ("A. Black Affidavit"), AR Vol. XIX at 178 (para. 37).
14 Affidavit of James D. McDonough ("McDonough Affidavit"), AR Vol. IV at 38 (para. 20).
15 McDonough Affidavit, AR Vol. IV at 39-40 (paras. 24-27).

newspaper assets in 2000 and 2001, and in 2004 sold its ownership of *The Daily Telegraph* and *The Jerusalem Post*.[16]

12. In May and June 2003, a New York-based shareholder of International called for an investigation and demanded disgorgement of "non-compete" and "management services" payments made to Black and entities he controlled.[17] This caused the International Board, including Black, to form the Special Committee to investigate the allegations, determine whether its officers and directors had acted appropriately, and bring litigation if appropriate. Gordon Paris, Raymond Seitz and Graham Savage ("Savage") were members of the Special Committee, which retained Richard C. Breeden ("Breeden"), a former Chair of the SEC, and his company, Richard C. Breeden & Co. to advise it.[18] The vast majority of the Special Committee's work was conducted in the U.S., although some interviews were conducted and some documents were taken in the U.K. and Canada. The documents from the investigation are kept in the United States.[19]

13. In late October 2003, the Special Committee concluded that certain payments Black and others received from International had not been properly authorized. This ultimately resulted in Black agreeing to a "Restructuring Proposal", the terms of which included, among others, the repayment by Black and the other recipients of US $32.15 million in unauthorized non-competition payments and an agreement that the Special Committee investigation would continue. In accordance with its disclosure duties under U.S. securities laws, International announced the key features of the Restructuring Proposal to the public and its shareholders in a press release.[20]

14. On January 5, 2004, in another press release issued in New York pursuant to its disclosure obligations under U.S. securities laws, International announced that Black was being

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16 McDonough Affidavit, AR Vol. IV at 38 (para. 21).

17 McDonough Affidavit, AR Vol. IV at 43 (paras. 36-37).

18 McDonough Affidavit, AR Vol. IV at 44-45 (paras. 38-40). Breeden was retained as outside legal counsel to the Special Committee to conduct the investigation into Black and his colleagues that the U.S. Court ordered in January 2004 be continued and, pursuant to the U.S. Order, Breeden was designated the Special Monitor of International to, among other things, protect the interests of the non-controlling International shareholders upon the occurrence of certain triggering events: U.S. Order, AR Vol. X at 193 *et seq.*

19 McDonough Affidavit, AR Vol. IV at 45 (para. 41).

20 McDonough Affidavit, AR Vol. IV at 45-47 (paras. 42, 45-47).

granted additional time to commence making the repayments required under the Restructuring Proposal. This is one of the two press releases complained of in the first three Actions.[21]

15. On January 16, 2004, the U.S. Court entered the U.S. Order, which, among other things, put in place procedures designed to permit the investigation to proceed without interference from Black and directed the Special Committee to file its Investigation Report with the U.S. Court and the SEC.[22]

16. On January 17, 2004, International's Executive Committee met via teleconference and voted to remove Black as Chair. This development was disclosed by International in a press release that it issued that day in accordance with its obligations under U.S. securities laws. Black also complains about this press release in the first three Actions.[23]

17. The next day, January 18, 2004, Black announced that he was selling Hollinger Inc. (which had voting control of International) to Press Holdings International Ltd., owned by the Barclays in London. This announcement constituted Black's repudiation of the Restructuring Proposal (which provided that Black would cooperate with International's strategic process), as it would have resulted in the Barclays gaining control of International.[24]

18. As announced in a press release that International issued from New York on January 20, 2004 in accordance with its disclosure obligations under U.S. securities laws, the Board: (i) formed a Corporate Review Committee to consider International's options, including to prevent Black from selling Hollinger Inc.; and, (ii) adopted a resolution expanding and clarifying the Special Committee's powers.[25] International then sued to enforce the Restructuring Proposal and enjoin the Barclays' Transaction. The Delaware Court of Chancery, applying Delaware law, found for International on virtually every issue.[26] The Special Committee thereafter continued

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21 McDonough Affidavit, AR Vol. IV at 47 (para. 48); International Press Release, AR Vol. VI at 39-41. See also: Amended Statements of Claim, AR Vol. I at 190-191 (First Action (04-CV-263720CM1)) and 208-209 (Second Action (04-CV-265298CM1)), and AR Vol. II at 106-107 (Third Action (04-CV-265299CM2)).

22 U.S. Order, AR Vol. X at 189-210.

23 McDonough Affidavit, AR Vol. IV at 47 (para. 49); International Press Release, AR Vol. VI at 49-50.

24 McDonough Affidavit, AR Vol. IV at 47-48 (para. 50).

25 McDonough Affidavit, AR Vol. IV at 48 (paras. 51-52).

26 McDonough Affidavit, AR Vol. IV at 49-51, 54-55 (paras. 55-59, 63-65); Delaware Court of Chancery's opinion in *Hollinger Int'l, Inc. v. Black et al.*, AR Vol. VII at 54-125; Order and Final

its investigation and prepared the Investigation Report, which, as noted, was then filed with the SEC and the U.S. Court, on behalf of the Special Committee, in accordance with the U.S. Order. This judicially-mandated report forms the basis of the fifth and sixth Actions.[27] (As discussed below at paragraph 24, the fourth Action relates to a press release about another one of International's legal proceedings – in the United States – against Black.)

19. If required to defend the Actions, the defendants will plead that the statements complained of were true and were required by, and made in accordance with, U.S. securities laws, which, like Ontario's *Securities Act*, demand immediate announcements of material developments in a company's affairs, and pursuant to the directives of the U.S. Order.[28]

iii. The Plaintiff's Significant Connections To The United States

20. Black is a citizen of the United Kingdom. He renounced his Canadian citizenship in 2001 to become a British peer. Black admits that he "has engaged for decades in substantial business activity in the United States and continues to retain substantial financial interests" there, that he has been "extensively investing in the American economy as a business owner over many years" and that "he is a party, both as plaintiff and as defendant, in extensive civil litigation in the United States".[29] At the time these Actions were brought, Black maintained two residences in the United States – in New York City, and in Florida.[30]

Judgment of Judge Strine of the Delaware Court of Chancery, AR Vol. VIII at 1-9; and Decision of the Delaware Supreme Court (affirming Judge Strine's decision), AR Vol. VIII at 10-20.

27 Amended Statements of Claim, AR Vol. II at 124-150 (Sixth Action (05-CV-285535PD2)) and 181-216 (Fifth Action (04-CV-276761CM2)).

28 McDonough Affidavit, AR Vol. IV at 41 (paras. 29-30); *Securities Act*, R.S.O. 1990, c. S.5, s. 75(1), Part VII hereto; *Securities Exchange Act of 1934*, 15 U.S.C. § 78m(l), **BA Tab 76**. See also NYSE Listed Co. Manual §§ 202.05 & 202.06 (in effect during the time relevant to the Actions, these sections required companies listed on the New York Stock Exchange, such as International, to immediately release material information via press releases), **BA Tab 74**. See generally NYSE Listed Co. Manual §202.06, amended May 8, 2009 (providing that the immediate-disclosure requirement may be satisfied by listed companies via a press release, the filing of a Form 8-K with the SEC or by some other method designed to provide broad public dissemination), **BA Tab 75**. In addition, International's Board had resolved that "The Special Committee shall report its conclusions regarding the allegations to the stockholders of the Company pursuant to public disclosure or otherwise, at such time and in such manner as the Special Committee deems appropriate": Minutes of the January 20, 2004 Board meeting, AR Vol. VI at 62.

29 McDonough Affidavit, AR Vol. IV at 33-35 (paras. 5-7).

30 *Ibid*.

21. After a criminal jury trial in the U.S. Court that resulted in his conviction on multiple felony counts relating to matters at issue in the investigation and the Investigation Report and an obstruction of justice charge, Black was sentenced to a six-and-a-half year prison term.[31] Although subsequent proceedings resulted in his convictions on certain counts being overturned based on the U.S. Supreme Court's narrowing of the underlying legal doctrine, convictions for fraud and obstruction of justice remain, and Black is to be resentenced in June 2011.[32] As a convicted felon and non-Canadian, Black cannot enter Canada.[33]

iv. The Defendants' Lack Of Connections To Canada

22. All of the defendants, other than Savage and Shmuel Meitar (who resides in Israel), reside in the United States.[34] Only Savage resides in and has assets in Ontario. The defendants, other than Breeden and his company, and Paul Healy (who was a Vice President, Corporate Development), were Directors of International at various times between 1994 and 2005.

v. The Related American Legal Proceedings

23. There were and are numerous civil and criminal legal proceedings that arose out of the events at issue in the Actions, almost all of which are in the United States. The suits include: claims and counterclaims between International (and its directors, officers, and advisors, including the defendants in the Actions) and Black and entities controlled or owned by him; claims by the SEC against International; claims by the SEC against Black and others; shareholders' class actions against International, Black and several of the defendants; and criminal proceedings against Black and others. Many of the issues raised in the Actions have been, or are being, adjudicated in other proceedings in the United States, where the events occurred and the documentary evidence, parties and witnesses are located.[35]

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31 McDonough Affidavit, AR Vol. IV at 33-34, 64 (paras. 5, 92).

32 *Black et al. v. United States*, 561 U.S. _ (2010), **BA Tab 11**; Paul Waldie, "No retrial for Black on 2 fraud convictions," *The Globe and Mail* (13 January 2011), online: The Globe and Mail www.theglobeandmail.com/news /world/americas/no-retrial-for-black-on-2-fraud-convictions/article1869101, **BA Tab 100**.

33 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 36, Part VII hereto.

34 McDonough Affidavit, AR Vol. IV at 35-37 (paras. 8-17). See also: Amended Statements of Claim, Fifth Action, AR Vol. II at 153-155 (paras. 3-8) and Sixth Action, AR Vol. II at 128-129 (paras. 3-10).

35 McDonough Affidavit, AR Vol. IV at 49-73 (paras. 53-120); Motion Reasons, AR Vol. I at 22 (para. 90).

24. The U.S. proceedings include the "Illinois Action", in which International alleges against Black and others, breaches of fiduciary duties in connection with the diversion of at least US $90 million from International through non-competition payments that were not authorized by the Board or were authorized as a result of misrepresentations, and were unfair to International's public majority non-controlling shareholders. International also seeks recovery of excessive management fees that were not negotiated at arm's length or otherwise failed to accord with the applicable laws of Delaware. (A similar complaint previously filed in New York was voluntarily dismissed and the matters were pursued instead in the Illinois Action – this discontinued New York action was disclosed by International, in fulfillment of its obligations under U.S. securities laws, in its press release of January 17, 2004, which is complained of in the first three Actions.)[36] While initially started as a separate claim, Black was ordered to pursue his claim to enforce certain stock option agreements as a counterclaim in the Illinois Action because the court would "need to determine if Black breached his fiduciary duty to International" in order to resolve the issues underlying both International's and Black's claims. International sought (and was granted) leave to amend the Illinois complaint in May 2004 and, in satisfaction of its disclosure obligations under U.S. securities laws, International issued a press release regarding the proposed amendment. This press release forms the basis of the fourth Action.[37]

25. The Illinois Action was actively litigated – more than two million pages of documents were exchanged, and depositions started – before it was stayed at the request of the U.S. Attorney's Office pending resolution of Black's criminal trial (and now the appeals).[38] The truth of the statements impugned by Black in the Actions is being litigated in the Illinois Action.

26. Litigation in Ontario has been stayed in recognition that the U.S. courts are the more appropriate forum. In a replevin action by International to recover property being held in Toronto, the defendants – Black privies – counterclaimed and two of them brought a motion for an anti-suit injunction requesting a stay of any claims outside Ontario relating to the management of the Hollinger group of companies, including the Illinois Action. The Ontario Superior Court

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36 International Press Release, AR Vol. VIII at 21-23.

37 McDonough Affidavit, AR Vol. IV at 55-58, 68-69 (paras. 66, 68-70, 72-74, 101-105); Order of the District Court for the Northern District of Illinois dated May 13, 2004, AR Vol. XVIII at 1-3; Memorandum and Order of the District Court for the Northern District of Illinois dated November 8, 2004, AR Vol. XVIII at 4-11; Amended Statement of Claim, AR Vol. II at 122-123 (Fourth Action (04-CV-270773CM1)).

38 McDonough Affidavit, AR Vol. IV at 58 (paras. 75-76).

dismissed the motion and stayed the counterclaim until the final disposition of certain U.S. proceedings, including particularly the one in Illinois, which was considered the more appropriate forum for resolution of these disputes.[39]

vi. The Decisions Below

27. In the Superior Court, Justice Belobaba addressed the "real and substantial connection" test by purporting to apply the eight factors listed in *Muscutt*.[40] He found, unreasonably, that only one of the eight factors – the international nature of the Actions – favoured the defendants.[41]

28. The Ontario Court of Appeal took the view that the tort was committed in Ontario because the statements made by International in fulfillment of its obligations under U.S. securities laws were downloaded and read in Ontario. Accordingly, under the *Van Breda* approach, there was a "presumption" of jurisdiction, which the Court concluded was not rebutted. The Court gave inadequate consideration to the need to prevent jurisdictional overreaching in cases involving statements that are widely disseminated over the Internet. Instead, the Court likened the statements to defective products that enter "normal distributive channels" and reasoned – based solely on the "US/Canada Media" contact number that appeared on International press releases – that the statements were "specifically directed to Canadian media."[42]

29. In considering the connection between the claims and Ontario, the Court of Appeal focussed on reputational harm to Black in Ontario rather than the facts underlying the Actions. The Court minimized the fact that in a libel case, including these Actions, the evidence rarely turns on how much reputational harm is caused (harm is usually presumed and damages are "at large"[43]) but, rather, on whether the words are true, privileged or defensible on other grounds,

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39 The Divisional Court dismissed Ravelston's motion for leave to appeal: McDonough Affidavit, AR Vol. IV at 69-72 (paras. 106, 111-117); Reasons of Justice Farley, and Reasons of Justice Power, AR Vol. XVIII at 110, 112 (paras. 3, 8) and 155 (para. 15), respectively.

40 *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.) [*Muscutt*], **BA Tab 45**.

41 Motion Reasons, AR Vol. I at 20 (para. 80). Belobaba J. so found despite all of the evidence to the contrary on the other factors, including: the non-Canadian residences of all but one of the parties (including the plaintiff); the subject matter (conducting the affairs of an American corporation under American law); unfairness to the defendants; the involvement of the U.S. Department of Justice, the SEC, and more than one U.S. court; and the fact that an Ontario libel judgment would be unenforceable in the United States.

42 CA Reasons, AR Vol. I at 52, 57-58, 60 (paras. 39, 56-57, 65).

43 Black does not seek special damages in any of the six Actions.

such as the American legal context in which they were published[44] – including the directives contained in the U.S. Order and the disclosure requirements of U.S. securities laws. The Court mentioned, but gave no weight to the fact that Black cannot enter Ontario, or that judgments in the Actions would be unenforceable in the United States.[45]

PART II – QUESTIONS IN ISSUE

30. There are two issues on this appeal:

(a) The proper test for assuming jurisdiction over transnational defamation cases and whether jurisdiction was properly assumed by the courts below in these Actions; and

(b) The proper approach to *forum non conveniens* in transnational defamation cases, and whether it was properly applied by the courts below in these Actions.

PART III – STATEMENT OF ARGUMENT

A. JURISDICTION

i. The Development Of A Real And Substantial Connection Test

31. In *Morguard*, this Court held that there must be a "real and substantial" connection between the subject matter of the action and the forum in order for courts to assume jurisdiction over out-of-province defendants.[46] *Morguard* holds that the "real and substantial test" is a flexible test intended "to capture the idea that there must be some limits on the claims to jurisdiction" and that the assumption of jurisdiction depends on principles of "order and fairness" and "jurisdictional restraint". It must be "guided by the requirements of order and fairness, not a

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44 CA Reasons, AR Vol. I at 56, 65-66 (paras. 50, 83-84).
45 CA Reasons, AR Vol. I at 53-54, 62 (paras. 44, 72).
46 *Morguard*, *supra*, at 1108, **BA Tab 43**.

mechanical counting of contacts".[47] As Justice La Forest stated: "it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit".[48]

32. The development of the real and substantial connection test in *Morguard* and *Hunt*,[49] the overhaul of choice of law rules in *Tolofson*, and the elaboration on the doctrine of *forum non conveniens* in *Amchem*[50] reflected the recognition by this Court that rigid rules that favoured jealous guarding of jurisdiction and sovereignty were out of step with a modern, interdependent country, and world. The test requires courts to respect territorial limits, foreign laws and foreign judgments, and "the legitimate actions of other states inherent in the principle of international comity" and not "unduly [enter] into matters in which the jurisdiction in which it is located has little interest."[51] Accordingly, the real and substantial connection test is intended to prevent jurisdictional overreaching. It does so by imposing discipline and restraint on the assumption of jurisdiction. As this Court stated in *Beals v. Saldanha*:

> The "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.[52]

ii. Application Of The Real And Substantial Test: *Muscutt, CJPTA* And *Van Breda*

33. In *Muscutt v. Courcelles*, decided in 2002, the Ontario Court of Appeal set out eight factors to consider in applying the real and substantial connection test:

(i) the connection between the forum and the plaintiff's claim;

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47 *Muscutt*, *supra*, at paras. 34, 37 (citing this Court's decision in *Hunt*, *infra*), **BA Tab 45**.

48 *Morguard*, *supra*, at 1103 [emphasis added], **BA Tab 43**.

49 *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 [*Hunt*], **BA Tab 30**.

50 *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 [*Amchem*], **BA Tab 2**.

51 *SOCAN*, *supra*, at para. 60, **BA Tab 54**; *Tolofson*, *supra*, at 1049, **BA Tab 57**. As La Forest J. put it, modern states "cannot live in splendid isolation": *Morguard*, *supra*, at 1095, **BA Tab 43**.

52 *Beals v. Saldanha*, 2003 SCC 72 per Major J. at para. 32 [emphasis added] [*Beals*], **BA Tab 9**. See also: *Libman v. The Queen*, [1985] 2 S.C.R. 178 at 212-213 [*Libman*], **BA Tab 34**.

(ii) the connection between the forum and the defendant;

(ii) unfairness to the defendant in assuming jurisdiction;

(iv) unfairness to the plaintiff in not assuming jurisdiction;

(v) the involvement of other parties to the suit;

(vi) the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;

(vii) whether the case is interprovincial or international in nature; and

(viii) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.[53]

34. The Ontario Court of Appeal was recently urged to abandon the *Muscutt* approach and adopt the *CJPTA*[54] which confirms the real and substantial connection test, but also lists jurisdictional connections that presumptively establish a real and substantial connection – though the presumptions are rebuttable. In *Van Breda*, Sharpe J.A. modified the *Muscutt* test to accept the presumptions in the *CJPTA*, but also clarified that the core of the real and substantial connection test is the connection the plaintiff's claim has to the forum and the connection of the defendants to the forum. The remaining *Muscutt* factors are simply "analytic tools to assist the court in assessing the significance of the connections between the forum, the claim and the defendant."[55]

35. Following the *CJPTA*, the approach in *Van Breda* elevates the importance of "place of tort" in the jurisdictional analysis by creating a presumption of a real and substantial connection where the tort was committed in the jurisdiction. On the other hand, *Van Breda* specifically excludes from the presumptive list situations where the plaintiff has suffered damages in Ontario.[56] *Van Breda* is, of course, now before this Court.

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53 *Muscutt*, *supra*, at paras. 77-109 (although the list of factors is described as non-exclusive, courts have consistently applied these eight), **BA Tab 45**.

54 *CJPTA*, *supra*, **BA Tab 99**.

55 *Van Breda*, *supra*, at para. 84, **BA Tab 61**.

56 *Van Breda*, *ibid.*, at paras. 71-72, 78, 109, **BA Tab 61**. The Court of Appeal held that, with two exceptions, the presumption of a real and substantial connection arises whenever one of the categories for service *ex juris* under Ontario's *Rules of Civil Procedure* applies – such as, for

(a) Appellants' Position On Jurisdiction

36. The *Muscutt* test has been criticized for being too subjective and therefore creating too much uncertainty, while the *CJPTA* approach has been criticized as being too rigid. These criticisms are illustrated by the findings of the courts below in these Actions. In the Superior Court, despite the overwhelming American context of this case, Belobaba J. decided – unreasonably and subjectively – that seven of the eight *Muscutt* factors supported Ontario assuming jurisdiction.[57] The Court of Appeal, following *Van Breda* and its incorporation of the *CJPTA* presumptions, assumed jurisdiction largely on the theory that the tort was committed in Ontario – even though the actions of the defendants occurred in the United States and the only sense in which the tort was "committed" in Ontario was that the statements were downloaded and read there, i.e., that Black was allegedly damaged in Ontario; this does not give rise to a presumption of jurisdiction.[58] The approaches by the courts below led the courts away from the core test, namely, the real and substantial connection between the forum and, as the *CJPTA* puts it, "the facts on which the proceeding against that person is based."[59]

37. Accordingly, and as elaborated below, this Court should articulate a test that provides certainty but is flexible enough to ensure that the real and substantial connection test is applied in every case. These appeals demonstrate that more certainty is required than the *Muscutt* approach provides and that *presumptions* are undesirable when inconsistent with a real and substantial connection. In these Actions, the only basis to say the tort of defamation was committed in Ontario was because damage was allegedly suffered there (a legal proposition this Court should reconsider). However, this factor – damage suffered – is properly excluded from the

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example, claims in respect of "real or personal property in Ontario" or a "contract made in Ontario", R.R.O. 1990, Reg. 194, r. 17.02, Part VII hereto.

57 In discussing the *Muscutt* factors, Justice Belobaba made several comments that betrayed his own apparent sympathy for Black and his claims – the merits of which (contrary to his assertion) were not argued before him and are not relevant to the matters in issue. For example, Justice Belobaba speculated (without evidence) that Black may have been "forced" to give up his Canadian citizenship. He also commented gratuitously upon the severity of the crimes for which Black was convicted, the fallibility of juries and the substance and objectives of required disclosures made by defendants in accordance with U.S. securities laws and the U.S. Order: Motion Reasons, AR Vol. I at 12, 20 (paras. 37-40, 80).

58 The Court also gave considerable weight to the 'unfairness' that would result if Black was deprived of "a trial before the community in which his reputation has been damaged": CA Reasons, AR Vol. I at 50-53, 59 (paras. 32-42, 63); *Van Breda*, *supra*, at para. 78, **BA Tab 61**.

59 *CJPTA*, *supra*, at s. 4, **BA Tab 99**.

presumptions in the *CJPTA*. Ultimately, the test requires consideration of the core points identified by Sharpe J.A. in *Van Breda* – the connection between the substance of the claim and the forum, and the connections between the defendants and the forum.

iii. Application Of The Real And Substantial Test To Transnational Libel

(a) Appellants' Position: The Substance Of The Claim

38. Transnational libel – especially in the age of the Internet – raises special challenges in resolving the jurisdiction question. As this Court noted in *SOCAN*, internet communications occur both "here and there"[60] – indeed everywhere. A lack of restraint may easily lead courts – as it has generally in England and specifically in these Actions – to assume jurisdiction over matters with only a "fleeting or relatively unimportant connection" in a forum with which the defendants have little or no connection,[61] and no expectation of being sued.[62] It also raises concerns regarding conflicts of laws, differing values relating to protection of speech and reputation, and the danger of one jurisdiction inappropriately imposing differing laws and values on the conduct of persons elsewhere. This is why this Court in *Libman*, which involved a dispute over whether a transnational fraud had occurred in Canada, required "that a significant portion of the activities constituting the offence" take place in Canada.[63]

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60 *SOCAN*, *supra*, at para. 59, **BA Tab 54**. In *SOCAN*, this Court reinforced that the real and substantial connection test is meant to prevent jurisdictional overreaching in the context of "international Internet transmissions in a way that will accord with international comity and be consistent with the objectives of order and fairness" (para. 60). Thus, while a Canadian court "*could* exercise copyright jurisdiction in respect both of transmissions originating here and transmissions originating abroad but received here" (para. 76 [emphasis in original]), the actual exercise of jurisdiction – and the application of Canadian law to such a dispute (para. 57) – requires a real and substantial connection between Canada and the transmission in question. The determination of whether a sufficient connection exists "will turn on the facts of [the] particular transmission." (para. 77). As the Court stated, albeit in the context of copyright, at para. 61: "In terms of the Internet, relevant connecting factors would include the *situs* of the content provider, the host server, the intermediaries and the end user. The weight to be given to any particular factor will vary with the circumstances and the nature of the dispute."

61 *Beals*, *supra*, at para. 32, **BA Tab 9**.

62 As Belobaba J. noted: "the defendants may not have expected as being probable or likely that they would cause injury in Ontario", Motion Reasons, AR Vol. I at 15 (para.55).

63 *SOCAN*, *supra*, at para. 58 (citing *Libman*, *supra* with approval), **BA Tab 54**.

39. Further, as *Castel and Walker* states: "[t]he challenges to choice of law analysis in cases of defamation are increased by the fact that, in Canada, each communication is regarded as a separate publication that gives rise to a distinct cause of action governed by its own law."[64]

40. Accordingly, the jurisdiction test must examine where, in substance, the cause of action is based, and whether it is sufficiently, substantively, based in the forum where the plaintiff has brought the action. This is, in fact, the "real and substantial connection" test without undue consideration of irrelevant, extraneous or discretionary subjective factors – a test that is orderly, and therefore fair. As Lord Pearson put it in *Distillers Co. v. Thompson*:

> The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise?[65]

41. The "series of events constituting" a cause of action for libel include the act of creating or making a defamatory statement, publishing or disseminating it, and having it subsequently heard or read. While the nature and extent of the dissemination are relevant to damages, more relevant to the claim itself, because they bear directly on the defences to libel, are the substance, subject matter and conduct giving rise to the words complained of and the context in which they were made. An objective evaluation of these factors prevents plaintiffs from making the facile assertion that there is a "real and substantial" connection to a particular jurisdiction simply because their claim is in respect of harm allegedly suffered there. As Sharpe J.A. stated in *Van Breda*, damages sustained in the jurisdiction is not a "sufficiently reliable indicator of a real and substantial connection" and, accordingly, is not included in the *CJPTA* presumptions.[66] Instead, focusing on the substance and the subject matter of the action requires courts to take a holistic view of the claim, which is consistent with the "deliberately general" guidance from this Court in *Morguard*.[67] It is also consistent with the two *Muscutt* factors preserved by Sharpe J.A. in *Van Breda*: the connection between the forum and the claim, and the connection between the defendants and the forum, which, in turn, come directly from this Court's holding in *Morguard*

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64 Janet Walker, *Castel and Walker: Canadian Conflict of Laws*, 6th ed., looseleaf (Markham, ON: LexisNexis, 2005) at 35-18 [*Castel and Walker*], **BA Tab 101**.

65 *Distillers Co. v. Thompson*, [1971] A.C. 458 at 468 [emphasis added] (P.C.) [*Distillers*], **BA Tab 21**.

66 *Van Breda*, *supra*, at para. 78, **BA Tab 61**.

67 See discussion in *Muscutt*, *supra*, at para. 36, **BA Tab 45**.

that looks to "the contacts that jurisdiction may have to the defendant or the subject-matter of the suit".[68]

42. Applying this common sense approach to these Actions it is clear that Ontario does not have a "real and substantial" connection to a matter which originated in and is about conduct and events in the United States, involving, mostly, American defendants acting on behalf of an American company. Further, as discussed below, this approach leads to a more rational, fair, and orderly result than would follow from application of rigid presumptions, or too much discretion based on subjective notions of "fairness".

(b) Problems With Approaches By The Courts Below

i. Presumed Jurisdiction Encourages Forum Shopping

43. The approach to the "real and substantial connection" test adopted by the Court of Appeal, following the *CJPTA*, creates an unjustified presumption that Canadian courts should assume jurisdiction over a defamation claim involving foreign defendants in any case where the statement has been read or downloaded in Canada. This is similar to the English approach, which has been widely criticized.[69] The test is so minimal that it may as well not exist. Indeed, as presently applied – and as applied in this case – Canadian courts will exercise jurisdiction over all cases involving Internet libel unless the connection is so fleeting as to be irrelevant.[70] In the few cases in which Canadian courts have declined jurisdiction there was little or no evidence of any publication or downloading in the jurisdiction.[71]

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68 *Van Breda*, *supra*, at para. 84, **BA Tab 61**; *Morguard*, *supra*, at 1103, **BA Tab 43**.

69 It is noteworthy that even courts in England, where there is no real and substantial connection test, will refuse to hear a case, not on jurisdictional grounds, but rather on the basis of abuse of process, if the plaintiff cannot demonstrate meaningful access within England to materials posted online: *Jameel (Yousef) v. Dow Jones & Co. Inc.* [2005] EWCA Civ 75 at paras. 68-70 [*Jameel*], **BA Tab 32**.

70 *Burke v. NYP Holdings, Inc. (c.o.b. New York Post)*, 2005 BCSC 1287 at paras. 2-4, 18, 29, 32-34 [*Burke*], **BA Tab 13**; *Barrick Gold Corp. v. Blanchard & Co.*, [2003] O.J. No. 5817 at paras. 15-25, 41-42, 49, 52-53 (Sup. Ct.), **BA Tab 8**; *Banro Corporation v. Éditions Écosociété Inc.*, [2009] O.J. No. 733 at paras. 19-30 (Sup. Ct.), aff'd 2010 ONCA 416, leave to appeal to S.C.C. granted (S.C.C. File No. 33819), **BA Tab 6**; *Henderson v. Pearlman*, 2006 CarswellOnt 5815 at paras. 2-4, 38-43 (Sup. Ct.), **BA Tab 28**; *Trizec Properties Inc. v. Citigroup Global Markets Inc.*, [2004] O.J. No. 323 at paras. 2, 13-20, 34, 52 (Sup. Ct.), **BA Tab 59**; *Wiebe v. Bouchard*, 2005 BCSC 47, **BA Tab 63**; *National Bank of Canada v. Weir*, 2010 QCCS 402 at paras. 15, 30-34, **BA Tab 46**; *Research in Motion Ltd. v. Visto Corporation*, [2008] O.J. No. 3071 (Sup. Ct.), **BA Tab 53**.

71 *Crookes v. Wikimedia Foundation Inc.*, 2009 BCCA 392 at paras. 4-5, 80-92, leave to appeal to S.C.C. granted (S.C.C. File No. 33412, appeal heard 2010-12-07), **BA Tab 18**; *Crookes v.*

44. The decision of the Court of Appeal, and its reliance on the presumption that the tort was committed in Ontario, arises from its legal conclusion that the tort of defamation occurs where words are published, downloaded or read.[72] However, in *Moran v. Pyle*, this Court stated that "[g]enerally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence."[73] This is especially true in defamation, where words are now so easily transmitted and read around the world.

45. The actual reading of words by a third party may be necessary to complete the tort giving rise to a cause of action for defamation, as it is the reading of the words by others that causes damage.[74] However, especially now in the age of the Internet, all actions of the defendants in a defamation action may well – and often do – occur in jurisdictions different from the many – perhaps countless – jurisdictions where the words are read. Accordingly, it is inappropriate to simply accept that the tort is "committed" where words are downloaded or read. This problematic aspect of defamation was commented upon by Chief Justice Gleeson in *Gutnick*:

> If the place in which the publisher acts and the place in which the publication is presented in comprehensible form are in two different jurisdictions, where is the tort of defamation committed? That question is not to be answered by an uncritical application of some general rule that intentional torts are committed where the tortfeasor acts or that they are committed in the place where the last event necessary to make the actor liable takes place...[75]

Holloway, 2007 BCSC 1325, aff'd 2008 BCCA 165, **BA Tab 17**; *Bangoura v. Washington Post* (2005), 258 D.L.R. (4th) 341 at paras. 1, 21-23, 46 (Ont. C.A.) [*Bangoura*], leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 497, **BA Tab 5**; *Olde v. Capital Publishing Ltd. Partnership*, [1996] O.J. No. 2777 at paras. 3, 15-16 (Sup. Ct.) [*Olde*], aff'd [1998] O.J. No. 237 (C.A.), **BA Tab 48**; *Paulsson v. Cooper*, [2009] O.J. No. 3121 at paras. 35-37, 54 (Sup. Ct.), motion to extend time to perfect the appeal dismissed, [2010] O.J. No. 123 (C.A.), **BA Tab 49**. See also: *Braintech, Inc. v. Kostiuk*, 1999 BCCA 169 at paras. 58, 61-63, 65, 69 [*Braintech*], leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 236, **BA Tab 12**.

72 CA Reasons, AR Vol. I at 50 (paras. 32-33).

73 *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 at 408 [emphasis added] [*Moran*], **BA Tab 42**.

74 See, e.g., *Braintech*, *supra*, at paras. 59, 61-65, **BA Tab 12**.

75 *Dow Jones and Company Inc. v. Gutnick*, [2002] HCA 56 at paras. 26, 28 [emphasis added – citations omitted] [*Gutnick*], **BA Tab 22**. Although *Gutnick* rejected the adoption of a "place where tortfeasor acts" test, it is noteworthy that the European Union E-Commerce Directive

46. A "place of reading" approach essentially confers jurisdiction upon any forum selected by the plaintiff, even when, as here, the words were downloaded all over the world, as Black's original claims emphasized, including New York and Chicago, many Canadian provinces and Black's country of citizenship and where he is a member of the House of Lords, England. There is no order and fairness, or restraint, if the plaintiff can pick and choose from many jurisdictions.

47. Further, anchoring the jurisdictional test on "place of reading" may result in the assumption of jurisdiction by forums that have little or nothing to do with the subject matter of the action. The statements in these appeals, for example, were made in or relate to a report of an American-based investigation into the suspected wrongdoing of Black in connection with his operation in the U.S. of a public company that was incorporated under the laws of Delaware, headquartered during its existence in either New York or Chicago and subject to the securities, criminal and other laws of the United States. The statements at issue were published by International in New York in fulfillment of International's disclosure obligations under U.S. securities laws. The question of damages allegedly sustained to Black's reputation in Ontario rightly does not create a presumption in favour of jurisdiction.[76] Consequently, this action involves matters in which Ontario has no interest, namely the conduct of (mostly) Americans, the governance of an American company in the United States and compliance with that country's laws, and the reputation of a man who cannot enter the province.

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emphasizes the "source of activity" in its choice of law approach: EC, Commission Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, [2000] O.J. L 178/4 at Recital 22, **BA Tab 68**. Similarly, in April 2004 a report from the House of Lords advocated a "country of origin rule" to govern choice of law for defamation and privacy actions: House of Lords European Union Committee, "8th Report of Session 2003-04, The Rome II Regulation, Report with Evidence" (London: House of Lords, 2004) at paras. 126-130, **BA Tab 88**.

[76] As discussed below, the "damage sustained" rule is not a "sufficiently reliable indicator of a real and substantial connection", and does not bring discipline to the exercise of jurisdiction: *Van Breda, supra*, at para. 78, **BA Tab 61**. Indeed, the place of reading and place of damage are the same, further undermining a place of reading approach. Nevertheless, the courts below gave substantial weight to Black's allegations that he "sustained damage in Ontario". For example, CA Reasons, AR Vol. I at 56 (para. 50): "In my opinion the facts relevant to Black's claim relating to publication in Ontario and the damage to Black's Ontario reputation form a significant connection between Black's claims and Ontario"; Motion Reasons, AR Vol. I at 11 (para. 35): "The statements in question may well have been made in the U.S. by directors or advisors of a U.S. company, but they were published or republished in Ontario and they are alleged to have caused injury in Ontario. The connection between the subject matter of the actions and Ontario is thus significant."

48. The "place of reading" approach to the location of a libel also necessarily creates problems with respect to the applicable law, which is also relevant to the *forum non conveniens* analysis (and caused the courts below to err in their analysis of that issue as discussed below at paras. 72, 86). In accepting that a libel occurs where it is read, the Court of Appeal notably did not refer to this Court's admonitions in *Tolofson* (in the choice of law context) that "[m]any activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided", and that "... State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country, or for that matter the actions in State B of citizens of State C, and it would lead to unfair and unjust results if it did."[77] As there are numerous potential places of reading, the current approach does not deal with the "structural problem" – discussed in *Tolofson* – that is posed by legal issues impacting more than one jurisdiction, and encourages forum shopping and a multiplicity of proceedings.

49. An approach to transnational libel that elevates place of reading over other considerations may also be inconsistent with free speech protections available in Canada and elsewhere. In *Van Breda*, Sharpe J.A. rightly noted, following this Court's ruling in *Beals*,[78] that "[i]f a court holds that there is a real and substantial connection sufficient to justify asserting jurisdiction against a foreign defendant, it thereby holds that there would be a real and substantial connection sufficient to require recognition and enforcement of a foreign judgment against an Ontario defendant rendered on the same basis."[79] However, in these Actions it is clear that any judgment Black might ultimately obtain cannot be enforced in the United States because Canadian libel law is inconsistent with the U.S. First Amendment principles protecting free speech in that country.[80] The threat of having to defend a libel action abroad should not chill discussion of individuals or companies with foreign ties, and this should be as true for Americans as for Canadians.

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77 *Tolofson*, *supra*, at 1051-1052, **BA Tab 57**. Contrast the Court of Appeal's statement that: "[s]ome activities by their very nature involve a sufficient risk of harm to parties outside the forum in which they originate that any unfairness in assuming jurisdiction is mitigated or eliminated", AR Vol. I at 60 (para. 65).

78 *Beals*, *supra*, at para. 29, **BA Tab 9**.

79 *Van Breda*, *supra*, at para. 103, **BA Tab 61**.

80 Opinion of Lee Levine, AR Vol. IV at 27-28. See also note 6, *supra*, for legislation enacted subsequent to Mr. Levine's opinion.

ii. Damage Sustained In The Jurisdiction

50. It has long been recognized that the place in which damages are sustained should not be a significant determinant of jurisdiction. As the Privy Council stated in *Distillers Co. v. Thompson* in the context of a negligence claim:

> In a negligence case the happening of damage to the plaintiff is a necessary ingredient in the cause of action, and it is the last event completing the cause of action. But the place where it happens may be quite fortuitous and should not by itself be the sole determinant of jurisdiction.[81]

51. In *Van Breda*, Sharpe J.A. correctly noted that where damage is sustained is not "a sufficiently reliable indicator of a real and substantial connection."[82]

52. The emphasis on place of damage is particularly misplaced in transnational libel cases, not only because plaintiffs may allege damage in any number of jurisdictions. As damages are presumed in libel actions, their proof or disproof is rarely a focal point of the action.[83] The focus is instead on liability, which is usually determined by whether defences such as truth, fair comment and privilege apply – all of which involve consideration of the substance of the words and the context (legal and factual) in which they were spoken or disseminated. Indeed, Belobaba J. and the Court of Appeal acknowledged that in these Actions "the main focus at trial would most likely be the truth of the statements."[84] Thus as one author stated over a century ago, perhaps the law went "wrong from the beginning in making the damage and not the insult the cause of action".[85] The comment underscores that it is illogical to frame a jurisdictional test around what is in practice often the least relevant aspect of the cause of action.

iii. Foreseeability Test Is Misplaced

53. The emphasis on "foreseeability" in the Court of Appeal in these Actions is also inconsistent with jurisdictional restraint, order and fairness. In many cases it may be foreseeable by the author that statements may be read or downloaded in a different jurisdiction, or many jurisdictions, but that cannot create, in itself, a justification for assuming jurisdiction. Such an

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81 *Distillers*, *supra*, at 467-468, **BA Tab 21**.
82 *Van Breda*, *supra*, at para. 78, **BA Tab 61**.
83 *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at para. 164, **BA Tab 29**.
84 CA Reasons, AR Vol. I at 65 (para. 83); Motion Reasons, AR Vol. I at 22-23 (paras. 90, 94).
85 *Gutnick*, *supra*, at para. 25 (quoting Pollock in *The Law of Torts*, (1887)), **BA Tab 22**.

approach would also have a significant chilling impact on freedom of expression, as it would subject individuals to restrictive laws in other countries because of the pervasiveness of the Internet. The Court of Appeal's holding that "[s]ome activities [of the defendants] by their very nature involve a sufficient risk of harm to parties outside the forum in which they originate that any unfairness in assuming jurisdiction is mitigated or eliminated" is inapt here.[86]

54. This is not a case like *Burke*, where American defendants wrote about an incident in Vancouver, involving a Vancouver-based plaintiff, and the publication became the focus of discussion in British Columbia, and the B.C. courts assumed jurisdiction.[87] Here, the defendants' dealings with Black had nothing to do with Ontario. The defendants' reasonable expectation was that if there was a legal dispute with Black arising from his management of International, it would be governed by American law and be litigated in the United States, where the company was located and operated, where the conduct occurred and where Black also lived and worked. And, as noted above, Black's operation of International did in fact spawn multiple civil and criminal proceedings in the United States.[88] As this Court stated in *Tolofson*, "[o]rdinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly."[89]

55. The reliance on the approach adopted in product liability cases is also inappropriate. In *Moran v. Pyle*, this Court found that where manufacturers distribute products for profit through "normal channels of trade" they should be prepared to defend an action in the forum where it was "reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it".[90] Unlike manufactured products, Internet statements are generally accessible anywhere in the world, derive constitutional protections in many jurisdictions, may not be profit-driven and may be compelled by the laws of the foreign jurisdiction in which the statements are posted (as was the case here).

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86 CA Reasons, AR Vol. I at 60 (para. 65). Black was not a 'party outside the forum' in which the statements were made (i.e. New York). To the contrary, he owned a residence there. Also, contrast the Court of Appeal's statement with this Court's caution regarding overreaching in *Tolofson*: see para. 48, *supra*.

87 *Burke*, *supra*, at paras. 1-4, 41, **BA Tab 13**.

88 *Supra* para. 23.

89 *Tolofson*, *supra*, at 1050-51, **BA Tab 57**.

90 *Moran*, *supra*, at 409, **BA Tab 42**.

56. The foreseeability inquiry adopted below to determine jurisdiction is also inconsistent with the appropriate changes in approach set out in *Van Breda*. There, Justice Sharpe wrote that consideration of "fairness" should be viewed as a whole, rather than as two separate factors viewed through the lens of each party (as it was in *Muscutt*). He stated that "consideration of fairness should ... serve as an analytic tool to assess the relevance, quality and strength" of the connections between Ontario and the claim and the defendants, respectively.[91] The fairness analysis should, therefore, look at the ties (or lack of ties) between the forum and each defendant and between the claim and the forum as a whole, rather than focusing on what was purportedly "foreseeable" to each defendant. This is consistent with the approach urged by the Appellants in this appeal.

iv. "Targeting"

57. Although the Court of Appeal found it unnecessary to determine whether a "targeting" approach to jurisdiction should be adopted, it stated in several instances that the defendants had "targeted" Ontario.[92] The meagre basis for this finding was that the electronically-published International press releases contained contact information for "US/Canada" and "UK" media – two New York City telephone numbers for the public relations firm that published the releases.[93] This is not "targeting".

58. The so-called targeting approach is applied by U.S. courts considering whether to assume personal jurisdiction over out-of-state defendants. Not unlike the *Muscutt* approach, it involves a consideration of all factors relating to publication. In *Young v. New Haven Advocate*, the United States Court of Appeals for the Fourth Circuit concluded that two Connecticut newspapers and certain of their staff did not subject themselves to the jurisdiction of Virginia courts by posting on the Internet news articles that, in the context of discussing Connecticut's policy of housing its prisoners in Virginia institutions, allegedly defamed the warden of a Virginia prison. The court explained:

> "[T]he fact that the newspapers' websites could be accessed anywhere, including Virginia, does not by itself demonstrate that the newspapers were intentionally directing their website content to a Virginia audience.

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91 *Van Breda*, *supra*, at paras. 97-98, **BA Tab 61**.

92 CA Reasons, AR Vol. I at 52, 58, 60-61 (paras. 38-39, 58, 65-66).

93 See, e.g., International Press Release, AR Vol. VI at 39-41.

> Something more than posting and accessibility is needed to 'indicate that the [newspapers] purposefully (albeit electronically) directed [their] activity in a substantial way to the forum state,' Virginia. The newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers."[94]

59. Although *Young v. New Haven Advocate* is a U.S. jurisdiction case to which different rules apply, this approach informs the jurisdiction analysis. It allows consideration of the expectations of speakers and publishers, looking at the substance of the defendants' actions and subject matter of the words, and avoids the prospect of unlimited liability, which may have a chilling effect on freedom of speech.[95]

60. As noted, the electronically-published press releases in the Actions had nothing to do with Ontario, and the mere inclusion of a "US/Canada" contact number cannot reasonably support a finding that there was a "target and focus" on Ontario that would satisfy the real and substantial connection test. By adopting a broad characterization of targeting, the Court of Appeal sidestepped consideration of the relevant contextual factors, other than the insignificant fact that the statements relate to an individual who once lived here, which is not a "substantial" connection between the Actions and Ontario.

(c) Other Factors Weighing Against Ontario Assuming Jurisdiction

61. There are many other reasons why the Ontario courts should not assume jurisdiction over these Actions because of a lack of a real and substantial connection. These include:

(i) Black Cannot Enter Ontario. In *Moran*, Dickson J. (as he then was) recognized the "important interest a state has in injuries suffered by persons within its territory."[96] Here, Black is not in Ontario, and is inadmissible to Canada.[97]

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94 There, the Court concluded that "the newspapers' websites, as well as the articles in question, were aimed at a Connecticut [not a Virginia] audience": *Young v. New Haven Advocate*, 315 F.3d 256, 263-264 (4th Cir. 2002), **BA Tab 64**. See also: *Olde*, *supra*, at paras. 13-16, **BA Tab 48**.

95 See: *Calder v. Jones*, 465 U.S. 783 at 789 (1984), **BA Tab 14**, where a California actress brought a defamation suit against media defendants based in Florida. The Supreme Court held the California court had jurisdiction over the Florida residents because, as was intended by the newspaper defendants, "California [was] the focal point both of the story and of the harm suffered." See also: M. Geist, "Is There a There There? Toward Greater Certainty for Internet Jurisdiction" (2001) 16 Berkeley Tec. L.J. 1345 at 1380-1381, **BA Tab 86**.

96 *Moran*, *supra*, at 409, **BA Tab 42**; *Muscutt*, *supra*, at paras. 77, 80 (citing *Moran*, *Hunt* and *Tolofson*), **BA Tab 45**.

97 *Immigration and Refugee Protection Act*, *supra*, s. 36, Part VII hereto.

(ii) The Defendants Have No Connection To Ontario. Other than Savage (who both Belobaba J. and the Court of Appeal described as a "secondary defendant"),[98] the defendants have no connections to the forum Black seeks to use against them. Further, as the motions judge noted, as directors of an American company dealing with U.S. corporate governance on business issues in that country, they "may not have expected as being probable or likely that they would cause injury in Ontario".[99]

(iii) Unfairness To The Defendants. If these Actions proceed in Ontario, the defendants will be forced to travel to a jurisdiction with which they (except Savage, about whom no personal conduct has been pleaded) have no connection, to defend a libel action under a legal regime that is substantially more onerous to them than that of the United States[100] – under whose securities laws and U.S. Order the statements at issue were made and the conduct of Black must be judged. Meanwhile, Black, who cannot enter this jurisdiction, would have to prosecute the Actions from the U.S., testifying via videolink, thereby impairing the defendants' ability to cross-examine and expose Black's lack of credibility.[101] This procedural accommodation would allow Black to avail himself of Canadian defamation law at the expense of the defendants' First Amendment rights of free speech.

(iv) No Unfairness To Black. This subjective "*Muscutt* factor" was applied by Belobaba J. to favour assuming jurisdiction on the basis that "Ontario is where [Black's] reputation was established", and is "a jurisdiction that is obviously very important to him."[102] However, this is not a principled basis on which to deal with jurisdiction and was rightly discarded as a factor in *Van Breda*. The alleged importance to Black of his reputation in Ontario is unsupported by any direct evidence from him. Black publicly and voluntarily renounced his Canadian citizenship (Justice Belobaba makes the extraordinary suggestion, unsupported by the record, that this renunciation was "forced").[103] While Black kept a house in Toronto (as well as in New York and Florida), the evidence shows that from 1998 to 2003 he spent little time in Ontario.[104] There is nothing unfair about requiring him to seek redress *against these defendants* where he lived and did business with them – in the United States. It is worth emphasizing again this Court's statement in *Tolofson* that "[o]rdinarily people expect

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98 Motion Reasons, AR Vol. I at 13 (para. 43); CA Reasons, AR Vol. I at 56 (para. 52).

99 Motion Reasons, AR Vol. I at 15 (para. 55).

100 Opinion of Lee Levine, AR Vol. IV at 21-28.

101 While Delaware Vice Chancellor Strine found "the key International witnesses – Paris, Seitz, and Breeden – entirely credible. … discern[ing] no improper motive they may have had at any time to testify other than truthfully", the Vice Chancellor was struck by Black's lack of credibility: "[a]s to Black himself, it became impossible for me to credit his word, after considering his trial testimony in light of the overwhelming evidence of his less-than-candid conduct towards his fellow directors ... I found Black evasive and unreliable. His explanations of key events and his own motivations do not have the ring of truth. I find it regrettable to say so, but it is the inescapable, and highly relevant conclusion I reach." [emphasis added] Delaware Court of Chancery's opinion in *Hollinger Int'l, Inc. v. Black et al*., AR Vol. VII at 91.

102 Motion Reasons, AR Vol. I at 17 (para. 62).

103 Motion Reasons, AR Vol. I at 12 (para. 37).

104 Reply Affidavit of James D. McDonough, sworn September 15, 2008 ("McDonough Reply Affidavit"), AR Vol. XX at 157-158 (paras. 11-12); Airplane Logs of International between 1998-2002, AR Vol. XXI at 153-232 and AR Vol. XXII at 1-70.

their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly."[105] Further, there was nothing preventing Black from suing the Ontario-based republishers.

(v) Republication Of The Words Complained Of Was Primarily Outside Ontario. Black originally alleged harm to his worldwide reputation in the Actions, reflecting the facts that he gave up his Canadian citizenship, and established residences and chose to conduct business elsewhere. Indeed, the republications Black originally complained of were predominantly outside Ontario. Only in response to the defendants' motion did Black amend his claims to attempt to restrict any alleged harm to Ontario. But this is just being selective about international *republication* of statements made in the U.S. – where the underlying events occurred, and is forum shopping. Narrowing the claims does not make their connection to Ontario any more real and substantial.[106]

(vi) An Ontario Judgment Would Be Unenforceable. Justice Belobaba properly found that "'American courts will not enforce foreign libel judgments that are contrary to the actual malice rule.'"[107] However, he and the Court of Appeal then minimized this point by asserting that "a judgment would have significant value to Black as vindication of his Ontario reputation."[108] This subjective reasoning again undermines the real and substantial connection test. If a judgment cannot be enforced against the defendants in a jurisdiction that possesses a highly-respected legal system, it is a strong indication that Canadian courts have little interest in the matter and should decline to assume jurisdiction. As Armstrong J.A. put it in *Bangoura*, "Canada and the U.S. have simply taken different approaches to a complex area of the law, based upon different policy considerations related to freedom of speech and the protection of individual reputations."[109] The possibility of Black pursuing Savage (as the sole Ontario defendant) for damages does not change the analysis. It is entirely inconsistent with principles of order and fairness that jurisdiction would be assumed over the Actions, leaving a secondary defendant, about whom nothing is pleaded, to face potential liability for the entirety of the claims.[110]

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105 *Tolofson*, *supra*, at 1050-1051, **BA Tab 57**.

106 Amended Statements of Claim, AR Vol. I at 86-212, Vol. II and Vol. III; A. Black Affidavit, AR Vol. XIX at 173, 178-179 (paras. 28, 37-40).

107 Motion Reasons, AR Vol. I at 19 (para. 74); CA Reasons, AR Vol. I at 62 (para. 72); Opinion of Lee Levine, AR Vol. IV at 27-28; *Bangoura*, *supra*, at para. 39, **BA Tab 5**; *Telnikoff v. Matusevitch*, 702 A.2d 230 at 236-238 (Md. 1997), **BA Tab 56**; *Matusevitch v. Telnikoff*, 877 F. Supp. 1 at 3-4 (D.D.C. 1995), aff'd 159 F.3d 636 (D.C. Cir. 1998), **BA Tab 38**; *Abdullah v. Sheridan Square Press, Inc.* 1994 WL 419847 at 1 (S.D.N.Y. May 4, 1994), **BA Tab 1**; *Bachchan v. India Abroad Publ'ns, Inc.* 154 Misc.2d 228 at 231-34 (Sup. Ct. N.Y. April 13, 1992), **BA Tab 4**. See also the U.S. libel tourism legislation cited at note 6, *supra*.

108 CA Reasons, AR Vol. I at 62 (para. 72); Motion Reasons, AR Vol. I at 20 (para. 78).

109 *Bangoura*, *supra*, at para. 39, **BA Tab 5**.

110 *Muscutt*, *supra*, at para. 91, **BA Tab 45**; Motion Reasons, AR Vol. I at 13, 19 (paras. 43, 73). The Court of Appeal erred in holding otherwise: CA Reasons, AR Vol. I at 56, 62, 66 (paras. 52, 72, 86).

(d) Libel Tourism In England And Australia

62. The United Kingdom and Australia do not have a "real and substantial" test to ensure jurisdictional discipline. Courts instead focus on place of publication and place of damage both in assuming jurisdiction through application of long arm statutes and in the *forum non conveniens* analysis. In England, the absence of jurisdictional restraint has led to widespread criticism and attempts at legislative reform. In urging new libel laws, Deputy Prime Minister Clegg has commented that "libel tourism is making a mockery of British justice."[111] The High Court of Australia has also called for statutory reform.[112]

63. English courts assume jurisdiction where "the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction".[113] Plaintiffs seeking to sue defendants who are outside the jurisdiction must seek leave, demonstrating that England is clearly the appropriate forum in light of the interests of all the parties and the ends of justice.[114] This burden is not a high one.

64. *King v. Lewis* involved publications available for downloading in England from www.fightnews.com and www.boxingtalk.com, and therefore jurisdiction existed. The court also found that England was the *forum conveniens*, even though the plaintiff and all three defendants were located in the United States and the articles were about a U.S.-based dispute.[115]

65. Despite the Court of Appeal's statement in *King* that "[w]e by no means propose a free-for-all for claimants libelled on the Internet",[116] it has become just that. English courts hear almost all transnational libel cases regardless of where the parties are located, the subject matter of the publication, or where the bulk of publication occurred.[117] The limited exceptions to

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111 Klein, *supra*, at 119, **BA Tab 89**.

112 *Gutnick*, *supra*, at paras. 137-138, **BA Tab 22**.

113 *Berezovsky v. Michaels*, [2000] 2 All E.R. 986 at 989 (H.L.) [*Berezovsky*], **BA Tab 10**.

114 *Berezovsky*, *ibid.*, at 999, **BA Tab 10**. This is also known as the *forum conveniens* or *Spiliada* test. Australian courts apply a similar test if forum is contested: *Gutnick*, *supra*, at paras. 9, 157, **BA Tab 22**.

115 *King v. Lewis*, [2004] EWCA Civ 1329, paras. 2-9, 44-45 [*King*], **BA Tab 33**.

116 *King*, *ibid.*, at para. 31, **BA Tab 33**.

117 In *Berezovsky*, *supra*, two prominent Russian businessmen sued *Forbes* over allegations of being involved in organized crime in Russia. Just under 2,000 (of 785,000) copies were distributed in England. The Court of Appeal concluded that England was the natural forum for the action. The majority of the House of Lords agreed, stating: "This case is solely concerned with the plaintiffs' reputations in England. They seek to have their reputations judged by English standards. The Court of Appeal thought that for this purpose England was the natural forum, and I agree with

England's open door approach are cases where the plaintiff cannot prove publication, or can only show very limited publication. However, "it will only be in rare cases that it is appropriate to strike out an action as an abuse on the ground that the claimant's reputation has suffered only minimal damage and/or that there has been no real and substantial tort within the jurisdiction".[118] This approach did not prevent a judgment in *Mahfouz v. Ehrenfeld*,[119] in which a Saudi businessman sued an American author in respect of a book, of which only 23 copies had been sold in England through Amazon.com. The defendants did not defend and the plaintiffs recovered the maximum damages available under summary procedure and a declaration that the statements were false.[120] Ironically, Ehrenfeld's application in the U.S. for a declaration that the words complained of were not actionable under U.S. law was dismissed on the basis that the New York court did not have personal jurisdiction over Mahfouz.[121] In response to cases such as

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them. I do not follow the relevance of the judge's remark that the article has 'no connection with anything which has occurred in this country'. A businessman or politician takes his reputation with him wherever he goes, irrespective of the place where he has acquired it." *Berezovsky*, *supra.*, at 998, **BA Tab 10**. There were two strong dissents in *Berezovsky*, both emphasizing the lack of ties between the plaintiffs and the forum and the need for deference to the judge of first instance: see Lord Hoffman at 1001-1002, 1004-1005 and Lord Hope at 1006-1008. See also: *Polanski v. Conde Nast Publications Limited*, [2005] UKHL 10, **BA Tab 50**; Claire Cozens, "Polanski wins libel case against Vanity Fair," *The Guardian* (22 July 2005), online: Guardian News and Media Ltd. www.guardian.co.uk/media/2005/jul/22/pressandpublishing.generalelection 2005, **BA Tab 83**. In *Polanski*, an English jury awarded film director Roman Polanski £50,000 after he sued for defamation in England (about statements in the United States) despite being unable to enter the country – he testified via video-link. American actress Kate Hudson sued the British edition of the American tabloid *National Enquirer* in England. The case settled: Associated Press, "Kate Hudson wins libel award over story," *U.S.A. Today* (20 July 2006), online: U.S.A. Today www.usatoday.com/life/people/2006-07-20-hudson_x.htm, **BA Tab 79**.

118 *Mardas v. N.Y. Times Co.*, [2008] EWHC 3135 at para. 12 (QB) [*Mardas*], **BA Tab 37**. See also: *Jameel*, *supra*, **BA Tab 32**; *Chadha v. Dow Jones & Co. Inc.*, [1999] EWCA Civ 1415, **BA Tab 15**.

119 [2005] EWHC 1156 (QB) [*Mahfouz UK*], **BA Tab 36**.

120 *Mahfouz UK*, *ibid.*, at paras. 22-23, 74-75, **BA Tab 36**.

121 *Ehrenfeld v. Bin Mahfouz*, 2006 WL 1096816 at 6 (S.D.N.Y Apr. 26, 2006), **BA Tab 25**. *Ehrenfeld* generated much critical discussion: David Partlett, "The Libel Tourist and the Ugly American: Free Speech in an Era of Modern Global Communications" (2009) 47 U. Louisville L. Rev. 629, **BA Tab 94**; Ellen Bernstein, "Libel Tourism's Final Boarding Call" (2010) 20 Seton Hall J. Sports & Ent. L. 205, **BA Tab 81**; Adam Cate, "Civil Procedure: Chapter 579: The California Anti-Libel Tourism Act" (2010) 41 McGeorge L. Rev. 533, **BA Tab 82**; Aidan Eardley, "Libel Tourism in England: Now the Welcome is Even Warmer" (2006) 17:1 Ent. L.R. 35, **BA Tab 84**; Tara Sturtevant, "Can the United States Talk the Talk & Walk the Walk When it Comes to Libel Tourism: How the Freedom to Sue Abroad Can Kill the Freedom of Speech at Home" (2010) 22 Pace Int'l L. Rev. 269, **BA Tab 98**; Todd Moore, "Untying Our Hands: The Case for Uniform Personal Jurisdiction Over 'Libel Tourists'" (2009) 77 Fordham L. Rev. 3207, **BA Tab 92**; Trevor Hartley, "Libel Tourism and Conflict of Laws" (2010) 59:1 I.C.L.Q. 25, **BA Tab 87**; Timothy Zick, "Territoriality and the First Amendment: Free Speech at - and Beyond - Our Borders" (2010) 85 Notre Dame L. Rev. 1543, **BA Tab 103**; Doug Rendleman, "Collecting a Libel Tourist's Defamation Judgment?" (2010) 67 Wash & Lee L. Rev. 467, **BA Tab 95**; Sarah

Ehrenfeld, and in an effort to protect its citizens' First Amendment free speech rights, the U.S. has enacted federal legislation that allows defendants in foreign libel actions to seek, among other things, declaratory relief in the U.S. Many states have implemented similar statutes.[122]

66. A draft *Defamation Bill*,[123] proposes significant changes to English libel law to curb libel tourism. This includes a requirement that English courts consider the extent of publication elsewhere in determining whether or not the plaintiff has suffered substantial harm within the jurisdiction.[124] The *Bill* also proposes abolition of the antiquated "multiple publication rule", which has contributed to libel tourism by permitting plaintiffs to sue whenever and wherever there is a publication or republication.[125]

Staveley-O'Carroll, "Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?" (2009) 4 NYU J. L. & Liberty 252, **BA Tab 97**; Robert McFarland, "Please do not Publish this Article in England: A Jurisdictional Response to Libel Tourism" (2010) 79 Miss. L.J. 617, **BA Tab 91**; Robin Morse, "Rights Relating to Personality, Freedom of the Press and Private International Law: Some Common Law Comments" (2005) 58 Current Legal Problems 133, **BA Tab 93**; Robert Balin, Laura Handman & Erin Reid, "Libel Tourism and the Duke's Manservant – an American Perspective" (2009) 3 EHR L. Rev. 303 [Balin], **BA Tab 80**; Richard Garnett & Megan Richardson, "Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-Border Libel Cases" (2009) 5:3 J. Private Int'l L. 471, **BA Tab 85**.

122 *Supra* note 6.

123 *HL Bill*, *supra*, **BA Tab 70**.

124 As leader of the Liberal Democratic Party (and now Deputy Prime Minister) Nick Clegg stated in the context of supporting the *HL Bill*: "Our libel law and practice have turned a country once famed for its traditions of freedom and liberty into a legal farce where people and corporations with money can impose silence on others at will." Klein, *supra*, at 119 [emphasis added], **BA Tab 89**.

125 *HL Bill*, *supra*, ss. 10 and 11, **BA Tab 70**. This rule emerged from the bizarre decision in *Duke of Brunswick v. Harmer* (1849), 14 Q.B. 185, **BA Tab 24**, where the plaintiff, exiled in France, sued successfully over an article published 17 years prior, by deliberately causing a republication to his "manservant" who was sent to purchase a back issue from the publisher. Today, the claim would be struck as an abuse of process (see *Jameel*, *supra*, at para. 56, **BA Tab 32**), yet the multiple publication rule it created continues to exist in English and Canadian libel law and allows a plaintiff to "slice and dice his reputation" suing in multiple jurisdictions for the harm alleged in each respective jurisdiction: see, e.g., Balin, *supra*, at 313, **BA Tab 80**. *Castel and Walker* also note this problem: *supra* note 64. See also: *Loutchansky v. Times Newspapers Ltd. & Ors*, [2001] EWCA Civ 536, **BA Tab 35**; *King*, *supra*, at para. 2, **BA Tab 33**, "[i]t is common ground that by the law of England the tort of libel is committed where publication takes place, and each publication generates a separate cause of action. The parties also accept that a text on the Internet is published at the place where it is downloaded"; *Mardas*, *supra*, at para. 31, **BA Tab 37**, even a "few dozen [Internet readers in the U.K.] is enough to found a cause of action here". Plaintiffs such as Gutnick, and in this case Black, have attempted to preclude the potential for abuse of process by undertaking not to sue in other jurisdictions, but there appears to have been no judicial consideration of what effect would or could be given to such an undertaking if a plaintiff were to ignore it. American courts rejected the multiple publication rule long ago, commenting as early as 1948 that the multiple publication rule was formulated "in an era which long antedated the

67. In *Gutnick*, the High Court of Australia agreed the Australian courts should hear a libel suit brought by a resident of the State of Victoria over an article in *Barron's*, a U.S. business magazine. Five hard copies were sold in Victoria, and 1,700 of 550,000 online subscribers had paid for their subscriptions by credit cards registered to Australian addresses.[126] On the basis that the tort of defamation occurred in Victoria because the words were downloaded and read there, the High Court found that "of course" the substantive issues would be determined in accordance with Victoria law, and therefore it was the convenient forum.[127]

68. The Court also justified its decision in *Gutnick* on mistaken assumptions about libel tourism, namely, (i) plaintiffs are "unlikely to sue" for defamation published outside the forum unless a judgment of real value can be obtained and enforced; and (ii) in most cases identifying the person about whom defamatory material is to be published will readily identify the defamation law to which that person can resort.[128] Courts, including the courts below, have in fact emphasized that individuals may wish to vindicate their reputations through litigation even where there is no prospect of recovering damages.[129]

69. As the English (and Australian)[130] approach illustrates, an absence of jurisdictional restraint leads to forum shopping, which threatens free speech and is inconsistent with comity, order and fairness.

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modern process of mass publication": *Gregoire v. GP Putnam's Sons*, 298 N.Y. 119, 122-123 (Ct. App. 1948), **BA Tab 27**. See also: Restatement (Second) of Torts § 577A (1977), **BA Tab 96**; Lori Wood, "Cyber-Defamation and the Single Publication Rule" (2001) 81 B.U. L. Rev. 895, **BA Tab 102**; *Zuck v. Interstate Publishing Corp.*, 317 F.2d 727, 733-734 (2d Cir. 1963), **BA Tab 65**. If the single publication rule were to apply, there would be no tort committed in Ontario, as the substantial publication occurred in New York.

126 *Gutnick*, *supra*, at paras. 97, 169, **BA Tab 22**.

127 *Gutnick*, *ibid.*, at para. 46-48, **BA Tab 22**.

128 *Gutnick*, *ibid.*, at paras. 53-54, **BA Tab 22**.

129 See for example: CA Reasons, AR Vol. I at 62 (para. 72): "I agree with the motion judge that even if the Ontario judgment is unenforceable in the United States, a judgment would have significant value to Black as a vindication of his Ontario reputation".

130 In a concurring judgment in *Gutnick*, Kirby J. expressed reservations about the matter being tried in Australia, noting that "the appellant (and interveners) have established real defects in the current Australian law of defamation as it applies to publications on the Internet", but suggested that those problems should be resolved through legislative reform (see paras. 137-138, 152, 164-166, **BA Tab 22**). His observations that the practicalities of suing abroad and that defendants may simply choose to ignore foreign judgments are not supported by the subsequent English experience.

B. FORUM NON CONVENIENS

70. In this case, the paramount consideration in *forum non conveniens* flows from the motion judge's determination that "the main focus at trial will most likely be the truth of what was said and not the nature or extent of the injury to reputation."[131] This finding is unassailable: either Black diverted assets from International in violation of his fiduciary duties, or he did not. If he did, then the impugned statements in the Investigation Report and elsewhere are true. If he did not, then the impugned statements are false, and other defences may apply based on the American context in which the statements were made and the conduct of the defendants. As there is no dispute that the statements were actually made, and damage is presumed,[132] the Actions' focus will entirely be on conduct in the United States, not Ontario. Given that finding of fact, unchallenged on appeal, Justice Belobaba's application of the *forum non conveniens* factors – he found only one favoured the defendants, and even this he qualified – was unreasonable. On a proper weighing of these factors, New York and Illinois are clearly more appropriate forums for the trial of the Actions than Ontario.

71. Both of the courts below also erred in law by failing to give effect to Justice Farley's 2004 decision.[133] Black, through the vehicle of Ravelston, already argued that Ontario was the convenient forum to decide issues related to whether he had diverted assets in breach of his fiduciary duties. He lost that argument. The Ontario court ruled many years ago that Illinois, and not Ontario, is the proper forum to decide those issues. Leave to appeal that decision was denied.[134] It is a final order, binding upon Ravelston, and importantly, upon Black, who was found to be a privy of Ravelston.[135]

72. Moreover, the court's exercise of discretion in considering *forum non conveniens* must also be guided by requirements of order and fairness.[136] Consideration is given to several factors, including the location in which the dispute arose, the location of the parties and location of witnesses and evidence,[137] avoidance of a multiplicity of proceedings, loss of juridical

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131 Motion Reasons, AR Vol. I at 22 (para. 90); CA Reasons, AR Vol. I at 65 (para. 83).
132 *Supra* note 83.
133 Reasons of Justice Farley, AR Vol. XVIII at 108-113.
134 Reasons of Justice Power, AR Vol. XVIII at 149-156.
135 See note 144, *infra*.
136 *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78 at para. 21, **BA Tab 55**.
137 *Muscutt, supra*, at para. 41, **BA Tab 45**; *Danks v. Ioli Management Consulting (c.o.b. IMC Ltd.)*, [2003] O.J. No. 4051 at paras. 20, 24-25, 27 (Master), aff'd [2005] O.J. No. 1830 (Div. Ct.), **BA**

advantage, and choice of law. The Court of Appeal, despite reservations ("this certainly was not a clear cut case"), erred in deferring to the motion judge's determination of this issue,[138] but appeared to ultimately be persuaded that Ontario was the appropriate forum "[g]iven the significance of the loss of juridical advantage to Black".[139] Thus, although the courts below both recognized that most of the evidence and witnesses will have to be imported, this was justified on the basis that Ontario law is applicable on a strict application of the *lex loci* test and more favourable to Black. But, as argued above, the *lex loci* test is ill-suited to defamation if it is determined solely on the basis of where damage may occur – especially when damage may occur in many jurisdictions.[140] Rather than demonstrating sympathy for Black's apparent loss of juridical advantage, the courts below should have given no weight to the *lex loci* test, and instead given effect to their recognition that the Actions will largely, if not entirely, deal with actions in the United States and raise issues of U.S. law.

73. In their application of the *forum non conveniens* test, the courts below unreasonably dismissed concerns for a multiplicity of proceedings and inconsistent verdicts on the basis that "none of the [other] litigation dealt with the issue of damage to Black's reputation in Ontario."[141] Thus, having found the focus of the Actions will not be damages, the courts nevertheless used damages to justify the matter proceeding in Ontario. This finding is illogical and unreasonable. The result of the holdings in the Ontario courts, therefore, is that these parties will be litigating the same fact-intensive issues, exchanging hundreds of thousands of documents, conducting extensive examinations for discovery of a large number of witnesses, and running lengthy trials in two different jurisdictions, with the possibility of inconsistent verdicts. And, on top of all that, Black cannot even attend the trial in Ontario (as he presently could in the U.S.) even though his

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Tab 19; *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.*, [2003] O.J. No. 560 at para. 72 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 186, **BA Tab 31**.

138 The standard of review of the exercise of judicial discretion is whether the judge has given weight to all relevant considerations: *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 at para. 43, **BA Tab 41**. An unreasonable determination of forum, including assigning insufficient weight to all the relevant factors, is reversible on appeal: *Mazda Canada Inc. v. Mitsui O.S.K. Lines, Ltd.*, 2008 FCA 219 at para. 7, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 383, **BA Tab 39**.

139 CA Reasons, AR Vol. I at 66 (paras. 87-88).

140 As was observed in *King*, *supra*, at para. 28, **BA Tab 33**, in such circumstances the "place where the tort is committed ceases to be a potent limiting factor."

141 CA Reasons, AR Vol. I at 65 (para. 84).

credibility will be in issue – a man already found to be "evasive and unreliable" and whose testimony "[did] not have the ring of truth."[142]

i. The 2004 Decision Of Justice Farley

74. Given Justice Belobaba's finding that the Actions will be principally concerned with the truth of the statements, the 2004 decision of Justice Farley, which considered the appropriate forum for litigating that exact issue, should have played a significant, if not dispositive, role in the analysis. The 2004 decision related to an anti-suit injunction brought by Black's companies, Ravelston Management Inc. and Ravelston Corporation Limited (collectively, "Ravelston"), wherein Ravelston sought to enjoin International from continuing the Illinois Action, in favour of an Ontario proceeding brought by Ravelston and Hollinger Inc.

75. In that proceeding, Black was found to be a privy of Ravelston,[143] and as such the findings of the Court are binding upon Black.[144] In finding against Black and in favour of International, Justice Farley ruled:

- "It would seem inappropriate to have the discovery process duplicated in Illinois and Ontario."
- Favouring Illinois would "avoid a multiplicity of concurrent proceedings with overlapping issues and fact background";
- The "hoodwinking is alleged to have taken place in the U.S.";
- The "Illinois action is the more comprehensive as to the claims and the parties"; and
- International "would be able to avail itself of the wider discovery rights available in the U.S. by using the U.S. federal court's subpoena power".[145]

76. Justice Farley's decision, along with the unsuccessful motion for leave to appeal, was binding on Black as to the issue of where the truth of the allegations against him should be

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142 *Supra* note 101.

143 Reasons of Justice Farley, AR Vol. XVIII at 110 (para. 3).

144 "When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies", *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 24 (quoting *McIntosh v. Parent*, [1924] 4 D.L.R. 420 (Ont. C.A.) [*McIntosh*]) [emphasis added], **BA Tab 20**.

145 Reasons of Justice Farley, AR Vol. XVIII at 111-112 (paras. 5, 8). Like the counterclaim stayed by Justice Farley, the Actions (especially as amended) "may be viewed with some suspicion as being 'tactical' as opposed to strategic".

litigated.[146] The courts below erred in allowing that issue to be relitigated by Ravelston's privy, Black. The courts should have found that Black was attempting to circumvent Justice Farley's decision by bringing the Actions in Ontario, which is an abuse of process.[147]

ii. The Location Of The Majority Of The Parties

77. All but one of the parties to the Actions, including the plaintiff, are located outside Ontario[148] – nine of the eleven parties, including the plaintiff, reside in the U.S. The finding that this was a "neutral factor" is unreasonable. For six of the ten defendants, New York is clearly the more convenient forum: Gordon Paris and Paul Healy reside in New York; Breeden, Breeden & Co. and Henry Kissinger are located in Connecticut, from which thousands of people commute to New York daily; and Richard Burt lives in Washington D.C., which is a 45-minute flight to New York.[149] Black had a residence in New York, maintains a large estate in Florida, and remains in the United States awaiting resentencing.[150]

78. The prejudice to the defendants from Black's inability to enter Canada should have been recognized by the courts below. Cross-examination – and extensive cross-examination can be anticipated in the Actions – is less effective when conducted through video-conferencing, especially where the evidence and the demeanour of the witness are critical to the determination of the issues in the case.[151] This is particularly so where the trial will be before a jury.[152] Even after his sentence is served, Black will be a convicted felon who is prohibited from entering Canada.[153] Even if Black returns to prison, he would still be able to attend at trial in the United States pursuant to a *habeas corpus ad testificandum*.[154]

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146 Black's efforts to avoid the Illinois Action have been refused not only by the Ontario court, but also the Illinois court, when Black sought to commence a separate action relating to his stock options: note 161, *infra*.

147 *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63 at para. 37, **BA Tab 58**. See also *McIntosh*, *supra*.

148 And the one Ontario defendant was described as being "at best a 'secondary' defendant": Motion Reasons, AR Vol. I at 13 (para. 43); CA Reasons, AR Vol. I at 56 (para. 52).

149 Motion Reasons, AR Vol. I at 6 (para. 13).

150 *Supra* para. 21.

151 *Rules of Civil Procedure*, *supra*, r. 1.08(5), Part VII hereto. See also: *R. v. Chapple*, 2005 BCSC 383 at para. 52, **BA Tab 51**.

152 Black has served jury notices: A. Black Affidavit, AR Vol. XIX at 173 (para. 28).

153 *Immigration and Refugee Protection Act*, *supra*, ss. 36(1)(b), 36(3)(c), Part VII hereto. Although, eventually, Black may seek discretionary permission to enter Canada from the Minister of Immigration, that discretion cannot be exercised until several years after Black completes his

iii. The Location Of Key Witnesses And Evidence

79. Despite finding that "the key witnesses and the bulk of the documentary evidence are currently located in the U.S.", Justice Belobaba said that he was unable to measure the extent to which this factor weighs in favour of the defendants because he was unclear as to how Rule 45 of the U.S. *Federal Rules of Civil Procedure*, which provides for an interstate summons power, would operate in this case.[155] The Court of Appeal simply deferred to Belobaba J. on this point. However, Rule 45 underscores the convenience of suing in the United States because it permits the parties to compel document production and testimony across U.S. jurisdictions.[156] In contrast, if the Actions were to proceed in Ontario, evidence would have to be compelled through letters rogatory or other more cumbersome means. Justice Belobaba's additional finding that "[c]omputer technology has diminished the importance of the physical location of documentary evidence", to which the Court of Appeal again deferred, is also unreasonable, as it ignores the realities of trial practice.[157] Accordingly, this factor also weighs against Ontario being the convenient forum.

iv. Avoidance Of A Multiplicity Of Proceedings

80. Justice Belobaba properly found that "the main focus at trial will most likely be the truth of what was said and not the nature or extent of the injury to reputation",[158] a finding also relevant to the jurisdiction analysis that requires consideration of the substance and subject matter of the action. His conclusion, however, that "there is no risk of parallel proceedings or inconsistent verdicts"[159] is manifestly unreasonable. As discussed above, the Illinois Action is dealing with the same facts underlying the statements – such as Black's liability "for some US $21 million in non-compete payments" and his breach of "certain fiduciary and contractual

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sentence: *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 17(a), Part VII hereto.

154 28 U.S.C. § 2241 (2006), **BA Tab 78**; *Barnes v Black*, 544 F.3d 807, 809 (7th Cir. 2008), **BA Tab 7**.

155 Motion Reasons, AR Vol. I at 22 (paras. 90-91).

156 McDonough Reply Affidavit, AR Vol. XX at 158-159 (para. 13); U.S. Federal Rule of Procedure 45, AR Vol. XXII at 71-73.

157 Motion Reasons, AR Vol. I at 22 (para. 90); CA Reasons, AR Vol. I at 64 (para. 82).

158 Motion Reasons, AR Vol. I at 22 (para. 90); CA Reasons, AR Vol. I at 65 (para. 83).

159 Motion Reasons, AR Vol. I at 25 (paras. 104-105). The Court of Appeal discounted this unreasonable finding on the basis that "there already were a multiplicity of proceedings": CA Reasons, AR Vol. I at 65 (para. 84).

duties".[160] The Illinois Action raises the question, among others, whether Black "breached his fiduciary duties and/or conspired to defraud International",[161] the very things at issue in the Actions. As Justice Farley ruled, it is wholly inappropriate to have duplicative discovery and trials in what will be extremely complex litigation.

81. However, Justice Belobaba made the superficial determination that, because there was no defamation action in the U.S., there was no risk of inconsistent verdicts. The Court of Appeal distanced itself from that conclusion, saying "[e]ven if the motion judge ought to have taken a broader view of the potential for inconsistent court decisions, including the risk of inconsistent findings relating to the truth of the statements, it is clear that there already were a multiplicity of proceedings, in a multiplicity of jurisdictions."[162] Yet there was nothing before the Court of Appeal, nor before Justice Belobaba, to conclude that the truth of the impugned statements would be determined in any of those other court proceedings extant in Ontario. As between the Ontario and Illinois courts, the Illinois court is the most appropriate forum to determine the truth of the impugned statements, just as Justice Farley held. Black was bound by that determination, and the courts below erred by not holding Black to the previous findings.

v. Loss Of Juridical Advantage

82. Justice Belobaba treated juridical advantage as a very significant factor, though he stopped short (he said) of accepting the plaintiff's submission that it trumps all other factors.[163] The Court of Appeal, however, appeared to do just that, stating "[g]iven the significance of the loss of juridical advantage to Black, I am not persuaded that the motion judge erred in the exercise of his discretion."[164]

83. The significance of the benefit to the plaintiff of seeking relief through Ontario's plaintiff-friendly laws is diminished by at least five factors: (1) the juridical advantage is only arrived at through application of the *lex loci* rule in an inflexible manner that is clearly ill-suited

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160 Motion Reasons, AR Vol. I at 24 (para. 102). See: the Chart at Appendix "A" illustrating the very significant overlap between the Actions and the Illinois Action; *Westec Aerospace Inc. v. Raytheon Aircraft Company*, 1999 BCCA 243 at paras. 26-29, aff'd 2001 SCC 26, **BA Tab 62**.

161 McDonough Affidavit, AR Vol. IV at 68 (para. 102); Minute order of Judge Manning, AR Vol. XVIII at 3. Some of these issues have already been determined by Vice Chancellor Strine in the Delaware action.

162 CA Reasons, AR Vol. I at 65 (para. 84).

163 Motion Reasons, AR Vol. I at 26 (paras. 111, 113).

164 CA Reasons, AR Vol. I at 66 (para. 87).

to Internet defamation; (2) as even Justice Belobaba acknowledged,[165] an Ontario judgment in Black's favour would not be enforceable in the United States – and so the juridical advantage has no teeth; (3) the juridical advantage may now be overstated in light of the recognition by this Court of the defence of public interest responsible communication;[166] (4) the defendants would suffer a major juridical disadvantage if the matter proceeds in Ontario;[167] and (5) procedurally, the case would be easier to pursue in the United States where Rule 45 facilitates efficient interstate document production and witness examination.

84. The juridical advantage offered to a plaintiff by Ontario's defamation law ought not to be permitted to trump the other factors, which in this case all favour the defendants. Black should be prohibited from enjoying a juridical advantage available in this jurisdiction given that he neither resides here nor can he legally enter the jurisdiction. To hold otherwise simply encourages forum shopping.

85. Moreover, under Canadian law, an insider of a Canadian corporation would be precluded from maintaining any action for defamation arising out of reports of a court-ordered investigation of allegations of malfeasance by such insider.[168] Thus, Black is seeking more favourable treatment than Canadian law would afford to a similarly-situated insider of a Canadian corporation.

vi. Choice Of Law

86. Even if this Court finds that the Ontario courts have jurisdiction over the Actions, it would be unreasonable to hold that Ontario defamation law should apply to the actions of American citizens exercising their free speech rights in the U.S., in respect of a corporate governance issue of an American company arising in the U.S., merely because the words complained of could be accessed from the Internet in this jurisdiction. As this Court has previously stated, "a 'real and substantial connection' sufficient to permit the court of a province

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165 Motion Reasons, AR Vol. I at 19 (para. 74).

166 *Grant v. Torstar Corp.*, 2009 SCC 61, **BA Tab 26**.

167 *McNichol Estate v. Woldnik*, [2001] O.J. No. 3731 at para. 23 (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 585, **BA Tab 40**.

168 See: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 234 and *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 165, Part VII hereto. See also: Delaware, *General Corporation Law*, § 141(e), codified at 8 Del. C. 1953, **BA Tab 67**. This is another point that Justice Belobaba did not properly consider: Motion Reasons, AR Vol. I at 15-16 (para. 56).

to take jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome."[169] The substance – indeed virtually the entirety – of these Actions is about events and conduct in the United States and American law should therefore apply.

87. Moreover, the laws governing the investigation and reporting of allegations of malfeasance on the part of officers and directors of corporations fall squarely under the rubric of corporate law. According to the internal affairs doctrine, the laws of a corporation's domicile exclusively govern the internal life of the corporation.[170] A complaint by an insider of a corporation that he or she had been defamed in connection with a lawfully authorized investigation of allegations of wrong-doing by such insider should be determined by the courts of the corporation's domicile,[171] and in accordance with those laws. Here, if Ontario assumes jurisdiction, the trial court will be required to apply Delaware law with respect to International's internal affairs. That would include, for example, subsection 141(e) of Delaware's *General Corporation Law*, which "fully" protects directors from liability where they have acted in good faith reliance on, among other things, reports or opinions of the company's officers, employees or professional advisors.[172] In view of the necessity of deciding these Actions in accordance with the overall fabric of Delaware corporate law, the courts of Ontario are a singularly inconvenient and inappropriate venue.[173]

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169 *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 at para. 58, **BA Tab 60**.

170 Legislatures and courts in foreign jurisdictions cannot properly interfere with the incorporating jurisdiction's exclusive authority over the corporation's internal affairs: *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at 179, **BA Tab 44**; *Reference re: Dominion Constitutional Act, s. 110 (Canada)*, [1934] S.C.R. 653 at 659, **BA Tab 52**; *Castel and Walker*, *supra*, at 10-53, **BA Tab 101**. This includes the power to direct the conduct of investigations of insider malfeasance: *Doyle v. Restrictive Trade Practices Commission*, [1983] 2 F.C. 867 at 873-74 (C.A.), leave to appeal to S.C.C. refused, [1983] C.S.C.R. no 267, **BA Tab 23**.

171 Indeed, imposition of liability under Ontario law for conduct that would not be actionable under the governing law of the corporation would represent an impermissible intrusion into the internal affairs of the foreign corporation: *Cira v. Rico Resources Inc.*, [2004] O.J. No. 30 at paras. 5-6 (Sup. Ct.), aff'd [2006] O.J. No. 436 (C.A.), **BA Tab 16**.

172 *Supra* note 168.

173 Illinois courts regularly and competently apply Delaware law without the need for expert evidence. See: *Niki Development Corp. v. HOB Hotel Chicago Partners, L.P.*, 2003 WL 1712563 at *16 (N.D. Ill. Mar. 31, 2003), **BA Tab 47**; *Anic v. DVI, Inc.*, 2002 WL 31804014 at *3 (N.D. Ill. Dec. 13, 2002), **BA Tab 3**.

PART IV – SUBMISSION ON COSTS

88. The Appellants request their costs in this Court and the courts below.

PART V – ORDER REQUESTED

89. The Appellants respectfully request that the appeal be granted and that this Court order that the Actions be dismissed or stayed as against them because (i) the Ontario Superior Court of Justice lacks jurisdiction over the plaintiff's claims against the defendants, and/or (ii) in the alternative, the Ontario Superior Court of Justice must decline to exercise that jurisdiction over the Appellants in the Actions on the basis that Ontario is the *forum non conveniens*, with costs in this Court and the courts below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26 day of January, 2011.

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PART VI – ALPHABETICAL TABLE OF AUTHORITIES

CASES

CASES ***(cont'd)***

CASES ***(cont'd)***

CASES *(cont'd)*

FOREIGN STATUTES, BILLS AND RULES

FOREIGN STATUTES, BILLS AND RULES ***(cont'd)***

SECONDARY SOURCES

SECONDARY SOURCES ***(cont'd)***

SECONDARY SOURCES ***(cont'd)***

PART VII

STATUTES, REGULATIONS, RULES

1. *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 165

Privileged statements

165. Any oral or written statement or report made by an inspector or any other person in an investigation under this Part has absolute privilege.

* * *

Immunité quant aux declarations

165. Les personnes, notamment les inspecteurs, qui font des déclarations orales ou écrites et des rapports au cours de l'enquête prévue par la présente partie jouissent d'une immunité absolue.

2. *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 234

Absolute privilege (defamation)

234. Any oral or written statement or report made by an inspector or any other person in an investigation under this Part has absolute privilege.

* * *

Immunité absolue (diffamation)

234. Les personnes, notamment les inspecteurs, qui font des déclarations orales ou écrites et des rapports au cours de l'enquête prévue par la présente partie jouissent d'une immunité absolue.

3. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 36

Serious criminality

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

Criminality

(2) A foreign national is inadmissible on grounds of criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

Application

(3) The following provisions govern subsections (1) and (2):

(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a pardon has been granted and has not ceased to have effect or been revoked under the Criminal Records Act, or in respect of which there has been a final determination of an acquittal;

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

(d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and

(e) inadmissibility under subsections (1) and (2) may not be based on an offence designated as a contravention under the Contraventions Act or an offence for which the permanent resident or foreign national is found guilty under the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985 or the Youth Criminal Justice Act.

* * *

Grande criminalité

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Criminalité

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

Application

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou de réhabilitation — sauf cas de révocation ou de nullité — au titre de la Loi sur le casier judiciaire;

c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

d) la preuve du fait visé à l'alinéa (1)c) est, s'agissant du résident permanent, fondée sur la prépondérance des probabilités;

e) l'interdiction de territoire ne peut être fondée sur une infraction qualifiée de contravention en vertu de la Loi sur les contraventions ni sur une infraction dont le résident permanent ou l'étranger est déclaré coupable sous le régime de la Loi sur les jeunes contrevenants, chapitre Y-1 des Lois révisées du Canada (1985), ou de la Loi sur le système de justice pénale pour les adolescents.

4. *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 17(a)

Prescribed period

17. For the purposes of paragraph 36(3)(*c*) of the Act, the prescribed period is five years

(*a*) after the completion of an imposed sentence, in the case of matters referred to in paragraphs 36(1)(*b*) and (2)(*b*) of the Act, if the person has not been convicted of a subsequent offence other than an offence designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*; and

(*b*) after committing an offence, in the case of matters referred to in paragraphs 36(1)(*c*) and (2)(*c*) of the Act, if the person has not been convicted of a subsequent offence other than an offence designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*.

* * *

Délai réglementaire

17. Pour l'application de l'alinéa 36(3)*c*) de la Loi, le délai réglementaire est de cinq ans à compter :

a) dans le cas des faits visés aux alinéas 36(1)*b*) ou (2)*b*) de la Loi, du moment où la peine imposée a été purgée, pourvu que la personne n'ait pas été déclarée coupable d'une infraction subséquente autre qu'une infraction qualifiée de contravention en vertu de la *Loi sur les contraventions* ou une infraction à la *Loi sur les jeunes contrevenants*;

b) dans le cas des faits visés aux alinéas 36(1)*c*) ou (2)*c*) de la Loi, du moment de la commission de l'infraction, pourvu que la personne n'ait pas été déclarée coupable d'une infraction subséquente autre qu'une infraction qualifiée de contravention en vertu de la *Loi sur les contraventions* ou une infraction à la *Loi sur les jeunes contrevenants*.

5. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rr. 1.08, 17.02

TELEPHONE AND VIDEO CONFERENCES

Where Available

1.08 (1) If facilities for a telephone or video conference are available at the court or are provided by a party, all or part of any of the following proceedings or steps in a proceeding may be heard or conducted by telephone or video conference as permitted by subrules (2) to (5):

1. A motion (Rule 37).
2. An application (Rule 38).
3. A status hearing (Rule 48.14).
4. At trial, the oral evidence of a witness and the argument.
5. A reference (Rule 55.02).
6. An appeal or a motion for leave to appeal (Rules 61 and 62).
7. A proceeding for judicial review.
8. A pre-trial conference or case conference.

Consent

(2) If the parties consent to a telephone or video conference and if the presiding judge or officer permits it, one of the parties shall make the necessary arrangements.

Order, No Consent

(3) If the parties do not consent, the court may, on motion or on its own initiative, make an order directing a telephone or video conference on such terms as are just.

(4) The judge or officer presiding at a proceeding or step in a proceeding may set aside or vary an order made under subrule (3).

Factors to Consider

(5) In deciding whether to permit or to direct a telephone or video conference, the court shall consider,

(a) the general principle that evidence and argument should be presented orally in open court;

(b) the importance of the evidence to the determination of the issues in the case;

(c) the effect of the telephone or video conference on the court's ability to make findings, including determinations about the credibility of witnesses;

(d) the importance in the circumstances of the case of observing the demeanour of a witness;

(e) whether a party, witness or lawyer for a party is unable to attend because of infirmity, illness or any other reason;

(f) the balance of convenience between the party wishing the telephone or video conference and the party or parties opposing; and

(g) any other relevant matter.

Arrangements for Conference

(6) Where the court permits or directs a telephone or video conference, the court may direct a party to make the necessary arrangements and to give notice of those arrangements to the other parties and to the court.

* * *

CONFÉRENCES TÉLÉPHONIQUES ET VIDÉOCONFÉRENCES

Applicabilité

1.08 (1) Si des installations en vue de la tenue d'une conférence téléphonique ou d'une vidéoconférence sont disponibles au tribunal ou sont fournies par une partie, tout ou partie de l'une ou l'autre des instances ou étapes d'une instance suivantes peut être entendu ou mené par conférence téléphonique ou vidéoconférence comme le permettent les paragraphes (2) à (5) :

1. Une motion (Règle 37).
2. Une requête (Règle 38).
3. Une audience sur l'état de l'instance (règle 48.14).
4. Lors du procès, le témoignage oral d'un témoin et la plaidoirie.
5. Un renvoi (règle 55.02).
6. Un appel ou une motion en autorisation d'interjeter appel (Règles 61 et 62).
7. Une instance relative à la révision judiciaire.
8. Une conférence préparatoire au procès ou une conférence relative à la cause.

Consentement

(2) Si les parties consentent à une conférence téléphonique ou à une vidéoconférence et que le juge ou l'officier de justice qui préside l'autorise, l'une des parties prend les dispositions nécessaires.

Ordonnance en l'absence de consentement

(3) Si les parties ne donnent pas leur consentement, le tribunal peut, sur motion ou de son propre chef, rendre une ordonnance prescrivant la tenue d'une conférence téléphonique ou d'une vidéoconférence, à des conditions justes.

(4) Le juge ou l'officier de justice qui préside une instance ou une étape d'une instance peut annuler ou modifier une ordonnance rendue en vertu du paragraphe (3).

Facteurs à prendre en considération

(5) Lorsqu'il décide s'il doit autoriser ou ordonner la tenue d'une conférence téléphonique ou d'une vidéoconférence, le tribunal tient compte des facteurs suivants :

a) le principe général selon lequel les témoignages et les plaidoiries devraient être présentés oralement en audience publique;

b) l'importance des témoignages pour ce qui est de trancher les questions en litige dans la cause;

c) l'effet de la conférence téléphonique ou de la vidéoconférence sur la capacité du tribunal d'émettre des conclusions, y compris des décisions relatives à la crédibilité des témoins;

d) l'importance d'observer le comportement d'un témoin, compte tenu des circonstances de l'affaire;

e) la question de savoir si une partie, un témoin ou l'avocat d'une partie ne peut se présenter pour cause d'infirmité, de maladie ou pour tout autre motif;

f) la prépondérance des inconvénients qu'il établit entre ceux que subirait la partie qui souhaite la tenue de la conférence téléphonique ou de la vidéoconférence et ceux que subiraient la ou les parties qui s'y opposent;

g) les autres questions pertinentes.

Dispositions relatives à la conférence

(6) Le tribunal qui autorise ou ordonne la tenue d'une conférence téléphonique ou d'une vidéoconférence peut enjoindre à une partie de prendre les dispositions nécessaires à cette fin et d'en donner avis aux autres parties et au tribunal.

* * *

SERVICE OUTSIDE ONTARIO WITHOUT LEAVE

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

Property in Ontario

(a) in respect of real or personal property in Ontario;

Administration of Estates

(b) in respect of the administration of the estate of a deceased person,

(i) in respect of real property in Ontario, or

(ii) in respect of personal property, where the deceased person, at the time of death, was resident in Ontario;

Interpretation of an Instrument

(c) for the interpretation, rectification, enforcement or setting aside of a deed, will, contract or other instrument in respect of,

(i) real or personal property in Ontario, or

(ii) the personal property of a deceased person who, at the time of death, was resident in Ontario;

Trustee Where Assets Include Property in Ontario

(d) against a trustee in respect of the execution of a trust contained in a written instrument where the assets of the trust include real or personal property in Ontario;

Mortgage on Property in Ontario

(e) for foreclosure, sale, payment, possession or redemption in respect of a mortgage, charge or lien on real or personal property in Ontario;

Contracts

(f) in respect of a contract where,

(i) the contract was made in Ontario,

(ii) the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario,

(iii) the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract, or

(iv) a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario;

Tort Committed in Ontario

(g) in respect of a tort committed in Ontario;

Damage Sustained in Ontario

(h) in respect of damage sustained in Ontario arising from a tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed;

Injunctions

(i) for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario;

(j) Revoked: O. Reg. 131/04, s. 9.

(k) Revoked: O. Reg. 131/04, s. 9.

(l) Revoked: O. Reg. 131/04, s. 9.

Judgment of Court Outside Ontario

(m) on a judgment of a court outside Ontario;

Authorized by Statute

(n) authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario;

Necessary or Proper Party

(o) against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario;

Person Resident or Carrying on Business in Ontario

(p) against a person ordinarily resident or carrying on business in Ontario;

Counterclaim, Crossclaim or Third Party Claim

(q) properly the subject matter of a counterclaim, crossclaim or third or subsequent party claim under these rules; or

Taxes

(r) made by or on behalf of the Crown or a municipal corporation to recover money owing for taxes or other debts due to the Crown or the municipality.

* * *

SIGNIFICATION EN DEHORS DE L'ONTARIO SANS AUTORISATION DU TRIBUNAL

17.02 L'acte introductif d'instance ou l'avis d'un renvoi peut être signifié sans l'autorisation du tribunal à une partie se trouvant en dehors de l'Ontario si la ou les demandes contre cette partie, selon le cas :

Biens se trouvant en Ontario

a) se rapportent à des biens meubles ou immeubles se trouvant en Ontario;

Administration de successions

b) se rapportent à l'administration de la succession d'un défunt relativement :

(i) soit, à des biens immeubles se trouvant en Ontario,

(ii) soit, à des biens meubles, si le défunt, au moment de son décès, était résident de l'Ontario;

Interprétation d'un acte

c) ont pour objet l'interprétation, la rectification, l'exécution forcée ou l'annulation d'un acte scellé, d'un testament, d'un contrat ou d'un autre acte visant :

(i) soit, des biens meubles ou immeubles se trouvant en Ontario,

(ii) soit, les biens meubles d'un défunt qui, au moment de son décès, était résident de l'Ontario;

Fiduciaire si l'actif comprend des biens se trouvant en Ontario

d) sont dirigées contre un fiduciaire relativement à l'exécution d'une fiducie contenue dans un acte, si l'actif de la fiducie comprend des biens meubles ou immeubles se trouvant en Ontario;

Hypothèque sur des biens se trouvant en Ontario

e) se rapportent à la forclusion, à la vente, au paiement, à la possession ou au rachat d'une hypothèque, d'une charge ou d'un privilège sur des biens meubles ou immeubles se trouvant en Ontario;

Contrats

f) se rapportent, selon le cas, à un contrat :

(i) qui a été conclu en Ontario,

(ii) dont les clauses stipulent qu'il doit être régi ou interprété conformément aux lois de l'Ontario,

(iii) dans lequel les parties ont convenu de reconnaître la compétence des tribunaux de l'Ontario pour connaître de toute instance relative au contrat,

(iv) dont l'inexécution a eu lieu en Ontario, même si elle a été précédée ou accompagnée d'une inexécution à l'extérieur de la province qui a rendu impossible l'exécution de la partie du contrat qui devait être exécutée en Ontario;

Délit commis en Ontario

g) se rapportent à un délit commis en Ontario;

Préjudice subi en Ontario

h) se rapportent à un préjudice subi en Ontario et qui découle d'un délit, d'une inexécution de contrat, d'un manquement à l'obligation de fiduciaire ou d'un abus de confiance, quel que soit l'endroit où ils ont eu lieu;

Injonctions

i) visent à obtenir une injonction enjoignant à une partie de faire ou de s'abstenir de faire quelque chose en Ontario ou visent des biens meubles ou immeubles se trouvant en Ontario;

j) Abrogé : Règl. de l'Ont. 131/04, art. 9;

k) Abrogé : Règl. de l'Ont. 131/04, art. 9;

l) Abrogé : Règl. de l'Ont. 131/04, art. 9;

Jugement d'un tribunal situé en dehors de l'Ontario

m) se fondent sur un jugement d'un tribunal en dehors de l'Ontario;

Demandes autorisées en vertu d'une loi

n) peuvent, en vertu d'une loi, être opposées à une personne qui se trouve en dehors de l'Ontario au moyen d'une instance introduite en Ontario;

Partie essentielle ou appropriée

o) visent une personne qui se trouve en dehors de l'Ontario et qui est une partie essentielle ou appropriée à une instance intentée à bon droit contre une autre personne qui en a reçu signification en Ontario;

Résident de l'Ontario ou personne qui y exploite une entreprise

p) visent une personne qui réside ordinairement en Ontario ou y exploite une entreprise;

Demande reconventionnelle, demande entre défendeurs ou mise en cause

q) font à bon droit l'objet d'une demande reconventionnelle, d'une demande entre défendeurs ou d'une mise en cause en vertu des présentes règles;

Impôts

r) visent le recouvrement par la Couronne ou une municipalité, ou en leur nom, d'impôts ou d'autres créances qui leur sont dus.

6. *Securities Act*, R.S.O. 1990, c. S.5, s. 75(1)

Publication of material change

75. (1) Subject to subsection (3), where a material change occurs in the affairs of a reporting issuer, it shall forthwith issue and file a news release authorized by a senior officer disclosing the nature and substance of the change.

* * *

Publication d'un changement important

75. (1) Sous réserve du paragraphe (3), si un changement important survient dans les affaires d'un émetteur assujetti, ce dernier publie et dépose sans délai un communiqué autorisé par un cadre dirigeant et divulguant la nature et la substance du changement.

Appendix "A"

OVERLAP OF ISSUES IN THE ACTIONS AND THE ILLINOIS PROCEEDING		
ISSUE	**THE ACTIONS (Amended Claims paras.)**	**ILLINOIS COMPLAINT (paras.)**
Defrauding through unauthorized non-competition payments.	First (44, 60, 76) Second (14, 21) Third (44, 60, 76) Fourth (14) Fifth (12)	371-381, 383-387, 389-391, 404-406, 413-417, 427-433, 439-444, 634-644, 646-649
Misappropriating more than $200 million through schemes to divert corporate assets and opportunities.	First (60) Second (21) Third (60) Fifth (12)	446-450, 634-644, 646-649
Wrongfully altering financial statements.	First (60) Second (21) Third (60)	74, 117-125, 630-632
Lying to public, failing to disclose and misrepresenting material information to Board, Audit Committee, directors and shareholders.	First (60) Second (21) Third (60) Fifth (12) Sixth (16)	383-387, 428-433, 435-438, 440-444, 530-535, 537-544, 546-550, 552-559, 561-565, 567-571, 581-585, 605-609, 619-622, 624-628, 630-632, 634-644, 646-649
Collecting unjustified and excessive management fees.	First (60) Second (21) Third (60) Fifth (12)	634-644, 646-649
Using company resources to finance personal lifestyle.	First (60) Second (21) Third (60) Fifth (12) Sixth (16)	12-16, 513-518, 525-528, 634-644, 646-649
Breaching fiduciary duties in connection with the sale of newspaper assets at less than fair value to companies controlled by Black.	Fourth (14) Fifth (12) Sixth (16)	530-535, 537-544, 546-550, 552-559, 561-565, 567-571, 581-585, 598-603, 605-609, 619-622, 624-628, 630-632, 634-644, 646-649
Receiving improper bonuses in connection with the operations of Hollinger Digital LLC.	Fourth (14)	459-463
Creating a corporate culture of controlling shareholder entitlement. Freely plundering the company's coffers.	Fifth (12) Sixth (16)	68-74, 367-369, 630-632, 634-644, 646-649
Improperly using company funds to make charitable donations in his own name.	Fifth (12)	13

First Action (04-CV-263720CM1) Amended Statement of Claim, AR Vol. I at 86-132.
Second Action (04-CV-265298CM1) Amended Statement of Claim, AR Vol. I at 192-207.
Third Action (04-CV-265299CM1) Amended Statement of Claim, AR Vol. II at 1-48.
Fourth Action (04-CV-270773CM1) Amended Statement of Claim, AR Vol. II at 108-121.
Fifth Action (04-CV-276761CM2) Amended Statement of Claim, AR Vol. II at 151-180.
Sixth Action (05-CV-285535PD2) Amended Statement of Claim, AR Vol. II at 124-137.
Second Amended Illinois Complaint, AR Vol. VIII at 24-236.