SCC File No: 33819

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

LES EDITIONS ECOSOCIETE INC., ALAIN DENEAULT,

DELPHINE ABADIE and WILLIAM SACHER

Appellants

(Appellants)

AND:

BANRO CORPORATION

RESPONDENT

(Respondent)

AND:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENER

AND:

CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENER

FACTUM

OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Holmes & King Barristers and Solicitors 1300 - 1111 West Georgia Street Vancouver, BC V6E 4M3 Telephone: (604) 681-1310 Facsimile: (604) 681-1307 Email: rdholmes@mhklaw.com **Robert D. Holmes, Q.C.** Counsel for the Intervener The British Columbia Civil Liberties Association	**Nelligan O'Brien Payne LLP** Barristers and Solicitors 50 O'Connor, Suite 1500 Ottawa, Ontario K1P 6L2 Telephone: (613) 231-8220 Facsimile: (613) 788-3698 Email: pam.maceachern@nelligan.ca **Pamela J. MacEachern** Ottawa Agent for the Intervener The British Columbia Civil Liberties Association

Jason B. Gratl **Gratl & Company, Barristers and Solicitors** 302-560 Beatty Street Vancouver, BC V6C 2L3 Telephone: 604.694-1919 Facsimile: 604.608-1919 email: Jason@gratlandcompany.com Counsel for the Intervener The B.C. Civil Liberties Association	
LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP 130 Adelaide Street West Toronto, Ontario M5H 3P5 Telephone: (416) 865-2949 Facsimile: (416) 865-9010 Email: Wmcdowell@litigate.com **William C. McDowell** Counsel for Les Editions Ecosociete Inc., Alain Deneault, Delphine Abadie and William Sacher	**Nelligan O'Brien Payne LLP** 50 O'Connor Street, Suite 1500 Ottawa, Ontario K1P 6L2 Telephone: (613) 238-8080 Facsimile: (613) 238-2098 Email: patricia.lawson@nelligan.ca **Patricia A. Lawson** Agent for the Counsel for Les Editions Ecosociete Inc., Alain Deneault, Delphine Abadie and William Sacher
McCague Peacock Borlack McInnis & Lloyd LLP 130 King Street West, Suite 2700 P.O. Box 136 Toronto, Ontario M5X 1C7 Telephone: (416) 860-0001 Facsimile: (416) 860-0003 Email: lhonickman@mccagueborlack.com **Lorne Honickman** Counsel for Banro Corporation	**Gowling Lafleur Henderson LLP** Barristers and Solicitors 160 Elgin Street, Suite 2600 Ottawa, ON K1P 1C3 Telephone: (613) 786-0139 Facsimile: (613) 786-3433 Email: henry.brown@gowlings.com **Henry S. Brown, Q.C.** Agents for Counsel for Banro Corporation
Osler, Hoskin & Harcourt LLP 1000, rue de la Gauchetiere Ouest Bureau 2100 Montreal, Quebec H3B 4W5 Telephone (514) 904-8108 Facsimile: (514) 904-8101 Email: krenno@osler.com **Karim Renno** Counsel for the Intervener Canadian Civil Liberties Association	**Osler, Hoskin & Harcourt LLP** 340 Albert Street Suite 1900 Ottawa, Ontario K1R 7Y6 Telephone (613) 787-1009 Facsimile: (613) 235-2867 Email: pwilson@osler.com **Patricia Wilson** Agent for the Intervener Canadian Civil Liberties Association

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PART I – STATEMENT OF FACTS

1. This appeal is about the interrelationship of constitutionally protected values of freedom of expression,[1] access to justice,[2] and democratic governance[3] in the context of interprovincial defamation cases. This factum of the BCCLA will urge two adaptations to *forum non conveniens* analysis. First, the court should assess imbalances in litigation capacity that may impair a litigant from exercising, and public from hearing, freedom of expression. Second, the court should assess evidence of the nature of the reputational interests alleged, including assessing the weight of damage occurring in different jurisdictions, whether the damage to reputation is actual or speculative, and whether the damage to reputation is purely financial (e.g., with corporations) or has a personal aspect (e.g., with individuals).

2. The Plaintiff is a "leading global mineral exploration and development company" (Appellants' Record ("AR") p. 13, Trial Reasons, para. 28), based in Ontario. The Defendants are individuals and a company resident in Quebec. They published a few thousand copies of a French language book. A few of those made their way to Ontario. They put references to the book on a website. The Defendants lack substantial means; at the least, there is no equality of arms between them and the Plaintiff. The Plaintiff prefers Ontario law and asserts that any publication in Ontario is a separate tort entitling it to sue there and enjoy the advantages of its laws. The Plaintiff seeks a worldwide, permanent, mandatory injunction against the Defendants from the Ontario courts. The Defendants argue for a substantial publication rule for forum selection and point to Quebec's enactment of anti-SLAPP legislation as an important statement of public policy enhancing protection of free expression.

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[1] *Reference re Alberta Statutes* [1938] S.C.R. 100 per Cannon, J., at pp. 145-146; *Switzman v. Elbing* [1957] S.C.R. 285, per Abbot, J., at pp. 327-8; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, per McIntyre, J., at paras. 12-15; *Grant v. Torstar Corp*., 2009 SCC 61 at paras. 47-50.

[2] B*.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 per Dickson, C.J.C., at paras. 1 and 24-26. *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 at paras. 16-20.

[3] *Grant v. Torstar Corp*., 2009 SCC 61 at paras. 48 and 52.

3. The BCCLA submits that forum selection, like other conflicts of laws issues, requires a contextual and purpose-driven approach[4] in which due regard is paid to the pluralistic[5] nature of the problem. That approach affords due recognition for the "gravitational" pull each jurisdiction has to govern the claims and parties.[6]

4. Rules of jurisdiction and procedure must adapt to ensure that they do not have a deleterious effect on substantive constitutional entitlements. In defamation cases, the *forum non conveniens* test must be adapted to allow preliminary assessment and balancing of individual reputational interests and free expression. The decision under appeal is overly tilted against free expression by (a) the notion that any publication within the forum jurisdiction constitutes a separate tort, (b) the presumption of falsity, (c) the presumption of damage, and (d) the presumption that the plaintiff's choice of forum and juridical advantages take precedence. Together, these presumptions award plaintiffs in multi-jurisdictional defamation cases an unreasonable degree of control over the venue and undermine the judicial discretion to be exercised on the analysis of *forum non conveniens.*

5. The BCCLA generally accepts the statement of facts set out in the Appellant's factum, but notes the following factors concerning the judgments below:

a) In assessing the location of the tort, the fact that fewer copies of the book were distributed in Ontario, rather than Quebec, did not assist the defendant (AR p. 13, Trial Reasons, para.65);

b) The harm to the plaintiff was deemed to be greatest in Ontario because the plaintiff is incorporated and headquartered in Ontario and would thus suffer the greatest harm in that locale (AR p. 13, Trial Reasons para.69);

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[4] *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 per McLachlin, CJC, at para. 56, "The principles of order and fairness, being purposive, are applied flexibly…"; *Beals v. Saldanha*, 2003 SCC 72 at para. 172 per Lebel, J., (dissenting on other grounds).

[5] *Sauvé v. Canada (Chief Electoral Officer),* 2002 SCC 68 at para. 97: "The range of choices made by different legislatures in different jurisdictions … supports the view that there are many resolutions to the particular issue at bar which are reasonable…"

[6] E.g., where at least a minimum standard of reasonable and substantial connections with the forum jurisdiction exist.

c) The plaintiff was entitled to the litigation advantage arising from proceeding with the litigation in Ontario rather than Quebec because the plaintiff has a real and substantial connection with Ontario (AR pp. 14-15, Trial Reasons, para.78-81);

d) All remaining factors considered in the decision were neutral; and

e) The decision did not consider any of the following to be of importance: the relative means of the litigants, the increased costs imposed on the defendants by out-of-Province litigation, the nature of the plaintiff's reputational interests and the effect of the choice of venue on the right to free expression.

PART II – POINTS IN ISSUE

6. The BCCLA accepts the Appellant's Statement of Questions in Issue (AF, para. 27), but will focus its submissions on forum conveniens, and particularly on whether the courts below:

a) Erred in presuming harm within Ontario to the reputation of the plaintiff without considering the nature of the plaintiff's reputational interests, and, in particular, by failing to distinguish between harm to the reputation of corporate persons and harm to the reputation of human beings;

b) Failed to appropriately consider the relative financial capacities of the plaintiff and the defendants to advance their interests;

c) Failed to give proper consideration to the effect of the litigation on rights of free expression, the right of others to read *Noir Canada* and form their own opinions on its contents, and the chilling effect of this litigation.

PART III – STATEMENT OF ARGUMENT

7. Forum non conveniens factors should take into account constitutional values, including freedom of expression, access to justice and democratic governance. The discretion must be made judicially, in accordance with principles of order and fairness, so as to determine the forum with the closest connection to the claims, the parties and the interests affected. Individual litigants should not be permitted a juridical advantage at the expense of others by proceeding where the connections are not the most substantial. The list of factors to be considered is not closed.[7]

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[7] *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at para. 28.

a) Assessing the Nature of the Reputational Interests and their Connection to the Venues -- Corporate Defamation Claims

8. The BCCLA takes the position that Canadian common law should contain no presumption of harm to a corporation's business reputation, at least for the purposes of determining the appropriate forum for a lawsuit, and preferably generally. Corporations do not have a human or personal interest in identity, personality and dignity.[8]

9. Adjudication of the most appropriate venue for a defamation lawsuit should involve a preliminary assessment of the nature of the reputational interests at stake and their connection to each of the proposed venues. Here, the courts below erred by failing to distinguish between harm to corporate as opposed to individual reputation, and between actual and presumed harm. Their decision is at odds with this court's recent statement concerning the basis for limiting free expression – individual rights to dignity.[9]

10. Individuals' defamation claims differ significantly from those of corporate bodies.[10] Corporate interests are solely economic. Corporations lack the right to claim for certain kinds of damages (e.g., injury to feelings).[11] Presumptions as to defamation damages in claims by corporations are anomalous (e.g., group libel is not recognized yet the interposition of a fictional legal person curiously leads to a different result). Other torts (e.g., malicious falsehood) already allow a remedy for actual damage proven by corporate entities. The Appellants argue that Banro's damages suffered in Ontario are minimal or non-existent and that pursuing a claim there under Ontario law is

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[8] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at para. 95.

[9] *Bou Malhab v. Diffusion Métromédia CMR inc*., 2011 SCC 9 at paras 17-18 per Deschamps, J., where limits on free expression arising from defamation law were held justifiable because of attributes of personality and individual autonomy "Reputation is a fundamental feature of personality that makes it possible for an individual to develop in society."

[10] *Dixon v. Powell River (City)* 2009 BCSC 406 at paras. 45-49; *Halton Hills (Town) v. Kerouac*, (2006), 270 D.L.R. (4th) 479 at para. 62 (Ont. Ct. G.D.); *Montague (Township) v. Page* (2006), 79 O.R. (3d) 515, at para. 29. For the U.K., *Derbyshire County Council v. Times Newspapers et al* [1993] AC 534, modified defamation law so as to disentitle public bodies from suing.

[11] *Walker v CFTO* (1987) 59 O.R. (2d) 104 (C.A.) per Robins, J.A. at para. 27: "But a company has no feelings and, therefore, as Lord Reid notes..., "[a] company cannot be injured in its feelings, it can only be injured in its pocket". Hence, unlike an individual, a company is not entitled to compensation for injury to hurt feelings or, it follows, to compensation by way of aggravated damages for a loss of this nature." See also *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, 2006 SCC 30 paras. 51-59.

abusive.[12] The argument against presuming corporate damage finds support as well from (a) the "responsible journalism" defence predicated on a negligence standard,[13] (b) the Ontario civil rules proportionality principle,[14] and (c) a corporate claimant being disentitled from claiming anything but injury "in its pocket."

11. The House of Lords recently reconsidered whether corporations were entitled to a presumption of defamation damages. A bare majority upheld it, albeit saying that where a corporation "has suffered no actual financial loss any damages awarded should be kept strictly within modest bounds."[15] Baroness Hale strongly dissented, holding that corporations should have to prove damage: "… such a requirement would achieve a proper balance between the right of a company to protect its reputation and the right of the press and public to be critical of it. These days, the dividing line between governmental and non-governmental organisations is increasingly difficult to draw. The power wielded by the major multi-national corporations is enormous and growing. The freedom to criticise them may be at least as important in a democratic society as the freedom to criticise the government." [16]

12. By questioning whether damage occurred in Ontario so as to underscore the lack of connection of Ontario to the alleged wrong, the Appellants address whether litigating in Ontario is abusive – whether as an abuse of right or process or a violation of the strong public policy of Quebec's anti-SLAPP laws. That engages whether, at least for jurisdiction analysis, substantial damages within the forum actually exist.

13. Applying a legal presumption of harm to corporate reputation unjustifiably interferes with that analysis. Given that this court has held that the law relating to

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[12] *Jameel v. Dow Jones* [2005] QB 946 (C.A.) at paras. 55 and 69.

[13] Grant v. Torstar 2009 SCC 61 at para. 126. The tort of negligence requires proof of actual damage: Hill *v.* Hamilton-Wentworth Regional Police Services Board, [2007] 3 S.C.R. 129, 2007 SCC 41 at para. 90.

[14] E.g., The Appellants Factum at paras. 94, 95 and 100 concerning *Jameel (Yousef) v. Dow Jones & Co.* [2005] EWCA Civ 75.

[15] *Jameel (Mohammed) v. Wall Street Journal* [2006] UKHL 44, [2007] 1 AC 359, para. 21 (Lord Bingham). They treated the South Hetton case as a halting place, rather than treating European human rights conventions as offering a stepping stone (cf. Lord Thankerton in Birch Bros. v. Brown [1931] AC 605).

[16] *Jameel v. Wall Street Journal*, Supra para. 90 (Lord Hoffman) and paras. 152-158 (Baroness Hale). Price v. Chicoutimi Pulp Co. (1915), 51 S.C.R. 179 at pages 6-7 (QL) refers to *South Hetton's* extension of libel laws to corporations and thus requires reconsideration.

finding jurisdiction, forum conveniens and choice of law is constitutional in nature, having a presumption of damage for corporations in defamation cases amounts to having a "property and civil rights" law interfere with a constitutional principle.

14. Unlike injury to dignity and identity, injury to financial interests must be proven on evidence or taken not to exist. Even without the benefit of an evidentiary presumption, a corporate plaintiff could still establish its choice of venue by demonstrating on evidence that it has suffered significant damages. If its key personnel resigned, contracts fell through, investors left and its stock price collapsed because of publication of Noir Canada in Ontario, the Plaintiff would no doubt have adduced such evidence. It did not do so. What remains is speculation. And speculation is hardly a basis for burdening constitutional interests.

15. Further, one must consider the extent of publication in relation to forum conveniens. Treating the case as one involving multiple torts, with Ontario having as good a claim to jurisdiction as Quebec because of the distribution in Ontario of 93 copies of Noir Canada is inadequate. That ought to be so for forum conveniens, just as Castel has argued concerning choice of law. "Only one law would be relevant instead of applying the law of each of the states or provinces where publication took place."[17]

16. Even if the "fresh evidence" application of the Plaintiff concerning Noir Canada listings in Ontario libraries is allowed and an assumption made that Ontario residents may have read it, the BCCLA takes the position that is insufficient for Ontario to find and retain jurisdiction. Absent evidence of serious harm to business reputation, mere publication should not be sufficient to establish a choice of venue that diverges from where the real "centre of gravity" is.

17. In the alternative, if damages to the plaintiff's business reputation can be presumed from the limited distribution or publication of the book in Ontario, the BCCLA submits that the connection between Ontario and any injury to the plaintiff's reputation is minimal. The distribution of 50 times more copies of the book in the Province of Quebec affords Quebec the most substantial connection to the case. While "substantial

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[17] J.-G. Castel, "Multistate Defamation: Should the Place of Publication Rule be Abandoned for Jurisdiction and Choice of Law Purposes?" (1990) 28 Osgoode Hall L.J. 153 at pp. 174-5.

connection" may get used for jurisdiction simpliciter, with forum non conveniens analysis the emphasis should be on which jurisdiction has the "most substantial connection".

18. It is not in the interests of justice or fairness to allow the plaintiff to secure the juridical advantage afforded by litigating in the Province of Ontario if 98% of the copies of the book at issue were sold in the Province of Quebec. As stated in Amchem, "the weight given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question".[18]

19. The BCCLA submits that this Court should put an end to the presumption of damages to corporate reputation, at least in respect of choice of venue. This small adaptation to the common law is necessary in order to mitigate the power of wealthy corporations to silence their critics merely by forum choices to their advantage and their critics disadvantage.

(b) Access to Justice Concerns

20. The decision under appeal accepted the proposition that that the plaintiff Banro Corporation has significantly more financial resources than the defendants (AR, page 10, Trial Reasons, para. 36-38). However, the court was not satisfied that the evidence established that the defendants could not afford to retain counsel or to participate in proceedings in Ontario, rather ironically basing that on the defendants having counsel to argue against jurisdiction. The trial judge's refusal to consider the relevance of the relative financial resources of the parties constitutes an error in principle.

21. Absent any legal aid program or advance costs award as a condition of the plaintiff proceeding, it will in many cases be prohibitively expensive for authors and publishers to defend in court their right to free expression. The lack of equality of arms and the complexities of having to defend their case in a jurisdiction in which falsity of disparaging comments and damage are presumed compounds the difficulties they face. Those raise serious issues as to access to justice.[19]

22. Any account of the affordability of defamation litigation must take into account not only the means of a defendant such as an author or publisher to pay the fees and

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[18] *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at para. 32.

[19] See *Steel and another v United Kingdom* (App no 68416/01) [2005] ECHR 68416/01 at paras. 48-72.

disbursements necessary to advance a defence, but also the relative financial ability of the plaintiff to deplete the resources of a defendant of more modest means. A forum may be inappropriate if it increases the litigation costs on the party that is less able to bear those costs. That is so whether the increase in costs arises due to distance and travel expense or due to differences in law that render participation in litigation and proving one's case more difficult.

23. A defendant also risks a heavy costs award. Cases exists where costs are vastly disproportionate.[20] That raises both access to justice and free expression constitutional concerns. Winkler, C.J., wrote: "Access to justice undoubtedly means different things to different people, but for me it simply connotes the laudable notion that people can and should resolve conflicts fairly, affordably and quickly through a court process. The fundamental question is, how do we promote these goals in practice?" [21]

c) Effects on Free Expression, Public Debate and Chilling Effects

24. Defamation lawsuits may often have deleterious effects on the rights of listeners. The right to freedom of expression serves the public interest in open debate.[22] The effects of a defamation action are not exhaustively captured by a comparative analysis of the juridical advantage of the parties themselves. Where the expression at issue relates to the public interest, a defendant bears the costs of defending the rights of the listeners as well as the costs of defending his or her own rights as a speaker. The public interest in ensuring that the costs of defending a lawsuit are not unnecessarily increased by the choice of forum is obviously heightened in such circumstances.[23] The

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[20] *Campbell v. MGN Limited* [2005] UKHL 61 £1,086,295.47 allowed a plaintiff on a judgment for only £3,500 in damages.

[21] W. Winkler, *Professionalism and Proportionality*, (Spring 2009) 27 Advocates' Soc. J. No. 4, 6 – 7. Accord, see C. L'Heureux-Dube, *Introduction,* (2007) 40 U.B.C. L. Rev. 449 – 454 ; B. McLachlin, *Preserving Public Confidence in the Courts and the Legal Profession,* (2003) 29 Man. L.J. 277 – 287; B. McLachlin, *Reflections -- The Challenges We Face*, (2007) 40 U.B.C. L. Rev. 819 – 828; I. Binnie, *The Boom in the Law Business*, (Winter 2006) 25 Advocates' Soc. J. No. 3, 4 – 12.

[22] *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para. 17 per Bastarache, J., "Freedom of expression protects not only the individual who speaks the message, but also the recipient. Members of the public – as viewers, listeners and readers – have a right to information on public governance..."

[23] *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 927 at para. 53.

chilling effects noted earlier are not just a concern for the individual speaker, but for the public at large.

25. Having a process that is risky, overly expensive and involves the spectre of a ruinous damage[24] and costs award as the consequence of engaging in a constitutionally protected activity is wrong.[25] Doing so in a context of legal rules that have been characterized as overly complex compounds the problem.[26] This court has expressed serious concerns about "chilling effects" on freedom of expression.[27] Concern about chilling effects is all the more pressing where there is no rule of proportionality as to damages and costs make litigation the "sport of kings."[28] These points, plus the fact that overall there is little or no recovery by defamation plaintiffs, [29] make a serious reconsideration of the tort and its place in the law appropriate. Among other things, that applies to where and whether the litigation ought properly to be litigated.[30]

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[24] *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, at para. 2, defendants "jointly liable for general damages in the amount of $300,000 and Scientology alone was found liable for aggravated damages of $500,000 and punitive damages of $800,000." *Botiuk v. Toronto Free Press,* [1995] 3 S.C.R. 3 at paras. 54 and 121, $465,000 plus interest at 13% for 12 ½ years and solicitor-client costs was upheld.

[25] *Steel and another v United Kingdom* (App no 68416/01) *[2005] ECHR 68416/01 at paras. 96-98; Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442, [1995] ECHR 18139/91 at paras. 50-51.

[26] Brown, *The Law of Defamation in Canada* (2004), at 1.1 notes "scarcely anything positive has been said about the law [of libel] as it has evolved," it was "marred in the making", is a "mausoleum of antiquities", has an "artificial and archaic character" and is full of "obscurity, complexity, technicalities, absurdities, irrationality," and "minute and barren distinctions." *Simpson v. Mair and WIC Radio Ltd*., 2006 BCCA 287 (appeal allowed, 2008 SCC 40) per Southin, J.A., at paras. 11-12 quotes Russell, L.J., about "the law of libel" having "such complication and subtlety that I wonder whether a jury on retiring can readily distinguish their heads from their heels" and at para. 24, warns against "those who go into the minefield that is the law of libel."

[27] *Grant v. Torstar*, supra, at paras. 39 and 53; *R. v. National Post*, 2010 SCC 16 per Binnie, J., at para. 67 and Abella, J., (dissenting) at paras. 122-123, 147.

[28] *Kerr v. Danier Leather Inc*., [2007] 3 S.C.R. 331, 2007 SCC 44 at para. 63.

[29] See David Boies, *The Chilling Effect of Libel Defamation Costs*, 39 St. Louis U. L.J. 1207 (1994-1995): only 3-8% of the amount involved in prosecuting, defending and paying judgments went to successful plaintiffs, with the rest eaten up in expenses.

[30] *Jameel v. dow Jones* [2005] QB 946 (C.A.) at paras. 55 and 69. Accord, see Pillai v Sarkhar [1994] T.L.R. 411 (Q.B.).

26. A jurisdiction better able to protect the right to freedom of expression will tend to be a forum better suited to the ends of justice. Fundamental freedoms like freedom of expression are higher statements of public policy than ordinary property and civil rights claims. The Quebec Civil Code places a burden on the plaintiff not only to establish a defamatory utterance occurred but also to establish fault. In this sense, Quebec's balance between free expression and reputation favours free expression to a greater extent than the common law in Ontario. The balance struck by Quebec accords with constitutional values, particularly in relation to alleged injury to corporate reputation.[31]

27. When choice of forum may have an effect of the right to freedom of expression, it is necessary to consider the nature of the expression in question. The expression here is on a matter of public interest and is thus at the core of what the Charter seeks to protect. That strong Charter interest must be given appropriate weight when exercising the forum conveniens discretion.[32]

PART IV – SUBMISSIONS AS TO COSTS

28. The BCCLA does not seek costs and asks that no costs be awarded against it.

PART V – NATURE OF ORDER SOUGHT

29. The BCCLA asks that this Honourable Court make an Order granting the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia this 10th day of March, 2011

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Jason B. Gratl
Counsel for the Intervener
B.C. Civil Liberties Association

Robert D. Holmes, Q.C.
Counsel for the Intervener
B.C. Civil Liberties Association

[31] *AR 15, Trial Reasons,* para.80
[32] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at para. 53.

PART VI – TABLE OF AUTHORITIES

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