S.C.C. File No.: 33900

IN THE 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:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENER

FACTUM
OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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INDEX

Page #

Part I: STATEMENT OF FACTS 1

Part II: QUESTIONS IN ISSUE 2

Part III: STATEMENT OF ARGUMENT 2
- Overview 2
- Freedom of Expression 4
- Access to justice 5
- Democratic governance 5
- First Issue – Finding Jurisdiction in Transnational Defamation Cases 6
- The Place the Tort was Committed 6
- Access to Justice and Legitimate Juridical Advantage 8
- Second Issue – Declining Jurisdiction in Transnational Defamation Cases 9

Part IV: SUBMISSIONS AS TO COSTS 10

Part V: ORDER SOUGHT 10

Part VI: TABLE OF AUTHORITIES 11

PART I – STATEMENT OF FACTS

1. This appeal is about how constitutionally protected values of freedom of expression,[1] access to justice,[2] and democratic governance[3] ought to work together in relation to transnational defamation cases. The BCCLA will focus in this Factum on jurisdiction simpliciter, although inevitably there is a spillover of points made on that with issues of forum conveniens and choice of law. The BCCLA seeks to have this Court set out that (a) constitutional values weigh more than ordinary laws and rules in the real and substantial connection test, (b) access to justice is a right of all parties and a constitutional interest of the public and the so-called "juridical advantage" ought be dispensed with, (c) state interests and the strength of their legitimate claims to govern particular situations ought to be weighed, and (d) the "proper law of the tort" should determine where it is deemed to be "committed".

2. The confluence of these issues in relation to deciding jurisdiction, forum and choice of law 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. It tests for jurisdiction, forum and choice of laws in a manner that respects free expression and ensures justice is not only done, but seen to be done. It sets aside parochial considerations, save for situations (not present here) where fundamental public policy

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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.

[4] *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 per Binnie, J. 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…"

choices of the forum jurisdiction may legitimately claim to govern.[6] While this appeal ostensibly addresses procedural matters of jurisdiction, forum and choice of law for adjudicating disputes among private litigants, those necessarily have substantive and practical consequences not just for the litigants, but for the public and societies whose courts and laws "compete" for recognition and application.

3. For purposes of this appeal, the BCCLA accepts the Appellants' Statement of Facts.

PART II – POINTS IN ISSUE

4. The BCCLA adopts the Appellants' statement of the Questions in Issue on this appeal: (a) what the proper test is for finding jurisdiction in transnational defamation cases, and (b) what the proper approach to accepting or declining jurisdiction in transnational defamation cases.

PART III – STATEMENT OF ARGUMENT

Overview – Constitutional Values

5. The "real and substantial connection" standard, as an emanation of the "order and fairness" requirement of the rule of law, is a constitutional limit on finding jurisdiction.[7] Provincial statutes, court rules and the common law relating to jurisdiction are subject to it.[8] Free expression, access to justice and democratic governance are constitutional

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

[7] *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, per Laforest, J., at paras. 1 and 63: "... courts are required, by constitutional restraints, to assume jurisdiction only where there are real and substantial connections to that place." But see J. Castel's critique of excessive constitutionalization of private international law principles in, "Back to the Future! Is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?" (1995) 33 Osgoode Hall L.J. 35, at paras. 9-12, 16, 21-23, 66, 81 and 107-109.

[8] Laforest, J., in *Hunt*, supra, at para. 60, "subject, however, to the principles in Morguard and to the demands of territoriality..." provincial legislation was permissible. Blom and Edinger, "The Chimera of the Real and Substantial Connection Test," (2005) 38 U.B.C. L. Rev. 373 – 421 at paras. 44-47 criticize *Spar Aerospace Ltd. v. American Mobile Satellite Corp*., [2002] 4 S.C.R. 205, 2002 SCC 78 at para. 57, interpreting it to suggest that provincial laws extending beyond what the "real and substantial" test would allow for jurisdiction may be acceptable if forum non conveniens laws allow for the test to be reined in within constitutional limits.

values as well. Enforcement of the real and substantial connection test ought not limit those, but rather ensure their fulfillment.[9]

6. That requires that constitutional values take precedence over ordinary laws and rules as factors to be considered. Defamation law is just one aspect of "property and civil rights" provided for by the common law and statute and must yield to superior constitutional values where required.[10]

7. Whatever jurisdictional test results here ought to ensure that (a) free expression is protected, (b) access to justice operates for all litigants through a fair balancing of their respective rights and interests, not deference to whatever the plaintiff chooses, and (c) legitimate differences in laws are considered so democratic choices of each potentially applicable jurisdiction are aptly recognized.[11]

8. The last point is illuminated by a consideration of what in the United States has developed as an "interest analysis" for choice of law focuses on which jurisdiction has the most substantial relationship. There are several variations on the approaches used. But it is notable that in identifying multiple factors and attempting to use those to establish which jurisdiction has the best claim to govern a particular situation, either through its courts taking jurisdiction or its law being applied, there are themes that are

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[9] An analogy may be drawn to *Hunt* at para. 55 which refers to *Aetna v. Feigelman* [1985] 1 S.C.R. 2, as moulding *Mareva* injunction rules, holding them "not applicable to situations where a corporate defendant was seeking to move assets for legitimate business purposes to another jurisdiction in Canada" because of the federal nature of Canada and yet that proposition has been limited for access to justice (proportionality) reasons, where the amount involved is modest and chasing a defendant across the country to enforce a judgment in another province would be uneconomic: *Gateway v. Sybra* (1987) 12 B.C.L.R. (2d) 234 (S.C.) per Southin, J., at paras. 24-28.

[10] Legislating to abolish defamation as a tort would be constitutionally permissible, but legislating to abolish free expression would not. See McLachlin, J., in *Reference Re Provincial Electoral Boundaries (Sask.)* [1991] 2 S.C.R. 158 at para. 36. With respect, the court should reconsider paras. 120-121 of *Hill v. Church of Scientology* [1995] 2 S.C.R. 1130 where Cory, J., strove to locate reputation as a constitutional value. See the criticism of *Hill* by Cameron, "Does Section 2(b) Really Make a Difference?" (2010), 51 S.C.L.R. (2d) 133 at pp. 134-140.

[11] See J. Castel, "Back to the Future! Is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?" (1995) 33 Osgoode Hall L.J. 35 at paras. 36-48.

similar to the "real and substantial connection" analysis that this court has adopted for Canada.

9. Indeed, the "interest analysis" approach of Professor Currie noted by Castel is discussed further by Professor Brilmayer and Ms. Anglin, who explain the "center of gravity" approach and how facets of its examination of state interests in the Restatement (2d) of Conflicts of Laws.[12] What is important for present purposes is that such an approach allows for (a) consideration of the constitutional, statute and common law purposes of each competing state in relation to a given set of facts and parties, and (b) allowing their respective weight as statements of state or public policy or interest to be considered. Thus, for the instant case, a U.S. constitutional law concern would carry a stronger "gravitational" pull than an Ontario common law right of action, others things being equal.

Freedom of expression

10. The Charter value of freedom of expression provides the lens through which defamation actions must be viewed and through which defamation law must be moulded.[13] Freedom to express the product of human thought, particularly on matters of public importance, is part of "human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy."[14] Defamation law limits expression. It is constitutionally permitted to do so only where false statements of fact negatively affecting the reputation of another are made and no privilege or defence attaches to the occasion. Falsity and the lack of a privilege or defence make for a sphere where what would otherwise be constitutionally protected expression loses that protection and permits an action in tort. Confining defamation actions to their limited, but proper, sphere and no further is essential to preserve expression rights.

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[12] See Brilmayer and Anglin, "Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger,"[2010] 95 Iowa L.R. 1125, at pages 1152-4, 1159-1164 and 1175. See also *Auten v. Auten* 124 N.E. 2d 99 (N.Y. 1954) and *Babcock v. Jackson* 191 N.E. 2d 279 (N.Y. 1963). The *Auten* "center of gravity" approach was noted by Evans, J., in *Montreal Trust Co. et al. v. Stanrock Uranium Mines Ltd.* [1966] 1 O.R. 258 (H.C.) at p. 15 (Q.L.) when deciding the proper law of a contract.

[13] B. McLachlin, *Bills of Rights in Common Law Countries*, (2002) 51 Int. and Comp. L.Q. 197 at page 200.

[14] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia,* 2007 SCC 27 at para 81.

Access to justice

11. Access to justice is equally a right of plaintiffs and defendants. It is not merely access to an institution. Rather, it is access to a just resolution of legal disputes by an impartial tribunal in accordance with the rule of law. Fundamental justice applies for the benefit of all parties to a controversy. Access to justice is thus not a property right of a party, but is rather a right of all who become engaged in the justice system.

12. Further, the public has an interest in ensuring the just adjudication of disputes and the efficient employment of the justice system. The justice system is a public resource, susceptible to all the usual problems of a resource commons. Principles of justice have always engaged proportionality, but it is now expressed in the rules of courts in Ontario, British Columbia and elsewhere. As well, the court's "inherent jurisdiction" to control its process and bar abuses of right or process ensures access to justice.

Democratic governance

13. Each jurisdiction is entitled to frame its laws as it sees fit, within the bounds of constitutional protections of fundamental freedoms and subject matter and territorial jurisdiction limits.[15]

14. Conflicts of laws rules govern (a) whether jurisdiction simpliciter (or "territorial jurisdiction") exists, (b) whether jurisdiction is properly retained or declined (forum conveniens), (c) what substantive law to apply (the "proper law" of the claims made), and (d) whether concerns as to "public policy" ought to preclude the application or enforcement in one jurisdiction of the laws or judgments of another. These rules try to rationalize the dividing line to ensure the respect due to each jurisdiction and its laws.

15. At root of this analysis is democratic governance, a principle founded on recognition that democratic societies legitimately enact the laws that courts apply and enforce within their jurisdiction. At the same time, however, modern societies recognize the overlapping and interconnected nature of many issues. Through conflicts of laws principles they endeavour to accommodate and respect each other's legitimate interests to govern the resolution of such disputes.

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[15] *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40 per Binnie, J., at paras. 50-51 and 80.

First Issue –Finding Jurisdiction in Transnational Defamation Cases

16. With those in mind, the first step is to consider whether jurisdiction simpliciter exists ("territorial jurisdiction" in the Uniform Law Conference of Canada model statute, now enacted in British Columbia, Nova Scotia and Saskatchewan). Jurisdiction may be based upon acceptance of jurisdiction, either through contract or attornment, or through ordinary residence in the jurisdiction. It may also be based upon whether a "real and substantial" connection exists between the forum jurisdiction and the facts upon which the proceeding are based. This factum will focus on two of the factors used in the courts below: the place of the tort and legitimate juridical advantage.

The Place the Tort was Committed

17. With torts "committed" in Ontario, under both the Ontario ex juris service rules and the Uniform Law Conference model statute a presumption of jurisdiction arises. Yet the Appellants' actions took place outside Ontario. The Respondent correctly asserts that under the current common law definition of defamation the focus is not upon those acts, but rather on where the publication was read.[16] Classically, the common law treats each incident of reading defamatory statements as a separate tort, presumes disparaging statements to be false and presumes damage as well. Neither order nor fairness would be served if multiple actions were brought, whether in one or multiple jurisdictions. Litigating thus would be an abuse of process or right. That realization necessitates reconsideration of the multiple tort approach. Castel notes that the law regarding jurisdiction may follow a multiple tort approach, but says that for choice of law purposes, "Only one law would be relevant instead of applying the law of each of the states or provinces where publication took place."[17] He advocates a "proper law of the tort" approach for choice of law decisions. The BCCLA submits that single tort approach should be applied to finding jurisdiction as well.

18. *Tolofson's* fixation on the lex loci delicti for choice of law requires reconsideration as well. The court's ruling there that the law of the place where the acts on which the personal injury action occurred is the appropriate law to apply has been criticized as

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[16] 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 p. 158-161.

[17] *Ibid*., at pp. 174-5.

inflexible.[18] It would be preferable if both jurisdiction and choice of law provide for a multi-factor approach that gives prominence to the state having the most substantial relationship to the alleged wrong. This is particularly important in the internet age, with multi-state defamation claims involving multiple jurisdictions in which readers may access materials.

19. Where expression is arguably constitutionally protected in one jurisdiction and is arguably not protected but rather is susceptible to private defamation suits in another, weighing the respective state interests is required. In transnational defamation cases, protecting freedom of expression by finding that the gravitational pull of a constitutional value is greater than that of an ordinary statute or common law is appropriate.

20. It is appropriate to consider the connections the Respondent has to Ontario. But that ought to be done without hiving off Ontario as a notional separate tort location through undertakings and pleadings manoeuvres. Assuming that the reality and substance of the alleged wrong should be regarded as a single tort, such an approach must be precluded. The Respondent is thus left with having to establish jurisdiction (and, ultimately, choice of law) based upon the factors connecting the claim and the defendants to Ontario. This allows for due consideration of the fact that the Respondent, notwithstanding having renounced Canadian citizenship, maintaining residences outside of Canada and labouring under criminal law difficulties that appear to preclude his re-entering Canada without special permission, clearly has a reputation in Canada and is a person Canadian media and Canadians continue to have interest in as a public figure.

21. The question for the court is whether that is enough, particularly where the wrong alleged was committed in the United States, the underlying facts relate to business activities and corporate actions within the United States and conduct that has been the subject of civil and criminal law proceedings there, and given that the courts of Illinois, New York or perhaps the federal courts of that country provide “substantial justice” in a sense that Canada recognizes.

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[18] Blom and Edinger, supra, at para. 31 note U.S. authorities and English statute law provide flexibility by holding that the place of the injury applies unless other connecting factors displace it; also, J. Castel, “Back to the Future! Is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?” (1995) 33 Osgoode Hall L.J. 35, at paras. 83-93 and 106.

Access to Justice and "Legitimate Juridical Advantage"

22. The "legitimate juridical advantage" factor should be recast or eliminated. It does not appear in the Uniform Conference model statute. The Respondent chose Ontario as he believes its ordinary laws afford him advantages over U.S. law. If one accepts that access to justice, as a constitutional principle, applies, then it must do so in an even-handed manner for all parties. Assuming Castel's call for choice of law rules to lead to "only one" choice in multistate defamation cases is applied, then a party's assertion of advantage in relation to substantive law is apt. It has been held that "the availability of higher damages in a jurisdiction is not a factor justifying the refusal of a stay, provided that substantial justice could be done in that jurisdiction…"[19]

23. McLachlin, J.A., in *Avenue Properties*, held that a B.C. law afforded a legitimate juridical advantage to a plaintiff, notwithstanding that the transaction involved Ontario real estate and the parties' contract chose Ontario law.[20] The juridical advantage there was a B.C. statute for the protection of British Columbians. It was, in reality, a strong public policy statement of B.C. and thus stood on a different plane from other laws.[21] It is better viewed as a democratic choice validly made by B.C. than a pawn the plaintiff could play.[22]

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[19] *Mazda Canada Inc. v. Mitsui O.S.K. Lines, Ltd.* 2008 FCA 219, leave to appeal refused [2008] S.C.C.A. No. 383, per Linden, J.A., who at para. 20 cited *Spiliada Maritime Corp. v. Cansulex,* [1987] A.C. 460; *"Herceg Novi" and "Ming Galaxy",* [1998] 2 Lloyd's Rep. 454 in support.

[20] *Avenue Properties Ltd. v. First City Development Corp. Ltd.* (1986) 7 B.C.L.R. (2d) 45 (C.A.) at paras. 39-42. Binnie, J., in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)* 2001 SCC 90 at paras. 53 and 91, uses "public policy" in at least two senses: (a) the overall public policy in orderly and effective administration of justice, and (b) statutes that provide protection or standards representing statements of policy that ought to supersede arguments about applying foreign legal standards. He adds that "any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed."

[21] *Spiliada v Cansulex* [1987] AC 460: "advantage to the plaintiff will ordinarily give rise to a comparable disadvantage to the defendant"; "to give the plaintiff his advantage at the expense of the defendant is not consistent with the objective approach"

[22] *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40 per Binnie, J., at paras. 76 and 84 on the "rules of the game."

24. There is no positive public policy in Canada or Ontario requiring that only our version of defamation law is correct.[23] The U.S. achieves "substantial justice" with its courts and the balance it strikes between freedom of expression and defamation.

25. There is a significant difference between protecting fundamental values like freedom of expression and recognizing ordinary "property and civil rights" claims. Canada has required in contexts where our constitutional protections are more extensive than those of other countries an accommodation from foreign jurisdictions that minimally impairs their legitimate purposes while preserving our fundamental values.[24] This preserves comity. Respecting constitutional protections of rights provided for in foreign jurisdictions should be done in transnational conflicts cases where public policy in Canada permits. The strength of the U.S. policy here was noted by Belobaba, J., when he accepted that while Ontario would enforce a U.S. defamation judgment, the U.S. would likely not do the same, largely because of its 1st Amendment concerns.

Second Issue –Declining Jurisdiction in Transnational Defamation Cases

26. Even if jurisdiction is found to exist, the factors already discussed need to be reviewed in relation to forum conveniens as they may yet militate against retaining jurisdiction. Indeed, the more minimalist the approach to jurisdiction simpliciter, the more heightened the approach to forum conveniens must to be satisfy the interests of justice. While the decision as to forum conveniens is one of discretion, that discretion ought to be judicially exercised and made with a view to all relevant factors, giving them each their appropriate weight.

27. In the present appeal, the lower courts appear to have gotten caught up in too rigid an approach, providing too much weight to the multiple tort approach, consequently to the notion of a tort having been committed in Ontario and then to

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[23] In *Tezcan v. Tezcan*, (1988) 20 B.C.L.R. (2d) 253, McLachlin, J.A., noted that keeping a case concerning B.C. real property in the B.C. courts did not end the analysis – one party asserted Turkish law applied; the other argued Turkish law was contrary to B.C. public policy. See also *Vladi v. Vladi* (1987) 7 R.F.L. (3d) 337 (N.S.S.C.).

[24] For example, *United States v. Burns*, 2001 SCC 7 at paras. 141-143 required assurances against the death penalty in extradition cases. See also *Global Securities Corp. v. British Columbia (Securities Commission),* [2000] 1 S.C.R. 494 at paras. 28-31: to maintain respect for the mutual administration of justice among different states sharing information obtained by compulsion here was upheld.

considerations of whether the parties' convenience in coming to Ontario for trial was significantly different from moving from New York to Chicago.

28. That approach ignores the large differences in the respective state interests involved. The U.S. constitutional law interest was given short shrift. The Ontario interest in the reputation of a former resident who, although he continues to have a reputation in Ontario, had voluntarily chosen to relocate to the United Kingdom and who became embroiled in civil and criminal law proceedings in the U.S. arising from business interests there, was overplayed.

29. The passive nature of the "publication" on the internet by the Appellants from their base in the United States generally for the review and notice of Americans in the United States was downplayed. It is thus open to this court to review the matter and pronounce how the discretion ought to have been exercised, or alternatively to remit the case for reconsideration based upon an authoritative pronouncement of how the forum non conveniens discretion ought properly to be exercised.

PART IV – SUBMISSIONS AS TO COSTS

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

PART V – NATURE OF ORDER SOUGHT

31. The BCCLA submits that the court's order ought to reflect a legal rule that protects freedom of expression, access to justice and democratic governance in shaping the tort of defamation and in deciding whether jurisdiction exists and whether, if it exists, it ought to be declined. In the present appeal, the BCCLA submits that ought to lead to a finding that jurisdiction does not exist in Ontario or alternatively, that if it does, it ought to be declined.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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

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Robert D. Holmes, Q.C.
Solicitor for the Intervener
British Columbia Civil Liberties Association

PART VI – TABLE OF AUTHORITIES

CASE LAW	**Paragraph**
Aetna v. Feigelman, [1985] 1 S.C.R. 2, at paras. 41 - 44	5
Auten v. Auten, 124 N.E. 2d 99 (N.Y. 1954)	9
Avenue Properties Ltd. v. First City Development Corp. Ltd., (1986) 7 B.C.L.R. (2d) 45 (C.A.) at paras. 39-42	20
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	1
Babcock v. Jackson, 191 N.E. 2d 279 (N.Y. 1963)	9
Beals v. Saldanha, 2003 SCC 72 at para. 172	2
British Columbia (Attorney General) v. Christie, 2007 SCC 21 at paras. 16-20	1
Gateway v. Sybra, (1987) 12 B.C.L.R. (2d) 234 (S.C.) per Southin, J., at paras. 24-28	5
Global Securities Corp. v. British Columbia (Securities Commission), [2000] 1 S.C.R. 494 at paras. 28-31	23
Grant v. Torstar Corp., 2009 SCC 61 at paras. 47-50 and 52	1
Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27 at para 81	10
Hill v. Church of Scientology, [1995] 2 S.C.R. 1130	6
Holt Cargo Systems Inc. v. ABC Containerline, N.V. (Trustees of) 2001 SCC 90 at paras. 53 and 91	20
Hunt v. T&N plc, [1993] 4 S.C.R. 289, per Laforest, J., at paras. 1, 60 and 63	5
Mazda Canada Inc. v. Mitsui O.S.K. Lines, Ltd., 2008 FCA 219, leave to appeal refused [2008] S.C.C.A. No. 383, per Linden, J.A., at para. 20	20
Montreal Trust Co. et al. v. Stanrock Uranium Mines Ltd., [1966] 1 O.R. 258 (H.C.) at p. 15 (Q.L.)	9

Reference Re Alberta Statutes [1938] S.C.R. 100 per Cannon, J., at pp. 145-146	1
Reference Re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158 at para. 36	6
RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, per McIntyre, J., at paras. 12-15	1
Sauvé v. Canada (Chief Electoral Officer), 2002 SCC 68 at para. 97	2
Spar Aerospace Ltd. *v.* American Mobile Satellite Corp., [2002] 4 S.C.R. 205, 2002 SCC 78 at para. 57	5
Spiliada v Cansulex, [1987] AC 460	20
Switzman v. Elbing, [1957] S.C.R. 285, per Abbot, J., at pp. 327-8	1
Tezcan v. Tezcan, (1988) 20 B.C.L.R. (2d) 253	22
Unifund Assurance Co. v. Insurance Corp. of British Columbia, [2003] 2 S.C.R. 63, 2003 SCC 40 per Binnie, J., at paras. 50-51, 76, 80 and 84 and per McLachlin, CJC, at para. 56	2, 13 and 20
United States v. Burns, 2001 SCC 7 at paras. 141-143	23
Vladi v. Vladi, (1987) 7 R.F.L. (3d) 337 (N.S.S.C.)	22
SECONDARY AUTHORITIES	
Blom and Edinger, “The Chimera of the Real and Substantial Connection Test,” (2005) 38 U.B.C. L. Rev. 373 – 421 at paras. 31, 44-47	5 and 18
Brilmayer and Anglin, “Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger,”[2010] 95 Iowa L.R. 1125, at pages 1152-4, 1159-1164 and 1175	9
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