



SUPREME COURT OF CANADA

CITATION: Breeden v. Black, 2012 SCC 19

DATE: 20120418

DOCKET: 33900

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
and
Conrad Black
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
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AND BETWEEN:

**Richard C. Breeden, Richard C. Breeden & Co., Gordon A. Paris, James R.
Thompson, Richard D. Burt, Graham W. Savage, Raymond G.H. Seitz, Shmuel
Meitar and Henry A. Kissinger**

Appellants

and

Conrad Black

Respondent

- and -

British Columbia Civil Liberties Association

Intervener

CORAM: McLachlin C.J. and Binnie,* LeBel, Deschamps, Fish, Abella, Charron,*
Rothstein and Cromwell JJ.

(* Binnie and Charron JJ. took no part in the judgment.)

REASONS FOR JUDGMENT:
(paras. 1 to 38)

LeBel J. (McLachlin C.J. and Deschamps, Fish, Abella,
Rothstein and Cromwell JJ. concurring)

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BREEDEN v. BLACK

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Indexed as: Breeden v. Black

2012 SCC 19

File No.: 33900.

2011: March 22; 2012: April 18.

Present: McLachlin C.J. and Binnie,¹ LeBel, Deschamps, Fish, Abella, Charron,*
Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Private international law — Choice of forum — Court having jurisdiction
— Forum non conveniens — Libel actions commenced in Ontario in respect of
statements posted on U.S. company’s website and in its annual report and
republished by three Canadian newspapers — Defendants bringing motion to stay the*

¹ Binnie and Charron JJ. took no part in the judgment.

actions on the grounds that the Ontario court lacks jurisdiction or, alternatively, should decline to exercise its jurisdiction on the basis of forum non conveniens — Whether the Ontario court can assume jurisdiction over the actions — If so, whether the Ontario court should decline to exercise its jurisdiction on the ground that the court of another jurisdiction is clearly a more appropriate forum for the hearing of the actions.

B is a well-known business figure who established a reputation as a newspaper owner and publisher in Canada and internationally. While B served as the chairman of a publicly traded U.S. company, the legitimacy of certain payments that had been made to B were questioned. A special committee formed to conduct an investigation concluded that the company had made unauthorized payments to B. The committee's report was posted on the company's website, which was accessible worldwide, along with press releases containing contact information directed at Canadian media. Statements were also published in the company's annual report summarizing the committee's findings.

B commenced six libel actions in the Ontario Superior Court against the ten appellants, who are directors, advisors and a vice-president of the company. B alleges that the press releases and reports issued by the appellants and posted on the company's website contained defamatory statements that were downloaded, read and republished in Ontario by three newspapers. He claims damages for injury to his reputation in Ontario.

The appellants brought a motion to have the actions stayed on the grounds that there was no real and substantial connection between the actions and Ontario, or, alternatively, that a New York or Illinois court was the more appropriate forum. The motion judge dismissed the motion, finding that a real and substantial connection to Ontario had been established and that Ontario was a convenient forum to hear the actions. The Court of Appeal unanimously dismissed the appeal. It found that a real and substantial connection was presumed to exist on the basis that a tort was committed in Ontario, and that the appellants had failed to rebut this presumption. It also found that there was no basis on which to interfere with the motion judge's exercise of discretion with regard to *forum non conveniens*.

Held: The appeal should be dismissed.

In the case at bar, it is necessary to engage in the real and substantial connection analysis to determine whether the Ontario court may properly assume jurisdiction over the actions. The framework for the assumption of jurisdiction was recently set out by this Court in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17. The issue of assumption of jurisdiction is easily resolved in this case based on a presumptive connecting factor — the alleged commission of the tort of defamation in Ontario. It is well established in Canadian law that the tort of defamation occurs upon publication of a defamatory statement to a third party, which, in this case, occurred when the impugned statements were read, downloaded and republished in Ontario by three newspapers. It is also well established that every repetition or

republishing of a defamatory statement constitutes a new publication, and that the original author of the statement may be held liable for the republication where it was authorized by the author or where the republication is the natural and probable result of the original publication. The republication in the three newspapers of statements contained in press releases issued by the appellants clearly falls within the scope of this rule. In the circumstances, the appellants have not displaced the presumption of jurisdiction that results from this connecting factor.

Having found that a real and substantial connection exists between the action and Ontario, it must be determined whether the Ontario court should decline to exercise its jurisdiction on the ground that the court of another jurisdiction is clearly a more appropriate forum for the hearing of the actions. Under the *forum non conveniens* analysis, the burden is on the party raising the issue to demonstrate that the court of the alternative jurisdiction is a clearly more appropriate forum. The factors to be considered by a court in determining whether an alternative forum is clearly more appropriate are numerous and will vary depending on the context of each case. The *forum non conveniens* analysis does not require that all the factors point to a single forum, but it does require that one forum ultimately emerge as *clearly* more appropriate. The decision not to exercise jurisdiction and to stay an action based on *forum non conveniens* is a discretionary one, and the discretion exercised by a motion judge will be entitled to deference from higher courts, absent an error of legal principle or an apparent and serious error on the determination of relevant facts.

When the *forum non conveniens* analysis is applied to the circumstances of the instant appeal, it becomes apparent that both the courts of Illinois and Ontario are appropriate forums for the trial of the libel actions. The factors of comparative convenience and expense for the parties and witnesses, location of the parties, avoidance of a multiplicity of proceedings and conflicting decisions and enforcement of judgment favour the Illinois court as a more appropriate forum, whereas the factors of applicable law and fairness to the parties favour the Ontario court. In the end, however, considering the combined effect of the relevant facts, and in particular the weight of the alleged harm to B's reputation in Ontario, and giving due deference to the motion judge's decision, the Illinois court does not emerge as a clearly more appropriate forum than an Ontario court for the trial of the libel actions.

Cases Cited

Applied: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17; **referred to:** *Charron Estate v. Village Resorts Ltd.*, 2010 ONCA 84, 98 O.R. (3d) 721; *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20; *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321; *Oppenheim forfait GMBH v. Lexus maritime inc.*, 1998 CanLII 13001; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

Statutes and Regulations Cited

Civil Code of Québec, S.Q. 1991, c. 64, art. 3135.

Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28, s. 11(2).

Federal Rules of Civil Procedure, 28 U.S.C.A., r. 45.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 17.02(g).

Authors Cited

Brown, Raymond E. *The Law of Defamation in Canada*, vol. 1. Toronto: Carswell, 1987.

Uniform Law Conference of Canada. *Uniform Court Jurisdiction and Proceedings Transfer Act* (online: http://www.ulcc.ca/en/us/Uniform_Court_Jurisdiction_+_Proceedings_Transfer_Act_En.pdf).

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Juriansz and Karakatsanis JJ.A.), 2010 ONCA 547, 102 O.R. (3d) 748, 321 D.L.R. (4th) 659, 265 O.A.C. 177, 76 C.C.L.T. (3d) 52, 91 C.P.C. (6th) 94, [2010] O.J. No. 3423 (QL), 2010 CarswellOnt 5877, affirming a decision of Belobaba J., 309 D.L.R. (4th) 708, 73 C.P.C. (6th) 83, [2009] O.J. No. 1292 (QL), 2009 CarswellOnt 1730. Appeal dismissed.

Paul B. Schabas, Ryder L. Gilliland and Erin Hault, for the appellants
Richard C. Breeden and Richard C. Breeden & Co.

Robert W. Staley and Julia Schatz, for the appellants Gordon A. Paris,

James R. Thompson, Richard D. Burt, Graham W. Savage, Raymond G.H. Seitz, Paul B. Healy, Shmuel Meitar and Henry A. Kissinger.

Earl A. Cherniak, Q.C., Kirk F. Stevens and Lisa C. Munro, for the respondent.

Robert D. Holmes, Q.C., for the intervener.

The judgment of the Court was delivered by

LEBEL J. —

I. Introduction

A. *Overview*

[1] This appeal concerns the manner in which the law of jurisdiction and the doctrine of *forum non conveniens*, which this Court recently reviewed in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (“*Club Resorts*”), are to be applied to a multistate defamation claim. The respondent, Conrad Black, filed six libel actions in the Ontario Superior Court against the ten appellants, who are directors, advisors and a vice-president of Hollinger International, Inc. (“*International*”). Lord Black alleges that certain statements issued by the appellants and posted on *International*’s website are defamatory and were published in Ontario when they were downloaded, read and

republished in the province by three newspapers. The appellants counter that the Ontario court should not assume jurisdiction over the actions because they are essentially American in substance or, alternatively, because the Illinois court is a more appropriate forum than the Ontario court.

[2] I find in this case that the Ontario court is entitled to assume jurisdiction as there exists a real and substantial connection between Ontario and the libel actions. Giving due deference to the motion judge's exercise of discretion, I further find that the appellants have not shown that the Illinois court is a clearly more appropriate forum for the trial of these claims. Accordingly, I would dismiss the appeal. Reaching this result requires some discussion of the relationship between the law of jurisdiction, the doctrine of *forum non conveniens* and the tort of defamation.

B. *Background Facts*

[3] Lord Black is a well-known business figure who established a reputation as a newspaper owner and publisher first in Canada, and then internationally. He was a Canadian citizen until 2001, when he abandoned his citizenship in order to accept an appointment to the British House of Lords. Until January 2004, Lord Black served as the chairman of International, a publicly traded company incorporated in Delaware and headquartered at different times in New York and Chicago. Lord Black and his Canadian associates exercised effective control over International through The Ravelston Corporation ("Ravelston") and Hollinger Inc., two privately held Ontario companies.

[4] In May 2003, a minority shareholder of International questioned the legitimacy of certain “non-compete” and “management service” payments that had been made to Lord Black or to companies under his ownership or control. International’s Board of Directors formed a Special Committee to conduct an investigation (the “Committee”) and retained the appellant Richard Breeden and his consulting firm as outside legal counsel to advise the Committee. In October 2003, the Committee concluded that International had made US\$32.15 million in unauthorized “non-compete” payments to Lord Black, Hollinger Inc., and certain senior managers, and that Lord Black himself had received US\$7.2 million. The Committee completed a report in August 2004. Pursuant to a U.S. Consent Order relating to an injunctive complaint filed by the U.S. Securities and Exchange Commission (“SEC”) against International in Illinois, the SEC and the U.S. District Court for the Northern District of Illinois were provided with the report; it was also posted on International’s website.

[5] Lord Black filed six actions in the Ontario Superior Court between February 2004 and March 2005. The first four actions relate to press releases that were posted on International’s website in January 2004 (the first three actions) and May 2004 (the fourth action). The fifth action relates to the Committee’s report, and the sixth relates to statements published in International’s annual report summarizing the Committee’s findings. The press releases contained contact information directed at Canadian media. International’s website was accessible worldwide.

[6] Lord Black alleges that the press releases and reports issued by the appellants and posted on International's website contained defamatory statements that were downloaded, read and republished in Ontario by the *Globe and Mail*, the *Toronto Star* and the *National Post*. He claims damages for injury to his reputation in Ontario. The allegations contained in the press releases posted on International's website were summarized as follows by the motion judge (para. 16):

- Black took money from [International] in the form of unauthorized non-compete payments, improperly enriching himself;
- Black misappropriated more than US \$200 million from [International] by engaging in repeated and systemic schemes to wrongfully divert corporate assets to himself and his associates;
- Black presided over a corporate kleptocracy that was engaged in a systemic, wilful and deliberate looting of [International];
- Black created an entity in which ethical corruption was a defining characteristic of the leadership team;
- Black misled the board, breached his fiduciary duties, engaged in self-dealing, lined his pockets at the expense of [International] almost every day, engaged in tax evasion, and used company money to make millions of dollars worth of charitable donations in his own name;
- Black took US \$500 million from [International] for himself and his associates;
- Black would continue to use his position as the controlling shareholder to act to the detriment of [International] and its public shareholders and in breach of US securities law.

[7] The appellants brought a motion to have the six libel actions stayed on the grounds that there was no real and substantial connection between the actions and

Ontario or, alternatively, that a New York or Illinois court was the more appropriate forum. At the hearing before this Court, counsel for the appellants argued that an Illinois court was the most appropriate forum.

[8] Five of the appellants are defendants in all six of the actions; namely, Richard C. Breeden, Richard C. Breeden & Co., Gordon A. Paris, Graham W. Savage and Raymond G.H. Seitz. James R. Thompson and Richard D. Burt are defendants in the first four actions. Paul B. Healy is a defendant in the fifth action and James R. Thompson, Richard D. Burt, Shmuel Meitar and Henry A. Kissinger are defendants in the sixth action. Mr. Savage lives in Ontario and Mr. Meitar in Israel; the remainder of the appellants live in the U.S., including three in Connecticut (Mr. Breeden, Richard C. Breeden & Co. and Mr. Kissinger), two in New York (Mr. Paris and Mr. Healy) and one each in Illinois (Mr. Thompson), the District of Columbia (Mr. Burt) and New Hampshire (Mr. Seitz). The parties did not differentiate between the six actions for the purposes of the motion; nor did the courts below.

[9] It should be noted that in addition to this litigation, several other civil and criminal proceedings were commenced in both the U.S. and Canada following the release of the Committee's report. In 2007, Lord Black was convicted of three counts of mail fraud and one count of obstruction of justice and sentenced to six and a half years in prison. Two of the convictions for mail fraud were later vacated on appeal. The argument that these convictions are relevant to the litigation since they affect Lord Black's admissibility into Canada was made in the courts below. In June 2011,

subsequent to the hearing before this Court, Lord Black was resentenced to 42 months in prison. He is now incarcerated in the United States.

[10] Two civil actions commenced against Lord Black by International in Delaware and Illinois are also relevant to this litigation. The Delaware action included claims against Lord Black and Hollinger Inc. for breach of their contractual and fiduciary duties under Delaware law. The Illinois action alleges that Lord Black and his associates received more than US\$90 million in unauthorized or improperly authorized non-compete payments, and claims that management service fees paid to Ravelston and Hollinger Inc. were improperly negotiated and grossly excessive. The Illinois action was stayed pending resolution of the criminal proceedings against Lord Black. The existence of the actions in Delaware and Illinois was taken into account by the courts below.

C. *Judicial History*

(1) Ontario Superior Court, 309 D.L.R. (4th) 708 (Belobaba J.)

[11] Writing prior to the Ontario Court of Appeal's decision in *Charron Estate v. Village Resorts Ltd.*, 2010 ONCA 84, 98 O.R. (3d) 721 ("Van Breda-Charron") Belobaba J. considered himself to be bound to apply *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.). Applying the eight *Muscutt* factors for assumption of jurisdiction, Belobaba J. found that a real and substantial connection to Ontario had been established. First, the actions could be connected to Ontario on the basis that Lord Black was claiming damages for a tort committed in Ontario and had long-

standing ties to Ontario. Second, the appellants could be connected to Ontario on the basis that it would have been reasonably foreseeable to them that the statements posted on International's website could result in injury to Lord Black's reputation in Ontario. Of the six remaining *Muscutt* factors, Belobaba J. considered that only one — the international nature of the case — clearly favoured the appellants. Jurisdiction *simpliciter* was thus established.

[12] Belobaba J. also found that Ontario was a convenient forum to hear the actions and that neither New York nor Illinois was clearly more appropriate. In his view, only one of the six traditional *forum non conveniens* factors — the location of key witnesses and evidence — favoured the appellants, and Belobaba J. was unable to measure the extent to which this factor weighed in their favour. Accordingly, Belobaba J. exercised his discretion to dismiss the motion to stay the actions.

(2) Ontario Court of Appeal, 2010 ONCA 547, 102 O.R. (3d) 748 (Doherty, Juriansz and Karakatsanis JJ.A.)

[13] In a judgment rendered subsequent to the release of its decision in *Van Breda-Charron*, the Ontario Court of Appeal unanimously dismissed the appeal brought by the appellants. Applying the approach set out in *Van Breda-Charron*, the Court of Appeal found that a real and substantial connection was presumed to exist on the basis that a tort was committed in Ontario, pursuant to rule 17.02(g) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The appellants had failed to rebut this presumption. The Court of Appeal found that the existence of a real and substantial connection was also supported by the principles of fairness and order and

the “general principles” identified in *Van Breda-Charron*. While the Court of Appeal did not consider it to be necessary to determine whether a “targeting” approach should be adopted in Canadian law, it nonetheless found that there was evidence on the record that the appellants did target and direct their statements at Ontario.

[14] With regard to *forum non conveniens*, the Court of Appeal found that there was no basis on which to interfere with the motion judge’s exercise of discretion. In the Court of Appeal’s view, Belobaba J. had correctly set out the relevant factors and was entitled to determine the significance he would give to each one. Accordingly, the appeal was dismissed.

II. Analysis

A. *Position of the Parties*

[15] The appellants allege that Lord Black is a libel tourist. In their view, the “place of reading” approach to libel should be eschewed in cases involving transnational libel claims in favour of an approach that considers whether a real and substantial connection exists between the forum and the *substance* of the action. In the case of a libel claim, that is the subject matter and conduct giving rise to the words complained of and the context in which they were made. The appellants contend that the substance of Lord Black’s actions is American and that both New York and Illinois are clearly more appropriate forums for the trial of the actions than Ontario.

[16] The appellants also reject the focus of the courts below on damage sustained in the jurisdiction as misplaced and contend that the analogy to product liability cases is inappropriate. In addition, they submit that whether or not the “targeting” approach is adopted in Canadian law, there was an insufficient basis to make such a finding on these facts. With regard to choice of law, the appellants reject the use by the courts below of the *lex loci delicti* test. In their view, *lex loci delicti* is ill-suited to transnational defamation claims if it is determined solely on the basis of where damage occurs, as damage may occur in multiple jurisdictions. The appellants submit that American law should be applied to the actions, reflecting their substance.

[17] Lord Black rejects the allegation that he is a libel tourist. He submits that when properly applied to transnational defamation claims, the real and substantial connection test is satisfied where (a) there is substantial publication in the jurisdiction, (b) the plaintiff has a substantial reputation to protect in the jurisdiction, and (c) the defendant is in a position to reasonably foresee substantial publication in the jurisdiction and to know of the plaintiff’s substantial reputation there. In Lord Black’s view, the courts below correctly applied this test to find that all three conditions were satisfied on the facts of this case.

[18] Lord Black also contends that the approach advocated by the appellants would improperly shift the focus of Canada’s defamation law from the reputation of the plaintiff to the conduct of the defendant. With regard to choice of law, Lord Black submits that this Court has established that *lex loci delicti* is the choice of law

rule for tort claims. In libel cases, that is the place of publication, which in this case is Ontario.

B. Jurisdiction Simpliciter

[19] Presence and consent are the two traditional bases of court jurisdiction in private international law. As discussed above, however, in this case, only one of the ten defendants is resident in Ontario and none of the other nine has consented to submit to the jurisdiction of the Ontario court. It is therefore necessary to engage in the real and substantial connection analysis to determine whether the Ontario court may properly assume jurisdiction over the six libel actions brought by Lord Black. The framework for the assumption of jurisdiction was recently set out by this Court in *Club Resorts*.

[20] The issue of the assumption of jurisdiction is easily resolved in this case based on a presumptive connecting factor — the alleged commission of the tort of defamation in Ontario. It is well established in Canadian law that the tort of defamation occurs upon publication of a defamatory statement to a third party. In this case, publication occurred when the impugned statements were read, downloaded and republished in Ontario by three newspapers. It is also well established that every repetition or republication of a defamatory statement constitutes a new publication. The original author of the statement may be held liable for the republication where it was authorized by the author or where the republication is the natural and probable result of the original publication (R. E. Brown, *The Law of Defamation in Canada*

(1987), vol. 1, at pp. 253-54). In my view, the republication in the three newspapers of statements contained in press releases issued by the appellants clearly falls within the scope of this rule. In the circumstances, the appellants have not displaced the presumption of jurisdiction that results from this connecting factor.

[21] Having established that there is a real and substantial connection between Ontario and the libel actions, I must now turn to the question of whether the Ontario court *should* exercise jurisdiction over the actions — the issue of *forum non conveniens*.

C. *Forum Non Conveniens*

[22] Having found that a real and substantial connection exists between the actions and Ontario, I must now determine whether the Ontario court should nonetheless decline to exercise its jurisdiction on the ground that a court of another jurisdiction is clearly a more appropriate forum for the hearing of the actions. The appellants contend that Illinois is a clearly more appropriate forum than Ontario. For the reasons that follow, I disagree.

[23] Under the *forum non conveniens* analysis, the burden is on the party raising the issue to demonstrate that the court of the alternative jurisdiction is a clearly more appropriate forum (*Club Resorts*, at para. 103). The factors to be considered by a court in determining whether an alternative forum is clearly more appropriate are numerous and variable. While they are a matter of common law, they

have also been codified, for example, in a non-exhaustive list in s. 11(2) of the British Columbia *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. That Act and others are themselves based on a uniform Act proposed by the Uniform Law Conference of Canada (*Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321, at para. 22; *Club Resorts*, at paras. 105-106), the *Uniform Court Jurisdiction and Proceedings Transfer Act* (“CJPTA”). Section 11 of the *CJPTA* states:

11(1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside [enacting province or territory] is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including:

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
- (b) the law to be applied to issues in the proceeding;
- (c) the desirability of avoiding multiplicity of legal proceedings;
- (d) the desirability of avoiding conflicting decisions in different courts;
- (e) the enforcement of an eventual judgment; and
- (f) the fair and efficient working of the Canadian legal system as a whole.

[24] As the drafters of the *CJPTA* confirm in their comments on s. 11, the factors enumerated in s. 11(2) reflect “factors that have been expressly or implicitly considered by courts in the past”. Section 11 of the *CJPTA* is also similar to the *forum non conveniens* provision of the *Civil Code of Québec*, S.Q. 1991, c. 64, and the factors considered by Quebec courts in exercising their discretion under that provision. Article 3135 of the *Civil Code* states:

Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

[25] As stated in *Club Resorts*, the use of the term “exceptionally” in art. 3135, like “clearly more appropriate ... forum”, reflects “an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed” (para. 109). The factors most commonly considered by Quebec courts in exercising this discretion were reviewed in *Oppenheim forfait GMBH v. Lexus maritime inc.*, 1998 CanLII 13001, where the Quebec Court of Appeal established that the relevant considerations include, among others, the following factors which are not individually determinative but must be considered globally (para. 18):

- (1) the place of residence of the parties and witnesses;
- (2) the location of the evidence;
- (3) the place of formation and execution of the contract;

- (4) the existence of proceedings pending between parties in another jurisdiction and the stage of any such proceeding;
- (5) the location of the defendant's assets;
- (6) the applicable law;
- (7) the advantage conferred on the plaintiff by its choice of forum;
- (8) the interests of justice;
- (9) the interests of the two parties;
- (10) the need to have the judgment recognized in another jurisdiction.

[26] With the exception of juridical advantage, the *Oppenheim* factors appear to largely correspond to the factors enumerated in s. 11(2) of the *CJPTA*. The *CJPTA* does not provide for consideration of any factor corresponding to the advantage conferred on the plaintiff by its choice of forum, although it also does not specifically exclude consideration of this factor where it is relevant. This approach is consistent with this Court's observation in *Club Resorts* that an emphasis on juridical advantage may be inconsistent with the principles of comity. In particular, a focus on juridical advantage may put too strong an emphasis on issues that may reflect only differences in legal tradition which are deserving of respect, or courts may be drawn too instinctively to view disadvantage as a sign of inferiority and favour their home jurisdiction (para. 112).

[27] Juridical advantage not only is problematic as a matter of comity, but also as a practical matter, may not add very much to the jurisdictional analysis. As this Court emphasized in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, “[a]ny loss of advantage to the foreign plaintiff must be weighed as against the loss of advantage, if any, to the defendant in the foreign jurisdiction if the action is tried there rather than in the domestic forum” (p. 933). Juridical advantage therefore should not weigh too heavily in the *forum non conveniens* analysis.

[28] In addition to the list of factors that a court may consider in determining whether to decline to exercise its jurisdiction, the *CJPTA* also sets out the role that considerations of fairness to both parties play in the *forum non conveniens* analysis: s. 11(1) states that “[a]fter considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding” (emphasis added). While the factors relevant to the *forum non conveniens* analysis will vary depending on the context of each case, s. 11 of the *CJPTA* serves as a helpful reference.

[29] When the *forum non conveniens* analysis is applied to the circumstances of the instant appeal, it becomes apparent that both the courts of Illinois and Ontario are appropriate forums for the trial of the libel actions. Indeed, many of the relevant factors favour proceeding in Illinois. Others favour a trial in Ontario. In the end,

however, giving due deference to the motion judge's exercise of discretion, I am not convinced that the appellants have established that the Illinois court emerges as a *clearly* more appropriate forum and that the motion judge made a reviewable error. I will consider each of the relevant factors in turn.

(1) Comparative Convenience and Expense for Parties and Witnesses

[30] In my view, the comparative convenience and expense for the parties and their witnesses favours a trial in Illinois. First, as the motion judge found, most of the witnesses and the bulk of the evidence are located in the U.S. It is significant in this regard that International was headquartered, at least for a time, in Illinois. In addition and as the motion judge noted, rule 45 of the *Federal Rules of Civil Procedure*, 28 U.S.C.A., facilitates the movement of witnesses and evidence between states. The location of the witnesses and evidence thus makes a trial in Illinois more convenient than a trial in Ontario.

[31] The same can be said of the location of the parties. While no single jurisdiction is home to a majority of the parties, it is significant that nine of the eleven parties, including Lord Black, reside in the U.S. Indeed, Lord Black is currently incarcerated in Florida. Moreover, owing to his criminal convictions and the fact that he abandoned his Canadian citizenship, Lord Black will not be able to enter Canada without the special permission of the Minister of Citizenship and Immigration even once he has finished serving his sentence. It may be, however, that a writ of *habeas corpus ad testificandum* could allow Lord Black to participate in person in a trial held

in the U.S.; otherwise, Lord Black would have to participate through video conferencing. As for the eight appellants who reside in the U.S., they are spread between different states, but it does not appear that financial considerations would impede the ability of any of them to participate in a trial in Illinois.

(2) Applicable Law

[32] In the companion case of *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, I discuss the implications of choice of law in the context of multistate defamation claims. Without resolving the issue, I note that there is some question as to whether the *lex loci delicti* rule, according to which the applicable law is that of the place where the tort occurred, ought to be abandoned in favour of an approach based on the location of the most harm to reputation. I need not address this issue here as, even under the alternative approach examined in *Éditions Écosociété*, the applicable law is that of Ontario.

[33] Indeed, this case is somewhat unique in that Lord Black has undertaken not to bring any libel action in any other jurisdiction, and has limited his claim to damages to his reputation in Ontario. As a result, only harm resulting from publication in Ontario need be considered. The evidence establishing Lord Black's reputation in Ontario is significant. As the motion judge found, while Lord Black is no longer ordinarily resident in Ontario, he spent most of his adult life in Ontario, first established his reputation as a businessman in Ontario, is a member of the Order of Canada, the Canadian Business Hall of Fame and the Canadian Press Hall of Fame,

and is the subject of five books written by Toronto-area authors. Lord Black's close family also lives in Ontario. Lord Black's undertaking and the evidence of his reputation in Ontario therefore suggest that, under the "most substantial harm to reputation" approach discussed in *Éditions Écosociété*, Ontario law should be applied to the libel actions. Alternatively, as the alleged tort of defamation was committed in Ontario, under *lex loci delicti*, Ontario law would also apply. In the circumstances, the applicable law factor supports proceedings in Ontario.

(3) Avoidance of a Multiplicity of Proceedings and Conflicting Decisions

[34] The Illinois and Delaware civil actions raise concerns about a multiplicity of legal proceedings. The motion judge accepted that neither of those actions involves a libel claim. He also accepted, however, that the focus of the trial of the libel actions will be the truth of what was said in the allegedly defamatory statements, which would also appear to be the very substance of the Delaware and Illinois civil actions. Many of the same transactions that will need to be proven through intensive litigation in the course of the Delaware and Illinois civil actions will likely also need to be proven in the libel actions. The differing form of these actions should not be emphasized at the expense of their substance. This suggests that there may be a risk of conflicting judgments, a consideration that favours the Illinois court as a more appropriate forum.

(4) Enforcement of Judgment

[35] Lord Black appears to concede that an Ontario judgment would be unenforceable in the U.S. He contends, however, that this factor should have no bearing on the *forum non conveniens* analysis because the lack of an actual malice requirement in Canadian defamation law affords him a legitimate juridical advantage. As discussed above, juridical advantage should not weigh too heavily in the *forum non conveniens* analysis. This caution is especially significant in a case such as this, where the American actual malice requirement reflects a deeply rooted and distinctive legal tradition that this Court has declined to adopt (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 137), but which comity requires we respect in foreign jurisdictions. Moreover, even if this advantage to Lord Black were taken into account, it would have to be balanced against the corresponding and very significant juridical disadvantage that the appellants would face if the trial were to proceed in Ontario. As a result, the fact remains that an Ontario judgment would be enforceable against only one of the ten appellants. On balance, this is an indication that an Illinois court may be a more appropriate forum for the actions to be heard in than an Ontario court.

(5) Fairness to the Parties

[36] This Court observed in *Club Resorts* that in addition to seeking to assure the efficacy of the litigation process, the doctrine of *forum non conveniens* also seeks to assure fairness to both parties. The courts below agreed that the balance of fairness favours litigation in Ontario because it would be unfair to prevent Lord Black from suing in the community in which his reputation was established, whereas there would

be no unfairness to the appellants if the actions were to proceed in Ontario because it would have been reasonably foreseeable to them that posting the impugned statements on the internet and targeting the Canadian media would cause damage to Lord Black's reputation in Ontario. I would agree, although I would also emphasize that the question of whether a targeting approach should be adopted in Canadian law does not arise on this appeal. As discussed above, the importance of permitting a plaintiff to sue for defamation in the locality where he enjoys his reputation has long been recognized in Canadian defamation law. Given the importance of his reputation in Ontario, this factor weighs heavily in favour of Lord Black.

III. Conclusion

[37] In the end, some of the factors relevant to the *forum non conveniens* analysis favour the Illinois court, while others favour the Ontario court. The *forum non conveniens* analysis does not require that all the factors point to a single forum or involve a simple numerical tallying up of the relevant factors. However, it does require that one forum ultimately emerge as *clearly* more appropriate. The party raising *forum non conveniens* has the burden of showing that his or her forum is *clearly* more appropriate. Also, the decision not to exercise jurisdiction and to stay an action based on *forum non conveniens* is a discretionary one. As stated in *Club Resorts*, the discretion exercised by a motion judge in the *forum non conveniens* analysis "will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts" (para. 112). In the

absence of such an error, it is not the role of this Court to interfere with the motion judge's exercise of his discretion.

[38] Considering the combined effect of the relevant facts, and in particular the weight of the alleged harm to Lord Black's reputation in Ontario, and giving due deference to the motion judge's decision, as I must, I conclude that an Illinois court does not emerge as a clearly more appropriate forum than an Ontario court for the trial of the libel actions brought against the appellants by Lord Black. Accordingly, I would dismiss the appeal with costs.

Appeal dismissed with costs.

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