

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

B E T W E E N:

HAARETZ.COM, HAARETZ DAILY NEWSPAPER LTD., HAARETZ
GROUP, SHLOMI BARZEL and DAVID MAROUANI

Appellants

and

MITCHELL GOLDHAR

Respondent

**FACTUM OF THE RESPONDENT,
MITCHELL GOLDHAR**

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

	Page No.
PART I - OVERVIEW AND FACTS	1
A. OVERVIEW	2
B. SUMMARY OF FACTS.....	5
(i) The Article Criticized Mr. Goldhar’s Canadian Business Practices	6
(ii) Hundreds of People Read the Article in Ontario	7
(iii)The Motions Judge’s Reasons.....	9
(iv)The Court of Appeal Rejects Haaretz’s Appeal.....	10
(v) Haaretz’s Witnesses of Dubious Relevance	12
(vi)Mr. Goldhar’s Legitimate Undertakings	13
(vii) Mr. Goldhar Delivers His Jury Notice	14
PART II - ISSUES	14
PART III - STATEMENT OF ARGUMENT	15
C. THIS COURT SHOULD NOT CREATE SPECIAL EXCEPTIONS TO THE LAW OF JURISDICTION <i>SIMPLICITER</i>	15
(i) The Courts Below Applied this Court’s Settled Jurisdiction <i>Simpliciter</i> Precedents	15
(ii) No Principled Basis to Change the Law.....	19
D. THE MOTIONS JUDGE’S <i>FORUM NON CONVENIENS</i> ANALYSIS WAS REASONABLE AND ENTITLED TO DEFERENCE	24
(i) Fairness to the parties.....	26
(ii) Comparative convenience and expense to witnesses.....	27
(iii)Loss of juridical advantage favours Ontario.....	30
E. CHOICE OF LAW CLEARLY FAVOURS ONTARIO AS A FORUM	31
(i) “Place of most substantial harm to reputation” will not address “libel tourism” and “forum shopping” concerns when adopted outside of comprehensive reform to the substantive law of defamation	32

(ii) The Appellants' proposed choice of law rule will increase cost and uncertainty of litigation.....	35
(iii) Limiting claims for damage to reputation to a single jurisdiction is a legitimate litigation strategy – one that means Ontario is the only appropriate forum to litigate Mr. Goldhar's claims	38
PART IV - SUBMISSIONS REGARDING COSTS	40
PART V - ORDER REQUESTED	40
PART VI - TABLE OF AUTHORITIES	1
JURISPRUDENCE.....	1
LEGISLATION.....	2
SECONDARY SOURCES	3

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Defendants
(Appellants)

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MITCHELL GOLDHAR

Plaintiff
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**FACTUM OF THE RESPONDENT,
MITCHELL GOLDHAR**

PART I - OVERVIEW AND FACTS

1. This case is about the right of a Canadian citizen and Ontario resident to vindicate his reputation against those who would, on the internet, attack his reputation in Ontario, the place where he lives and maintains his business. In their attempt to undermine this right, the Appellants fail to recognize that the internet is not only a powerful tool for the free exchange of ideas, but also a powerful weapon for the destruction of reputations.

2. The Appellants' proposed changes to the settled law of jurisdiction and choice of law would mean that Canadians would increasingly have to pursue, around the world, internet publishers who defame those Canadians' personal character and reputations. Those proposals would also increase the cost and uncertainty of defamation litigation here in Canada.

3. This Court should reject each of the Appellants arguments because they:

- (a) would fragment the law of jurisdiction *simpliciter* in a manner that is unjustified by this Court's clear precedents or any theoretical basis;

- (b) undermine the discretion of motions judges in applying the settled law of *forum non conveniens*, a discretion the this Court has repeatedly endorsed; and
- (c) create an exception to the *lex loci delicti* rule that is globally unprecedented and would increase the cost, complexity and uncertainty of defamation litigation in Canada.

4. The Appellants' position also threatens to alter key principles of the substantive law of defamation in Canada. Some jurisdictions have addressed "libel tourism" and "forum shopping" concerns through legislative reforms. Where necessary, these changes have been accomplished not through piecemeal tinkering with private international law principles, but instead through comprehensive overhaul of the substantive law of defamation.

5. Whatever reforms this Court does consider making would not change the outcome below. This is not a case of "libel tourism" or "forum shopping", as the Appellants seek to characterize it. Instead, it is that of a prominent Canadian businessperson seeking vindication of his reputation against scurrilous accusations of "megomania", "penny pinching" and irrational behaviour in the way he operates his Canadian business. The Appellants should have expected to be sued in Canada for those words, particularly when they made them available to a significant Canadian audience.

6. Under any reasonable set of private international law principles, this Court should not prevent the Respondent, Mitchell Goldhar, from prosecuting his action against the Appellants in Ontario in the circumstances of this case.

A. Overview

7. In 2011, Haaretz, an Israeli newspaper with a global profile, published an article on its website about Mr. Goldhar, a prominent Canadian businessman.

8. The Haaretz article criticized Mr. Goldhar's management of an Israeli soccer team that he had purchased only two years prior. Accusing Mr. Goldhar of "megomania", "penny-pinching" and a chronic lack of "long-term planning", the Article did not only question his management of Maccabi Tel Aviv; it also disparaged the way in which Mr. Goldhar runs his main Canadian business interest, the prominent Ontario-based shopping centre chain, SmartCentres.

9. The article was made available online not only in Hebrew but also in English. Haaretz's own electronic and oral evidence revealed that the English version alone was read by at least "200 to 300" people in Canada. As such insidious libel often does, Haaretz's spread widely beyond the initial readers. It became known amongst the hundreds of people who work at SmartCentres' headquarters.

10. Mr. Goldhar's reputation in Ontario was attacked. He therefore began this action against Haaretz and the author and editor of article in Ontario.

11. Haaretz's predictable jurisdiction and forum motion was dismissed by Justice Faieta, applying this Court's recent, settled precedents. He concluded (consistent with *Éditions Écosociété v Banro Corp.*,¹ and *Black v Breeden*²) that the fact that the article was read in Ontario created a presumption of jurisdiction. He also held that Haaretz had not met its burden of rebutting that presumption. The Haaretz article was read more widely in Ontario than the book at issue in *Banro*.

12. Justice Faieta appropriately exercised his discretion to refuse to stay the Ontario action in favour of Israel on the basis of *forum non conveniens* arguments, holding that Israel was not clearly a more convenient forum. Just as this court did in *Black*, Justice Faieta relied in part on Mr. Goldhar's undertaking to only seek damages in Ontario.

13. A majority of the Court of Appeal for Ontario upheld this decision. As those judges concluded, it should have been no surprise to Haaretz that, having criticized a Canadian businessman for his Canadian business practices, they should be called to account in a Canadian court. Even the dissenting judge, Justice Pepall, agreed that this Court's decisions in *Banro* and *Black* controlled the outcome of the jurisdictions *simpliciter* analysis.

14. Haaretz says it is only asking this court to "clarify the framework for accepting jurisdiction *simpliciter* and applying *forum non conveniens* where a defamation claim arises solely from the Internet".³ But its position would require the Court to consider wholesale changes to the law of

¹ *Éditions Écosociété Inc v Banro Corp*, 2012 SCC 18, [2012] 1 SCR 636 [*Banro*].

² *Breeden v Black*, 2012 SCC 19, [2012] 1 SCR 666 [*Black*].

³ Appellants' Factum at para 7.

jurisdiction, forum, and choice of law, including through the recognition of a series of unjustified special exceptions for internet-based defamation.

15. As set out in detail below:

- (a) There is no principled or practical reason to depart from the two-stage *Van Breda* test for jurisdiction *simpliciter* endorsed by this Court and applied in *Black* and *Banro* only five years ago. Creating a special jurisdiction regime for internet defamation is impractical and will unjustifiably fragment the law of jurisdiction *simpliciter*;
- (b) The Appellants' argument for "robust and careful review" of facts related to *forum non conveniens* is, at best, a call for the appellate courts to interfere in a motion judge's discretionary conclusion that Israel was clearly not the most appropriate forum; and
- (c) Concerns about "forum shopping" and "libel tourism" do not justify amending the choice of law rule for defamation in the way the Appellants propose. To do so would depart from fundamental principles in the common law of defamation in Canada, where there has been no attempt to reform the substantive law of defamation.

16. The internet is special, but not only because it is a medium for free expression. It is also a medium that promotes the spread of libel, gossip and innuendo on a scale far greater beyond what any print media could. But like most 'internet' defamation cases, this one goes well beyond the online realm.

17. This case reflects online defamatory content that was read by hundreds of Canadians and which, as such reputation-damaging content often does, then spread amongst the hundreds of people then working within Mr. Goldhar's Canadian business. Words that are not read cause no harm. For words that *are* read, the existing rules of jurisdiction *simpliciter*, *forum non conveniens* and choice of law appropriately allow Canadians defamed in Canada through the medium of the internet to, in most cases, seek redress against foreigners for the damage to their reputation in Canada.

18. This Court should not take up the Appellants' offer to amend the law piecemeal.

B. Summary of Facts

The Respondent, Mr. Goldhar, is a Prominent Canadian with a Significant Reputation in Ontario

19. The Respondent, Mr. Goldhar, is a Canadian businessman who resides in Toronto, Ontario.

20. The notion that there is no evidence in the record of Mr. Goldhar's reputation in Ontario, repeated throughout the Appellants' factum⁴ and the dissent in the Court of Appeal, below,⁵ is remarkable in light of the uncontroverted evidence that Mr. Goldhar lives, works and participates in the prominent community life of Toronto.

21. Mr. Goldhar is the founder, owner, and operator of the Ontario-based commercial real estate developer SmartCentres. He is also an instructor at the University of Toronto and a member of the board of several entities in Ontario, including a member (emeritus) of the Board of Directors at Toronto's Hospital for Sick Children.⁶

22. The Appellants' characterization of the fact that Mr. Goldhar "owns and operated shopping malls in Canada" as being "in addition to owning" the Israeli soccer team, Maccabi Tel Aviv ("MTA")⁷ is transparently unfair.⁸ Mr. Goldhar had only owned that team since 2009, two years before the article at issue in this litigation was written. His reputation in Ontario long precedes any public knowledge of him in Israel, having operated a business in Ontario for at least 17 years.⁹ There is no evidence that Mr. Goldhar had a profile of any kind in Israel prior to his purchase of MTA in 2009.

⁴ Appellants' Factum at paras 4, 11, 14, 22, 50, 54-56, 82-84, and 86.

⁵ *Goldhar v Haaretz.com et al*, 2016 ONCA 515 at paras 143, 163, 176, and 183, 132 OR (3d) 331 per Pepall JA, Appellants' Record, Tab 4 [**CA Dissent Reasons**].

⁶ *Goldhar v Haaretz.com et al*, 2015 ONSC 1128 at para 10, 125 OR (3d) 619 per Faieta J, Appellants' Record, Tab 3 [**Motion Reasons**]; Affidavit of Lior Kodner, sworn October 16, 2012 at para 4, Appellants' Record, Tab 10.

⁷ Motion Reasons at para 4, Appellants' Record, Tab 3.

⁸ Appellants' Factum at para 11.

⁹ Affidavit of Shlomi Barzel, sworn October 15, 2012 at para 7, Appellants' Record, Tab 9; Motion Reasons at para 49, Appellants' Record, Tab 3.

(i) *The Article Criticized Mr. Goldhar's Canadian Business Practices*

23. The Appellants, Haaretz Daily Newspaper Ltd., Haaretz.com, Haaretz.co.il and Haaretz Group (collectively “**Haaretz**”) publish a newspaper in Israel. The Appellant, David Marouani, was a writer for Haaretz and the Appellant, Shlomi Barzel, was his editor.¹⁰

24. Haaretz is Israel's oldest daily newspaper.¹¹ It publishes online in both Hebrew and English, and operates an English-language website.¹² As the Mr. Barzel himself put it, “Haaretz is one of the most distinguished newspaper[s] in Israel, even around the world. ... It is known for [its] quality ... [and] accuracy”.¹³ Haaretz knows very well that its political and opinion writing in particular is “influential outside Israel” and that it is seen as a “very reliable source”.¹⁴

25. On November 29, 2011, the Appellants wrote and published an article about Mr. Goldhar titled “Long-Distance Operator” (the “**Article**”). The Article contained untrue and defamatory statements about the “way that Canadian owner Mitch Goldhar” manages the MTA soccer club. It asserted that Mr. Goldhar suffers from borderline “megalomania,” “penny-pinching,” and a chronic lack of “long-term planning.”¹⁵

26. The Article drew specific attention to Mr. Goldhar's Canadian identity and the manner in which he conducts his business affairs in this country. Referring to him as “Canadian owner Mitch Goldhar,” the Article noted that he “spends most of his time in Canada,” and claimed that his management style was “imported directly from his main business interest – a partnership with Wal-Mart to operate shopping centres in Canada.”¹⁶

¹⁰ Motion Reasons at para 7, Appellants' Record, Tab 3.

¹¹ Motion Reasons at para 6, Appellants' Record, Tab 3.

¹² Motion Reasons at para 6, Appellants' Record, Tab 3.

¹³ Cross-examination of Shlomi Barzel, September 16, 2014 at QQ 44-47, Respondent's Record, Tab 7 [**Barzel Cross**].

¹⁴ Barzel Cross at QQ 51-54, Respondent's Record, Tab 7.

¹⁵ Motion Reasons at para 9, Appellants' Record, Tab 3; David Marouani, “Long-distance operator”, *Haaretz* (30 November 2011), online:

<<http://www.haaretz.com/soccer-profile-long-distance-operator-1.398588>>, a copy of which is included in Schedule “A” to the Amended Statement of Claim, Appellants' Record, Tab 7.

¹⁶ Motion Reasons at para 9, Appellants' Record, Tab 3; Article, Appellants' Record, Tab 7, Schedule “A”.

27. As the Majority of the Court of Appeal below put it:

Contrary to Haaretz's submissions, the subject matter of the article is not confined to a discussion of Goldhar's business dealings in Israel or of the operation of Maccabi Tel Aviv. Rather, the article puts Goldhar's Canadian connection front and center by acknowledging that he is a long distance operator and spends most of his time in Canada and by asserting that he imported his management model for Maccabi Tel Aviv from his main business interest, his Canadian shopping center partnership.

[...] Goldhar pleads that the natural and ordinary meaning of the article is that he displays characteristics of a mental disorder, makes irrational business decisions, treats employees in an offensive manner, and is irrationally thrifty concerning benefits to employees.

[...] What is important is that the alleged sting of the article is very much related to how Goldhar conducts business in Canada because the article draws a link between Goldhar's management model and his Canadian business. Although the main subject of the article may be the management of an Israeli soccer team, the article makes Goldhar's management model – and its Canadian origins – an integral part of that subject.¹⁷

(ii) *Hundreds of People Read the Article in Ontario*

28. Haaretz published four versions of the Article: Hebrew print, Hebrew online, English print, and English online.¹⁸ The Appellants took no steps to limit the geographic availability of the Article outside of Israel.¹⁹ Haaretz never blocked access to the Article from Canada²⁰ and it is still available online for Canadians to read, reference, and share (in print or online) in English.²¹

¹⁷ *Goldhar v Haaretz.com et al*, 2016 ONCA 515 at paras 38-41, 132 OR (3d) 331 per Simmons JA, Appellants' Record, Tab 4 [CA Majority Reasons].

¹⁸ Motion Reasons at para 12, Appellants' Record, Tab 3.

¹⁹ Motion Reasons at para 12, Appellants' Record, Tab 3.

²⁰ Cross-examination of Lior Kodnor, September 16, 2014 at Q 18, Respondent's Record, Tab 6 at 61 [Kodnor Cross].

²¹ See <http://www.haaretz.com/soccer-profile-long-distance-operator-1.398588>.

29. The Article was made available to Canadians online. In fact, the Appellants admit that the English version of the Article was read more times in Canada than in any other country in the world, including Israel.²²

30. Based on the Appellants' own evidence, the Motions Judge found that the Article was published and read in Canada on hundreds of occasions.²³ In particular, Justice Faieta noted the following:

However, Haaretz was made available internationally on its website in Israel in both Hebrew and English. At the time of publication, access to the website was unrestricted. As a result, the Article could be accessed from anywhere in the world using the internet. Information provided by the corporate defendants reveals that there were 216 unique visits to the Article in its online form in Canada. This does not mean that 216 people viewed the Article online. A unique visit means a visit to the Haaretz website from a unique IP address on a particular day. Accordingly, there could have been a single visit to view the Article online by the same person each day for several days. As a result there could have been far fewer than 216 people who viewed the Article online. Similarly, the data provided by the corporate defendants cannot be dissected to determine how many of the views of the Article occurred in Ontario, rather than across Canada. On the other hand, since more than one computer may share an IP address, one unique visit might have represented many people viewing the Article from one or more computers that share a single IP address.

In any event, the evidence of Lior Kodner, the Head of Digital Group at the Haaretz Companies (whose duties include serving as editor in chief for all of Haaretz's websites) was that, based on his assessment of the internet traffic to the Haaretz website, it is likely that 200 to 300 people in Canada read the Article online.²⁴

31. In addition to the 200 to 300 people in Canada who read the Article online, two witnesses for Mr. Goldhar gave evidence that they had personally received and read the Article in Ontario,

²² Motion Reasons at paras 62-63, Appellants' Record, Tab 3.

²³ Motion Reasons at paras 2 and 20, Appellants' Record, Tab 3.

²⁴ [emphasis added] Motion Reasons at paras 12-13, Appellants' Record, Tab 3.

and that they knew of other Ontarians who had done the same.²⁵ The Motions Judge accepted their uncontested evidence, which established that the “Article came to the attention of most of the approximately 200 people that work at SmartCentre’s office,” that it became “the talk in the office,” and that the “Article would have ‘gotten around’ to most of the 200 people in the office.”²⁶

(iii) The Motions Judge’s Reasons

32. On December 30, 2011, shortly after the Article came to the attention of his colleagues in Ontario, Mr. Goldhar served the Applicants with a libel notice and issued his claim. The Amended Statement of Claim attaches a copy of the Article.²⁷

33. The Appellants responded with a motion challenging the action on the basis of lack of jurisdiction and *forum non conveniens*.

34. The Motions Judge dismissed the Appellants’ motion. Justice Faieta reviewed the parties’ substantial materials and instructed himself as to the relevant law from this Court on the issue of jurisdiction, including the three leading decisions in *Van Breda v Club Resorts Ltd*,²⁸ *Éditions Écosociété v Banro Corp*,²⁹ and *Black v Breeden*.³⁰

35. As Justice Faieta (and the majority in the Court of Appeal) agreed, the Appellants conceded below that a presumptive connecting factor, namely a tort committed in Ontario, had been established under the *Van Breda* jurisdiction analysis.³¹

36. Justice Faieta found that the Appellants had not established facts that could rebut the presumption of jurisdiction.³² At the second stage, he found that Israel was not a clearly more appropriate forum and declined to exercise his discretionary power to stay the action.³³

²⁵ Affidavit of Joseph Amato, sworn August 21, 2013 at paras 3 and 6, Respondent’s Record, Tab 3; Affidavit of Nadia Di Cesare, sworn August 21, 2013 at paras 4 and 9, Respondent’s Record, Tab 4.

²⁶ Motion Reasons at paras 14-15, Appellants’ Record, Tab 3.

²⁷ Article, Appellants’ Record, Tab 7, Schedule “A”.

²⁸ *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 [*Van Breda*].

²⁹ *Éditions Écosociété Inc v Banro Corp*, 2012 SCC 18, [2012] 1 SCR 636 [*Banro*].

³⁰ *Breeden v Black*, 2012 SCC 19, [2012] 1 SCR 666 [*Black*].

³¹ Motion Reasons at para 20, Appellants’ Record, Tab 3; CA Majority Reasons at paras 10 and 124, Appellants’ Record, Tab 4.

37. The Motions Judge also rejected the Appellants' argument that this action was an abuse of process. He found that the suit was "far from being an abuse of process" and that "it is not surprising that the plaintiff has sought to vindicate his reputation in an Ontario court."³⁴

(iv) The Court of Appeal Rejects Haaretz's Appeal

38. The Appellants appealed Justice Faieta's decision to the Court of Appeal for Ontario. A majority of that Court upheld Justice Faieta's decision.³⁵ It rejected Haaretz's arguments because, among other reasons:

- (a) The subject matter of both the Article and the action have a significant connection to Ontario:

[T]he article puts Goldhar's Canadian connection front and center by acknowledging that he is a long distance operator and spends most of his time in Canada and by asserting that he imported his management model for Maccabi Tel Aviv from his main business interest, his Canadian shopping center partnership.

Although the main subject of the article may be the management of an Israeli soccer team, the article makes Goldhar's management model – and its Canadian origins – an integral part of that subject.³⁶

- (b) "This is not a case of libel tourism. On the motion judge's findings, Goldhar lives in Ontario and has operated a business here for at least 17 years. ... it should not have come as a surprise to Haaretz that Goldhar would seek to vindicate his reputation here."³⁷
- (c) "Further, I do not accept Haaretz's claim that the connection between the tort and Ontario is weak because the article was published more extensively in Israel. At the rebuttal stage of the jurisdiction simpliciter analysis, the question is whether,

³² Motion Reasons at para 26, Appellants' Record, Tab 3.

³³ Motion Reasons at para 69, Appellants' Record, Tab 3.

³⁴ Motion Reasons at para 76, Appellants' Record, Tab 3.

³⁵ CA Majority Reasons, Appellants' Record, Tab 4.

³⁶ CA Majority Reasons at paras 37-41, Appellants' Record, Tab 4.

³⁷ CA Majority Reasons at para 42, Appellants' Record, Tab 4.

objectively speaking, Ontario has a real and substantial connection to the subject matter of the action, not whether there is another forum that could also take jurisdiction over the action.”³⁸

39. On the issue of jurisdiction *simpliciter*, even Justice Pepall in dissent agreed that this Court’s decisions in *Black* and *Banro* controlled the result, and rejected the Appellants’ arguments (renewed in this Court) that the presumption of jurisdiction was not rebutted. As Justice Pepall noted, citing this Court’s precedent in *Banro*, “the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules”.³⁹

40. On the issue of *forum non conveniens*, the majority of the Court of Appeal rejected each of Haaretz’s arguments. The majority,

- (a) Heeded this Court’s warnings about the high threshold for appellate intervention on this issue;⁴⁰
- (b) Found that it was open to the motions judge to (1) conclude that there were adequate procedures to address any inconvenience to witnesses; (2) consider the effect of Mr. Goldhar’s offer to fund travel and accommodation expenses for witnesses; and (3) treat Haaretz’s proposed witness list with caution;⁴¹
- (c) Applied this Court’s clear precedents to conclude that Mr. Goldhar’s claim was governed by Ontario law;⁴²
- (d) Concluded that Mr. Goldhar’s undertaking to limit his claim to damages in Ontario is not evidence of “forum shopping” but instead “confirms the significance to him of his reputation in Ontario and the importance to him of vindicating his reputation here”;⁴³

³⁸ CA Majority Reasons at para 43, Appellants’ Record, Tab 4.

³⁹ CA Dissent Reasons at para 12, Appellants’ Record, Tab 4, citing *Banro* at para 109.

⁴⁰ CA Majority Reasons at paras 49-50, Appellants’ Record, Tab 4.

⁴¹ CA Majority Reasons at paras 69-73, Appellants’ Record, Tab 4.

⁴² CA Majority Reasons at paras 84-88, Appellants’ Record, Tab 4.

⁴³ CA Majority Reasons at para 87-88, Appellants’ Record, Tab 4.

- (e) Agreed with Haaretz that Mr. Goldhar had not demonstrated a loss of juridical advantage to proceeding in Israel because he had not yet delivered a jury notice,⁴⁴ but ultimately concluded that loss of juridical advantage was a neutral factor;⁴⁵ and
- (f) Concluded that the Motions Judge had correctly held that it was not unfair for the action to proceed in Ontario.⁴⁶

(v) *Haaretz's Witnesses of Dubious Relevance*

41. On the motion, the Appellants filed affidavit evidence indicating that they anticipated they could potentially call 22 witnesses to speak to this matter, most of whom live in Israel.

42. Moran Meiri, an Israeli lawyer who had represented Maccabi Tel Aviv in the past, interviewed eight of Haaretz's proposed witnesses. Only two had any relevant evidence. None of them would willingly testify for Haaretz (in whatever jurisdiction).⁴⁷

43. Given the lack of evidence from Haaretz supporting the relevance of these witnesses, coupled with Mr. Goldhar's undertaking to pay for any witness's travel and accommodation expenses, the Motions Judge concluded that the expense and convenience factor only slightly favoured a trial in Israel. The Court of Appeal majority found that the Motions Judge's overall assessment of the cost and convenience of a trial in Ontario was reasonable.⁴⁸

44. In particular, the majority noted that the record contained "scant information about what particular witnesses are actually likely to say."⁴⁹ Haaretz did not provide any witness statements or notes of conversations with the proposed witnesses, and Mr. Marouani – the reporter who

⁴⁴ CA Majority Reasons at paras 92-94, Appellants' Record, Tab 4.

⁴⁵ CA Majority Reasons at paras 99-110, Appellants' Record, Tab 4.

⁴⁶ CA Majority Reasons at para 104, Appellants' Record, Tab 4.

⁴⁷ Affidavit of Moran Meiri sworn September 9, 2013 at paras 5-9, Respondent's Record, Tab 5 at 38-39 [**Meiri Affidavit**].

⁴⁸ CA Majority Reasons at para 67, Appellants' Record, Tab 4.

⁴⁹ CA Majority Reasons at para 73, Appellants' Record, Tab 4.

researched and wrote the Article – did not provide any evidence on the motion.⁵⁰ The majority held that the Motions Judge was entitled to treat the proposed witness list with caution.⁵¹

45. The majority also held that the Motions Judge was entitled to accept that reluctant witnesses in Israel could be compelled to provide evidence in Israel through a combination of letters of request and videoconferencing, to be used as evidence in the Ontario trial.⁵² As set out below, this was correct as a matter of law.

(vi) Mr. Goldhar’s Legitimate Undertakings

46. The Motions Judge also relied in part on two undertakings by Mr. Goldhar, which addressed concerns raised by the Appellants in the *forum non conveniens* analysis:

- (a) Mr. Goldhar agreed to pay the travel and accommodation costs of Haaretz’s witnesses, in accordance with the rates set out in the *Rules of Civil Procedure*; and
- (b) Mr. Goldhar agreed to limit his claim to damages for reputational harm suffered in Canada, as did the plaintiff in *Black*.⁵³

47. The first undertaking undermined the significance of inconvenience to Israeli witnesses.⁵⁴

48. The second undertaking, which paralleled the accepted undertaking in *Black*, was held to be “a very significant factor” in the choice of law analysis given that no claim was being advanced to harm to reputation outside Ontario.⁵⁵ By giving up a claim to damages sustained around the world, Mr. Goldhar confirmed that it was Canadian reputation with which he was most concerned about protecting. The Motions Judge concluded that the choice of law factor favoured a trial in Ontario.⁵⁶

⁵⁰ CA Majority Reasons at para 73, Appellants’ Record, Tab 4.

⁵¹ CA Majority Reasons at para 73, Appellants’ Record, Tab 4.

⁵² CA Majority Reasons at paras 59 and 68-71, Appellants’ Record, Tab 4.

⁵³ Motion Reasons at paras 44 and 50, Appellants’ Record, Tab 3; CA Majority Reasons at paras 68, and 87-88, Appellants’ Record, Tab 4.

⁵⁴ Motion Reasons at para 44, Appellants’ Record, Tab 3.

⁵⁵ Motion Reasons at para 50, Appellants’ Record, Tab 3.

⁵⁶ Motion Reasons at para 51, Appellants’ Record, Tab 3.

49. The majority of the Court of Appeal found there was no error in the Motions Judge's approach to either undertaking, dismissing the Appellants contention that they amounted to "forum shopping."⁵⁷ The majority agreed with the Motions Judge's conclusion that the undertaking confirmed the significance to Mr. Goldhar of his reputation in Ontario, and the importance of vindicating that reputation in this jurisdiction.⁵⁸

(vii) Mr. Goldhar Delivers His Jury Notice

50. Following the Court of Appeal's dismissal of the appeal on June 18, 2016, Mr. Goldhar promptly followed through on his counsel's submissions to the Court of Appeal and delivered a jury notice on July 5, 2016.⁵⁹

51. It was not until more than two months later, September 26, 2016, that the Appellants sought leave to appeal.

PART II - ISSUES

52. This case raises the following issues:

- (a) Should the Court treat cross-border internet defamation differently than other forms of cross-border defamation for the purposes of jurisdiction *simpliciter* analysis?
- (b) Should the Court treat cross-border internet defamation differently than other causes of action for the purposes of *forum non conveniens* analysis?
- (c) Should the Court adopt a special choice of law rule for multi-jurisdictional defamation?

⁵⁷ CA Majority Reasons at para 88, Appellants' Record, Tab 4.

⁵⁸ CA Majority Reasons at para 88, Appellants' Record, Tab 4.

⁵⁹ Jury Notice dated July 4, 2016, Respondent's Record, Tab 1 [**Jury Notice**].

PART III - STATEMENT OF ARGUMENT

C. This Court Should Not Create Special Exceptions to the Law of Jurisdiction *Simpliciter*

(i) The Courts Below Applied this Court’s Settled Jurisdiction Simpliciter Precedents

53. In *Van Breda*, this Court endorsed the two-step approach in the model *Court Jurisdiction and Proceedings Transfer Act*, enacted at that time in several provinces, which created a nearly uniform and consistent test for jurisdiction *simpliciter* across the country.⁶⁰

54. In *Van Breda*, the Court made clear that “[t]he *situs* of the tort is clearly an appropriate connecting factor, as can be seen from rule 17.02(g) [of the *Ontario Rules of Civil Procedure*], and from the *CJPTA*, the *Civil Code of Québec* and the jurisprudence of this Court since *Tolofson*. The difficulty lies in locating the *situs*, not in acknowledging the validity of this factor once the *situs* has been identified.”⁶¹

55. In the case of defamation, there is no difficulty. The Appellants correctly note at paragraph 29 of their factum that the tort of defamation is one of strict liability, and is committed where material is “communicated” to, or “read and understood” by at least one person other than the plaintiff.⁶²

56. This feature of the substantive law of defamation is not some mere “technicality”, as the Appellants claim.⁶³ As this Court’s decision in *Banro* makes clear, “a single instance of publication is sufficient for the tort to crystallize” and so be actionable.⁶⁴ Defamatory words that have been communicated to even a single person are actionable in common law Canada. Without

⁶⁰ *Van Breda* at paras 40-43 and 80-81.

⁶¹ *Van Breda* at para 88.

⁶² Appellants’ Factum at para 29; *Grant v Torstar Corp*, 2009 SCC 61 at para 27, [2009] 3 SCR 640.

⁶³ Appellants’ Factum at para 29.

⁶⁴ *Banro* at para 55; Raymond E Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd ed, (Toronto: Thomson Reuters Canada Ltd, 1999) (online loose-leaf, updated 2017) at 7.2 [*Brown on Defamation*].

some wholesale amendment to the substantive law of defamation,⁶⁵ there is thus no reason why a single instance of publication should not give rise to a presumption of jurisdiction.

57. The Appellants’ argument that “the place where words on the Internet are downloaded ... [necessarily] gives rise to only a ‘weak relationship’ and is an unreliable basis on which to presume a ‘real and substantial connection’”⁶⁶ reflects a misunderstanding of this Court’s clear precedents.

58. In both *Banro* and *Black*, the Court confirmed that the *situs* of the torts of libel and slander are where they are completed and published, or where the impugned words are heard or read, and that this is sufficient to establish a presumption of jurisdiction.⁶⁷

59. As this Court said in *Black*, a case where the impugned press release was originally posted online from Chicago but read and downloaded in Ontario:

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.⁶⁸

60. In *Banro*, the Court expressly confirmed that, “[a]t this stage of the proceedings, the plaintiff need not show evidence of harm or that the book was read. The plaintiff need only allege publication and its allegations should be accepted as pleaded unless contradicted by evidence

⁶⁵ *Banro* (“To adopt the standard of substantial publication in the context of private international law would amount to a significant change in the substantive tort. It would be anomalous to adopt a new standard in the context of private international law but to continue applying the traditional standard in the context of the substantive tort” at para 55).

⁶⁶ Appellants’ Factum at para 32.

⁶⁷ *Banro* at paras 34 and 38; *Black* at para 20.

⁶⁸ [emphasis added] *Black* at para 20.

adduced by the defendants.”⁶⁹ In *Banro*, a presumption was established where only 93 copies of a book were sold into Ontario, with 15 to be found at Ontario libraries.⁷⁰

61. In the present case, the Motions Judge and Court of Appeal agreed, consistent with *Banro*, that the 200 to 300 people who likely read the Article was a more than sufficient basis on which to find that a presumption had been established. Indeed, this was a position that the Appellants, below, did not contest.⁷¹

62. The Appellants now cite the concerned commentary of Justice Pepall in dissent below to the effect that, in cases of internet defamation, proof of publication is “virtually automatic” by showing that the material was “accessed” and “downloaded”.⁷² But even Justice Pepall agreed that a presumption of jurisdiction had been established – and that it could not have been rebutted in light of *Banro* and *Black*.⁷³ It was the Appellants’ own evidence that established that “200 to 300” individuals likely read the article in Canada. As this Court said in *Van Breda*, rebutting the presumption of jurisdiction will be difficult where the presumptive connecting factor is that of a tort committed in the forum.⁷⁴

63. The Appellants cite *Van Breda* for the proposition that “it may be possible to [rebut the presumption] ... in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province”.⁷⁵ But *Banro*, in which the Court rejected the argument that the presumption was rebutted, was just such a multi-jurisdictional defamation case, one in which less than 100 of the more than 5,000 copies of the impugned material was distributed in Ontario.⁷⁶ As in *Banro*, the courts below rejected Haaretz’s reliance on the relative extent of publication across jurisdictions.

⁶⁹ *Banro* at para 38.

⁷⁰ *Banro* at paras 17 and 39.

⁷¹ Motion Reasons at para 20.

⁷² Appellants’ Factum at para 31, citing CA Dissent Reasons at para 127, Appellants’ Record, Tab 4.

⁷³ CA Dissent Reasons at paras 95-96, Appellants’ Record, Tab 4.

⁷⁴ *Van Breda* at para 96.

⁷⁵ *Van Breda* at para 96.

⁷⁶ *Banro* at paras 17 and 39.

64. Consistent with *Van Breda*, *Black* and *Banro*, the Courts below appropriately looked beyond the absolute or relative publication figures at all of the facts, including that “the alleged sting of the article is very much related to how Goldhar conducts business in Canada”, to conclude that there was a real and substantial connection between Ontario and the substance of the action.⁷⁷

65. The Courts below correctly noted that it was not Mr. Goldhar’s obligation to lead evidence at this stage in the litigation regarding the harm to his reputation in Ontario. The substantive law of defamation in Canada is clear that such harm is presumed in cases of libel (i.e. defamation in writing). The rationale for this fundamental principle in the Canadian law of defamation has been explained in the following way:

Where the words are defamatory, damages are presumed and awarded at large [...] Harm to reputation is presumed from the mere publication of the defamatory falsehood; it “naturally, proximately and necessarily” results from the publication. This presumption is irrebuttable. The law even assumes that the plaintiff’s reputation and character are unblemished until the contrary is proved. The “presumption arises by logical inference from the patently defamatory character of the publication, assisted by the reasoning of experience”. It is a procedural tool designed to permit a plaintiff to recover damages without having to prove any damage to his or her reputation. It applies even though it is not shown that a single person familiar with the plaintiff has read the defamatory words or, if they read them, did not believe that they were true, or, if accepted as true, did not alter their regard for, or opinion of, the plaintiff. No proof of special damage or actual injury is required, although the plaintiff is free to provide such proof if he or she wishes to do so. If he fails to prove special damages, “he may still resort to, and recover, his general damages”.⁷⁸

66. This policy rationale was confirmed by the Ontario Court of Appeal in *Paulsson v Cooper*, applying the *Van Breda* test (before this Court’s adoption of it) to a case of multi-jurisdictional defamation involving internet-based and physical copies of an academic journal:

[T]he appellant is a Canadian citizen and long-time resident of Ontario. Although he studied and worked in locations outside

⁷⁷ CA Majority Reasons at para 41, Appellants’ Record, Tab 4.

⁷⁸ [citations omitted] *Brown on Defamation* at 25.2.

Ontario for ten years from 1992 to 2002, during which time he obtained his important academic credentials and wrote his book, his place of residency since 2002 is Ontario. Reputational damage follows the person whose reputation is impugned. [...] To the extent damage to reputation is ultimately proved (and in the case of libel, damage flows from a finding of liability), that damage is suffered in Ontario.

Generally speaking, the plaintiff in a defamation action will typically suffer the most injury to his or her reputation in the jurisdiction where he or she resides.⁷⁹

67. Even Justice Pepall below held that this Court’s decision in *Banro* and *Black* controlled the result of the jurisdiction *simpliciter* analysis.⁸⁰

68. It is simply not the case, as the Appellant’s imply, that this approach to jurisdiction *simpliciter* is too liberal, or risks creating a situation where the presumption is irrebuttable.⁸¹ The volume of publication, the nature of the impugned words, and their relationship to the forum are all relevant factors that defendants can cite in seeking to rebut the presumption, or to establish that “only a relatively minor element of the tort has occurred in the province”.⁸²

69. But it should be no surprise to anybody, including the Appellants, that Ontario courts will have jurisdiction to deal with defamation claims by a long-time Ontario resident where the evidence establishes that hundreds of Ontarians read the Article which criticized the plaintiff’s business practices in Ontario.

(ii) No Principled Basis to Change the Law

70. The Appellants cite concerns about free expression, comity,⁸³ libel tourism, and forum shopping.⁸⁴ They argue that Canadian law is “out of step” with developments in UK and US jurisdiction law in defamation,⁸⁵ and that this Court should adopt what some US courts have

⁷⁹ [citations omitted] 2011 ONCA 150 at paras 29-30, 105 OR (3d) 28.

⁸⁰ CA Dissent Reasons at paras 95-96, Appellants’ Record, Tab 4.

⁸¹ Appellants’ Factum at paras 49-53 and 58.

⁸² *Van Breda* at paras 96-97.

⁸³ Appellants’ Factum at paras 33ff.

⁸⁴ Appellants’ Factum at paras 47ff.

⁸⁵ Appellants’ Factum at para 61.

required to ground personal jurisdiction over internet defamation defendants, namely “targeting” of the forum jurisdiction.⁸⁶

71. To do so would create a special exception to the *Van Breda* test for a narrow sub-class of one tort – internet-based defamation – which would unjustifiably fragment the law of jurisdiction *simpliciter* and has no precedent in Canadian law (or the law of any other jurisdiction). The existing *Van Breda* test gives courts more than enough flexibility to address the free expression and related concerns that the Appellants now raise.

72. As this Court noted in *Hill v Church of Scientology*, when it rejected the “actual malice” rule laid down by the Supreme Court of the United States in *New York Times v Sullivan*, the law must recognize that there are limits to freedom of expression:

A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation. [...]

Although it is not specifically mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.

Further, reputation is intimately related to the right to privacy which has been accorded constitutional protection.⁸⁷

73. So too, in *Crookes v Newton*, Justice Abella stressed that internet-based defamation is particularly powerful:

[I]ndividuals’ reputations are entitled to vigorous protection from defamatory comments. It is clear that “the right to free expression does not confer a licence to ruin reputations” [...] Because the Internet is a powerful medium for all kinds of expression, it is also a potentially powerful vehicle for expression that is defamatory. [...]

⁸⁶ Appellants’ Factum at paras 41ff.

⁸⁷ *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at paras 107, 120, and 121, 126 DLR (4th) 129, citing *R v Dymont*, [1988] 2 SCR 417 at 427, 55 DLR (4th) 503.

New activities on the Internet and the greater potential for anonymity amplify even further the ease with which a reputation can be harmed online:

The rapid expansion of the Internet coupled with the surging popularity of social networking services like Facebook and Twitter has created a situation where everyone is a potential publisher, including those unfamiliar with defamation law. A reputation can be destroyed in the click of a mouse, an anonymous email or an ill-timed Tweet.⁸⁸

74. In overturning a motion judge's award of damages for defamation as inadequate, the Court of Appeal for Ontario noted in *Barrick Gold Corp v Lopehandia*, that

Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of individuals and corporations, by [...] its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility. The mode and extent of publication is therefore a particularly significant consideration in assessing damages in Internet defamation cases.⁸⁹

75. This admonition has been repeatedly applied in Ontario, where the Superior Court of Justice has, for instance, recently awarded an elevated award of damages for a campaign of defamation because it took place over the internet.⁹⁰

76. Academic debates over the proper limits of jurisdiction over defamation claims have similarly recognized the power of the internet to do violence to individual reputations. As one article cited by the Appellants notes, the current settled law – which sees a single instance of publication act as a presumption of jurisdiction, but gives defendants the opportunity to rebut that presumption – appropriately balances the two competing interests at issue, including on the internet.⁹¹ As Matthew Castel suggests, “in the case of a multistate defamation claim involving the Internet, the defendant could attempt to [rebut the presumption and] convince the court that he or

⁸⁸ [citations omitted] *Crookes v Newton*, 2011 SCC 47 at paras 37-38, [2011] 3 SCR 269.

⁸⁹ *Barrick Gold Corp v Lopehandia* (2004), 71 OR (3d) 416 at para 34, 239 DLR (4th) 577 (CA).

⁹⁰ *Rutman v Rabinowitz*, 2016 ONSC 5864 [*Rutman*].

⁹¹ Matthew Castel, “Jurisdiction and Choice of Law Issues in Multistate Defamation on the Internet” (2013) 51:1 Alberta L Rev 153 at 159-160 [*Castel*].

she has limited the access to the allegedly defamatory material”,⁹² something the defendants have not done here.

77. The creation of special rules for jurisdiction that apply only to certain torts has been expressly rejected by other courts. As the U.S. Supreme Court itself recognized in *Calder v Jones*, “libel chill” concerns do not justify “special” tests for personal jurisdiction in libel actions:

We also reject the suggestion that First Amendment concerns enter into the jurisdictional analysis. The infusion of such considerations would needlessly complicate an already imprecise inquiry. [...] Moreover, the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. [...] To reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.⁹³

78. *Calder* established in United States law a general “effects based” test for personal jurisdiction in all cases (not merely defamation) – one that does not at all resemble this Court’s two-step approach in *Van Breda*. The “targeting” approach to internet defamation adopted by the Fourth Circuit Court of Appeals in *Young*, and now contended for by the Appellants, is not itself universally applied in the United States.⁹⁴ Indeed, the “targeting” approach has been criticized by U.S. scholars who note that it is a departure from the “effects based” precedent in *Calder* and creates a jurisdictional “safe harbour” for defamation defendants who publish on the internet.⁹⁵ The approach, adopted by the Fourth Circuit in *Young*, is based on two fundamental fictions: (1)

⁹² Castel at 159-160.

⁹³ *Calder v Jones*, 465 US 783 (1984) at 790-91.

⁹⁴ Joel Reidenberg et al, “Internet Jurisdiction: A Survey of Legal Scholarship Published in English and United States Case Law” (2013) Center on Law and Information Policy at Fordham Law School Research Paper No 2309526 at 11 and 61, Respondent’s Book of Authorities [BOA], Tab 4; Patrick Joseph Borchers, “Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction” (2004) 98:2 Nw UL Rev 473, in particular, at 473, 488; Patrick Joseph Borchers, “How ‘International’ Should a Third Conflicts Restatement Be in Tort and Contract” (2017) 27:3 Duke LJ 461 at 469-472.

⁹⁵ Sarah H Ludington, “Aiming at the Wrong Target: The “Audience Targeting” Test for Personal Jurisdiction in Internet Defamation Cases” (2012) 73:1 Ohio St LJ 541 [Ludington].

that there can be truly “local” internet publications, and (2) the presumption that such publications are “aimless”, or not intended to be read outside the jurisdiction.⁹⁶

79. The UK *Defamation Act, 2013*, relied on by the Appellants, provides little principled guidance for an alternative approach. Section 9(2) of that statute does amend the law of jurisdiction for defamation for claims against non-EU foreigners;⁹⁷ but only by reversing the burden of proof under the traditional English *forum non conveniens* analysis⁹⁸:

A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.⁹⁹

80. Both the American and English approaches apparently contended for by the Appellants are simply incompatible with the two-stage *Van Breda* test that this Court adopted only 5 years ago. Creating exceptions to that test for defamation actions would unjustifiably add incoherence and uncertainty to the law.

81. In any event, the adoption of a special targeting-based approach would not help the Appellants. Many U.S. courts, relying on *Calder*, have not required a defendant to uniquely target a forum,¹⁰⁰ and have held that jurisdiction can be assumed as long as the action concerns speech about a known resident of the forum.¹⁰¹ As even one U.S. commentator contending for a narrow reading of *Calder* has noted, the courts of a forum should be able to assume jurisdiction as long as the defendant has intentionally targeted a plaintiff with its tortious conduct and knew that the

⁹⁶ Ludington at 554.

⁹⁷ *Defamation Act 2013* (UK), c 26, s 9 [*Defamation Act 2013*].

⁹⁸ Alex Mills, “The law applicable to cross-border defamation on social media: whose law governs free speech in ‘Facebookistan’?” (2015) 7:1 J Media L, 1 at 4-7, Respondent’s BOA, Tab 3 [Mills].

⁹⁹ *Defamation Act 2013*, s 9.

¹⁰⁰ Lee Goldman, “From *Calder* to *Walden* and Beyond: The Proper Application of the “Effects Test” in Personal Jurisdiction Cases” (2015) 52 San Diego L Rev 357 at 375, Respondent’s BOA, Tab 1 [Goldman], citing *Walden v Fiore*, 134 S Ct 1115 (2014) at 1125.

¹⁰¹ Goldman at 368 Respondent’s BOA, Tab 1, citing *Gordy v Daily News*, 95 F3d 829 (9th Cir 1996).

plaintiff was primarily resident in the forum.¹⁰² The Appellants were not ignorant of Mr. Goldhar's Ontario residence – they called him a “long distance operator” because of it.

82. This is consistent with the approach of Professor Geist, a noted proponent of targeting-based approaches to internet jurisdiction, who argued as far back as 2001 that a relevant factor in jurisdiction analysis is the knowledge of the online defamer as to the plaintiff's forum of residence.¹⁰³ He also concluded that, in regard to internet activity in particular, courts can look to whether foreign website operators attempted to avoid the forum with their online activities (such technology being widely available).¹⁰⁴

83. Here, the Motions Judge found as a fact that the Article, fairly read, referred to Mr. Goldhar's Canadian business operations and conduct (and indeed criticizes those operations and that conduct). Further, the evidence is that Haaretz, knowing itself to be “one of the most distinguished newspaper[s] ... around the world”¹⁰⁵ never made any effort to make its website (or even the Article) inaccessible to Canadians. On these bases alone, any reasonable approach to a “targeting” requirement to jurisdiction would be more than satisfied.

D. The Motions Judge's *Forum Non Conveniens* Analysis was Reasonable and Entitled to Deference

84. This court has repeatedly reminded litigants that the onus on foreign defendants asserting that a Canadian jurisdiction is *forum non conveniens* is a high bar. Courts have the discretion – but

¹⁰² Goldman at 376 and 382 (“The defendant has ‘fair warning’ of the possibility of suit in that forum and can easily avoid suit there by not willfully causing injury to a known forum resident.” [citation omitted]), Respondent's BOA, Tab 1.

¹⁰³ Michael A Geist, “Is There a There There – Toward Greater Certainty for Internet Jurisdiction” (2001) 16:3 Berkeley Tech LJ 1345 at 1402 (“The implied knowledge factor is most apparent in the defamation tort cases that follow from the *Calder* decision. In those cases, courts have accepted that the defaming party is or should be aware that the injury inflicted by her speech would be felt in the jurisdiction of her target”). [Geist].

¹⁰⁴ Geist at 1401.

¹⁰⁵ Barzel Cross at Q 45, Respondent's Record, Tab 7.

not any obligation – to decline to exercise jurisdiction in favour of a clearly more appropriate forum. In *Van Breda*, Justice LeBel emphasized this high bar and high level of discretion:

The use of the words “clearly” and “exceptionally” should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. [...]

The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. [...]

The exercise of discretion 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, which, as I emphasized above, takes place at an interlocutory or preliminary stage.¹⁰⁶

85. This Court has also repeatedly reminded appellants, citing both *Van Breda* and *Banro*, that “[a] motions judge’s discretionary decision to refuse to decline jurisdiction on the basis of forum non conveniens is entitled to considerable deference on appeal”.¹⁰⁷ Similar language was recently used by Justice Abella in emphasizing that other discretionary decisions (i.e. motions for interlocutory injunctions) “are entitled to a high degree of deference” from reviewing courts.¹⁰⁸

86. The Motions Judge below concluded that the Appellants had not discharged their onus of showing that Israel was a “clearly more appropriate forum”. The majority in the Court of Appeal upheld this result as reasonable. The majority was mindful of this Court’s admonitions in concluding that “the motion judge’s decision not to stay the proceedings on the basis of *forum non*

¹⁰⁶ *Van Breda* at paras 109-112.

¹⁰⁷ *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30 at para 54, [2016] 1 SCR 851.

¹⁰⁸ *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 22.

conveniens is a discretionary one, and accordingly entitled to a high degree of deference on appeal”.¹⁰⁹

87. The Appellants now attack the *forum non conveniens* conclusions of the Motions Judge and the majority in the Court of Appeal on the basis that they should have conducted a “robust and careful review” of the relevant factors.¹¹⁰

88. At best, this is simply a complaint that the discretion of the courts below should have been exercised differently. At its most troubling, it is an unjustified call for a lower bar for foreign defendants in defamation cases.

89. As the review of each of the relevant factor below illustrates, both of these arguments are unjustified.

(i) Fairness to the parties

90. Among the factors on the non-exhaustive list that the Motions Judge considered was fairness to the parties. He concluded that this important criterion required that the Ontario action not be stayed in favour of Israel. In doing so, he had appropriate regard to the fundamental balance between the interest of plaintiffs and defendants in defamation actions:

The defendants submit that it is unreasonable for the defendants to have to defend a defamation action thousands of miles away in Ontario in relation to an article about the way a local soccer team is managed by its owner that “virtually no one” read in Ontario.

On the other hand the plaintiff submits that several hundred people read the Article in Canada. The defendants’ own evidence was that readers in Canada made up the majority of the Article’s online English version. The defendants published an article about a Canadian’s businessman’s ownership of an Israeli soccer team that impugned his reputation. There is no surprise or injustice to the plaintiff’s attempt to vindicate his reputation in Ontario, where he lives and works.¹¹¹

¹⁰⁹ CA Majority Reasons at para 50, Appellants’ Record, Tab 4.

¹¹⁰ Appellants’ Factum at paras 59-64.

¹¹¹ [emphasis added] Motion Reasons at paras 61-62, Appellants’ Record, Tab 3.

91. The Appellants’ arguments that this reflected an “unreasonable focus” on the fact that Goldhar “lives and works” in Ontario should be rejected.¹¹² Both the Motions Judge and the majority in the Court of Appeal pointed to the fact that the Article is, at its core, a criticism of the way in which Mr. Goldhar runs his Canadian business.

92. This conclusion was consistent with Justice LeBel’s direction in *Banro* to the effect that:

The importance of place of reputation has long been recognized in Canadian defamation law. For example, the importance of permitting plaintiffs to sue for defamation in the locality where they enjoy their reputation was recognized [...] in *Jenner v. Sun Oil Co. Ltd.* [...] In that case, McRuer C.J.H.C. found that the plaintiff would not be able to satisfactorily “clear his good name of the imputation made against him” other than by suing for defamation in the locality where he enjoyed his reputation – that is, where he lived and had his place of business and vocation in life.¹¹³

93. The majority in the Court of Appeal found no basis on which to interfere in this decision.¹¹⁴ The majority appropriately considered the Motion Judge’s reasons as a whole and found his ultimate conclusion reasonable. It was the dissenting judge, Justice Pepall, who misunderstood the role of a reviewing court and unreasonably parsed each aspect of the Motions Judge’s reasons to substitute her own judgment for that of the Motions Judge.

(ii) *Comparative convenience and expense to witnesses*

94. The Appellants’ main attacks on the decisions below focus on the issue of comparative convenience and expense to witnesses. As the majority in the Court of Appeal below found, three factors drove the Motion Judge’s analysis on this issue:

[F]irst, the availability of videoconferencing to obtain the testimony of witnesses unwilling or unable to come to Ontario; second, Goldhar’s undertaking to fund travel and accommodation expenses

¹¹² Appellants’ Factum at para 76, citing CA Majority Reasons at para 104, Appellants’ Record , Tab 4.

¹¹³ *Banro* at para 59.

¹¹⁴ CA Majority Reasons at para 104, Appellants’ Record, Tab 4.

for Haaretz's witnesses; and third, the lack of evidence concerning the likely testimony of Haaretz's proposed witnesses.¹¹⁵

95. While the Motions Judge did misapprehend that Israeli witnesses could be compelled to attend at trial in Ontario using letters rogatory, as the Court of Appeal noted below, this did not render his assessment of this factor unreasonable.¹¹⁶

96. The law in Ontario is clear that letters rogatory together with Ontario's *Rules of Civil Procedure* expressly enable a party to seek and obtain video evidence by commission at (and before) trial in foreign jurisdictions.¹¹⁷ The Motions Judge's ultimate conclusion, that there were adequate mechanisms to obtain the evidence of any Israeli witnesses for use at trial in Ontario, was correct as a matter of law.

97. The Appellants' argument that Mr. Goldhar had to lead evidence to prove that Israeli courts would respect a Canadian letters rogatory request,¹¹⁸ ignores the fact that it is the defendants' heavy onus to demonstrate that Israel is clearly the more appropriate forum. As a matter of comity, absent evidence to the contrary, Canadian courts should assume that letters of request will be honoured:

Consistent with these broad principles of comity it might be said that absent public policy considerations to the contrary, Ontario should give effect to foreign letters of request for the taking of evidence just as Ontario would expect the foreign jurisdiction to enforce our letters of request.¹¹⁹

¹¹⁵ CA Majority Reasons at para 68, Appellants' Record, Tab 4.

¹¹⁶ CA Majority Reasons at para 67, Appellants' Record, Tab 4.

¹¹⁷ *Moore v Bertuzzi*, 2014 ONSC 1318, 53 CPC (7th) 237 [*Moore*].

¹¹⁸ Appellants' Factum at para 68.

¹¹⁹ *Moore* at para 60; see also para 81 ("By rules of comity, if an Ontario court could enforce a request from a foreign court, for example the State of Washington, to have a witness in Ontario examined live, by videoconferencing technology, during a trial in Washington, so could an Ontario court request that a court in Washington enforce its request that a witness in Washington testify live during a trial in Ontario.")

98. The suggestion that Mr. Goldhar's undertaking to pay the cost of travel and accommodations for Haaretz's witnesses is empty or amounts to 'purchasing' a forum has no basis.

99. First, Mr. Goldhar is seeking to vindicate his reputation in Ontario, his place of residence and the place where he has long maintained his key business interest. That there could be anything *per se* illegitimate about that is a remarkable submission.

100. Second, whatever form the undertaking took (oral or otherwise), the Motions Judge expressly ordered that compliance with it be a condition of the action proceeding to trial in Ontario.¹²⁰

101. Third, litigants of all kinds – wealthy or not – are regularly ordered to pay the extraordinary costs associated with obtaining discovery evidence abroad. Thus, in *Moore v Bertuzzi*, plaintiffs seeking to obtain evidence by video at trial from Washington State were ordered to pay all expenses related to the videoconferencing facilities (subject to any costs award by the trial judge) and to pay the witnesses conduct monies pursuant to the *Rules*.¹²¹ In short, there is nothing unusual about Mr. Goldhar's undertaking (and the Motions Judge's order) to that effect.

102. Finally, the Court of Appeal correctly recognized that there was ample evidentiary basis on which the Motions Judge could approach "with caution" the relevance of the evidence of the 22 proposed witnesses of the Appellants, virtually all of whom were in Israel.¹²² The Appellants' argument on this issue, as well as the treatment of it by the Motions Judge and the Court of Appeal below, reveal this as a classic case of appellants asking a higher court to simply re-weight the evidence to get to a different factual conclusion with which they disagreed.

103. The Appellants should not have been surprised that, given that the Article criticizes Mr. Goldhar's business practices in Ontario, the evidence of their 22 proposed Israeli witnesses

¹²⁰ Motion Reasons at para 78, Appellants' Record, Tab 3.

¹²¹ *Moore* at para 103.

¹²² CA Majority Reasons at para 73, Appellants' Record, Tab 4.

was of relatively little importance. They certainly cannot demonstrate any palpable and overriding error on this issue.¹²³

104. Ultimately, the Motions Judge concluded that the comparative convenience and expense to the witnesses in fact “slightly favours” a trial in Israel. The Appellants point to no error in principle in this result.

(iii) *Loss of juridical advantage favours Ontario*

105. The Motions Judge properly concluded that a proceeding in Israel would deprive Mr. Goldhar of an important juridical advantage: access to a jury trial.¹²⁴

106. Although the Court of Appeal noted that at the time of that appeal Mr. Goldhar had not delivered a jury notice,¹²⁵ any party in Ontario may do so before the close of pleadings.¹²⁶ Pleadings are not closed and Mr. Goldhar delivered a jury notice, shortly after the Court of Appeal’s decision in this case and long before the Appellants even sought leave to appeal.

107. While a juridical advantage must be substantive and not merely procedural, the right to a jury has frequently been held to constitute an important substantive right.¹²⁷ As noted in *Brown on Defamation*, “it is important to ensure that the person defamed be tried by a jury in the community where his or her reputation has been established.”¹²⁸

108. The meaning and ‘sting’ of allegedly defamatory words are an essential aspect of any defamation action and fact finders must be sensitive to the contextual understandings held amongst

¹²³ *Housen v Nikolaisen*, 2002 SCC 33 at paras 10 and 23, [2002] 2 SCR 235 (“We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence.”)

¹²⁴ Motion Reasons at para 55, Appellants’ Record, Tab 3.

¹²⁵ CA Majority Reasons at para 99, Appellants’ Record, Tab 4.

¹²⁶ *Rules of Civil Procedure*, RRO 1990, Reg 194, r 47.01.

¹²⁷ *R v Colonial Homes Ltd*, [1956] SCR 528 at 533, 4 DLR (2d) 561; *Sloane v Toronto Stock Exchange* 5 OR (3d) 412, 4 CPC (3d) 278; *Kempf v Nguyen*, 2015 ONCA 114 at paras 43, 64 and 67, 124 OR (3d) 241; *Colby Physioclinic Ltd v Ruiz*, 2002 NSCA 113 at paras 4-5, 208 NSR (2d) 138 [*Colby Physioclinic*];

¹²⁸ *Brown on Defamation* at 17.3(1.1)(b), cited in *Black v Breeden* (2009), 309 DLR (4th) 708 at para 63, 73 CPC (6th) 83 (Ont SCJ), affd 2010 ONCA 547, affd 2012 SCC 19.

particular communities.¹²⁹ This is particularly so where, as here, it is only Mr. Goldhar's reputation in Ontario which is at issue in the litigation.

109. The effect of this approach is not to demean or criticize the Israeli civil trial, as the Appellants suggest,¹³⁰ but rather to acknowledge that there is a substantial advantage in having defamatory words interpreted by a trier of fact who understands their true impact in the jurisdiction in which Mr. Goldhar's reputation has been damaged.¹³¹

110. Having served a jury notice, Mr. Goldhar is entitled to the legitimate juridical advantage of having his peers in his place of residence assess the sting of the Article in Ontario. It would be unfair to require Mr. Goldhar to submit his claim of harm to reputation in Ontario to that of an Israeli trier of fact (i.e. a judge; the Appellants have led no evidence that a jury trial would be available in Israel).

111. In any event, the majority of the Court of Appeal was appropriately confident that the Motions Judge was aware of this Court's standard cautions against placing too much emphasis on this factor.¹³²

E. Choice of Law Clearly Favours Ontario as a Forum

112. The Court should decline the Appellants' invitation to take up the issue left for another day in *Banro*, namely a potential change to the choice of law rule for multijurisdictional defamation,¹³³ because:

- (a) A special "place of most substantial harm to reputation" rule for defamation actions is (1) unjustified outside of the context of wholesale legislative reform of the law of defamation; and (2) is unworkable and will only increase the cost and uncertainty of cross-border defamation litigation; and

¹²⁹ *Brown on Defamation* at 17.3(1.1)(b).

¹³⁰ Appellants' Factum at para 74.

¹³¹ *Colby Physioclinic* at paras 4-5.

¹³² CA Majority Reasons at para 100, Appellants' Record, Tab 4; *Van Breda* at para 112; *Black* at paras 26-27.

¹³³ *Banro* at para 62.

- (b) Whatever choice of law rule is applied, a litigant like Mr. Goldhar should be entitled to limit his claim for damages to that for publication in the forum of his residence, meaning that the law of that forum must necessarily apply.
- (i) ***“Place of most substantial harm to reputation” will not address “libel tourism” and “forum shopping” concerns when adopted outside of comprehensive reform to the substantive law of defamation***

113. This Court last considered the arguments for a “place of most substantial harm to reputation” defamation choice of law rule in *Banro*. There, Justice LeBel canvassed the theoretical basis for this potential rule, including:

- (a) That Justice La Forest left open the door in *Tolofson* to the recognition of exceptions to the *lex loci delicti* rule, “where an act occurs in one place but the consequences are directly felt elsewhere”;¹³⁴
- (b) “The importance of place of reputation has long been recognized in Canadian defamation law”, including “the importance of permitting plaintiffs to sue for defamation in the locality where they enjoy their reputation”;¹³⁵ and
- (c) Changes to choice of law rules in Australian domestic legislation justified by a concern about “forum shopping”,¹³⁶ and shared with some Canadian authors.¹³⁷

114. None of these arguments were compelling enough for the Court to endorse a change in the law in *Banro*, nor should they be today. As that case and the English and Australian experiences illustrate, it is only comprehensive reform (likely, legislative) of the tort of defamation that could ever truly address libel tourism concerns.

¹³⁴ *Banro* at paras 50-51, citing *Tolofson v Jensen*, [1994] 3 SCR 1022 at 1042 and 1050, 120 DLR (4th) 289.

¹³⁵ *Banro* at para 58, citing *Jenner v Sun Oil Co*, [1952] 2 DLR 526, [1952] OR 240.

¹³⁶ *Banro* at para 59, citing *Defamation Act 2005* (Qld), s 11(3).

¹³⁷ *Banro* at paras 60-61, citing Law Reform Commission, “Unfair Publication: Defamation and Privacy” (1979) Report No 11 at 190-91, J.-G. Castel, “Multistate Defamation: Should the Place of Publication Rule be Abandoned for Jurisdiction and Choice of Law Purposes?” (1990), 28 Osgoode Hall LJ 153 at 177; Craig Martin, “Tolofson and Flames in Cyberspace: The Changing Landscape of Multistate Defamation” (1997), 31 UBC L Rev 127, at 149 and 158, Respondent’s BOA, Tab 2.

115. In *Banro*, the Court rejected the appellants' contention that it should adopt the English approach of "substantial publication" because to do so would have been at odds with fundamental aspects of the law of defamation in common law Canada, including that the tort is actionable upon even a single instance of publication to a single person. This, despite acknowledged challenges with the way in which the common law tort functions in the internet age.¹³⁸

116. To the extent there are unique challenges in dealing with the law of defamation, they should not be fundamentally altered on an interlocutory motion such as this one.¹³⁹

117. While other common law jurisdictions have seen reform to address "libel tourism" and "forum shopping" concerns, those have most often focused on amendments to what Justice LeBel called in *Banro* the substantive law of defamation.¹⁴⁰ In Australia and England and Wales, jurisdictions cited by the Appellants, that reform has been accomplished through wholesale legislative change and not any incremental judicial change to private international law.

118. The UK *Defamation Act 2013*, cited by the Appellants, was just such a comprehensive legislative reform of the law of libel and slander in England and Wales. While it reverses the traditional *forum non conveniens* rule for defamation actions, as noted above,¹⁴¹ among other things it also: (1) adopted a single publication rule, modeled on the U.S. approach;¹⁴² (2) eliminated the right to a jury trial;¹⁴³ (3) created a new defence for operators of websites;¹⁴⁴ and (4)

¹³⁸ *Banro* at paras 3, 34 and 52-55.

¹³⁹ *Baglow v Smith*, 2012 ONCA 407, 350 DLR (4th) 694 (overturning summary judgment granted in favour of defendants in an action alleging defamation in the context of an online web forum debate) ("The issues raised in this action are all important issues because they arise in the relatively novel milieu of Internet defamation in the political blogosphere. However, they are not issues that lend themselves to determination on a motion for summary judgment in circumstances such as this" at para 23).

¹⁴⁰ *Banro* at para 55.

¹⁴¹ *Defamation Act 2013*, s 9; Explanatory Notes to *Defamation Act 2013* at paras 65-67 [Explanatory Notes].

¹⁴² *Defamation Act 2013*, s 8; Explanatory Notes at paras 60-64; *Brown on Defamation* at 7.12(6)(b).

¹⁴³ *Defamation Act 2013*, s 11; Explanatory Notes at paras 71-73.

imposed a “serious harm” requirement to bring a defamation claim.¹⁴⁵ Nevertheless, the UK legislation ignored choice of law rules that have been called “parochial” and “chauvinist”.¹⁴⁶

119. Thus, in Australia, as Justice LeBel noted in *Banro*, it was a series of model *Defamation Acts*, adopted in 2005, which changed the choice of law rule for multi-jurisdictional defamation.¹⁴⁷ However, as in England and Wales, those reforms included a whole host of substantive changes to the law of defamation, including: (1) adoption of the single publication rule;¹⁴⁸ (2) abolition of the distinction between libel and slander;¹⁴⁹ and (3) capping damages for non-economic loss (i.e. general damages).¹⁵⁰ Unlike the English approach, the Australian legislative reform does change the choice of law rule for defamation in the case of publication in multiple jurisdictions – but only for jurisdictions within Australia.¹⁵¹ The ordinary choice of law rules in Australia still apply where publication occurs both within one Australian forum and a foreign jurisdiction.¹⁵²

120. While the Australian approach requires the Court to determine “which Australian jurisdictional area has the closest connection with the harm”, it is not accurate to characterize it as a “place of most substantial harm” test. Instead, it is a contextual approach, which looks at more than just the “extent of harm” in each competing forum. Instead, the relevant statutes call for the application of a multi-factor test that also takes into account, among other things, “where the

¹⁴⁴ *Defamation Act 2013*, s 5; Explanatory Notes at paras 36-43.

¹⁴⁵ *Defamation Act 2013*, s 1; Explanatory Notes at paras 10-12.

¹⁴⁶ Mills at 10-17, Respondent’s BOA, Tab 3. As Mills notes, defamation has been excluded from UK and EU statutory choice of law rules, leaving in place a complex “double actionability” rule in defamation cases.

¹⁴⁷ *Banro* at para 59.

¹⁴⁸ See e.g. *Defamation Act 2005*, (NW) s 11 [*Defamation Act 2005* (NW)]; see also *Banro* where the adoption of the single-publication rule was particularly unappealing to Justice LeBel, who noted that adopting an Australian-like model for choice of law “would not result in a change to the substantive tort of defamation” at para 61.

¹⁴⁹ *Defamation Act 2005* (NW), ss 6, 7.

¹⁵⁰ *Defamation Act 2005* (NW), s 35.

¹⁵¹ *Defamation Act 2005* (NW), s 11.

¹⁵² See e.g. *Dow Jones and Co Inc v Gutnick*, (2002) HCA 56, 210 CLR 575; *Barach v University of New South Wales*, [2011] NSWSC 431.

plaintiff was ordinarily resident”, the “extent of publication” in each forum and “any other matter that the court considers relevant”.¹⁵³

121. In short, if the concern about “libel tourism” is truly a valid one, the English and Australian experiences illustrate that it is a problem that should be left to the legislature to address, and not this Court – particularly when acting at a preliminary jurisdictional stage where, notwithstanding a limited record, it has been clearly demonstrated that Mr. Goldhar is no “libel tourist”.

122. Any such reform should await legislative action, likely following (as in the Australian case), comprehensive study by scholarly efforts like those of the Law Commission of Ontario, which has only recently initiated a project on Defamation Law in the Internet Age.¹⁵⁴

(ii) The Appellants’ proposed choice of law rule will increase cost and uncertainty of litigation

123. The problematic nature of the Appellants’ proposed choice of law rule is exemplified by their complaint, on this motion, that there was no direct evidence that Mr. Goldhar’s reputation in Ontario was damaged. By this, they mean that Mr. Goldhar did not call Ontario residents to testify that they thought less of him after reading the Article.¹⁵⁵ They expressly argue that Mr. Goldhar had to call that evidence if he sought to contend that Ontario law applied under the “most substantial harm to reputation” test (an issue addressed below).¹⁵⁶

124. However, this submission ignores the fact that the common law has never required proof of harm to reputation to make out a successful claim for damages in defamation on the merits. Instead,

[...] “General compensatory damages are such as the law will presume to be the natural or probable consequence of the defendant's conduct and for the harm which normally results from

¹⁵³ *Defamation Act 2005* (Qld) (NW), s 11(3) (“In determining the Australian jurisdictional area with which the harm occasioned by a publication of matter has its closest connection, a court may take into account ... (d) any other matter that the court considers relevant.”)

¹⁵⁴ Law Commission of Ontario, “Defamation Law in the Internet Age: Project Scope Statement” (June 2016), online: <<http://www.lco-cdo.org/wp-content/uploads/2016/06/Defamation.pdf>>.

¹⁵⁵ Appellants’ Factum at paras 14 and 82.

¹⁵⁶ Appellants’ Factum at paras 82-84 and 86.

such defamation.” They may be recovered without proof of any actual pecuniary loss, and serve to console the plaintiff for distress suffered from the publication and to repair the harm done to, and vindicate, his or her reputation. “Proof of the defamation itself establishes the fact of injury and the existence of damage to the plaintiff’s reputation.”

General damages necessarily flow from the defamatory publication and compensate the plaintiff for any harm to his or her reputation or emotional well-being. They arise by inference of law, require neither a special allegation nor proof of injury or special damages, and are awarded at large, “since the exercise of assessment necessarily involves a substantial degree of subjectivity” and the real damages suffered by the plaintiff can seldom be ascertained. They include both the injury sustained by the plaintiff from the lessening of the esteem in which he or she is held in the community, and the injury caused to his or her feelings.¹⁵⁷

125. If “place of most substantial harm to reputation” is adopted as the relevant test for choice of law, it will necessarily inject, at the interlocutory (*forum non conveniens*) stage, extensive litigation over the nature and extent of the plaintiff’s reputation and the extent to which any individual publication has harmed him or her. Parties would compete to hale witnesses from one (or two, or three) competing jurisdictions to testify about the extent to which a plaintiff’s reputation was harmed (or not) by a given defamatory statement.

126. This would require a plaintiff to lead evidence of harm to reputation at the interlocutory stage that she would never have to lead at the trial of the action. Just as Justice LeBel was in *Banro*, the Court should today be wary of adopting any choice of law rule that risks fundamentally altering the nature of defamation actions in common law Canada.¹⁵⁸

127. Indeed, given that the determination of choice of law at the interlocutory stage would never bind the trial judge,¹⁵⁹ the contest over where a plaintiff’s reputation was “most” harmed would continue into the merits phase of any action.

¹⁵⁷ *Brown on Defamation* at 25.3.

¹⁵⁸ *Banro* at para 55.

¹⁵⁹ *Sydney Steel Corp v Canadian National Railway Co*, [1998] NSJ No 277, 164 DLR (4th) 747 (CA) (“In common law Canada, a determination for the purposes of an interlocutory application of

128. “Place of most substantial harm to reputation” is the very kind of fact-based inquiry that would have to be left to the trier of fact. It is difficult to see how a court could determine choice of law definitively without considering the evidence of harm to reputation in the context of all of the other potential evidence that would be led at trial about a plaintiff’s reputation (good or bad), standing, character, business interests, etc. Any party asserting that a claim is governed by foreign law would have to prove that foreign law at trial – even though the trier of fact may not find that law applicable on all of the facts.

129. Far from leading to certainty and predictability, moving from *lex loci delicti* to “place of most substantial harm to reputation” would make the ultimate choice of law dependent on all of the evidence at trial, and threaten to expand the cost and expense of litigation on the merits. “[I]t is the duty of the jury alone to determine from the evidence the gravity of the defamatory remark.”¹⁶⁰

130. The unworkability of this test is illustrated by the Appellants’ obsession throughout this litigation with the supposed ‘smoking gun’ admission of two of Mr. Goldhar’s Ontario employees that they did not think less of Mr. Goldhar after they read the Article.¹⁶¹ This, it is said, is proof that Mr. Goldhar’s reputation was not damaged at all in Ontario.

131. But this is exactly the type of evidence that a defendant is not permitted to lead at trial in a defamation action as a defence to general damages:

If the plaintiff pleads only general damages, the defendant cannot offer evidence relating to any special damages such as the amount of income the plaintiff made following the publication of the

the law governing a contract is not binding on the trial judge hearing the action. ... the finding ... concerning choice of law on an interlocutory application is not a final determination of that issue because it would be open to the judge at trial ... to make his or her own determination of that question” at para 19).

¹⁶⁰ *Brown on Defamation* at 22.3(8)(a).

¹⁶¹ Appellants’ Factum at paras 4, 14, 56 and 82; CA Dissent Reasons at paras 182-84, Appellants’ Record, Tab 4.

defamatory remarks, nor can he or she show that the plaintiff's reputation was not actually injured.¹⁶²

132. Furthermore, the Appellants have not actually led any positive evidence that any Israelis thought less of Mr. Goldhar as a result of reading the Article. They only point to the potential for harm to reputation, in other words, Mr. Goldhar's alleged higher profile in Israel.

133. Accordingly, the Appellants' proposed choice of law test is more appropriately styled not as "place of most substantial harm", but instead "place of most substantial reputation".¹⁶³ This approach, which simply compares the relative "profile" of the plaintiff's reputation in Ontario to that of another jurisdiction to determine choice of law, is unprecedented and should be rejected.

134. Mr. Goldhar's reputation in Ontario, the place of his significant business interests and residence, should be "substantial" enough for Ontario courts to apply the law of this province to allow him to vindicate his reputation – particularly where the Article at issue specifically mentions Mr. Goldhar's Canadian residence and his business interests here.

(iii) Limiting claims for damage to reputation to a single jurisdiction is a legitimate litigation strategy – one that means Ontario is the only appropriate forum to litigate Mr. Goldhar's claims

135. Whatever choice of law rule the Court provisionally applies at this interlocutory stage, the inevitable conclusion is that Ontario law governs the entire claim of Mr. Goldhar against the Appellants, even if a "most substantial harm to reputation" approach is adopted.

136. This Court (and the courts below) recognized in *Black* that an undertaking to limit a multijurisdictional defamation claim to damages to reputation in Ontario is a legitimate litigation

¹⁶² [emphasis added] *Brown on Defamation* at 22.3(6)(a), citing *Clay v Lagiss*, 143 Cal App 2d 441, 299 P2d 1025 (1956); *Rutman* ("It is conceded that there was no proven financial loss nor evidence that anyone actually thought the worse of Rutman because of the defamatory posts" at para 236).

¹⁶³ CA Majority Reasons at para 86.

strategy, which appropriately creates certainty about what law will apply to otherwise multijurisdictional defamation claims.¹⁶⁴

137. The Appellants’ argument that Mr. Goldhar’s undertaking differs from the plaintiff in *Black* is of no moment. While it is true that Lord Black’s undertaking also included one to not initiate litigation in other jurisdictions, any attempt by Mr. Goldhar to initiate proceedings against Haaretz in another jurisdiction would clearly be barred by the doctrine of abuse of process.¹⁶⁵

138. A party who resides and maintains his principal business in Ontario, Mr. Goldhar, is not “forum shopping”, any less than the plaintiff in *Black*, a “party [who] ha[d] a real and substantial connection with the forum”.¹⁶⁶ There is no reason for this Court to now resile from its conclusions in *Black*, which recognized that it is legitimate for plaintiffs to limit their damages claims to that forum within which they ordinarily reside.

139. Even the vaunted Australian approach specifically recognizes that “the place at the time of publication where the plaintiff was ordinarily resident” is a factor to consider in determining the applicable law.¹⁶⁷ The place where the plaintiff ordinarily resides is a legitimate independent factor to consider in determining the applicable law – on the basis that the plaintiff has a legitimate interest in vindicating his reputation in his own community, pursuant to the law of that community.

140. It is submitted that, just like there is “no surprise or injustice to the plaintiff’s attempt to vindicate his reputation in Ontario, where he lives and works”,¹⁶⁸ there should also be no surprise or injustice in the Court applying the law of the jurisdiction where he lives and works.

¹⁶⁴ *Black* at para 33; *Black v Breeden*, 2010 ONCA 547 at para 84, 102 OR (3d) 748 [***Black ONCA***].

¹⁶⁵ *Carter v BC Federation of Foster Parents Assn*, 2005 BCCA 398 at para 19, 257 DLR (4th) 133, citing *Thomson v Lambert*, [1938] SCR 253, 2 DLR 545 and *Jameel v Dow Jones & Co Inc*, [2005] 2 WLR 1614 (HL).

¹⁶⁶ *Black* ONCA at para 86, citing *Amchem Products Inc v British Columbia (Workers’ Compensation Board)*, [1993] 1 SCR 897, 102 DLR (4th) 96.

¹⁶⁷ *Defamation Act 2005* (NW), s 11(3)(a).

¹⁶⁸ Motion Reasons at paras 61-62, Appellants’ Record, Tab 3; CA Majority reasons at para 104, Appellants’ Record, Tab 4.

PART IV - SUBMISSIONS REGARDING COSTS

141. The Respondent requests his costs in this Court and throughout.

PART V - ORDER REQUESTED

142. The Respondent asks this Court to dismiss the appeal with costs in this Court and throughout.


ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of July, 2017.



William C. McDowell



Julian Porter, Q.C.



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PART VI - TABLE OF AUTHORITIES

JURISPRUDENCE

	<i>Case Authority</i>	<i>Paragraph(s)</i>
1	<i>Amchem Products Inc v British Columbia (Workers' Compensation Board)</i>, [1993] 1 SCR 897, 102 DLR (4th) 96	138
2	<i>Baglow v Smith</i>, 2012 ONCA 407, 350 DLR (4th) 694	116
3	<i>Barach v University of New South Wales</i>, [2011] NSWSC 431	119
4	<i>Barrick Gold Corp v Lopehandia</i> (2004), 71 OR (3d) 416, 239 DLR (4th) 577 (CA)	74
5	<i>Black v Breeden</i> (2009), 309 DLR (4th) 708, 73 CPC (6th) 83 (Ont SCJ)	107
6	<i>Black v Breeden</i>, 2010 ONCA 547, 102 OR (3d) 748	136, 138
7	<i>Breeden v Black</i>, 2012 SCC 19, [2012] 1 SCR 666	11, 34, 58, 59, 111, 136
8	<i>Calder v Jones</i>, 465 US 783 (1984)	77
9	<i>Carter v BC Federation of Foster Parents Assn</i>, 2005 BCCA 398, 257 DLR (4th) 133	137
10	<i>Clay v Lagiss</i>, 143 Cal App 2d 441, 299 P2d 1025 (1956)	131
11	<i>Club Resorts Ltd v Van Breda</i>, 2012 SCC 17, [2012] 1 SCR 572	34, 53, 54, 62, 63, 68, 84, 111
12	<i>Colby Physioclinic Ltd v Ruiz</i>, 2002 NSCA 113, 208 NSR (2d) 138	107, 109
13	<i>Crookes v Newton</i>, 2011 SCC 47, [2011] 3 SCR 269	73
4	<i>Dow Jones and Co Inc v Gutnick</i>, (2002) HCA 56, 210 CLR 575	119
15	<i>Éditions Écosociété Inc v Banro Corp</i>, 2012 SCC 18, [2012] 1 SCR 636	11, 34, 39, 56, 58, 60, 63, 92, 112, 113, 115, 117, 119, 126
16	<i>Goldhar v Haaretz.com et al</i>, 2015 ONSC 1128	19, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 35, 36, 37, 46, 47, 48, 61, 93, 100, 105, 140
17	<i>Goldhar v Haaretz.com</i>, 2016 ONCA 515	20, 27, 35, 38, 39, 40, 43, 44, 45, 46, 49, 62, 64, 67, 86, 91, 93, 94, 95, 102, 106, 111, 130, 133, 140

	<i>Case Authority</i>	<i>Paragraph(s)</i>
18	<i>Google Inc v Equustek Solutions Inc</i>, 2017 SCC 34	85
19	<i>Gordy v Daily News</i>, 95 F3d 829 (9th Cir 1996)	81
20	<i>Grant v Torstar Corp</i>, 2009 SCC 61, [2009] 3 SCR 640	55
21	<i>Hill v Church of Scientology of Toronto</i>, [1995] 2 SCR 1130, 126 DLR (4th) 129	72
22	<i>Housen v Nikolaisen</i>, 2002 SCC 33, [2002] 2 SCR 235	103
23	<i>Jameel v Dow Jones & Co Inc</i>, [2005] 2 WLR 1614 (HL)	137
24	<i>Jenner v Sun Oil Co</i>, [1952] 2 DLR 526, [1952] OR 240	92
25	<i>Kempf v Nguyen</i>, 2015 ONCA 114, 124 OR (3d) 241	107
26	<i>Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP</i>, 2016 SCC 30, [2016] 1 SCR 851	85
27	<i>Moore v Bertuzzi</i>, 2014 ONSC 1318, 53 CPC (7th) 237	96, 97, 101
28	<i>Paulsson v Cooper</i> 2011 ONCA 150, 105 OR (3d) 28	66
29	<i>R v Dymont</i>, [1988] 2 SCR 417, 55 DLR (4th) 503	72
30	<i>R v Colonial Homes Ltd et al</i>, [1956] SCR 528, 4DLR (2d) 561	107
31	<i>Rutman v Rabinowitz</i>, 2016 ONSC 5864	75, 131
32	<i>Sloane v Toronto Stock Exchange</i> 5 OR (3d) 412, 4 CPC (3d) 278	107
33	<i>Sydney Steel Corp v Canadian National Railway Co</i>, [1998] NSJ No 277, 164 DLR (4th) 747 (CA)	127
34	<i>Thomson v Lambert</i>, [1938] SCR 253, 2 DLR 545	137
35	<i>Tolofson v Jensen</i>, [1994] 3 SCR 1022, 120 DLR (4th) 289	113
36	<i>Walden v Fiore</i>, 134 S Ct 1115 (2014) at 1125	81

LEGISLATION

	<i>Source</i>	<i>Paragraph(s)</i>
37	<i>Defamation Act 2013</i> (UK), c 26, s 1, s 5, s 8, s 9, s 11	118
38	<i>Rules of Civil Procedure</i>, RRO 1990, Reg 194, r 47.01	106
39	<i>Defamation Act 2005</i> (NW), s 6, s 7, s 8, s 11, s 35	119, 120, 139

40	Defamation Act 2005 (Qld), s 11(3)	113, 120
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	<i>Source</i>	<i>Paragraph(s)</i>
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42	Borchers, Patrick Joseph, “Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction” (2004) 98:2 Nw UL Rev 473	78
43	Brown, Raymond E, <i>Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States</i>, 2nd ed, (Toronto: Thomson Reuters Canada Ltd, 1999) (online loose-leaf, updated 2017)	56, 65, 107, 108, 118, 124, 129, 131
44	Castel, J-G, “Multistate Defamation: Should the Place of Publication Rule be Abandoned for Jurisdiction and Choice of Law Purposes?” (1990), 28 Osgoode Hall LJ 153 at 177	113
45	Castel, Matthew “Jurisdiction and Choice of Law Issues in Multistate Defamation on the Internet” (2013) 51:1 Alberta L Rev 153	76
46	Explanatory Notes to <i>Defamation Act 2013</i>, paras 10-12, 36-43, 60-64, 65-67, 71-73	118
47	Geist, Michael A, “Is There a There There – Toward Greater Certainty for Internet Jurisdiction” (2001) 16:3 Berkeley Tech LJ 1345	82
48	Lee Goldman, “From <i>Calder</i> to <i>Walden</i> and Beyond: The Proper Application of the “Effects Test” in Personal Jurisdiction Cases” (2015) 52 San Diego L Rev 357, Respondent’s BOA, Tab 1	81
49	Law Commission of Ontario, “Defamation Law in the Internet Age: Project Scope Statement” (June 2016)	122
50	Law Reform Commission, “Unfair Publication: Defamation and Privacy” (1979) Report No 11	113
51	Ludington, Sarah H., “Aiming at the Wrong Target: The “Audience Targeting” Test for Personal Jurisdiction in Internet Defamation Cases” (2012) 73:1 Ohio St LJ 541	78

	<i>Source</i>	<i>Paragraph(s)</i>
52	Martin, Craig “Tolofson and Flames in Cyberspace: The Changing Landscape of Multistate Defamation” (1997), 31 UBC L Rev 127, Respondent’s BOA, Tab 2	113
53	Mills, Alex “The law applicable to cross-border defamation on social media: whose law governs free speech in ‘Facebookistan’?” (2015) 7:1 J Media L, 1, Respondent’s BOA, Tab 3	79, 118
54	Joel Reidenberg et al, “Internet Jurisdiction: A Survey of Legal Scholarship Published in English and United States Case Law” (2013) Center on Law and Information Policy at Fordham Law School Research Paper No 2309526, Respondent’s BOA, Tab 4	78

S.C.C. Court File No: 37202

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO)

B E T W E E N:

HAARETZ.COM, HAARETZ DAILY NEWSPAPER
LTD., HAARETZ GROUP, SHLOMI BARZEL and
DAVID MAROUANI

Appellants

- and -

MITCHELL GOLDHAR

Respondent

FACTUM OF THE RESPONDENT
MITCHELL GOLDHAR

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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