SCC 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, HAARETZ.CO.IL, SHLOMI BARZEL AND DAVID MAROUANI

APPELLANTS
(Appellants)

- and -

MITCHELL GOLDHAR

RESPONDENT
(Respondent)

- and -

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

INTERVENER

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Part I OVERVIEW

[1] In this appeal, CIPPIC invites the Court to consider two jurisdictional challenges exacerbated by the ubiquity of the internet: access to justice and forum shopping. The law of jurisdiction over alleged internet libel should ensure access to justice for deserving claimants while limiting forum shopping that favours deep-pocketed parties.

[2] The internet has heightened concerns about access to justice for members of vulnerable groups, such as targets of cyberviolence: bullying, harassment, hate speech, and revenge porn. If flexibility and fairness to ensure access to justice were the only relevant internet policy aims, the solution would be to lower the threshold of jurisdiction for victims of such wrongs.

[3] However, the internet has also increased the ability to forum shop merely for juridical advantage. Because the same general framework applies to all plaintiffs, an overly lax approach to internet jurisdiction may open the door to disorderly misuse and overcrowding of our courts.

[4] Sections A and B of CIPPIC's factum offer the Court insights into the nature of these internet-specific policy challenges. Section C suggests ways to solve them by nuancing, not replacing, the technology-neutral *Van Breda* framework in internet cases. Section D proposes specific ways to integrate internet-related connecting factors and policy aims.

Part II POSITION ON APPELLANTS' QUESTIONS

[5] CIPPIC's position on the first issue—factors related to jurisdiction *simpliciter*—is that publication of content on the internet may be an objective basis to assume jurisdiction, if it establishes where a defendant carries on business or where a tort occurred. CIPPIC takes no position on whether jurisdiction was properly assumed in this case.

[6] CIPPIC takes no position on the second issue—the appropriate level of scrutiny. However, CIPPIC suggests that a *forum non conveniens* analysis must account for internet policy aims like enabling access to justice and deterring forum shopping.

[7] CIPPIC addresses the third issue—applicable law—to the extent the internet influences the test for jurisdiction. A fact-specific enquiry into the place of most substantial harm is more appropriate at the *forum non conveniens* stage than at the jurisdiction *simpliciter* stage.

Part III STATEMENT OF ARGUMENT

A. The test of jurisdiction should enable access to justice for vulnerable persons.

[8] The test for jurisdiction articulated and applied by the Court in this appeal will not only govern billionaires and multinational media companies. CIPPIC encourages the Court to consider potential impacts of the decision in this appeal on vulnerable plaintiffs seeking access to justice.

[9] Access to justice is a fundamental principle of private international law. In cross-border settings, "equal access to justice" is particularly relevant for "members of vulnerable groups."

> *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, GA Res 67/1, UNGAOR, 67th Sess, UN Doc A/Res/67/1 (2012) at 14.

[10] Not all cases raise equally important access to justice concerns. Some plaintiffs can pursue litigation abroad, or even in multiple jurisdictions. Other plaintiffs, however, denied access to the courts of a particular jurisdiction, typically their home forum, are denied justice altogether.

[11] *Douez v Facebook Inc* addresses jurisdictional aspects of access to justice for one vulnerable group—consumers facing an imbalance of bargaining power—in the internet context.

> *Douez v Facebook Inc*, 2017 SCC 33; Marina Pavlović, "Contracting out of Access to Justice: Enforcement of Forum‑Selection Clauses in Consumer Contracts" (2016) 62 McGill LJ 389.

[12] CIPPIC invites this Court to consider access to justice for other vulnerable groups and internet contexts. Jurisdiction issues will foreseeably arise in tort cases involving cyberviolence. Common cyberviolence scenarios include cyberbullying, as in *AB v Bragg*; the non-consensual distribution of intimate images, as in *Doe 464533 v ND*; and the malicious publication of racial slurs, as in *St Lewis v Rancourt*.

> *AB v Bragg Communications Inc*, 2012 SCC 46; *Doe 464533 v ND*, 2016 ONSC 541; *St Lewis v Rancourt*, 2015 ONCA 513.

[13] Members of vulnerable groups already face significant barriers to justice. Professors Bailey and Steeves highlight barriers facing young victims of defamation. They also address the impacts of cyberviolence on girls and young women, who may rely on defamation or other actions to seek justice. Professor Mahoney explains injustices associated with online hate speech targeted at racialized communities. Jurisdictional hurdles should not exacerbate access to justice challenges.

> Jane Bailey & Valerie Steeves, *Defamation Law in the Age of the Internet: Young*

> *People's Perspectives* (Toronto: LCO, 2017) at 94–95; Jane Bailey & Valerie Steeves, eds, *eGirls, eCitizens: Putting Technology, Theory and Policy into Dialogue with Girls' and Young Women's Voices* (Ottawa: University of Ottawa Press, 2015); Suzanne Dunn, Julie S Lalonde & Jane Bailey, "Terms of Silence: Weaknesses in Corporate and Law Enforcement to Cyberviolence against Girls" (2017) 10:2 Girlhood Studies 80; Kathleen E Mahoney, "Speech, Equality, and Citizenship in Canada" (2010) 39 Comm L World Rev 69.

[14] CIPPIC endorses a jurisdictional framework that enshrines the principles of access to justice. Courts should especially consider access to justice at the *forum non conveniens* stage.

B. The test of jurisdiction should deter forum shopping for extraterritorial remedies.

[15] The requirement of a real and substantial connection between a court and the subject matter of a dispute is rooted in constitutional principles and public policy. Constitutionally imposed limits confer legitimacy on the exercise of state power. Public policy goals of balancing fairness, certainty, predictability, consistency, efficiency, and order inform substantive rules.

> *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at paras 31–33, 66–67 [*Van Breda*].

[16] The desire to deter forum shopping is linked to both constitutional limits and substantive rules of private international law. Courts cannot and ought not entertain attempts to litigate disputes where there are hypothetical or weak connections. Commencing an action in a place where the plaintiff may gain juridical advantage is not *per se* illegitimate. But shopping for a forum without a real and substantial connection only to obtain juridical advantage is a problem.

[17] The unique juridical advantage offered by this Court's recent decision in *Equustek* entices plaintiffs with hypothetical and weak connections to Canada to commence litigation here. Following *Equustek*, Canada is now the only place in the world where a third-party takedown or delisting order with extraterritorial effect has been upheld by the jurisdiction's highest court.

> *Google Inc v Equustek Solutions Inc*, 2017 SCC 34.

[18] Commentators on the *Equustek* ruling immediately saw the expansive breadth of disputes in which forum shoppers might seek extraterritorial takedown orders, including defamation, privacy, cybersecurity, and beyond. Now, "Canada is an ideal venue to enforce rights in many areas of law and seek a global remedy".

> Sangeetha Punniyamoorthy & Thomas Kurys, "Global Injunctions Available Against Search Engines, Rules Supreme Court of Canada" Case Comment on *Google Inc v Equustek Solutions*, 2017 SCC 34, *CanLII Connects* (11 July 2017); Éloïse Gratton & Julien Boudreault, "Supreme Court Gives the Green Light to Global Orders to Take

Down Search Results", Case Comment on *Google Inc v Equustek Solutions Inc*, *CanLII Connects* (5 July 2017).

[19] The forum shopping enticed by the ability to get an extraterritorial "Equustek order" from a Canadian court is made even more tempting by lower court decisions about the circumstances in which such orders can be sought. For example, a real and substantial connection to Canada was found in *AT v Globe24h.com*, a dispute over a Romanian website's posting of thousands of Canadian judicial and tribunal decisions implicating the privacy of Canadians. The Court's declaratory order anticipated that internet intermediaries could be encouraged or compelled to delist content from search engines.

AT v Globe24h.com, 2017 FC 114 at para 88.

[20] CIPPIC submits that this Court may consider ways to limit undesirable forum shopping by plaintiffs with hypothetical or weak relationships to Canada or its provinces. One way to ensure that plaintiffs seeking justice in Canada are not merely forum shopping is to accept undertakings not to seek an Equustek order at an interlocutory stage or should an action be successful.

[21] The granting, or mere possibility, of an Equustek order by a Canadian court substantially increases the likelihood of multi-jurisdictional proceedings and inconsistent judgments. Indeed, this Court's decision in *Equustek* led directly to subsequent proceedings in the Northern District of California that seek to have this Court's decision declared unenforceable. Experience with previous extraterritorial orders suggests the that best case scenario is protracted and unpredictable litigation in multiple jurisdictions. Somewhat worse is the reasonable prospect of contradictory rulings from Canadian and foreign courts, requiring internet intermediaries to choose which laws to follow.

Google Inc v Equustek Solutions Inc, Clarma Enterprises Inc and Robert Angus (24 July 2017), Cal Dist Ct, 5:17-cv-04207 (complaint); *Yahoo! Inc v La Ligue contre le Racisme et L'Antisemitisme*, (2006) 433 F.3d 1199, 1244-1245 (9th Cir 2006); *In the Matter of a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp,* 829 F.3d 197 (2d Cir 2016), reh'g denied, 855 F.3d 53 (2d Cir 2017).

[22] Plaintiffs' undertakings to limit multi-jurisdictional proceedings or the impacts of litigation in the proposed jurisdiction have been an influential factor in the *forum non conveniens* analysis. For example, in *Breeden v Black*, the plaintiff undertook not to bring any libel action in any other jurisdiction, and limited his claim to damages to his reputation in Ontario. In the present case, the plaintiff agreed to limit his damage claim to Ontario.

Breeden v Black, 2012 SCC 19 at para 33; Respondent's Factum at para 46.

[23] Plaintiffs' undertakings regarding an Equustek order may be an indicative factor in assessing connections to the forum and the desire to genuinely pursue a trial beyond interlocutory relief. On one hand, plaintiffs who are purely forum shopping for juridical advantage—specifically an extra-territorial Equustek order that could not be obtained in their home forums—would be unwilling to waive that option. On the other hand, plaintiffs who wish to resolve disputes in a Canadian federal or provincial court and minimize the possibility of parallel, multi-jurisdictional proceedings or inconsistent judgments would be willing to waive the right to an Equustek order.

[24] The appropriateness of an extraterritorial Equustek order and its relevance to a *forum non conveniens* analysis is, however, highly fact dependent. Commentators have suggested that the biggest problems may arise in cases where free speech is at issue, and intermediaries are effectively internet censors in choosing which laws to respect and which to ignore. The Court in *Equustek* pointed out that protecting expression was not particularly relevant on the facts of that case, which concerned alleged intellectual property infringement.

> Michael Geist, "Global Internet Takedown Orders Come to Canada: Supreme Court Upholds International Removal of Google Search Results" (28 June 2017), *Michael Geist* (blog). Aaron Mackey, Corynne McSherry & Vera Ranieri, "Top Canadian Court Permits Worldwide Internet Censorship" (28 June 2017), *Electronic Frontier Foundation* (blog);

[25] In assessing the seriousness of plaintiffs' undertakings to limit parallel proceedings and conflicting rulings, however, courts should consider why an Equustek ruling might be sought. An Equustek order may be the only meaningful remedy in cases involving reputational, personality, privacy, or other similar rights related to dignity or personhood, such as with cyberviolence. However, in cases of primarily economic claims by legal persons operating multi-nationally with tenuous links to the jurisdiction, such as zealous enforcement of intellectual property rights, the plaintiff's only interest in shopping for a Canadian forum may be to obtain an Equustek order.

C. The framework for assessing jurisdiction should be technology-neutral.

[26] The reality that an act may be done in multiple places, sequentially or simultaneously, and have legal consequences both "here and there" is not unique to the internet. However, the internet's ubiquity and significance in so many facets of life, and its reach across the entire world, make jurisdictional issues more serious and widespread.

> *Society of Composers, Authors, and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 at paras 58–59 [*SOCAN*], citing *Libman v Queen* at 212-213; Lawrence Lessig, "The Law of the Horse: What Cyberlaw Might Teach" (1999) 113

Harv L Rev 501.

[27] A novel approach to internet-related jurisdiction cases is unwarranted. The *Van Breda* framework is robust enough to withstand the challenge. The framework should be neutral as to the technological circumstances in which it applies. But that does not mean all rules must apply exactly the same way to internet-related activities as to other activities.

[28] Some tailoring is needed to ensure that the framework functions as effectively online as it does offline. CIPPIC endorses a technology-neutral approach to jurisdiction "in the substantive functional sense, not the minimalist notion of media neutrality":

> [C]ourts are rightly beginning to recognize that cases involving cyberspace raise distinct policy and practical issues that cannot be adequately addressed by importing conventional legal doctrine into the digital realm. Here, technological neutrality means something more.… A more sophisticated approach to cyberlaw … reflects a richer vision for technological neutrality; one that considers substantive functional equivalence.
>
> Jeremy de Beer & Tracey Doyle, "Dealing with Digital Property in Civil Litigation" in Todd L Archibald & Randall Scott Echlin, eds, *Annual Review of Civil Litigation 2016* (Toronto: Carswell, 2016) at 163, 186–190, 192.

[29] A merely media neutral approach would treat newspapers and websites identically. A functionally neutral approach would apply the same framework, values, and principles to both communication platforms, ensuring substantively equal effect of the law across technologies.

[30] Step one in creating a technology-neutral framework is to integrate the *SOCAN* and *Van Breda* factors for determining jurisdiction *simpliciter*. Step two is to ensure functional equivalence by integrating internet-related policy considerations when assessing *forum non conveniens*.

D. Internet-related factors integrate well into the *Van Breda* framework.

[31] Now, it is not clear how *SOCAN*, the leading Canadian case on internet jurisdiction, fits with *Van Breda*, the leading case on jurisdiction generally. A question exists whether *SOCAN* and *Van Breda* establish distinct frameworks for jurisdiction in different kinds of cases. For example, in *Davydiuk*, the Federal Court held that jurisdiction over alleged copyright infringement on the internet should be determined by the *SOCAN* test, not the *Van Breda* test.

> *Davydiuk v Internet Archive Canada*, 2014 FC 944 at paras 28–29.

[32] The *Van Breda* framework was designed to be adaptable. Justice LeBel noted "it does not purport to be an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law" (at para 85). CIPPIC submits that the *SOCAN* factors

for assessing jurisdiction in internet copyright cases (or internet cases generally) ought not be separated from the *Van Breda* factors for assessing jurisdiction in other cases.

1. Internet-related factors may influence where business is carried on.

[33] In *Van Breda*, the Court was not asked "to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction." However, also at para 87, the Court suggested that "the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there."

[34] The Court in *Van Breda* discussed, at para 114, the insufficiency of advertising as a connecting factor. CIPPIC submits that, analogously, publishing content on a website is alone insufficient to create a real and substantial connection. Because, as the Court explained, "[a]dvertising is often international, if not global" and "ubiquitous, crossing borders with ease," establishing a connection on that basis alone would mean "commercial organizations of a certain size could be sued in courts everywhere and anywhere in the world." If internet access to a publication were alone a sufficient connecting factor, jurisdiction would expand even further than with advertising. Virtually all individuals and organizations with a web presence, not only large commercial organizations, could then sue or be sued in Canadian courts.

[35] CIPPIC does not propose a definitive list of factors to determine whether a defendant carries on business in a jurisdiction. *SOCAN* factors, such as "the *situs* of the content provider, the host server, the intermediaries and the end user", are relevant considerations. Other factors, including parties' intentions, technologies, and knowledge, may play a role. Targeting content toward or actively gathering data in a particular jurisdiction suggests that an entity carries on business there.

> *SOCAN* at para 61; Michael Geist, "Is There a There There: Toward Greater Certainty for Internet Jurisdiction" (2001) 16:3 BTLJ 1345; *Calder v Jones*, 465 US 783 (1984); *Equustek Solutions v Google Inc*, 2015 BCCA 265 at para 54.

2. Internet-related factors may influence the place of contract or tort.

[36] Courts have decided cases in which electronic contracts are connected to multiple jurisdictions. However, as Professor Pitel has noted, "the sense has increased that the place of contracting is not a sufficiently important connection to a particular jurisdiction." Increased mobility and connectivity may create purely circumstantial connections based on a recipient's transient location when the acceptance was received.

> *Inukshuk Wireless Partnership v NextWave Holdco LLC*, 2013 ONSC 563; *Eco-Tec Inc v Lu,* 2015 ONCA 818; *Tyoga Investments Ltd v Service Alimentaire Desco Inc*, 2015 ONSC 3810; *Neophytou v Fraser*, 2015 ONCA 45; Stephen GA Pitel, "Checking in to Club Resorts: How Courts Are Applying the New Test for Jurisdiction" (2013) 42 Adv Q 190 at 202.

[37] While one may question the relevance of the place of electronic contracting as a presumptive factor, there is no doubt about the importance of the place of a tort. Courts have not, however, fully grappled with the complexities of multi-jurisdictional online torts. Sensitivity to the peculiarities of some internet torts is warranted.

[38] In *Crookes v Newton*, Justice Abella focussed on the communicative purpose of a publication rather than applying the traditional rule. This resulted in a functionally equivalent approach to alleged defamation via hyperlink to protect the flow of information on the internet.

[39] To limit exposure to liability, the Appellants ask this Court to make similar adjustments to the law of online libel. They ask courts to determine *the* place of most substantial harm, instead of recognizing that a tort or torts may have happened in multiple places. Defamatory content posted online can easily be read simultaneously in many places, thus placing a tort in geographically unconnected jurisdictions. Internet publication makes it likely, if not inevitable, that torts will occur in multiple places. But that does not change the fact that a tort has occurred in the place that matters: the plaintiff's chosen forum, usually the plaintiff's home forum.

[40] CIPPIC is concerned that moving to the "most substantial harm" rule at the jurisdiction *simpliciter* stage would undermine the objectivity and predictability of the *Van Breda* framework. As Justice LeBel noted at para 82 in *Van Breda*, jurisdiction *simpliciter* is "established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum." Looking for the place of most substantial harm is an inherently fact-specific enquiry better made in an assessment of *forum non conveniens*.

3. Internet policy considerations may influence *forum non conveniens* principles.

[41] The likelihood of parallel proceedings and the possibility of conflicting judgements are among the *forum non conveniens* factors most affected by the ubiquity of the internet. This Court recognized in *Equustek* at para 41: "The Internet has no borders—its natural habitat is global." While the internet may be borderless, law is not. The global nature of internet communications increases the number of jurisdictions where a single act may trigger liability and subsequent court

action. The more places a wrong occurs, the more places proceedings may arise. The more places proceedings arise, the more rulings may conflict.

[42] The relative strength of parties' connections to a particular forum is also influenced by the internet. Local plaintiffs typically have strong connections to their home forums, where their rights are most impacted. Foreign defendants may also have strong connections to their home forums, but their actions create connections to plaintiffs' forums, too. Courts may assess the strength of defendants' connections to a forum using indicia of carrying on business, the *SOCAN* factors (transmissions' places of origin, hosting, caching, routing, and receipt), and actions to limit the geographic accessibility of content.

[43] Particular characteristics of the parties are also relevant. Different interests may arise for natural and legal persons. For vulnerable individuals whose rights have been affected by internet conduct, like cyberviolence, the impact is always felt in their home jurisdiction. Legal persons' interest in jurisdictional certainty is often to limit exposure to liability to their preferred forum.

[44] The nature of the action and rights at issue should also be considered under the *forum non conveniens* analysis. Constitutional or quasi-constitutional rights and rights affecting dignity (such as expression, privacy, and reputation) raise different considerations than purely economic rights (such as intellectual property). Internet activities that cause harm to identity or personhood should generally be litigated in plaintiffs' home forums. In cases of predominantly economic harm to legal persons, plaintiffs more likely have logistical, legal, and financial resources to pursue or defend actions in foreign forums.

Part IV ORDER SOUGHT

[45] CIPPIC requests an additional 5 minutes for oral argument, for a total of 10 minutes.

Part V COSTS

[46] The intervener will not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of September, 2017

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