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## Annual Review of Civil Litigation

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"War of the Words": Differing Canadian and American Approaches to Internet Defamation — — Antonin I. **Pribetic** and Marc J. Randazza

Mr. Justice Todd L. Archibald

### [L] — I. INTRODUCTION Online publications are...

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#### I. INTRODUCTION

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*Online publications are often about people, and it is perhaps human nature to find greater pleasure in writing and reading scandalous stories reflecting upon the wickedness of one's fellow men than about the Mother Teresas of this world, defamatory material abounds in cyberspace.*<sup>1</sup>

*The law recognizes in every man the right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit.*<sup>2</sup>

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Canada-U.S. relations are a product of a centuries-old, common British legal heritage; the world's largest undefended border;<sup>3</sup> and political and economic ties; a relationship "characterized as one of complex interdependence, [but] also "asymmetrical" due to the obvious power disparities between the two countries."<sup>4</sup>

Internet communication through social networking websites such as Facebook, Twitter, Google+ and Tumblr, to name a few, is fast becoming the most popular mode of communication in the 21st century and has facilitated freedom of expression and globalization of information. Many readers enjoy posting their personal views, opinions and musings on blogs, microblogs and chat rooms on a variety of topics — social, political, and legal.

However, as Elbert Hubbard once said, "To act in absolute freedom and at the same time to realize that responsibility is the price of freedom, is salvation."<sup>5</sup>

This article will provide a comparative analysis of differing approaches to Canadian and American Internet defamation law. It begins with a discussion of the elements of a cause of action and available defences. It then canvasses jurisdiction and choice of law issues. Following a review of notice requirements and limitation periods, it provides the mechanics for unmasking anonymous defendants — John Doe applications, *Norwich Pharmacal* orders, injunctive relief. Finally, the paper outlines the key legal issues in the recognition and enforcement of Canadian cyberlibel judgments abroad, within the context of the libel tourism debate in the U.S. and U.K.

#### II. INTERNET DEFAMATION/CYBERLIBEL — ELEMENTS OF A CAUSE OF ACTION AND DEFENCES

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In Canada, defamation is a strict liability tort, which means that the defamer's intent is only relevant on the measure of damages. In order to succeed in an action for libel (publication of defamatory material in permanent form) or slander (defamatory statements communicated by spoken words or other transitory form — audible or visible — such as significant sounds, looks, signs or gestures), a plaintiff must prove that:

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- the words are defamatory, meaning that the statements are false, injurious, and lower the person's esteem and reputation within their community;<sup>6 7 8</sup>
  - the words were published, and
  - the defamed person is the plaintiff.
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An illustration to the Canadian judicial approach to internet defamation is the recent Ontario decision in *Sagman v. Politi*.<sup>9</sup> In *Sagman*, the plaintiffs, two brothers, were successful medical doctors; one plaintiff was also a medical technology entrepreneur, and the other was a vice-president of a major pharmaceutical company. After losing a lawsuit brought against him by the plaintiffs in Quebec over a failed condominium purchase, the defendant (coincidentally, also a brother of the two plaintiffs) threatened to "crush" them. He created two websites in the plaintiffs' names and posted false statements that the plaintiffs had committed various criminal offenses and that they were untrustworthy as doctors. The plaintiffs sued the defendant in defamation. After the websites in the action were removed by way of consent order, the defendant withdrew from participating in the proceedings and his statement of defence was subsequently struck out. The plaintiffs then moved for default judgment, seeking both compensatory and punitive damages.

Morgan J. allowed the action and held that the false statement caused damages to the plaintiffs' personal and professional reputations. The websites were online for approximately three months, during which time the media learned of their existence. The Court found that the defendant's only discernable purpose in creating the websites was to harm the plaintiffs. The defendant never apologized and had continued his online libel campaign until he declared personal bankruptcy.

Each plaintiff was awarded \$150,000 for general damages (one-half of the jury award in *Hill v. Church of Scientology*) and punitive damages in the amount of \$50,000. Finally, the defendant was ordered to pay the plaintiffs' costs (lawyer fees and disbursements) in the amount of \$39,500 on a partial indemnity (approximately 60 percent of total plaintiffs' lawyer fees and disbursements).<sup>10</sup>

Under Canadian common law, a transnational defamation dispute is generally heard within the territory or location of the defamation, or where the defamed person suffered damages to his or her personal and/or business reputation (the "*lex loci delicti*," or the law of the place of the wrong).<sup>11</sup>

Anyone who republishes a defamatory statement, or facilitates its publication to the public (electronic or otherwise), may be liable for per se damages for injury to reputation (and subject to an injunction (a court order enjoining or prohibiting continued republication, such as ordering a webmaster to remove the alleged defamatory postings) and adverse cost consequences. As Raymond E. Brown puts it: "Jurisdiction may . . . be exercised even though the defendant's website is located in the foreign jurisdiction . . . where the republication of the defamatory material in the jurisdiction where the plaintiff resides [or where he resided or has a reputation] is the natural and probable consequence of the posting elsewhere."<sup>12</sup>

There are, however, a number of affirmative defences to a libel or slander action; namely:

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- Justification (i.e. truth);
- Express or implied consent;
- Absolute privilege (statements made in an official capacity or required by law);
- Qualified privilege (absent malice);
- Fair comment (statements of opinion as opposed to fact, lacking malice and in furtherance of social policy objectives);
- Innocent dissemination (e.g. ISPs, passive webhosting); and
- Responsible Communication on Matters of Public Interest (also referred to as the "responsible journalism" defence).<sup>13 14</sup>

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## 1. United States Internet Defamation/Cyberlibel

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In contrast to Canadian defamation law, U.S. law prohibits imposing a standard of strict liability for the tort of defamation. The lowest level of fault permitted for private persons is negligence.<sup>15</sup> As in Canada, an action may be brought for libel (publication of defamatory material) or slander (defamatory statements communicated by spoken words or another form). While the standard is slightly differently worded from state to state, the common elements are: 1) a statement of fact 2) published or otherwise broadcast about the plaintiff 3) that is false 4) that causes material harm to the plaintiff and 5) the defendant's fault in publishing the statement amounted to at least negligence.<sup>16</sup>

The U.S. has a heightened standard for defamation actions brought by a public figure. To prove defamation, a public figure must show that the false information was published with actual malice — knowledge that the statement was false or that it was made with reckless disregard for the truth.<sup>17</sup> In determining whether a plaintiff is a public figure, a U.S. court will look to whether the person is involved in a "public controversy," or a matter that reasonable people would expect to affect people beyond its immediate participants.<sup>18</sup> The court will determine whether the statement was sufficiently related to the plaintiff's role as a public figure.<sup>19</sup> This is the "Actual Malice" test applied in *NYT v. Sullivan*,<sup>20</sup> but explicitly rejected in *Hill v. Church of Scientology of Toronto*.<sup>21</sup> Some plaintiffs are "general purpose public figures," like famous celebrities or the President. However, just about anyone can become a "limited purpose public figure." Further, a U.S. public figure plaintiff cannot sidestep the "actual malice" standard by pleading a cause of action other than defamation; in *Hustler Magazine v. Falwell*,<sup>22</sup> the U.S. Supreme Court held that tort claims brought by a public figure and based upon speech are *all* subject to the "actual malice" standard.<sup>23</sup>

Defamation disputes are generally heard where the alleged harmful acts took effect. In general the defendant must have sufficient contacts with the forum state, and the claims must have arisen from those contacts.<sup>24</sup> Jurisdiction is discussed in detail *infra*.

As in Canada, a U.S. defendant can bring certain affirmative defences to a defamation action, including:

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- Truth
  - Consent

- Absolute Privilege<sup>25</sup>
- Conditional Privileges<sup>26</sup>
- Statements of Opinion<sup>27</sup>

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### III. JURISDICTION AND CHOICE OF LAW ISSUES

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#### 1. Black v. Breeden

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In *Black v. Breeden*, the Supreme Court of Canada confirmed a liberal judicial approach to assuming jurisdiction in internet-based libel actions. The case involved Conrad Black, Lord Black of Crossharbour, who filed six libel actions in Ontario in respect of statements posted on the Hollinger International website. The defendants in the actions were directors, advisors and a vice president of Hollinger, a publicly traded company headquartered in Chicago.

Black, who was formerly chairman of Hollinger, alleged that press releases and reports issued by the defendants contained defamatory statements which were downloaded, read and republished in Ontario by The Globe and Mail, the Toronto Star, and the National Post, and damaged his reputation in Ontario. The defendants moved to stay the actions on the ground that the Ontario court did not have jurisdiction, or alternatively that Ontario was not the convenient forum. The defendants argued that there was no real and substantial connection between Ontario and the actions, and that the more convenient forum was either New York or Illinois.

The motion judge, Belobaba, J. of the Superior Court of Justice disagreed and dismissed the defendants' motion and held that the Ontario court had jurisdiction over the actions and Ontario was the convenient and appropriate forum.<sup>28</sup> While the statements in question may have been made in the United States, they were republished in Ontario and were alleged to have caused injury to Lord Black's reputation in Ontario. The connection between Lord Black and Ontario was significant and he had long-standing ties to Ontario (albeit he had renounced his Canadian citizenship in favour of British citizenship to receive his peerage). The American defendants were connected to Ontario, as it was reasonably foreseeable to them that the allegedly defamatory press releases would be downloaded and published in Ontario and would result in damage to Lord Black's reputation in Ontario.

Mr. Justice Belobaba applied the test for assumed jurisdiction as set out in *Muscutt v. Courcelles*<sup>29</sup> in the context of an Internet-based libel action, which the Ontario Court of Appeal then modified and reformulated in *Van Breda v. Village Resorts Ltd.*,<sup>30</sup> and the Supreme Court of Canada thereafter further simplified.<sup>31</sup>

The defendants appealed.

The Court of Appeal for Ontario affirmed and held that the motion judge did not err in finding that the alleged tort was committed in Ontario.<sup>32</sup> There was evidence that the defendants targeted and directed their statements to the Ontario jurisdiction. The press releases posted on the Internet specifically provided contact information for Canadian media, as well as American and U.K. media outlets. The contact information for Canadian media clearly anticipated that the statements would be read by a Canadian audience and invited comments from Canadian media. The facts relevant to Black's claim relating to publication in Ontario and the damage to Lord Black's Ontario reputation formed a significant connection between the subject-matter of Black's claims and Ontario. Accordingly, the motion judge did not err in finding that there was a real and substantial connection between Lord Black's claim and Ontario or in finding that there was a connection between the defendants and Ontario.

Moreover, as Lord Black's claims related to statements published in Ontario and his undertaking to not commence defamation actions elsewhere, the motion judge correctly concluded that it would be unfair to deprive him of a trial before the community in which his reputation had been damaged. In addition, there was no unfairness to hold the defendants accountable for the accuracy of statements that were widely disseminated over the Internet and specifically directed to Canadian media. The motion judge correctly concluded that Ontario was a convenient and appropriate forum, and that neither New York, Illinois, nor any other American jurisdiction was clearly more appropriate.

According to the Ontario Court of Appeal:

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[36] The defendants advocate a different approach to a claim for libel originating on the Internet. They suggest that the focus of the analysis of where the tort of Internet libel is committed should be on whether the defendant targeted the statements to the forum rather than where they were downloaded and read.

[37] In support of the "targeting analysis" advocated, the defendants cite M. Geist, "Is There a There There? Toward Greater Certainty for Internet Jurisdiction" (2001), 16 Berkeley Tec. L.J. 1345, at 1380 and the case of *Young v. New Haven Advocate*, 315 F.3d 256 at 262-63 (4th Cir. 2002). In *Young*, the United States Court of Appeals for the 4th Circuit concluded that two Connecticut newspapers did not subject themselves to the jurisdiction of Virginia courts by posting on the Internet news articles that allegedly defamed the warden of a Virginia prison. The court explained at p. 263: "Something more than posting and accessibility is needed to 'indicate that the [newspapers] purposefully (albeit electronically) directed [their] activity in a substantial way to the forum state', Virginia. The newspapers must, through the Internet postings, manifest intent to target and focus on Virginia readers."<sup>33</sup> [citations omitted]

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With respect to the discretionary *forum non conveniens* test, Karakatsanis J.A. (as she then was) agreed with the motion judge that it was inappropriate to label it forum shopping or libel tourism where the party has a real and substantial connection with the forum.<sup>34</sup> Further, Justice Karakatsanis notes that "even if the judgment is not enforceable in the United States, it is enforceable in Ontario, and there is also value in the vindication of a defamation judgment regardless of the ability to collect damages."<sup>35</sup>

## 2. *Banro Corporation v. Les Éditions Écosociété Inc.*

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In *Banro Corporation*,<sup>36</sup> the plaintiff, an Ontario gold exploration company action sued for defamation over the publication of statements concerning the plaintiff in a book entitled, "Noir Canada Pillage, corruption et criminalité en Afrique" ("Noir Canada"), which was written in French, published by the defendant, Les Éditions Écosociété Inc. ("Écosociété"), authored by the defendant, Alain Deneault, with the research and editing assistance of the defendants, Delphine Abadie and William Sacher, and promoted on various websites and in a speech as part of a book signing tour in Ontario.

The *per curiam* decision notes that,

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[1] Although the Muscutt mechanics of the test for jurisdiction simpliciter were clarified and modified in *Van Breda*, the foundation of the test for assuming jurisdiction (whether there is a real and substantial connection between the Ontario court and the claim) remains the same.

[2] In our view, whether the Muscutt or *Van Breda* principles are applied, the decision of Justice Roberts remains sound. There is ample support in the record for her conclusion that there is a real and substantial connection in this case.<sup>37</sup>

### 3. Supreme Court of Canada Decisions in *Banro* and *Black*

The Supreme Court of Canada dismissed both appeals in *Banro*<sup>38</sup> and *Black*<sup>39</sup> and upheld the Ontario court's assumption of jurisdiction over the foreign defendants, based upon a restatement of the "real and substantial connection" test for tort actions. Both decisions also do not disturb the Ontario court's rulings on *forum non conveniens*.

Those hoping that the *Banro* and *Black* decisions would clarify the test for assuming jurisdiction in multi-state defamation actions, particularly, those which give rise to internet defamation, will be met with disappointment.

In *Black*, the "New" *Van Breda* test as applied to defamation actions merely establishes the presumptive jurisdictional factor of the republication of the alleged libel in Ontario. Publication occurs when the impugned statements are read, downloaded and republished in Ontario.

In both the *Black* and *Banro* decisions, the Supreme Court demurs in adopting a new choice of law rule for defamation actions; albeit in *Banro*, Le Bel J. notes in passing that "one possible alternative to the *lex loci delicti* as the choice of law rule in defamation cases may be the place of most substantial harm to reputation."

Whether applying the *lex loci delicti* rule or the locus of the most substantial harm to reputation, the applicable law was that of Ontario and this factor favoured Ontario in the *forum non conveniens* analysis, as did the factor of juridical advantage. In *Black*, the issue of the choice of law is intertwined with considerations of fairness and loss of juridical advantage under the *forum non conveniens* analysis:

[36] This Court observed in *Club Resorts* that in addition to seeking to assure the efficacy of the litigation process, the doctrine of *forum non conveniens* also seeks to assure fairness to both parties. The courts below agreed that the balance of fairness favours litigation in Ontario because it would be unfair to prevent Lord Black from suing in the community in which his reputation was established, whereas there would be no unfairness to the appellants if the actions were to proceed in Ontario because it would have been reasonably foreseeable to them that posting the impugned statements on the internet and targeting the Canadian media would cause damage to Lord Black's reputation in Ontario. I would agree, although I would also emphasize that the question of whether a targeting approach should be adopted in Canadian law does not arise on this appeal. As discussed above, the importance of permitting a plaintiff to sue for defamation in the locality where he enjoys his reputation has long been recognized in Canadian defamation law. Given the importance of his reputation in Ontario, this factor weighs heavily in favour of Lord Black.<sup>40</sup>

In *Banro*, Justice Le Bel rejects the English "substantial publication" requirement, noting it "reflects England's merits-based approach to the assumption of jurisdiction, which is arguably inconsistent with the Canadian approach of treating jurisdiction separately from the merits of a claim."<sup>41</sup> Justice Le Bel acknowledges that the problem of forum shopping has been addressed in other jurisdictions, notably Australia which enacted the *Defamation Act 2005 (Old.)* to include a defamation-specific choice of law rule — "most closely connected to the harm occasioned by the publication as a whole." However, despite similar calls for reform in Canada, the issue of adopting the proper law of the tort as a rule of conflicts in defamation cases is left for another day.<sup>42</sup>

Unlike the American single publication rule, in Canada, repetition or republication of a defamatory statement constitutes a new publication. The original author of the statement may be held liable for the republication where it was authorized by the

author or where the republication is the natural and probable result of the original publication (citing R. E. Brown, *The Law of Defamation in Canada* (1987), vol. 1, at pp. 253-54). As Le Bel J. notes,

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In my view, the republication in the three newspapers of statements contained in press releases issued by the appellants clearly falls within the scope of this rule. In the circumstances, the appellants have not displaced the presumption of jurisdiction that results from this connecting factor.<sup>43</sup>

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Similarly, in *Banro*, unlike the lower court and Court of Appeal, the Supreme Court downplays the significance of the promotion of the alleged libellous book "Noir Canada" on various websites and in a speech as part of a book signing tour in Ontario. Rather, the Supreme Court held:

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[37] The motion judge's decision to assume jurisdiction should be upheld. When the analytical framework identified in *Club Resorts* is applied, it is clear that there is a real and substantial connection between Banro's claim and Ontario.

[38] Here, the alleged tort of defamation occurred in Ontario. *Noir Canada* was distributed in Ontario. At 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 adduced by the defendants. For the purposes of proving defamation, publication may be inferred when the libellous material is contained in a book that is circulated in a library; the new evidence adduced by Banro on consent establishes that 15 copies of *Noir Canada* were circulated in Ontario libraries and one copy was checked out. In addition, Banro adduced evidence establishing that its reputation in Ontario is vital to conducting business, attracting investors and maintaining good relations with regulators such as the Ontario Securities Commission.

[39] As discussed in *Club Resorts*, the commission of a tort in Ontario is a recognized presumptive connecting factor that *prima facie* entitles the Ontario court to assume jurisdiction over this dispute. For the reasons discussed above, the defendants have not shown that only a minor element of the tort of defamation occurred in Ontario. As a result, they have not displaced the presumption of jurisdiction that arises in this case.

[40] On this basis, I conclude that the motion judge correctly assumed jurisdiction. That said, it is then entirely appropriate for the respondent party in such a motion to raise the doctrine of *forum non conveniens*, and ask that factors that go beyond the objective connecting factors considered in the jurisdictional analysis be taken into account.<sup>44</sup>

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Although not applied or expressly approved, the Supreme Court does note the Court of Appeal's decision in *Paulsson v. Cooper*,<sup>45</sup> where the Court adopted Nordheimer J.'s reasoning in *Barrick Gold v. Blanchard*<sup>46</sup> with respect to "reasonable foreseeability of harm to reputation", rather than evidence of damage to the plaintiff's reputation, as a relevant factor in assuming jurisdiction over a foreign defendant in a defamation case. This signifies a departure from the Court of Appeal's earlier decision in *Bangoura v. Washington Post*.<sup>47</sup>

On the issue of *forum non conveniens*, Le Bel J. in *Banro* reinforces the Court's holding in *Van Breda* that the onus remains with the defendant to demonstrate that another jurisdiction is a "clearly more appropriate forum." In *Banro*, Le Bel J rejected the appellant's arguments relating to disproportionality of costs (compared with the minimal potential for recovery for damage to reputation in Ontario); the effect of parallel proceedings; the applicability of Quebec law; and comparative juridical advantage.

In *Black*, Le Bel J. acknowledges that the courts of Illinois and Ontario were both appropriate fora for the trial of the libel actions. On the one hand, the factors of comparative convenience and expense for the parties and witnesses, location of the parties, avoidance of a multiplicity of proceedings and conflicting decisions and enforcement of judgment all favoured the Illinois court as a more appropriate forum. On the other hand, the factors of applicable law and fairness to the parties favoured the Ontario court. The determinative factor appears to be where Conrad Black's local reputation is to be vindicated.

For Lord Black, the result is a Pyrrhic victory (insofar as he is now a convicted felon, subsequently released after serving 42 months in a Florida prison on fraud and obstruction of justice charges), but a victory nonetheless, insofar as Lord Black settled his libel actions subsequently.<sup>48</sup> For *Banro*, the defamation action may proceed in Ontario.

What is peculiar about the Supreme Court's jurisdictional approach is the reluctance to face the issue of Internet defamation in *Black* and *Banro* head-on, only obliquely suggesting in *Banro* that the appeal "raises difficult issues when publication occurs through the Internet, as this Court noted recently in *Crookes v. Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269 . . ." <sup>49</sup>

Rather than focusing on the issue of jurisdiction in internet defamation actions — through websites, blogs and social media sites like Twitter and Facebook — Le Bel J. opts to refer to the issue of Internet jurisdiction in the *Van Breda* decision, albeit only *in obiter*:

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Active advertising in the jurisdiction or, for example, 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. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor.<sup>50</sup>

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Hence, while having a website does not necessarily mean a company carries on business in the jurisdiction, allowing republication of defamatory statements on a personal or business website is sufficient for the court to assume jurisdiction.

#### 4. Intermediary Liability

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The Supreme Court of Canada's decision in *Crookes v. Newton*<sup>51</sup> should be welcome news to website owners, bloggers and forum moderators. The majority opinion by Abella J. (Binnie, Le Bel, Charron, Rothstein and Cromwell JJ. concurring) held that there is no intermediary liability for hyperlinking to defamatory content which does not constitute re-publication unless the alleged libel is endorsed or repeated as follows:

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[27] Hyperlinks are, in essence, references. By clicking on the link, readers are directed to other sources. Hyperlinks may be inserted with or without the knowledge of the operator of the site containing the secondary article. Because the content of the secondary article is often produced by someone other than the person who inserted the hyperlink in the primary article, the content on the other end of the link can be changed at any time by whoever controls the secondary page. Although the primary author controls whether there is a hyperlink and what article that word or phrase is linked to, inserting a hyperlink gives the primary author no control over the content in the secondary article to which he or she has linked. (See David Lindsay, *Liability for the Publication of Defamatory Material via the Internet*, Research Paper No. 10,

University of Melbourne Centre for Media, Communications and Information Technology Law (2000), at pp. 14 and 78; M. Collins, *The Law of Defamation and the Internet*, at paras. 5.42 and 2.42 to 2.43.).

[28] These features — that a person who refers to other content generally does not participate in its *creation or development* — serve to insulate from liability those involved in Internet communications in the United States: see *Communications Decency Act*, 47 U.S.C. §230 (1996); see also Jack M. Balkin, "The Future of Free Expression in a Digital Age" (2009), 36 *Pepp. L. Rev.* 427, at pp. 433-34; *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir. 1997); *Barrett v. Rosenthal*, 40 Cal.4th 33 (Cal. 2006); *Fair Housing Council of San Fernando Valley v. Roommates.Com LLC*, 521 F.3d 1157 (9th Cir. 2008).

[29] Although the person selecting the content to which he or she wants to link might *facilitate* the transfer of information (a traditional hallmark of publication), it is equally clear that when a person follows a link they are leaving one source and moving to another. In my view, then, it is the actual creator or poster of the defamatory words in the secondary material who is publishing the libel when a person follows a hyperlink to that content. The ease with which the referenced content can be accessed does not change the fact that, by hyperlinking, an individual is referring the reader to other content. (See *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at paras. 97-102.)

[30] Hyperlinks thus share the same relationship with the content to which they refer as do references. Both communicate that something exists, but do not, by themselves, communicate its content. And they both require some act on the part of a third party before he or she gains access to the content. The fact that access to that content is far easier with hyperlinks than with footnotes does not change the reality that a hyperlink, by itself, is content neutral — it expresses no opinion, nor does it have any control over, the content to which it refers.

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[42] Making reference to the existence and/or location of content by hyperlink or otherwise, without more, is not publication of that content. Only when a hyperlinker presents content from the hyperlinked material in a way that actually repeats the defamatory content, should that content be considered to be "published" by the hyperlinker. Such an approach promotes expression and respects the realities of the Internet, while creating little or no limitations to a plaintiff's ability to vindicate his or her reputation. While a mere reference to another source should not fall under the wide breadth of the traditional publication rule, the rule itself and the limits of the one writer/any act/one reader paradigm may deserve further scrutiny in the future.<sup>52</sup>

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McLachlin C.J. and Fish J. concurred in the result, but were of the view that a hyperlink should constitute publication if, read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to. A mere general reference to a website is not enough to find publication. Also, the Chief Justice and Fish J. recognized that the law struggles to keep up with the pace of technology and that the issue is by no means resolved, noting:

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[52] We add a final comment, with an eye to future technological changes. Abella J., as noted, states that "a hyperlink, by itself, should never be seen as 'publication' of the content to which it refers" (para. 14). So long as it is necessary to click on a hyperlink to access its content, this may be correct. What, however, of features in which a hyperlink projects content on the page automatically, or in a separate frame, with little or no prompting from the reader? Would inclusion of such a hyperlink, by itself, amount to publication? Like the issue of embedded hyperlinks, this question is not before us and should not be taken to have been decided in this case. Like Abella J. (at para. 43), we would leave issues concerning hyperlinks of this sort to be dealt with if and when they arise.<sup>53</sup>

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Deschamps J., also concurring in the result, disagreed with the majority's holding to grant blanket immunity for hyperlinking to defamatory content:

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[96] What should be clear from this is that not all forms of references are the same as regards the extent to which they facilitate access to the information in question. While my colleague's statement that "[h]yperlinks are, in essence, references" (para. 27) is superficially correct; it is inaccurate to equate a hyperlink with, for example, a footnote in a book. A footnote that does not actually reproduce the information to which the reader is being referred does not make that information readily available. The reader has to locate and obtain the document the footnote refers to and then find the information within the document. In contrast, an automatic hyperlink requires no action whatsoever, while an embedded deep hyperlink requires only the tap of a finger to gain access to the information. The effort involved is even less than that of turning a page in a book. Although it is of course true that hyperlinks are a form of reference, the extent to which they facilitate access and their ubiquity on the Internet cannot be overlooked.<sup>54</sup>

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At paragraph 103 of the *Crookes* decision, Deschamps J. points out that the *Communications Decency Act*, 47 U.S.C. §230 (1996) only exempts ISPs and website owners from liability for their *passive*, as opposed to *active*, conduct. The issue of hyperlinking is not fully resolved, as Abella J. notes,

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[43] I am aware that distinctions can be drawn between hyperlinks, such as the deep and shallow hyperlinks at issue in this case, and links that automatically display other content. The reality of the Internet means that we are dealing with the inherent and inexorable fluidity of evolving technologies. As a result, it strikes me as unwise in these reasons to attempt to anticipate, let alone comprehensively address, the legal implications of the varieties of links that are or may become available. Embedded or automatic links, for example, may well prove to be of consequence in future cases, but these differences were not argued in this case or addressed in the courts below, and therefore need not be addressed here.<sup>55</sup>

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Website owners are the fulcrum between the freedom of expression and protection of one's reputation. Many website owners endeavour to promote online community standards. Where an internet service provider acts in good faith in improving the online community, one may argue that it is entitled to be shielded from liability for defamatory content; particularly if it was unaware and did not actively incite or propagate the cyberlibel.

In the authors' view, the majority's decision is sound. It protects ISPs, website owners and bloggers from liability for third party content (who hasn't included a link without reading it?), while still allowing people to sue the maker of the statement. Whether embedded or automatic links become a "hot button" issue remains to be seen.<sup>56</sup>

(a) United States jurisdiction & choice of law issues

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As in Canada, courts in the United States have had some difficulty in determining the metes and bounds of personal jurisdiction in the context of Internet defamation cases. In general, however, U.S. courts have decided that merely publishing a statement on the Internet, without more, does not subject a defendant to jurisdiction in a given state.

A U.S. court may have jurisdiction over a defendant who resides or has a continuous business presence in the forum state, which is known as "general jurisdiction." It may also have "specific jurisdiction" over a non-resident defendant if two requirements

are satisfied: (1) the forum state's "long-arm" statute permits jurisdiction, and (2) the exercise of jurisdiction complies with the due process requirements of the United States Constitution.

A state's "long-arm" statute may create restrictions on a court's ability to exercise jurisdiction over a defendant. Many states, including California and Nevada, permit jurisdiction to the extent it is consistent with the due process requirements of the U.S. Constitution. Other states provide general limitations on the extent of long-arm jurisdiction, while a small number of states provide limitations on defamation actions in particular, providing that a court does not have jurisdiction over a defamation defendant merely because the acts constituting the cause of action took place in that state.<sup>57</sup>

Typically, the more significant burden for a plaintiff to meet in proving a court's jurisdiction, particularly in Internet defamation cases, is whether the exercise of jurisdiction is consistent with the due process requirements of the U.S. Constitution. The threshold requirement in this analysis is that the non-resident defendant must have sufficient "minimum contacts" with the forum state, such that the exercise of jurisdiction over the defendant would not offend "traditional notions of fair play and substantial justice."<sup>58</sup> This standard is frequently conceptualized in terms of whether the defendant has "purposefully availed" himself of the protections of the forum state.<sup>59</sup> Different courts across the U.S. have developed different particular formulations of this standard. The U.S. Court of Appeals for the Eleventh Circuit, for example, has articulated the test as:

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[f]irst, the contacts must be related to the plaintiff's cause of action . . . [s]econd, the contacts must involve some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum," and "[t]hird, the defendant's contacts with the forum must be such that the defendant should reasonably anticipate being haled into court there.<sup>60</sup>

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The United States Supreme Court in *Calder v. Jones*<sup>61</sup> developed an "effects" test to determine whether a court may exercise personal jurisdiction over a non-resident defendant, which requires: (1) an intentional act (2) that is expressly aimed at the forum state and (3) causes injury that the defendant knows is likely to be suffered in the forum state."<sup>62</sup> The Court in *Calder* found that jurisdiction in California was proper over a defendant residing in Florida who published allegedly libelous statements about California residents because "California [wa]s the focal point both of the story and of the harm suffered."<sup>63</sup> This test does not, however, "stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction."<sup>64</sup> Rather, to satisfy the third prong of the test, the plaintiff must show that "the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum, and point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum."<sup>65</sup>

Most U.S. courts, when confronted with the issue, have found that merely posting something on the Internet does not establish a court's personal jurisdiction over a defendant. The defendant's Internet activity must be "expressly targeted at or directed to the forum state . . . [It] must, through . . . Internet postings, manifest an intent to target and focus on [the state's] readers."<sup>66</sup> The defendant must specifically target an audience within the forum state, rather than a general audience throughout the United States.<sup>67</sup> This conclusion is somewhat at odds with the Canadian Supreme Court's decision in *Black v. Breeden*, which placed a much greater emphasis on the location of the reputational harm suffered by a defamation plaintiff.

While a U.S. court will generally apply the law of the forum state in which a suit is brought, a defamation defendant is not necessarily out of options if a court in a plaintiff-friendly state has jurisdiction over him. Several states recognize the concept of *dépeçage*,<sup>68</sup> which allows a court to engage in a choice-of-law analysis on an issue-by-issue basis, rather than applying one state's laws to the entire suit.<sup>69</sup> Under this analysis, for example, a court may apply the forum state's laws as to the elements of

a defamation claim, but may then apply the laws of the defendant's state of residence to determine what defences or immunities the defendant may have to the claims.

A court's application of *dépeçage* may be especially vital to a defendant who resides in a state with a strong Anti-SLAPP statute.<sup>70</sup> A slim majority of states have Anti-SLAPP statutes, though there is little consistency in their deterrent effect against SLAPP suits. Nevada currently has perhaps the strongest Anti-SLAPP statute in the U.S.; it defines speech protected under the statute broadly so as to include statements on matters of public interest,<sup>71</sup> it requires a plaintiff to make a strong showing of the merits of his case early in litigation,<sup>72</sup> and it allows a successful Anti-SLAPP movant to bring an affirmative cause of action against the party who brought the SLAPP suit.<sup>73</sup> On the west coast, California has a very strong Anti-SLAPP statute<sup>74</sup> but the Washington State Supreme Court has recently struck down that state's Anti-SLAPP statute as unconstitutional.<sup>75</sup> Some states, however, have anemic statutes that do almost nothing to deter SLAPP suits. Florida's Anti-SLAPP statute,<sup>76</sup> for example, only applies to actions brought by the government in response to an exercise of the right to petition or assemble under the First Amendment,<sup>77</sup> and to suits based upon a homeowners' association's right to free speech or petition.<sup>78</sup> Such protections have little potential application in the context of cyber-libel litigation.

Anti-SLAPP statutes are fairly new statutory tools to prevent frivolous lawsuits in the specific context of defamation and similar claims. They are based primarily on the First Amendment to the U.S. Constitution and only started to come into existence in the late 20th century, after the U.S. Supreme Court began taking significant steps to outline the constitutional contours of defamation claims. It is not surprising, then, to see that Canada does not have similar laws currently on its books.

#### (b) United States intermediary liability

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In the United States, ISPs are protected, to an extent, from liability for statements made by third-party users of their services. The *Communications Decency Act*<sup>79</sup> (the "CDA" or "§230") prevents ISP liability for the publication of defamatory language created by third parties, though the ISP may be responsible for running the site. It applies to an ISP that shows 1) it is an interactive service provider or user of such service, 2) the cause of action considers the defendants as the publisher or speaker, and 3) the information at issue is provided by a third party information content provider.

In *Zeran v. America Online*,<sup>80</sup> an anonymous poster attempted to sell offensive shirts referring to the Oklahoma City bombing on AOL. The poster listed Zeran's home phone number and Zeran began receiving offensive and harassing phone calls. Despite Zeran's requests, AOL would not post retractions of the messages nor disclose the poster's identity further. The Court reasoned that §230 was meant to prevent ISPs from potentially "severely restrict[ing] the number and type of messages posted" for fear of liability, but also to encourage service providers to self-regulate.<sup>81</sup> Zeran argued that §230 protection does not equally apply to distributors or publishers of defamatory statements. "AOL falls squarely within [the] traditional definition of a publisher" as it was "in the business of making [its] facilities available to disseminate the writings composed . . . by others."<sup>82</sup> Despite this, the Court found that AOL was the kind of intermediary meant to be covered by §230, and thus was not subject to liability for the anonymous posting.

While §230 may be unpopular among successful defamation plaintiffs for permitting defamatory statements to stay on the Internet even after the speaker has been found liable for them, the rationale underlying the statute is very much focused on maintaining the robust exchange of ideas on the Internet, and is very much in line with the Canadian Supreme Court's decision in *Crookes v. Newton*.

## IV. NOTICE REQUIREMENTS AND LIMITATION PERIODS

The Court of Appeal for Ontario's judgment in *Shtauf v. Toronto Life Publishing Co. Ltd.*,<sup>83</sup> confirms that the six-week notice requirement and three-month limitation period under the Ontario *Libel and Slander Act*,<sup>84</sup> not the two-year general limitation period in section 4 of the *Limitations Act, 2002*,<sup>85</sup> governs libel actions based on online versions of newspaper articles.

The *Shtauf* case involves an ongoing libel action stemming from a June 2008 Toronto Life article entitled, "How to Piss Off a Billionaire" published in Toronto Life's print and online editions, which referred to Russian billionaire Alex Schnaider and described the ongoing litigation between Schnaider and Michael Shtauf, a former business partner. The article also named Toronto lawyer Gregory Roberts.

After the Court of Appeal for Ontario set aside the dismissal of the plaintiffs' claim<sup>86</sup> in June 2011, Toronto Life brought a motion for summary judgment to dismiss the action, arguing that the defamation claim was time-barred under the *Libel and Slander Act* ("the Act") and the negligence claim would inevitably fail due to a lack of proximity and foreseeability as necessary elements to establish a *prima facie* duty of care.<sup>87</sup>

Shtauf and Roberts brought a cross-motion to amend their statement of claim to add a claim for libel in the print version of the article based upon the "recapture" provision under section 6 of the Act. The motion judge granted the plaintiffs' motion to amend, dismissed the claim for libel in the print version of the article, and dismissed Toronto Life's motion for summary judgment.

Both parties appealed.

The key issue on the appeal was discoverability, or, perhaps more accurately, the lack of an evidentiary record or pleading to raise the issue of discoverability.

While the plaintiffs complained about the print version of the article, they did not sue over it. They became aware of the internet version of the article in late August 2008, and gave notice under the *Libel and Slander Act* in October 2008, then sued Toronto Life and related individual defendants. Laskin J.A. for the unanimous panel (Juriansz and Tulloch JJ.A. concurring) writes,

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[45] I am inclined to agree with the plaintiffs' position. The defendants did not plead discoverability in their statement of defence; they did not rely on it in their amended notice of motion for summary judgment; they did not argue it in their factum on the motion; and the motion judge made no reference to discoverability in his reasons.

[46] In limited circumstances, this court can entertain an issue not raised in the trial court. But to do so we must have a satisfactory record to address the issue and be persuaded that if we do consider it, the party against whom the issue is raised will not be prejudiced: see *Ross v. Ross*, 1999 NSCA 162, 181 N.S.R. (2d) 22; 767269 *Ontario Ltd. v. Ontario Energy Savings L.P.*, 2008 ONCA 350. I expect that had the plaintiffs known discoverability was to be an issue before the motion judge, they would have filed a good deal of evidence to try to show that they could not reasonably have discovered the internet article earlier. Thus, I cannot say that the plaintiffs would not be prejudiced were we to consider the issue for the first time in this court.

[47] But even if we were to consider discoverability, the material filed before us shows that the date the article, and especially the alleged offending portion, could be accessed on the internet is disputed. The defendants say that it could be accessed around the time it was posted, at the end of May. The plaintiffs say that they could not access it until August. In support of their assertion, they point to Shtauf's August 1 letter, which did not refer to the internet version of the article.

[48] This dispute can only be resolved at trial. Therefore, though I do not think that discoverability can properly be raised on this appeal, even if it could, it is a genuine issue requiring a trial.<sup>88</sup>

The Court of Appeal also soundly rejected Toronto Life's argument for adoption of the American "single publication" rule.<sup>89</sup>

Justice Laskin also held that in respect of the plaintiffs' Internet libel claim, there was a genuine issue for trial whether it was subject to the notice and limitation provisions in the *Libel and Slander Act*:

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[21] Our court has grappled with the question in two decisions: *Weiss v. Sawyer* (2002), 61 O.R. (3d) 526 (C.A.) and *Bahlhieda v. Santa* (2003), 68 O.R. (3d) 115 (C.A.).

[22] In *Weiss*, the evidence conflicted on whether the publication — an allegedly defamatory letter — was published over the internet. Assuming that it was, Armstrong J.A. wrote, at para. 24, that he thought the word "paper" in s. 1(1) of the Act was broad enough to include a newspaper published on the internet. He did not discuss whether the internet publication was published in Ontario though implicitly he held that it was, as he found that the notice requirement in s. 5(1) of the Act applied. Armstrong J.A. did not decide whether the internet publication was also a "broadcast" as there was no evidence to make that determination.

[23] In *Bahlhieda*, this court held that in the light of the conflicting evidence in the case, the question whether an internet publication was a broadcast from a station in Ontario was an issue for trial. The panel said, at para. 6: "Summary judgment applications are not a substitute for trial and thus will seldom prove suitable for resolving conflicts in expert testimony particularly those involving difficult, complex policy issues with broad social ramifications".

[24] In this case, I think the sensible course is that adopted in *Bahlhieda*: to leave to trial the question whether the internet version of the article is a newspaper published in Ontario or a broadcast from a station in Ontario. I am not satisfied that the evidentiary record before us is sufficient to decide these questions, which have broad implications for the law of defamation.

[25] Leaving these questions for trial also makes practical sense. On my proposed disposition of these appeals, the issue whether the claim for libel in the internet version of the article is subject to the notice and limitation provisions of the Act is relevant only to the issue of discoverability, an issue I would also leave to be determined at trial.

[26] Therefore, I would hold that the issue whether the claim for libel in the internet version of the article is subject to ss. 5(1) and 6 of the Act is a genuine issue requiring a trial.<sup>90</sup>

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With respect to the plaintiff's attempt to recapture under section 6 of the Act their claim for libel in the print version of the article, Laskin J.A. held:

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[71] In summary, a plaintiff who has brought a libel action against the media, may include in that action a claim for an earlier libel. However, to include or recapture that earlier libel, the plaintiff must meet three timing requirements. First, the earlier libel must have been published within the year period before the commencement of the action (s. 6). Second, proper notice must have been given within six weeks after the earlier libel claim to the plaintiff's knowledge (s. 5(1)). Third, the claim for the earlier libel must be asserted in the action and therefore within three months after the libel sued on came to the plaintiff's knowledge (s. 6).

[72] It is the third requirement that the plaintiffs failed to meet. Their claim for libel in the print version of the article could not be brought beyond the three-month limitation period provided for in s. 6. In other words, it could not be brought after November 20, 2008. As the plaintiffs did not assert this claim until June 2011, it is long out of time.<sup>91</sup>

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While it is arguable that the *Shtatif* decision ostensibly holds that the Act applies to *all* forms of Internet libel (blogs, Facebook, Twitter, chat forums, etc.), this may be overreaching, since it is difficult to reconcile the statutory definitions of "broadcast" and "newspaper" with Internet media. Section 1(1) of the Act defines "broadcasting" and "newspaper" as follows:

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"broadcasting" means the dissemination of writing, signs, signals, pictures and sounds of all kinds, intended to be received by the public either directly or through the medium of relay stations, by means of,

(a) any form of wireless radioelectric communication utilizing Hertzian waves, including radiotelegraph and radiotelephone, or

(b) cables, wires, fibre-optic linkages or laser beams, and "broadcast" has a corresponding meaning; ("radiodiffusion ou télédiffusion", "radiodiffuser ou télédiffuser") "newspaper" means a paper containing public news, intelligence, or occurrences, or remarks or observations thereon, or containing only, or principally, advertisements, printed for distribution to the public and published periodically, or in parts or numbers, at least twelve times a year.<sup>92</sup>

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Whether a blogger residing in Ontario is "broadcasting" in Ontario, when the blog is hosted by a server in another jurisdiction, seems to put a premium on physical location of servers at the expense of the locus of reputational harm. Then again, what if the server is in the cloud? Certainly, Facebook and Twitter are American companies with servers within the U.S. territorial jurisdiction.<sup>93</sup>

### 1. United States Notice Requirements & Limitation Periods

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The United States is a patchwork of different rules regarding defamation claims, with most states adopting the "single publication" rule, and others taking the Canadian approach and declining to do so. Many states that recognize the "single publication" rule have done so by statute.<sup>94</sup>

Each state has its own statute of limitations period for defamation actions, with some states requiring an action to be brought within one year,<sup>95</sup> and others allowing an action to be brought within three years. In states that have adopted the "single publication" rule, the statutory period typically begins to run upon the initial publication of the allegedly defamatory statement.<sup>96</sup>

An interesting creature of statute that has emerged in only a few states is a pre-suit notice requirement to certain defamation defendants. Perhaps the most well-developed of these statutes is Florida Statutes §770.01, which requires plaintiffs in a defamation action based on the "publication or broadcast, in a newspaper, periodical, or other medium," to "serve notice in writing on the defendant, specifying the article or broadcast and the statements therein which he or she alleges to be false and defamatory" at least five days before filing suit.<sup>97</sup> The purpose of the statute is to allow corrections or retractions by publishers and foster settlements in lieu of legal action. See *Wagner, Nugent, et al. v. Flanagan*, 629 So.2d 113 (Fla. 1993). While the statute was previously construed narrowly to include only "traditional" print media,<sup>98</sup> Florida courts have since expanded the statute to a broad spectrum of "media defendants," including Internet bloggers.<sup>99</sup> If a plaintiff does not comply with the statute's requirements, his entire complaint is subject to dismissal.<sup>100</sup> The dismissal is without prejudice, allowing the plaintiff to re-file his suit (if the statute of limitations has not yet expired), but this is still a forceful sanction on plaintiffs that is not found elsewhere in the U.S.

## V. UNMASKING ANONYMOUS DEFENDANTS

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In Ontario, a procedure exists for plaintiffs faced with defamatory statements to compel an Internet Service Provider (ISP) to disclose the identities of anonymous web or email account holders using aliases or pseudonyms.

In *Irwin Toy Limited v. John Doe*,<sup>101</sup> Justice Wilkins of the Ontario Superior Court of Justice established the test and outlined the procedure for bringing this type of motion. Wilkins J. had to determine the relevant criteria to order an ISP to identify a subscriber who had allegedly sent a defamatory message through the electronic mail to approximately 75 persons utilizing the services of the Internet. The plaintiffs were able to identify the internet alias of the sender, which was then tracked to an Internet protocol (IP) address, traced and ascertained to be a subscriber of iPrimus Canada, an internet service provider. iPrimus Canada declined to identify the subscriber unless it was ordered to do so by a court of law.

Wilkins, J. discussed the public policy rationale underpinning the concepts of privacy and confidentiality on the Internet:

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In keeping with the protocol or etiquette developed in the usage of the internet, some degree of privacy or confidentiality with respect to the identity of the internet protocol address of the originator of a message has significant safety value and is in keeping with what should be perceived as being good public policy. As far as I am aware, there is no duty or obligation upon the internet service provider to voluntarily disclose the identity of an internet protocol address, or to provide that information upon request.<sup>102</sup>

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Accordingly, the Court held that the appropriate test was that plaintiffs must demonstrate on a *prima facie* basis that the originator of the message in question has released, by electronic mailing, words which are capable of being construed by a properly charged jury as being defamatory. The Court concluded that the plaintiffs had met this test and ordered iPrimus Canada to disclose the true identity of the person who sent e-mails containing Irwin Toy's private and confidential files and alleged false information about its management.

Wilkins J. added that such disclosure should not be automatic upon the issuance of a statement of claim, otherwise, the anonymity of the Internet could be shattered for the price of the issuance of a spurious statement of claim and the benefits obtained by the anonymity lost in inappropriate circumstances. He also indicated that requiring a plaintiff to commence a lawsuit against an ISP to obtain the identity of the real tortfeasor would be unjust and expensive since the law respecting an ISP's liability for its customers' actions is not clear.

In *Warman v. Fournier et al.*,<sup>103</sup> the Ontario Divisional Court reversed the lower court decision of Kershman, J. ordering the disclosure of all personal information, including name, email and Internet Protocol (IP) addresses of multiple anonymous posters in a defamation case.

The Divisional Court established the following test for compelling third-party disclosure of the identities of anonymous posters in Internet defamation actions:

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[34] Given the circumstances in this action, the motions judge was therefore required to have regard to the following considerations: (1) whether the unknown alleged wrongdoer could have a reasonable expectation of anonymity in the particular circumstances; (2) whether the Respondent has established a *prima facie* case against the unknown alleged wrongdoer and is acting in good faith; (3) whether the Respondent has taken reasonable steps to identify the anonymous

party and has been unable to do so; and (4) whether the public interests favouring disclosure outweigh the legitimate interests of freedom of expression and right to privacy of the persons sought to be identified if the disclosure is ordered.<sup>104</sup>

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## 1. Norwich Pharmacal Order

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The first three factors in *Warman* are functionally equivalent to the test for granting a "Norwich Pharmacal" Order. Unlike some other provinces (e.g. Nova Scotia, Prince Edward Island and British Columbia (specifically, pre-action attachment or garnishment)), Ontario does not have a specific procedural mechanism granting pre-action discovery. Rule 31.10 of the Ontario *Rules of Civil Procedure*<sup>105</sup> does allow a plaintiff to examine a non-party with leave of the court and reads as follows:

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### — Discovery of Non-Parties with Leave

31.10

General — (1) The court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue *in the action*, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation. R.R.O. 1990, Reg. 194, r. 31.10 (1). [emphasis added]

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Ontario Superior Court judges, do, however, have inherent jurisdiction based upon the fusion of the courts of law and equity under section 96(1) of the *Courts of Justice Act*.<sup>106</sup> Nevertheless, the "Norwich Pharmacal" order, an extraordinary discretionary remedy, has a long pedigree in Canada, following the seminal House of Lords decision in *Norwich Pharmacal Co. v. Comrs. of Customs and Excise*.<sup>107</sup> In *Norwich Pharmacal*, Lord Cross of Chelsea identified the following test to determine whether pre-action discovery of a third party should be allowed in the exercise of the court's discretion:

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- (i) the strength of the applicant's case against the unknown alleged wrongdoer;
  - (ii) the relationship between the alleged wrongdoer and the respondent (the person from whom discovery is sought);
  - (iii) whether the information could be obtained from another source; and
  - (iv) whether the provision of the information "would put the respondent to trouble which could not be compensated by the payment of all expenses by the applicant".<sup>108</sup>

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The court will consider the following factors on an application for *Norwich Pharmacal* relief:

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- (i) Whether the applicant has provided evidence sufficient to raise a valid, bona fide or reasonable claim;
- (ii) Whether the applicant has established a relationship with the third party from whom the information is sought such that it establishes that the third party is somehow involved in the acts complained of;

- (iii) Whether the third party is the only practicable source of the information available;
- (iv) Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure, some [authorities] refer to the associated expenses of complying with the orders, while others speak of damages; and
- (v) Whether the interests of justice favour the obtaining of the disclosure.<sup>109</sup>

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## 2. Charter Implications

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In *Warman*, the Divisional Court highlighted the *Charter*<sup>110</sup> values engaged when seeking the court's assistance in identifying anonymous defendants in an internet defamation action:

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[22] While the *Charter* does not apply to strictly private litigation between litigants not invoking state action, the Divisional Court has held that, because the Rules of Civil Procedure have the force of a statute, they must be interpreted in a manner consistent with *Charter* rights and values: see *D.P. v. Wagg*, [2002] O.1. No. 3808 at paras. 65-66 (Div. Ct.). In that case, the court held that whenever one party to a civil suit invokes or relies upon government action (in that case, the Rules of Civil Procedure; as enforced by the machinery of the administration of justice) to produce what amounts to the infringement of another party's *Charter* rights, *Charter* values are invoked.

[23] On appeal, Rosenberg I.A., speaking for the Court, was prepared to assume for purposes of that case, that *Charter* values should inform the discovery process: *D.P. v. Wagg* (2004), 71 O.R. (3d) 229 at para. 61 (C.A.). However; the appeal was ultimately decided on the principle that the Superior Court has inherent jurisdiction to control the discovery and production process under the Rules of Civil Procedure to ensure that important state and other third party interests; including *Charter* interests, are protected, even if the particular documents do not, strictly speaking, fall within a recognized category of privilege: see para. 28.

*Manner in Which Courts Address the Need to Take Charter Rights into Consideration in Relation to a Request/or Disclosure.*

[24] In circumstances where *Charter* rights are engaged and therefore courts are required to take such interests into consideration in determining whether to order disclosure, the case law indicates that the *Charter* protected interests are balanced against the public interest in disclosure in the context of the administration of justice by a combination of (1) a requirement of an evidentiary threshold, (2) fulfillment of conditions establishing the necessity of the disclosure sought, and (3) an express weighing of the competing interests in the particular circumstances of the litigation. In order to prevent the abusive use of the litigation process, disclosure cannot be automatic where *Charter* interests are engaged. On the other hand, to prevent the abusive use of the internet, disclosure also cannot be unreasonably withheld even if *Charter* interests are engaged.<sup>111</sup>

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While the Divisional Court's concern to ensure fairness to all parties is laudable, any concerns over privacy or freedom of expression are misplaced in the context of a defamation action. There is no such thing as "anonymous free speech." If you say it, then you own it. Hiding behind the cloak of anonymity under the pretext of an alleged infringement of the anonymous posters' section 2(b) *Charter* right of freedom of expression is misplaced. Neither of the parties in the *Warman* litigation are

government actors. In my view, the implications of the Divisional Court's analysis is to put up further barriers for plaintiffs in identifying anonymous posters who intentionally hide behind temporary email addresses or masked IP proxies.

It is noteworthy that the Ontario Court of Appeal decision in *P. (D.) v. Wagg*<sup>112</sup> addressed the principles underlying the obligation placed on the Crown to screen Crown Brief documents prior to use in a collateral proceeding. In *D.P. v. Wagg*, Justice Rosenberg did in fact state, as Wilton-Siegel, J. pointed out, that for the purposes of the appeal, he was prepared to assume that the Divisional Court was correct that *Charter* values informed the discovery process. The Court of Appeal, however, also decided that a statement excluded from the criminal proceeding on the basis of a *Charter* violation was still required to be produced in the related civil proceeding. The analysis of a section 8 violation is different in civil and criminal matters.

It is difficult to reconcile the Divisional Court's conclusion that *D.P. v. Wagg* establishes that section 32 of the *Charter* extends to every individual, including putative defendants, affected by the court's order and exercise of inherent jurisdiction. If this were so, then the Divisional Court should have simply imposed a notice requirement upon the website/bulletin board owners to notify the anonymous defendants of the nature of the motion. If the anonymous parties chose to oppose the motion, the Divisional Court may have also included a provision that any anonymous defendants remain as such while represented by counsel at the return of the motion. In our view, there was no need to invoke the *Charter* when the parties whose *Charter* rights are being balanced are not even before the court to make submissions.

The litigation strategy to unmask anonymous defendants may be summarized in the following six (6) steps:

1. *Identification*: Retain a forensic computer expert to help identify the ISP by retrieving the original IP address from the e-mail message headers of account information. An IP address is a numeric sequence address given to servers and users connected to the Internet.
2. *Verification*: Check the ISP's website to determine the terms and conditions of its customer user agreement. Most ISPs impose a privacy policy restricting the release of customers' personal information. Some ISPs have a policy of notifying customers of third-party requests for their personal information to ensure protection of privacy.
3. *Prosecution*: Commence an action against the unknown defendant(s) using the pseudonym (s) "John Doe #1", "John Doe #2, etc. setting out a cause of action such as defamation or breach of confidence, or if also suing the website or blog owner, add the unnamed defendants sequentially;
4. *Notification*: Provide written notice to the ISP of the nature of the claim (*eg.* provide a copy of the Statement of Claim) and seek either consent or no opposition to the proposed motion.
5. *Data Retention*: Request written confirmation that the ISP has preserved the electronic records, which identify the subscriber with the verified IP address to ensure records retention (and avoidance of automatic records destruction) in the intervening period.
6. *Interlocutory Motion*: Bring a motion against the ISP under rules 30.10 and 31.10 of the *Rules of Civil Procedure* dealing with non-party discovery, or a motion for a *Norwich Pharmacal* order for pre-action discovery, taking into account the *Charter* values engaged following the *Warman* decision. The grounds for the motion and supporting affidavit by the forensic computer expert typically includes the following:
  - Evidence demonstrating that the plaintiff has a *prima facie* case against "John Doe" in respect of the allegations made in the statement of claim, including a copy and details of the alleged defamatory emails, blog posts or online comments, or unauthorized confidential email(s), the e-mail address list or account information and number of third-party recipients;

- Specifics concerning the forensic computer expert's verification process in connecting the internet alias to the IP address and ISP;
- A statement to the effect that unless and until the ISP identifies the "John Doe" defendant with the verified IP address, the plaintiff will not be in a position to serve their statement of claim or otherwise prosecute the action.

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### 3. Injunctions

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The Ontario decision in *Pichler v. Meadows*<sup>113</sup> provides guidance on the test for prohibitive injunctions in defamation actions. It also offers an important reminder that an undertaking as to damages is mandatory and the "clean hands" doctrine applies.

The plaintiff, Pichler, is the president of an Ontario internet media consulting firm and owner of a transexuality website. Pichler sought an interim and interlocutory injunction restraining the defendant, Meadows, an owner and operator of an escort service and sexual and gender counselling websites, from publishing or republishing five articles published on her websites. Pichler alleged that the articles were defamatory, causing harm to his business income, which harm would continue if no injunction were granted.

In 2005, Meadows and four others (the "*Beidas* Plaintiffs") sued Pichler for damages for defamation and moved for injunctive relief in respect of Pichler's publication of certain articles on his website. On August 22, 2006, Himel J. ordered that Pichler was prohibited from publishing any materials which might tend to identify the *Beidas* Plaintiffs. By judgment dated May 29, 2008, the Divisional Court set aside Himel J.'s order.<sup>114</sup> The *Beidas* action was dismissed for delay a year later.

Subsequently, Pichler learned that Meadows was publishing articles describing him in highly derogatory terms. Justice Spence was inclined to agree with Pichler that the foregoing statements were defamatory; including the statement that he had a criminal record which Pichler asserted was "false because all of the criminal charges that have been laid against him have been disposed of without any conviction against him."<sup>115</sup>

Adopting the Divisional Court's reasoning in the *Beidas* decision, Spence, J. applied the second branch of the three-part test for interlocutory relief established in *American Cyanamid* and approved by the Supreme Court of Canada in *RJR-Macdonald Inc v. Canada (Attorney-General)*, namely: irreparable harm.<sup>116</sup> Based upon the foregoing, the first branch (serious issue to be tried) appears to have been a *fait accompli*, while the third branch (balance of convenience) was inapplicable. Additionally, Rule 40.03 of the *Rules of Civil Procedure* requires the plaintiff to give an undertaking as to damages. Finally, in respect of defamation actions, the equitable "clean hands" doctrine also factors into the analysis.<sup>117</sup>

In Spence, J.'s view, "it would not be proper for the Court on this motion to make findings that certain of these factual assertions are false and defamatory."<sup>118</sup> Nevertheless, the learned justice held that:

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[32] [w]ith respect to the statements that are entirely or principally comments rather than factual assertions, whether any of such comments constitutes defamation would depend in part on whether the comments are made with malice. The plaintiff submits that they are malicious and gives his reasons for that position. It appears from the defendant's submissions that she has published these articles because the plaintiff will not agree not to continue to publish personal information about her and other individual transsexuals.

[33] There are at least two important issues here: (1) whether that apparent motive of the defendant is her real and her only motive or not; and (2) whether her motive is malicious.

[34] These issues involve matters that should be determined by the trier of fact rather than on this motion.

...

[40] It is well-settled law that for harm to be "irreparable" for the purpose of the interlocutory injunction test, it must be harm of a type that is not readily determinable and compensable in monetary terms. It appears that the plaintiff is still carrying on business and that to the extent that the business is vulnerable it may well be partly (which could therefore be substantially) for unrelated reasons.

[41] For these reasons, the plaintiff has not established that, without the injunction, his business will likely suffer irreparable harm.<sup>119</sup>

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Pichler also omitted providing his undertaking as to damages as required by Rule 40.03 and the Court found that he failed to come to the Court with clean hands.<sup>120</sup>

In another Ontario decision, *Henderson v. Pearlman*,<sup>121</sup> Hennessy, J. of the Ontario Superior Court of Justice granted the Ontario based plaintiff summary judgment and a permanent injunction arising from defamatory postings on various American defendants' websites. The plaintiff owned and operated a fraud awareness website established in May 2000 from Sudbury, Ontario. He also had published a 432-page book entitled *Crimes of Persuasion: Schemes, Scams, Frauds*, dealing with telemarketing fraud, investment schemes, and consumer scams. The plaintiff further asserted that he routinely advised law enforcement agency officials and defence lawyers on matters related to consumer and investment fraud.

The plaintiff commenced an Internet defamation action in 2005, alleging that the defendants had defamed him through a "program of misinformation on various websites, internet newsgroups and internet fora.

The plaintiff sought summary judgment of his claim and damages for Internet defamation. The plaintiff's defamation claim against ten defendants — seven of which were based in Florida and three in Oregon — was based upon alleged defamatory remarks made about him on various websites. The Oregon defendants' motion challenging jurisdiction and requesting a stay of proceedings on lack of jurisdiction *simpliciter* or that Ontario was *forum non conveniens* was dismissed, as was the Florida defendants' attempt to set aside a previous order regarding forum, to stay proceeding, and for a declaration that Ontario was not the most convenient forum.<sup>122</sup> The defendants who were successfully served were either noted in default, or the action against them discontinued.

Hennessy, J. relied upon the leading case in *Barrick Gold Corp. v. Lopehandia*<sup>123</sup> where Blair J.A., prefaced his reasons with the following observation:

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The Internet represents a communications revolution. It makes instantaneous global communication available cheaply to anyone with a computer and an Internet connection. It enables individuals, institutions, and companies to communicate with a potentially vast global audience. It is a medium which does not respect geographical boundaries. Concomitant with the utopian possibility of creating virtual communities, enabling aspects of identity to be explored, and heralding a new and global age of free speech and democracy, the Internet is also potentially a medium of virtually limitless international defamation.<sup>124</sup>

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While the plaintiff only sought summary judgment, the Court, *sua sponte*, entertained granting an injunction based upon the test set out in *Canada (Human Rights Commission) v. Canadian Liberty Net*:

- The likelihood of a finding of defamation at trial;
- The words in question must be clearly defamatory and obviously impossible to justify; and
- the trial judge's acceptance of a defence of justification would of necessity have to be set aside as some perverse finding on appeal. <sup>125</sup>

Given that the defendants were noted in default, the Court inferred that the plaintiff's allegations were true (Rule 19.02(1) of the *Rules of Civil Procedure*), stating:

43 In the absence of any defence and in view of the deemed admissions to all allegations in the Statement of Claim, there is no difficulty in resolving the question of fact once the question of law is determined.

44 To call someone a career criminal and a child molester is clearly and obviously defamatory. These words are repeated, in modified phrases and sentences, throughout the various websites. The descriptions of the plaintiff, noted above, serve to illustrate both these labels. The statements are clearly capable of being defamatory. And in these circumstances, as untrue, baseless attacks on the character and integrity of the plaintiff, they are clearly defamatory in fact. In the absence of any intent to justify, no reasonable jury would find these words anything but defamatory.

45 As Blair J.A. said in *Barrick Gold*, "[t]he extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that "the truth rarely catches up with a lie" (at para. 32).

46 The allegations and information appearing about the plaintiff on the defendants' websites, and bulletin boards would tend to lower him in the estimation of right thinking members of society and this information would expose him to contempt. I am satisfied that the statements could not justify a verdict other than this. A jury would not be able to find justification for such statements (*Canada Metal Co. Ltd. et al. v. Canadian Broadcasting Corp. et al.* (1975), 7 O.R. (2d) 261 at page 262). <sup>126</sup>

47 Accordingly, I find the words complained of defamatory.

The Court issued a permanent injunction against the defendants on the following terms:

51 This is an exceptional case which calls for the extraordinary relief of an injunction. The defendants have attempted to avoid service, attempted to move the proceedings to Florida and, when unsuccessful, refused to participate in any way in these proceedings.

52 I am satisfied that on a balance of probabilities, a permanent injunction should be granted to prohibit the defendants from continuing to post these comments. They are clearly defamatory and there is no evidence that the defendants have ever, including until the present time, taken any steps to remove the postings from their website.

...

54 An order enjoining the defendants from continuing to comment about the plaintiff cannot be so broad as to preclude them from exercising their rights to free expression (see *Beidas v. Pichler* (2008), 238 O.A.C. 103 (Div. Ct.), at paras. 46-47 on this point).

55 Accordingly, I enjoin the defendants from publishing or republishing:

- (a) any material in the specified articles;
- (b) any material derived from those articles;
- (c) any material pertaining to, or referencing those articles;
- (d) any information relating to the status, lifestyle, personal activities or business of the plaintiff; and
- (e) any other information that is defamatory of the plaintiff.<sup>127</sup>

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Finally, the plaintiff was awarded general and aggravated damages of \$10,000 against each of six of the defendants for their respective involvement in the creation, publication or republication of the libellous statements, with costs submissions reserved to a later date.

In *Astley v. Verdun*,<sup>128</sup> Astley had sued Verdun for libel. In 2011, a jury awarded Astley \$650,000 in damages. Madam Justice Chapnik, the trial judge, subsequently issued an expansive injunction, prohibiting Verdun from communicating with anyone about Astley. Verdun ignored the injunction and did so anyway. On May 23, 2013, Goldstein J. found Verdun guilty of contempt of court and sentenced him to a conditional sentence followed by probation. Justice Goldstein further ordered that Verdun would be monitored by means of regular appearances and that he would have to pay the costs of the contempt proceeding. Any wilful breaches of Mr. Justice Goldstein's order or Madam Justice Chapnik's order would, in Mr. Justice Goldstein's view, undoubtedly result in a period of incarceration in jail.

(a) Unmasking anonymous defendants in United States courts

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The *Communications Decency Act*, 47 U.S.C. §230, discussed previously, shields ISPs from liability both from the statements of third parties, and from failing to disclose the identities of anonymous third-party speakers.<sup>129</sup> *Dendrite v. Doe No. 3*,<sup>130</sup> illustrates the key role the First Amendment plays in disclosure of anonymous defendants on the web. In that case, plaintiffs brought an action against anonymous posters and sought to compel Yahoo! to disclose the defendants' identities. The Court set forth a five-part test requiring the plaintiff to 1) "undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application" 2) identify and set forth the exact statements made by each poster that the plaintiff alleges constitutes defamatory speech 3) allege all elements of the causes of action asserted against the defendants 4) present evidence supporting the claims and 5) demonstrate that on balance and in the particulars of the case the plaintiff's right to identify the speaker outweighs the anonymous defendant's First Amendment right to anonymous speech. The Court rejected the plaintiffs' request as they failed to show adequate harm from the statements.

An alternative test was used in a Delaware case, *Doe v. Cahill*.<sup>131</sup> *Cahill's* test simply rejected the balancing test in *Dendrite* and instead requires that plaintiffs show they can survive a motion for summary judgment.<sup>132</sup> State courts generally use one of these two forms of the test and all conclude that the First Amendment rarely permits disclosure.

(b) Preliminary injunctions

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In the United States the First Amendment plays a large part in preventing preliminary injunctions in many defamation cases. The Supreme Court of the United States recognises that government restriction of speech in the form of prior restraint against the media constitutes "the most serious and least tolerable infringement on First Amendment rights," thus public criticism is frequently upheld.<sup>133</sup> Plaintiffs must independently establish four elements to obtain a preliminary injunction: (1) a likelihood of irreparable harm and the unavailability of an adequate remedy at law; (2) a substantial likelihood of success on the merits; (3) that the threatened injury to the petitioner outweighs any possible harm to the respondent; and (4) the granting of a temporary injunction will not disserve the public interest.<sup>134</sup>

If the allegedly defamatory speech is proven to be unlawful, a narrow injunction is possible but they are still considered impermissible prior restraints.<sup>135</sup> In *Oakley* the Court stated, "injunctions against any speech, even libel, constitute prior restraints" as they can prevent speech even before it occurs, "by requiring court permission before that speech can be repeated." Similar to a preliminary injunction, for a permanent injunction a plaintiff must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."<sup>136</sup>

After plaintiffs Oakley and Jannard acquired the sunglass company defendant McWilliams had been working for, McWilliams began sending the plaintiffs derogatory emails. The emails accused the plaintiffs of criminal activity, adultery, and some contained pornographic images. McWilliams additionally represented himself as the plaintiffs on multiple email accounts and used those email accounts to post death threats. Defendant McWilliams was found to have intentionally published false statements in order to damage the plaintiff's character and reputation. The plaintiffs sought a permanent injunction following the Court's ruling.

In response to the permanent injunction request the Court first thought it best to note that "the traditional answer and the best answer," as to whether to issue an injunction against defamatory speech, "is no." The Court barely touched on the factors normally assessed for an injunction and instead went into a lengthy overview of U.S. court history of denying injunctions in defamation cases:

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Such prior restraints are presumptively unconstitutional, and a heavy burden of justification rests on anyone seeking a prior restraint on the right of free speech . . . [I]njunctions against speech were not permissible in defamation cases under early English and American common law, and the Supreme Court has never departed from this precedent . . . Further, in the infrequent instances where other courts have upheld injunctions of defamatory speech, there have usually been unique and extenuating circumstances and vigorous dissents.<sup>137</sup>

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The U.S. Supreme Court and state courts place heavy, almost insurmountable, burdens on plaintiffs to achieve injunctive relief against defamatory speech.

## **VI. RECOGNITION AND ENFORCEMENT OF CANADIAN CYBERLIBEL JUDGMENTS ABROAD**

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Forum shopping or "libel tourism" remains the sticking point in cross-border defamation actions.

The Ontario Bar Association<sup>138</sup> has sent the Ontario Attorney General, The Honourable John Gerretsen, a gentle reminder<sup>139</sup> to consider the Report of the Expert Advisory Panel on Anti-SLAPP legislation. The Ontario provincial government *Bill 83, Protection of Public Participation Act, 2014* is currently in second reading stage<sup>140</sup> in the Legislative Assembly of Ontario.

That said, the United Kingdom, which is consistently criticized by American free speech and civil liberties advocates as a notoriously plaintiff-friendly libel tourism jurisdiction has taken significant legislative action to dispel this reputation. *The Defamation Act 2013*,<sup>141</sup> which came into force on January 1, 2014, will undoubtedly have some impact on how Canadian defamation law in the digital age responds to the tension between freedom of expression on the one hand, and the protection of reputation and privacy, on the other.

According to one English commentator:

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The Act codifies and consolidates large parts of existing caselaw and statute, specifically in relation to the defences of "justification" (now "truth"), "journalistic qualified privilege" (now "publication on a matter of public interest") and "fair comment" (now "honest opinion"). The latter two defences have been modified and are not mere codifications. Amongst other provisions, the Act establishes (or codifies) a "serious harm" threshold for bringing a defamation claim and introduces a "single publication rule" (potentially of great significance to online publication) and a new defence for website operators.

The Act also reverses the presumption regarding mode of trial — to judge rather than jury.<sup>142</sup>

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The U.K. *Defamation Act 2013* applies in England and Wales only.

In the U.S. the "*Securing the Protection of our Enduring and Established Constitutional Heritage Act*" ("SPEECH Act")<sup>143</sup> represents a retreat from judicial comity, back to judicial isolationism. The SPEECH Act is essentially a blocking statute that restricts enforcement of foreign libel judgments (particularly English libel judgments) in the U.S. rendered against American publishers, journalists and academics unless they meet American First Amendment standards of free speech and freedom of the press.<sup>144</sup>

The irony is that rather than an English libel judgment, it seems that a Canadian libel judgment was the first challenged under the SPEECH Act.

In *Mina Mar Group Inc. v. Divine*,<sup>145</sup> the plaintiffs, Mina Mar Group Inc., a Toronto-based investor relations services, and its principal Miro Zecevic, successfully moved for a partial default judgment for Internet defamation against New Jersey-based defendants, James Divine and Catherine Divine, both of whom were noted in default. Under the *Ontario Rules of Civil Procedure*, pursuant to rule 19.02 (1) of the *Ontario Rules of Civil Procedure*, a defendant who has been noted in default is deemed to admit the truth of all allegations of fact made in the statement of claim.

Justice Perell summarizes the Minamar action as follows:

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[5] Beginning in 2006 and continuing to date, by profuse postings on Internet bulletin boards and websites, particularly the website of InvestorsHub.com Inc., the Defendants, James Divine and Catherine Divine have frequently defamed Mino Mar and Mr. Zecevic. The Defendants' postings, which are authored under the pseudo name of "Stratey" describe the plaintiffs as thieves, crooks, sham artists, liars, dishonest, corrupt, incompetent, and immoral.

[6] As a consequence of the defamatory statements, Mina Mar has lost clients and opportunities for new clients.

[7] Mina Mar and Mr. Zecevic demanded that the Divines withdraw their postings and apologize, but the Divines refused to do so.

[8] On this motion for a partial default judgment, reserving their right to claim special damages (its pecuniary losses) by setting the action down for a trial for an assessment of their business and other losses, Mina Mar and Mr. Zecevic seek general damages, punitive damages, and injunctive relief.<sup>146</sup>

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After a comprehensive review of Canadian damage awards for Internet defamation, Perell J. awarded the plaintiffs \$50,000 for general damage and if the plaintiffs abandon their outstanding claim for special damages, held that an award of \$25,000 for punitive damages would be appropriate. The Court also granted a permanent injunction restraining the defendants from disseminating, posting on the Internet or publishing further defamatory statements concerning the plaintiffs, plus costs.

According to one report,<sup>147</sup> the co-defendant, InvestorsHub.com Inc. ("iHub"), which owns and operates the website where the defamatory statements were posted, settled with the plaintiffs by posting an apology:

A December 2010 letter from InvestorsHub to Mina Mar, posted on Mina Mar's website, states:

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In compliance with the Judgment of the Ontario Superior Court, InvestorsHub.com Inc. ("iHub") hereby apologizes to Mina Mar Group Inc., Mina Mar Group Inc. (of the USA) and Miro Zecevic for defamatory postings authored by third parties not affiliated with iHub that appeared on the iHub website.

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Rather than challenging the Ontario court's jurisdiction at first instance, iHub previously brought a declaratory judgment action against Mina Mar and Zecevic in Florida which was dismissed without prejudice for lack of subject-matter/diversity jurisdiction.<sup>148</sup>

In a subsequently filed federal complaint, iHub, along with its former president Robert Zumbrunnen and former employee, Matthew Brown, accused Mina Mar Canada (and its U.S. affiliate) and Zecevic of engaging in "libel tourism," alleging that "Canada provides less protection for free speech than United States and Florida law." The Canadian defendants initially filed an Answer and Affirmative Defenses<sup>149</sup> denying the libel tourism allegation and asserting estoppel arising from the prior settlement and online apology.<sup>150</sup> However, the parties entered into a Stipulated Final Judgment which reads in part:

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19. The parties acknowledge, and the Court finds, that Canadian law does not provide as much protection of speech as the First Amendment, federal law, and Florida law. For example, the First Amendment requires that a defamation plaintiff who is either a public official or public figure must prove that the defendant made the defamatory statement with actual malice, meaning that the defendant either knew the statement was false or acted with reckless disregard to the statement's truth or falsity. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 111 L. Ed. 2d 686 (1964); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967). The Canadian Supreme Court has specifically refused to adopt the Sullivan actual malice standards for Canadian defamation actions. See *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 (Can.) (stating that Court will not adopt Sullivan standard in Canada). See also *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640 (Can.) (modifying Canadian defamation law while still rejecting First Amendment standards); Rodney A. Smolla, Law of Defamation §1:9.75, at 1-17-1-29 (describing differences between United States law and "the more plaintiff-friendly" Canadian defamation law).

20. Nor does Canadian law provide the protections for freedom of on-line speech provided by the *Communications Decency Act*, 47 U.S.C. §230.

21. In addition, the InvestorsHub Parties and the Mina Mar Parties are the only parties whose rights would be affected by the final judgment and both the InvestorsHub Parties and the Mina Mar Parties consent to entry of this Final Judgment. As such, entry of final judgment in favor of the InvestorsHub Parties is appropriate. See Florida Wildlife Federation, 2009 WL 5217062, at \*3.

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Accordingly, the Ontario judgment was declared unenforceable pursuant to the SPEECH Act and Florida's *Uniform Out-of-Country Foreign Money-Judgment Recognition Act*.<sup>151</sup>

In *Pontigon v. Sanchez-Lord*,<sup>152</sup> the Missouri Court of Appeals-East District reversed a lower court decision registering an Ontario libel judgment. The parties were first cousins. The plaintiff/respondent, Ms. Sanchez-Pontigon and her husband, both Ontario residents, sued the defendant/appellant, Ms. Manalansand-Lord and her American publisher for libel arising from statements made in Ms. Manalansand-Lord's self-published autobiography entitled, "From Fieldhand to Ph.D., Ms. Asia International Motivation for Success and Happiness," the first chapter of which was posted on the Internet.

No one had appeared on behalf of the defendants at trial, despite having been given notice by the trial coordinator through email and fax and by plaintiffs' counsel via email. In reported reasons in *Sanchez-Pontigon v. Manalansand-Lord*,<sup>153</sup> Quinlan, J. of the Ontario Superior Court of Justice awarded Sanchez-Pontigon \$25,000 in general damages and \$12,500 as aggravated damages for defamation relating to accusations that the plaintiff was involved in criminal activity, including kidnapping and fraud. The Ontario court also awarded \$13,716 in costs.

According to the Missouri Court of Appeals:

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This "judgment" was filed in St. Charles County, Missouri — Ms. Lord was given notice — and after hearing the Circuit Court granted the registration, from which a garnishment issued.

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Note the quotation marks around the word "judgment."

Relying on the SPEECH Act, the Missouri Appeals Court reversed, the underlying registration was set aside and the garnishment quashed. The Missouri Appeals Court held that the Circuit Court failed to analyze whether the Ontario judgment met U.S. First Amendment standards of free speech and freedom of the press protection. The Missouri Appeals Court also refused to give the Ontario judgment "full faith and credit" on the grounds that:

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This record does not contain a certified and authenticated copy of the Canadian "judgment" by the Canadian court and thus fails to comply with the full faith and credit clause of the U.S. Constitution. Art. IV §1, U.S. Constitution. There is simply not enough here to show that this "judgment" is entitled to full faith and credit in a Missouri court. As such, the Circuit Court should not have proceeded to hearing, judgment and execution.

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Consequently, the plaintiff was ordered to file a certified and authenticated Canadian judgment in accordance with Missouri procedural law and the Circuit Court's decision was reversed and remanded for further hearing.<sup>154</sup>

## 1. United States Enforcement of Foreign Cyberlibel Judgements

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There is no specific U.S. statute that covers enforcement of foreign judgments in the United States. Federal Rule of Civil Procedure 69 provides that a federal court's execution of a foreign judgment "must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." Each state has different enforcement rules.

For example, the District of Columbia has adopted the *2005 Uniform Foreign-country Money Judgments Recognition Act* (URA).<sup>155</sup> It applies to judgments that grant or deny recovery of a sum of money and are 1) final, 2) conclusive and 3) enforceable. This means that the judgment must not be subject to additional proceedings, though a D.C. court is not required to stay recognition of a foreign judgment merely because it is subject to possible appeal. Overall, the D.C. state courts will not acknowledge a foreign judgment for enforcement of injunctive relief.

Further, a foreign judgment must generally be compatible with U.S. due process requirements. Using D.C. as an example again, the courts may not recognize a foreign judgment if it was rendered under a judicial system that does not provide impartial tribunals or procedures "compatible with the requirements of due process of law" under the U.S. Constitution, or the court lacked jurisdiction.<sup>156</sup> Despite this, the foreign country's judicial process need not be identical to America's.<sup>157</sup> The constitution of the foreign country needs to establish some minimum due process guarantees<sup>158</sup> and there must be evidence that the foreign country's courts actually provide due process.<sup>159</sup>

In considering the enforceability of a foreign defamation judgment in the United States, Constitutional concerns are paramount since one cannot render a defamation judgment in the United States without implicating the First Amendment. As mentioned above, The SPEECH Act prohibits a U.S. court from recognizing or enforcing a foreign defamation judgment unless the foreign court's law applied standards at least as protective of free speech as the U.S. Constitution and the constitution of the state in which the domestic court is located.<sup>160</sup>

## VII. CONCLUSION

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Striking a fair balance between freedom of expression and protection of reputation in the digital age is the hallmark of a free and democratic society. In many respects, Canada lags behind its American and English cousins in the development of Internet defamation law. Where the U.K. has adopted a single publication rule and has moved significantly to address the issue of "libel tourism" through the passage of the *Defamation Act 2013*, Canadian defamation law remains a patchwork quilt of provincial statutes and common law principles that do not necessarily reflect emergent technologies and globalized, real-time communications. This, in some measure, is due to the unique nature of Canadian constitutional division of powers and anachronistic provincial libel and slander statutes that are in need of an overhaul.

Nevertheless, Canadian courts have expressly rejected the American approach and favour reputation over free speech. This is unsurprising, given that section 2(b) of the *Charter* is interpreted more liberally than the U.S. First Amendment. Moreover, the U.S. SPEECH Act remains a roadblock for Canadian plaintiffs attempting to enforce judgments obtained against American libel defendants, and represents a retreat from an era of judicial comity into a cross-border "war of the words." Will Canadian judges take umbrage with their American brethren and sistren refusing to enforce Canadian libel judgments unless they meet American First Amendment standards? Is this another example of American exceptionalism? Time will tell.

### Footnotes

- 1 Uta Kohl, JURISDICTION AND THE INTERNET: REGULATORY COMPETENCE OVER ONLINE ACTIVITY (Cambridge, U.K.: Cambridge University Press, 2007) at 111 [Kohl].

- 2 *Scott v. Sampson* (1882), 8 Q.B.D. 491 (Eng. Div. Ct.) at p. 503, quoted in *Lever v. George*, 1950 CarswellOnt 33, [1950] O.R. 115, [1950] 2 D.L.R. 85 (H.C.), cited in Klar, et al., REMEDIES IN TORT, Rainaldi (Ed.) (Toronto: Carswell-Thompson Professional Publishing, 2006-Rel.1-looseleaf), at 6-17).
- 3 <[www.internationalboundarycommission.org/history.html](http://www.internationalboundarycommission.org/history.html)>.
- 4 Gerald Schmitz, Canada and the United States: US-Canada-US relations: Introduction and overview (Parliament of Canada, January 2009) (available at <[www.parl.gc.ca/content/lop/researchpublications/prb0834\\_01-e.htm](http://www.parl.gc.ca/content/lop/researchpublications/prb0834_01-e.htm)> (last access May 4, 2015))
- 5 Fra Elbert Hubbard, INSPIRATIONAL WRITINGS OF ELBERT HUBBARD, Kessinger Publishing, LLC, 2005.
- 6 In *Color Your World Corp. v. Canadian Broadcasting Corp.*, 1998 CarswellOnt 535, 156 D.L.R. (4th) 27 (C.A.) at p. 36 [D.L.R.], ; leave to appeal refused [1998] 2 S.C.R. ix (S.C.C.), Abella J.A. (as she then was) defined defamation as follows:

A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him [or her] in the estimation of right-thinking members of society generally and in particular to cause him [or her] to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right-thinking member of society. Hence the test is an objective one . . .

- 7 This article does not discuss criminal libel which remains an indictable offence in Canada: See *Criminal Code of Canada*, R.S.C. c. C-34, Defamatory Libel, ss. 298-300 (as am.).
- 8 For a discussion on the threshold issue and test for determining whether words used are capable of defamatory meaning: See *St. Lewis v. Rancourt*, 2014 ONSC 3209, 2014 CarswellOnt 7044 (S.C.J.); additional reasons 2014 CarswellOnt 11424 (S.C.J.), available at: <[www.canlii.org/en/on/onsc/doc/2014/2014onsc3209/2014onsc3209.html](http://www.canlii.org/en/on/onsc/doc/2014/2014onsc3209/2014onsc3209.html)>.
- 9 *Sagman v. Bell Telephone Co. of Canada*, 2014 ONSC 4183, 2014 CarswellOnt 9413, 121 O.R. (3d) 607 (S.C.J.) (Ont. S.C.J.) per Morgan, J.[*Sagman*].
- 10 *Ibid.*
- 11 *Kohl*, at 112-113.
- 12 Raymond E. Brown THE LAW OF DEFAMATION IN CANADA, 2nd ed. (1999).
- 13 See the Supreme Court of Canada decisions in *Cusson v. Quan*, 2009 SCC 62, 2009 CarswellOnt 7958, 2009 CarswellOnt 7959 and the companion decision in *Grant v. Torstar Corp.*, 2009 SCC 61, 2009 CarswellOnt 7956, 2009 CarswellOnt 7957, recognizing the defence of Responsible Communication on Matters of Public Interest (also known as the "responsible journalism" defence), which applies to journalists and non-journalists (i.e. bloggers) alike. In *Grant v. Torstar Corp.*, Binnie J. at paras. 96-97 held:

[96] A second preliminary question is what the new defence should be called. In arguments before us, the defence was referred to as the responsible journalism test. This has the value of capturing the essence of the defence in succinct style. However, the traditional media are rapidly being complemented by new ways of communicating on matters of public interest, many of them online, which do not involve journalists. These new disseminators of news and information should, absent good reasons for exclusion, be subject to the same laws as established media outlets. I agree with Lord Hoffmann that the new defence is "available to anyone who publishes material of public interest in any medium": *Jameel*, at para. 54.

[97] A review of recent defamation case law suggests that many actions now concern blog postings and other online media which are potentially both more ephemeral and more ubiquitous than traditional print media. *While established journalistic standards provide a useful guide by which to evaluate the conduct of journalists and non-journalists alike*, the applicable standards will necessarily evolve to keep pace with the norms of new communications media. For this reason, it is more accurate to refer to the new defence as responsible communication on matters of public interest. [emphasis added]

- 14 But see *R. v. National Post*, 2010 SCC 16, 2010 CarswellOnt 2776, 2010 CarswellOnt 2777, where Binnie J. discusses the scope of journalist-source confidentiality and journalistic privilege, and appears to maintain the distinction between traditional media and citizen journalists, bloggers, etc. based upon unspecified professional journalistic standards.
- 15 See e.g. *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284 (9th Cir., 2014) at p. 1288.
- 16 See e.g. *Internet Solutions Corp. v. Marshall*, 39 So.3d 1201 (Fla., 2010) at p. 1214 n.8; *SPX Corp. v. Doe*, 253 F.Supp.2d 974 (N.D. Ohio, Div. Eastern, 2003) at p. 978; Cal. Civ. Code §§44, 45a, & 46 (2015); *Dillon v. City of New York*, 261 A.D.2d 34 (N.Y.A.D., 1999) at p. 38.
- 17 *New York Times Co. v. Sullivan*, 376 U.S. 254 (Ala. S.C., 1964).
- 18 *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (Ill. S.C., 1974).
- 19 *Ibid.*
- 20 *NYT*, 376 U.S. 254.
- 21 *Hill v. Church of Scientology of Toronto*, 1995 CarswellOnt 396, 1995 CarswellOnt 534, [1995] 2 S.C.R. 1130.

- 22 485 U.S. 46 (Sup. Ct., 1988).
- 23 The Court found that that this standard applied in a claim for intentional infliction of emotional distress based upon a caricature of the plaintiff published in the defendant's magazine. *Ibid.* at 56-57.
- 24 See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). For further explanation, see *infra* U.S. Jurisdiction.
- 25 See *Jackson v. BellSouth Telecommunications*, 372 F.3d 1250 (11th Cir., 2004) at p. 1274 (Discussing absolute immunity for acts occurring during judicial proceedings).
- 26 See e.g. *Abraham v. Lancaster Community Hospital*, 217 Cal. App. 3d 796 (Cal. App. 2d Dist., 1990) at p. 823; *Ortega Trujillo v. Banco Central Del Ecuador*, 17 F. Supp. 2d 1334 (S.D. Fla., 1998) at p. 1338; *Rakofsky v. Washington Post*, 39 Misc.3d 1226(A) (N.Y. Sup., 2013) (finding that the fair report privilege protected alleged "misrepresentation" of statements in various news articles).
- 27 See e.g. *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (Ill. S.C., 1974) at pp. 339-340.
- 28 *Black v. Breeden*, 2009 CarswellOnt 1730, 73 C.P.C. (6th) 83, 309 D.L.R. (4th) 708, [2009] O.J. No. 1292 (S.C.J.) per Belobaba J., ; additional reasons 2009 CarswellOnt 2707 (S.C.J.); affirmed 2010 CarswellOnt 5877 (C.A.); affirmed 2012 CarswellOnt 4272, 2012 CarswellOnt 4273 (S.C.C.).
- 29 *Muscutt v. Courcelles*, 2002 CarswellOnt 1756, 60 O.R. (3d) 20 (C.A.); additional reasons 2002 CarswellOnt 2313 (C.A.).
- 30 *Van Breda v. Village Resorts Ltd.*, 2010 CarswellOnt 549, 98 O.R. (3d) 721 (C.A.); additional reasons 2010 CarswellOnt 1751 (C.A.); affirmed 2012 CarswellOnt 4268, 2012 CarswellOnt 4269 (S.C.C.).
- 31 In *Club Resorts Ltd. v. Van Breda*, (sub nom. *Van Breda v. Village Resorts Ltd.*) 2012 SCC 17, 2012 CarswellOnt 4268, 2012 CarswellOnt 4269 Le Bel J. further revised the "real and substantial connection" test for assuming jurisdiction over non-resident defendants based upon the following four presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:
- (a) the defendant is domiciled or resident in the province;
  - (b) the defendant carries on business in the province;
  - (c) the tort was committed in the province; and
  - (d) a contract connected with the dispute was made in the province.
- 32 *Black v. Breeden*, 2010 ONCA 547, 2010 CarswellOnt 5877, 102 O.R. (3d) 748, 76 C.C.L.T. (3d) 52, 91 C.P.C. (6th) 94, 321 D.L.R. (4th) 659, 265 O.A.C. 177, [2010] O.J. No. 3423; affirmed 2012 CarswellOnt 4272, 2012 CarswellOnt 4273 (S.C.C.).
- 33 *Ibid.* at paras. 36-37.
- 34 *Ibid.* at para. 86 per Karakatsanis J.A., citing, *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, 1993 CarswellBC 1257, 1993 CarswellBC 47, [1993] 1 S.C.R. 897 at p. 920 [S.C.R.].
- 35 *Ibid.* at paras. 86-88.
- 36 *Banro Corp. v. Éditions Écosociété Inc.*, 2010 ONCA 416, 2010 CarswellOnt 3776, [2010] O.J. No. 2389; affirmed 2012 CarswellOnt 4270, 2012 CarswellOnt 4271 (S.C.C.).
- 37 *Ibid.* at paras. 1-2.
- 38 *Banro Corp. v. Éditions Écosociété Inc.*, 2012 SCC 18, 2012 CarswellOnt 4270, 2012 CarswellOnt 4271 [*Banro*].
- 39 *Black v. Breeden*, 2012 SCC 19, 2012 CarswellOnt 4272, 2012 CarswellOnt 4273 [*Black*].
- 40 *Ibid.* at para. 36.
- 41 *Banro*, *supra* note 38, at para. 55.
- 42 *Ibid.* at para. 60-62.
- 43 *Black*, *supra* note 39, at para. 20.
- 44 *Banro*, at *supra* note 38, at paras. 37-40.
- 45 *Paulsson v. Cooper*, 2011 ONCA 150, 2011 CarswellOnt 1164, 105 O.R. (3d) 28; additional reasons 2011 CarswellOnt 3498 (C.A.) [Disclosure: the author was co-counsel for the plaintiff at motions court level].
- 46 *Barrick Gold Corp. v. Blanchard & Co.*, 2003 CarswellOnt 6739 (S.C.J.); additional reasons 2004 CarswellOnt 9854 (S.C.J.).
- 47 *Bangoura v. Washington Post*, 2005 CarswellOnt 4343, 258 D.L.R. (4th) 341 (C.A.); additional reasons 2005 CarswellOnt 7304 (C.A.); leave to appeal refused 2006 CarswellOnt 932, 2006 CarswellOnt 933 (S.C.C.).
- 48 "Black to See 'substantial' payout from libel settlement" The Canadian Press. Published Thursday, June 23, 2011 10:49PM EDT via CTV News: (available at: <[www.ctvnews.ca/black-to-see-substantial-payout-from-libel-settlement-1.661475](http://www.ctvnews.ca/black-to-see-substantial-payout-from-libel-settlement-1.661475)> (last accessed May 4, 2015)
- 49 See discussion the Supreme Court of Canada decision in *Crookes v. Newton*, *infra*.

- 50 *Van Breda*, *supra* note 30, at para. 87.
- 51 *Crookes v. Wikimedia Foundation Inc.*, 2011 SCC 47, 2011 CarswellBC 2627, 2011 CarswellBC 2628 [*Crookes*].
- 52 *Ibid.* at paras. 27-30, 42.
- 53 *Ibid.* at para. 52 per McLachlin C.J., and Fish J.
- 54 *Ibid.* at para. 96 per Deschamps J.
- 55 *Ibid.* at para. 43 per Abella J. (Binnie, Le Bel, Charron, Rothstein and Cromwell JJ. concurring).
- 56 In *Baglow v. Smith*, 2015 ONSC 1175, 2015 CarswellOnt 2391 (C.J.) Polowin J. found that the defendant message board operators were liable for anonymous defamatory posts, but held that the defence of fair comment applied and dismissed the plaintiff's claim.
- 57 Georgia, New York, Connecticut and Minnesota have such statutes.
- 58 *International Shoe Co. v. State of Washington*, 326 U.S. 310 (Wash. S.C., 1945).
- 59 See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) at p. 475.
- 60 *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209 (11th Cir., 1999) at p. 1220.
- 61 465 U.S. 783 (1984).
- 62 *Brayton Purcell LLP v. Recordon & Recordon*, 575 F.3d 981 (9th Cir., 2009) at p. 986.
- 63 *Calder*, 465 U.S. at 789.
- 64 *Bancroft & Masters Inc. v. Augusta National Inc.*, 223 F.3d 1082 (9th Cir., 2000) at p. 1087.
- 65 *IMO Industries, Inc. v. Kiekert AG*, 155 F.3d 254 (3d Cir., 1998) at pp. 265-266.
- 66 *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir., 2002); See also *Remick v. Manfredy*, 238 F.3d 248 (3d Cir., 2001) at p. 259, fn. 3 (holding that the "mere posting of information or advertisements on an Internet website does not confer nationwide personal jurisdiction"); and see *Herman v. Cataphora, Inc.*, 730 F.3d 460 (5th Cir., 2013) at pp. 465-466 (finding that allegedly defamatory statements made on the Internet must have a "focal point" in the forum state to create personal jurisdiction).
- 67 See *Revell v. Lidov*, 317 F.3d 467 (5th Cir., 2002) at p. 472; see also *Internet Solutions Corp. v. Marshall*, 2010 U.S. Dist. LEXIS 145503 (M.D. Fla., 2010) at \*12; and see *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir., 1997) (finding that merely operating a web page accessible in the forum state, thereby potentially creating harm in that state, does not create liability in the state).
- 68 *Dépeçage* has been defined as "the process of applying different rules of different states on the basis of the precise issue involved." In *re Air Crash Disaster Near Chicago*, 644 F.2d 594 (7th Cir., 1981) at p. 611, cert. denied by *Lin v. American Airlines Inc.*, 454 U.S. 878 (1981).
- 69 Under this concept, a court uses its conflicts of laws principles for each separate issue. See *Judge v. American Motors Corp.*, 908 F.2d 1565 (11th Cir., 1990) at p. 1578, citing *Hertz Corp. v. Piccolo*, 453 So.2d 12 (Fla., 1984); and see *Estate of Miller ex rel. Miller v. Thrifty Rent-A-Car System, Inc.*, 609 F.Supp.2d 1235 (M.D. Fla. Div. Orlando, 2009) at p. 1251.
- 70 Anti-SLAPP statutes are meant to prevent Strategic Lawsuits Against Public Participation [SLAPP suits], i.e. meritless lawsuits that a plaintiff brings not because he believes he has a valid claim, but because he wishes to silence a defendant's protected speech or punish him for it. Generally, they provide a procedural mechanism for dismissing such suits before significant attorney's fees can be incurred, and allow for a defendant to recover his attorney's fees if he prevails on a motion to dismiss under the statute.
- 71 See NRS 41.637.
- 72 The plaintiff must show by "clear and convincing evidence" that he has a "probability of prevailing on the claim." NRS 41.660(3)(b).
- 73 See NRS 41.670(1)(c).
- 74 See Cal. Civ. Code 425.16.
- 75 See *Davis v. Cox*, 183 Wn.2d 269 (Wash. 2015). Washington's law required plaintiffs to show a "probability of prevailing on the claim" by "clear and convincing evidence." However, the clear and convincing evidence standard violated the Washington Constitution's civil jury trial right. The Court held that a requirement "that the trial judge [must] make a factual determination of whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim" and that this "creates a truncated adjudication of the merits of a plaintiff's claim, including non-frivolous factual issues, without a trial. Such a procedure invades the jury's essential role in deciding debatable questions of fact. In this way, RCW 4.24.525(4)(b) violates the right of trial by jury under article I, section 21 of the Washington Constitution."
- 76 This statute is set to be amended in July 2015, to cover a broader array of speech, though still not to the extent that states such as Nevada and California protect speech.
- 77 See Fla. Stat. 768.295.
- 78 See Fla. Stat. 720.304(4).
- 79 47 U.S.C. §230.
- 80 *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir., 1997).

- 81 *Ibid.* at 331.
- 82 *Ibid.* at 332.
- 83 *Shtauf v. Toronto Life Publishing Co.*, 2013 ONCA 405, 2013 CarswellOnt 8040 [*Shtauf*].
- 84 *Libel and Slander Act*, R.S.O. 1990 c. L.12.
- 85 *Limitations Act*, 2002, S.O 2002 c.24.
- 86 *Shtauf v. Toronto Life Publishing Co.*, 2010 ONCA 82, 2010 CarswellOnt 487.
- 87 *Bella v. Young*, 2006 SCC 3, 2006 CarswellNfld 19, 2006 CarswellNfld 20, [2006] 1 S.C.R. 108.
- 88 *Shtauf*, *supra* note 83, at paras. 45-48.
- 89 *Ibid.* at para. 27-40.
- 90 *Ibid.* at paras. 21-26.
- 91 *Ibid.* at paras. 71-72.
- 92 *Libel and Slander Act*, R.S.O. 1990 c. L.12., §1(1).
- 93 See *Tucows.Com Co. v. Lojas Renner S.A.*, 2011 ONCA 548, 2011 CarswellOnt 8081; leave to appeal refused 2012 CarswellOnt 6413, 2012 CarswellOnt 6414 (S.C.C.), which held that a domain name is personal property.
- 94 See California *Code of Civil Procedure* §§3425.1-3425.5; see also Florida Statutes §§770.05, 770.07.
- 95 California and New York are some notable examples of states with this short limitation period. Tennessee even has a six-month limitation period for slander actions.
- 96 See Fla. Stat. §770.07 (providing that "[t]he cause of action for damages founded upon a single publication or exhibition or utterance, as described in s. 770.05, shall be deemed to have occurred at the time of the first publication or exhibition or utterance thereof in this state").
- 97 California has a similar provision for a plaintiff to recover general or exemplary damages. See Cal. Civ. Code §48a (2008). Unlike Florida's statutes, however, non-compliance with this provision does not potentially expose the plaintiff's case to dismissal.
- 98 See *Bridges v. Williamson*, 449 So. 2d 400 (2d Dist., 1984) at p. 401.
- 99 See *Comins v. Vanvoorhis*, 135 So. 3d 545 (5th Dist., 2014) at p. 560.
- 100 See *Mancini v. Personalized Air Conditioning & Heating, Inc.*, 702 So. 2d 1376 (4th Dist., 1997).
- 101 *Irwin Toy Ltd. v. Joe Doe*, 2000 CarswellOnt 3164, 12 C.P.C. (5th) 103, [2000] O.T.C. 561 (S.C.J.).
- 102 *Ibid.* See also *Diamante Development Corporation v. John Doe* (April 17, 2002), Doc. Toronto 02-CV-227609 CM3 (Ont. S.C.J.) per Chapnik, J.; *Ontario First Nations Limited Partnership v. John Doe* (June 3, 2002), Doc. Toronto 02-CV-229617CM3 (Ont. S.C.J.); *Canadian Blood Services v. John Doe* (June 17, 2002), Doc. Ottawa 02-CV-20980 (Ont. S.C.J.).
- 103 *Warman v. Wilkins-Fournier*, 2010 ONSC 2126, 2010 CarswellOnt 2737 (Div. Ct.) (per Wilton-Siegel, J., Kent and Heeney, JJ. concurring) [*Warman*].
- 104 *Ibid.* at para. 34.
- 105 *Rules of Civil Procedure*, RRO 1990, Reg. 194.
- 106 *Courts of Justice Act*, R.S.O. 1990, c. C.43., §96(1).
- 107 *Norwich Pharmacal Co. v. Customs & Excise Commissioners* (1973), [1974] A.C. 133 (U.K. H.L.), [*Norwich Pharmacal*].
- 108 *Ibid.* at 199.
- 109 See *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619, 2009 CarswellOnt 4854; additional reasons 2009 CarswellOnt 7755 (C.A.) where Justice Cronk cited with approval Justice Mason's formulation of the factors for *Norwich Pharmacal* relief in *Alberta Treasury Branches v. Leahy*, 2000 CarswellAlta 1648, 270 A.R. 1 (Q.B.); affirmed 2002 CarswellAlta 578, 303 A.R. 63 (C.A.); leave to appeal refused 2002 CarswellAlta 1510, 2002 CarswellAlta 1511, [2002] S.C.C.A. No. 235 [*Leahy*].
- 110 *The Canadian Charter of Rights and Freedoms, The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 [the *Charter*].
- 111 *Warman*, *supra* note 103, at paras. 22-24.
- 112 *P. (D.) v. Wagg*, 2002 CarswellOnt 3288, 61 O.R. (3d) 746 (Div. Ct.); reversed in part 2004 CarswellOnt 1983, 71 O.R. (3d) 229 (C.A.); additional reasons 2004 CarswellOnt 2660 (C.A.) [*D.P. v. Wagg*].
- 113 *Pichler v. Meadows*, 2010 ONSC 1863, 2010 CarswellOnt 1932 (S.C.J.) [*Pichler*].
- 114 *Beidas v. Pichler*, 2008 CarswellOnt 3183, 294 D.L.R. (4th) 310, 238 O.A.C. 103 (Div. Ct.); additional reasons 2008 CarswellOnt 7329 (Div. Ct.) [*Beidas*].
- 115 *Ibid.* at para. 14.
- 116 *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] 1 S.C.R. 311.

- 117 *Pichler*, *supra* note 113, per Spence J., (citing Murray, J. in *Beidas* who cites Perell, J. in *Sherwood Dash Inc. v. Woodview Products Inc.*, 2005 CarswellOnt 7191, [2005] O.J. No. 5298 (S.C.J.)).
- 118 *Ibid.* at para. 31.
- 119 *Ibid.* at paras. 30-32, 40-41.
- 120 *Ibid.* at paras. 42-49.
- 121 *Henderson v. Pearlman*, 2009 CarswellOnt 4875 (S.C.J.); additional reasons 2010 CarswellOnt 75 (S.C.J.).
- 122 *Ibid.*
- 123 *Barrick Gold Corp. v. Lopehandia*, 2004 CarswellOnt 2258, 71 O.R. (3d) 416 (C.A.).
- 124 *Ibid.*
- 125 *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CarswellNat 388, 1998 CarswellNat 387, [1998] 1 S.C.R. 626 at para. 49 [*Canadian Liberty Net*].
- 126 *Henderson v. Pearlman*, *supra* note 121, at paras. 43-47.
- 127 *Ibid.* at para. 51-55.
- 128 *Astley v. Verdun*, 2011 ONSC 3651, 2011 CarswellOnt 5011 (S.C.J.) per Chapnik J.; see also *Astley v. Verdun*, 2013 ONSC 6996, 2013 CarswellOnt 15612 (S.C.J.); additional reasons 2014 CarswellOnt 3330 (S.C.J.) and *Astley v. Verdun*, 2013 ONSC 2998, 2013 CarswellOnt 6664 (S.C.J.) per Goldstein J., ; affirmed 2014 CarswellOnt 13412 (C.A.).
- 129 See *Zeran v. American Online*, *supra* note 80.
- 130 *Dendrite International Inc. v. Doe*, 342 N.J. Super. 134 (U.S. N.J. Super. A.D., 2001).
- 131 *Doe v. Cahill*, 884 A.2d 451 (Del., 2005).
- 132 *Ibid.* at 464.
- 133 *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (Sup. Ct., 1979).
- 134 *Burger King Corp. v. Cabrera*, 2010 U.S. Dist. LEXIS 141413, 2010 WL 5834869 (S.D. Fla., 2010).
- 135 See *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087 (C.D. Cal., 2012) at p. 1089.
- 136 *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) at p. 391.
- 137 *Ibid.* at 1089.
- 138 "OBA Submission to the Advisory Panel on Anti-SLAPP Legislation": <[www.oba.org/CMSPages/GetFile.aspx?guid=8f076ea6-1039-4f9e-a7abf1ffb013529c](http://www.oba.org/CMSPages/GetFile.aspx?guid=8f076ea6-1039-4f9e-a7abf1ffb013529c)> (last accessed May 4, 2015).
- 139 Dianne Saxe, Ontario Bar Association prods Attorney General on Anti-SLAPP Law — Envirolaw Environmental Law and Litigation (Last accessed May 4, 2015).
- 140 Bill 83, *Protection of Public Participation Act, 2014*: <[www.ontla.on.ca/bills/billsfiles/40\\_Parliament/Session2/b083.pdf](http://www.ontla.on.ca/bills/billsfiles/40_Parliament/Session2/b083.pdf)> (last accessed May 4, 2015). Bill status: <[www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&BillID=2810detailPage=bills\\_detail\\_status](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2810detailPage=bills_detail_status)> (last accessed May 4, 2015).
- 141 *Defamation Act 2013*, 2013, c.26 <[www.legislation.gov.uk/ukpga/2013/26/contents/enacted](http://www.legislation.gov.uk/ukpga/2013/26/contents/enacted)> (last accessed May 4, 2015).
- 142 See Iain Willson and Max Campbell, *Defamation Act 2013: A Summary and Overview* — Inform's Blog <[bit.ly/1hLmVLe](http://bit.ly/1hLmVLe)> (last accessed May 4, 2015).
- 143 *Securing the Protection of our Enduring and Established Constitutional Heritage Act, SPEECH Act, H.R. 2765*, 111th Congress (2009-2010) 08/10/2010, Public Law No: 111-223, available at: <[beta.congress.gov/111/bills/hr2765/BILLS-111hr2765enr.pdf](http://beta.congress.gov/111/bills/hr2765/BILLS-111hr2765enr.pdf)> (last accessed May 4, 2015).
- 144 For a comprehensive discussion of the SPEECH Act, see Laura E. Little, "Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States," *European Yearbook of Private International Law*, Vol. 14, (2012) and Steven Richman, "INTERNET ABUSES: EFFECTIVE STRATEGIES FOR DEALING WITH THEM" (February 2014).
- 145 *Mina Mar Group Inc. v. Divine*, 2011 ONSC 1172, 2011 CarswellOnt 1122 (S.C.J.) [Minamar].
- 146 *Ibid.* at paras. 5-8.
- 147 Bridget Freeland, "Investing Website Wants Canadian Defamation Judgment Thrown Out", Courthouse News: available at "[www.courthousenews.com/2011/01/14/33315.htm](http://www.courthousenews.com/2011/01/14/33315.htm)" (last accessed May 4, 2015).
- 148 *InvestorHub.com Inc. v. Mirko Zecevic*, Doc. 09-60060-CIV-ZLOCH (S. Dist. Fla.) Final Order of Dismissal per Judge William J. Zloch, available at: <[www.minamargroup.com/docs/dismissal\\_order\\_investors\\_Hub.pdf](http://www.minamargroup.com/docs/dismissal_order_investors_Hub.pdf)> (last accessed May 4, 2015)
- 149 *InvestorsHub.com, Inc. v. Mina Mar Group, Inc.*, 2011 WL 12506239 (N.D. Fla., Div. Tallahassee, 2011) Defendants' Answer and Affirmative Defenses, available at: <[www.docstoc.com/docs/71665516/InvestorsHubcom-v-Mina-Mar-Doc-4-filed-27-Jan-11](http://www.docstoc.com/docs/71665516/InvestorsHubcom-v-Mina-Mar-Doc-4-filed-27-Jan-11)> (last accessed May 4, 2015)

- 150 [InvestorsHub.com, Inc. v. Mina Mar Group, Inc.](#), 2011 WL 12506239 (N.D. Fla., Div. Tallahassee, 2011) Stipulated Final Judgment per Judge Robert L. Hinkle, available at: <[adserv.stocksites.com/images/pubdocs/mmg/Florida\\_Final\\_Judgment\\_iHub\\_v\\_MinaMar.pdf](http://adserv.stocksites.com/images/pubdocs/mmg/Florida_Final_Judgment_iHub_v_MinaMar.pdf)> (last accessed May 4, 2015).
- 151 Stipulated Final Judgment, *ibid.* at paras. 22-23, citing SPEECH Act and *Out-of-Country Foreign Money-Judgment Recognition Act*, Fla. Stat. §§55.601-55.607.
- 152 [Pontigon v. Lord](#), 340 S.W.3d 315 (Mo. App., E.D., 1st Div., 2011) per Kenneth M. Romines, J. (Roy L. Richter, C.J. and Kelly Broniec, Sp.J., concurring), available at: <[www.courts.mo.gov/file.jsp?id=46052](http://www.courts.mo.gov/file.jsp?id=46052)>.
- 153 [Sanchez-Pontigon v. Manalansan-Lord](#), 2009 CarswellOnt 3183, [2009] O.J. No. 2293 (S.C.J.).
- 154 In the very recent Supreme Court of Nova Scotia judgment in [Trout Point Lodge Ltd. v. Handshoe](#), 2014 NSSC 62, 2014 CarswellNS 110, Justice Kevin Coady ordered the defendant to pay the plaintiffs \$390,000 for defamation, copyright infringement and misappropriation of personality, after the blogger repeatedly smeared the Nova Scotia couple and incorrectly linked them to a Louisiana political scandal. The plaintiffs' earlier judgment: [Trout Point Lodge Ltd. v. Handshoe](#), 2012 NSSC 245, 2012 CarswellNS 585, was declared unenforceable under the SPEECH ACT by a Mississippi District Court, later affirmed on appeal: [Trout Point Lodge, Ltd. v. Handshoe](#), 729 F. 3d 481 (5th Cir., 2013). According to the Toronto Star,
- Contacted by the Star, Handshoe called the Nova Scotia court decision "worthless" and vowed to continue to write about the lodge and urge Americans to stay away from it. Handshoe's lawyer, Jack "Bobby" Truitt of Covington, La, said the Nova Scotia decision isn't consistent with American free speech protection.
- See Peter Edwards, "Nova Scotia couple wins copyright lawsuit against homophobic U.S. blogger," Toronto Star, Monday, February 24, 2014, <[www.thestar.com/news/canada/2014/02/24/nova\\_scotia\\_couple\\_wins\\_lawsuit\\_against\\_homophobic\\_american\\_blogger.html](http://www.thestar.com/news/canada/2014/02/24/nova_scotia_couple_wins_lawsuit_against_homophobic_american_blogger.html)> (last accessed May 4, 2015).
- 155 D.C. Code §15-361 *et seq.*
- 156 D.C. Code §15-364(b).
- 157 See [Ingersoll Mill. Mach. Co. v. Granger](#), 833 F.2d 680 (7th Cir., 1987) (finding that the *Uniform Recognition Act* need only be "compatible" with American due process requirements).
- 158 See [S.C. Chimexim S.A. v. Velco Enterprises Ltd.](#), 36 F. Supp. 2d 206 (S.D.N.Y., 1999) (finding that 1991 Romanian Constitution provided due process guarantees and an independent judiciary).
- 159 See [Bridgeway Corp. v. Citibank](#), 201 F.3d 134 (2d Cir., 2000) (finding that despite the Liberian constitution establishing an independent judiciary, due process compliance was in question because Liberian judicial system did not follow constitutional requirements).
- 160 28 U.S.C. §4102(a)(1)(A); 47 U.S.C. §230. See 28 U.S.C. §4102(c)(1) (providing that U.S. courts "shall not recognize or enforce" foreign defamation judgments that are inconsistent with §230).