

CITATION: Sikhs for Justice v. The Republic of India, 2020 ONSC 2628
COURT FILE NO.: CV-19-623990
DATE: 20200427

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SIKHS FOR JUSTICE, Plaintiff/Respondent

AND:

THE REPUBLIC OF INDIA and ANI MEDIA PRIVATE LTD.,
Defendants/Moving Party

BEFORE: Kimmel J.

COUNSEL: *Nader Hasan and Carlo Di Carlo*, for the Plaintiff/Respondent

Lorne Honickman and Scott Dallen, for the Defendant ANI Media Private
Ltd./Moving Party

No one appearing for the defendant the Republic of India¹

HEARD: February 28, 2020

ENDORSEMENT
(MOTION CHALLENGING JURISDICTION AND FORUM)

[1] The defendant ANI Media Private Ltd. moves pursuant to s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 21.01(3) of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194, for an order dismissing or permanently staying this action on the grounds that the Ontario Superior Court of Justice (“Ontario”) does not have jurisdiction over its subject matter, or that Ontario is not the convenient forum.

[2] Sikhs for Justice (“SFJ”) is a not-for-profit organization incorporated in Ontario with offices in London, New York, Washington and Toronto. Its founder and principal director, Gurpatwant Singh Pannun, is a lawyer based in New York City. SFJ alleges in its statement of claim that the Republic of India, with various media allies in India including ANI Media, have engaged in a campaign of defamation against SFJ. The smear campaign is alleged to be a reaction to what SFJ calls its “Referendum 2020 Project”. SFJ describes its Referendum 2020 Project to be a worldwide referendum for an independent Sikh nation in Punjab, India, to be called Khalistan.

[3] SFJ’s statement of claim alleges that the Republic of India has carried out the smear campaign with the assistance of media organizations in India, through three media articles: one in

¹ As of the date of the hearing of the motion, the plaintiff advised that the Republic of India had not yet been served with the statement of claim that was issued on July 8, 2019.

the *Tribune* (Chandigarh), one in *India Today* and the third written by ANI Media and provided to an online newspaper in India called the *Business Standard* for publication. The *Business Standard* is said to have published the article attributed to ANI Media (the “ANI Article”) entitled: “Twitter suspends pro-Khalistan activist Gurpatwant Singh Pannun’s account” on June 18, 2019. The defamatory words attributed to ANI Media from this publication are defined in the statement of claim as the “ANI Defamatory Words”.

[4] The statement of claim pleads that “[t]his action addresses a campaign of defamation that the defendants have carried out against SFJ.” This alleged “smear campaign” against SFJ, said to have been orchestrated by the government of India, is at the core of this action. This campaign is pleaded to be a malicious attempt to threaten SFJ’s viability as a not-for-profit organization through the dissemination of alleged “Defamatory Words” by all three media organizations with the intent to damage SFJ’s brand in Ontario and around the world, thereby impairing SFJ’s ability to fundraise and remain viable. SFJ pleads its two-fold objective in bringing this claim to be: “to put an end to this campaign of defamation and to attempt to undo the harm caused to its reputation.”

[5] Because the alleged Defamatory Words were published in online forums that are accessible to persons in Ontario, SFJ pleads that thousands of individuals within Ontario have seen and/or heard the Defamatory Words said to be contained in the three identified articles (including the ANI Article), thereby damaging SFJ’s reputation in Ontario, for which it seeks damages. SFJ also seeks a permanent injunction restraining the defendants or any other persons acting on behalf of the defendants from publishing, posting or reposting any communications defamatory to SFJ. SFJ alleges that, given the defamation campaign, it is likely that the defendants will continue to publish defamatory statements despite any finding of liability to SFJ in this action if not enjoined from doing so.

[6] For Ontario to have jurisdiction *simpliciter* over this claim, there must be a real and substantial connection between the claim and the Province of Ontario. This determination first involves consideration of whether any of the presumptive connecting factors identified by the Supreme Court of Canada in the case of *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 exist, and second whether the party challenging the assumption of jurisdiction has successfully rebutted the presumption (see also *Haaretz.com v. Goldhar*, 2018 SCC 28).

[7] Even if Ontario could assume jurisdiction over this action, the Court can decline that jurisdiction if the defendant establishes that an alternative forum is clearly more appropriate for the adjudication of the SFJ’s claims.

[8] The Supreme Court of Canada in *Haaretz* grappled with one of the issues that arises in this case: Is there, in effect, universal jurisdiction for claims of Internet defamation because publications on the Internet are accessible and can be downloaded anywhere? I do not accept this as a general proposition. Even though the *situs* of the tort of defamation can, in theory, be anywhere that the impugned publication is accessed and downloaded, “if there is no real and substantial connection between the action and the forum, the presumptive connecting factor [the commission of the tort of defamation in the forum] would be rebutted.” (See *Haaretz*, at para. 174, dissenting but not this point. See also para. 43.) A presumptive connecting factor can be rebutted if it is not reasonable for the defendant to expect to be answering the claims made in Ontario.

[9] The nature of the claims made by SFJ in this action are such that it would not be reasonably foreseeable to ANI Media that it would be sued for them in Ontario. SFJ's claims are tied to an alleged malicious smear campaign that threatens SFJ's viability. SFJ offers no admissible evidence of harm or of the threats to its viability; rather, it relies solely on allegations and inferences of harm to its reputation and brand. The alleged smear campaign is said to have been orchestrated by the Republic of India, and to have originated and been carried out in India with the assistance of Indian media outlets, only one of which is ANI Media. SFJ seeks to stop the campaign from being carried out through a permanent injunction and to undo the alleged harm caused to its reputation by that campaign. The presumptive connecting factor of the alleged defamation in Ontario by the ANI Article having been accessed and downloaded by two individuals connected to SFJ in Ontario is rebutted by these other considerations.

[10] The Unlawful Activities Tribunal in India has designated SFJ as an unlawful association pursuant to the *Unlawful Activities (Prevention) Act, 1967*. The defendant's expert witness on Indian law testified that consequently, restrictions have been imposed on SFJ and its representatives. SFJ did not argue that Ontario is a forum of necessity because of these restrictions. SFJ argued that those restrictions go against a finding that India is clearly a more appropriate forum in the *forum non conveniens* analysis, since SFJ would effectively be unable to participate in any proceeding in India without its representatives, and possibly its witnesses, facing criminal prosecution.

[11] Given that Ontario does not have jurisdiction over this action, it is not necessary to consider whether ANI Media has established that there is another forum that is clearly more appropriate in which to adjudicate SFJ's claims. The forum analysis is a close call. The significant impediments to a proceeding in India for SFJ are matched by significant impediments to a proceeding in Ontario for ANI Media.

[12] The Republic of India has not been served and, as a sovereign state, cannot be compelled to participate in this Ontario action. The other two media outlets alleged to have been involved in this smear campaign, and whose articles are alleged to have formed part of the Defamatory Words, are not named as defendants. The comparable convenience, or inconvenience, to the witnesses is equally inconvenient as between Ontario and India and that produces unfairness to SFJ in India and to ANI Media in Ontario.

[13] However, it is comparatively more inconvenient for SFJ to proceed in India than for ANI Media to proceed in Ontario because of the potential for incarceration of SFJ's representatives if they were to attend to instruct counsel or testify in India, and because of the possibility that SFJ might not be permitted to commence an action at all in India while it remains designated as an unlawful association.

[14] Most of the other factors that are to be considered in the forum analysis are neutral as between Ontario and India, although the enforceability of an Ontario judgment and injunction in India is problematic. Thus, India would be the preferred jurisdiction for enforcement purposes. Ultimately, the consideration of the forum factors identified by the Supreme Court of Canada in *Van Breda* does not clearly establish India as a more appropriate forum.

[15] The Supreme Court of Canada directs that the jurisdiction and forum analyses are dependent upon distinct factors (*Haaretz*, at para. 43). Thus, my finding that Ontario does not have jurisdiction over the claims raised in this action is dispositive of this motion. It does not matter that the forum factors would not have led Ontario to decline to exercise its jurisdiction if that jurisdiction had been established. I therefore grant the motion and dismiss the proceeding, for the more detailed reasons below.

The Issues to be Decided

[16] The following issues have been identified for the court to decide on this motion:

- a. Could Ontario assume *jurisdiction simpliciter* over this action based on the existence of any presumptive connecting factors?
- b. If a presumptive connection to Ontario can be established, is it rebutted (would it be reasonable to call upon ANI Media to answer proceedings in Ontario)?
- c. Does the forum of necessity doctrine apply in this case?
- d. If any presumptive connection to Ontario is not rebutted, is there an alternative forum to Ontario that is clearly more appropriate for this action?

A. Jurisdiction *Simpliciter* – Is there a Presumptive Connection Between the Subject Matter of this Action and Ontario

[17] A Canadian court can assume jurisdiction *simpliciter* if the plaintiff can show that a “real and substantial connection” exists between the forum and the subject matter of the litigation. The Supreme Court of Canada explained the underlying purposes of the test in *Haaretz*, at para. 30:

The constitutional purpose of the jurisdiction *simpliciter* test is to establish a minimum threshold for the assumption of jurisdiction in order to prevent improper assumptions of jurisdiction[.] Its objective is to delineate circumstances in which a court has jurisdiction, not circumstances in which it should exercise it (which is the purpose of *forum non conveniens*). The prioritization of order and predictability at the jurisdiction *simpliciter* stage is also consistent with the principle of comity, which is central to Canadian private international law[.] [citations omitted]

[18] The list of presumptive connecting factors is intended to guide the court when deciding jurisdiction. This non-exhaustive list, recognized by the Supreme Court of Canada in *Van Breda* at para. 90, includes:

- 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 to the dispute was made in the province.

[19] The onus lies on the plaintiff to establish the existence of at least one of the presumptive connecting factors. The party arguing for the court to assume jurisdiction need only establish that there is a good arguable case for assuming jurisdiction. This threshold is considered to be “rather low” (*Van Breda*, at para. 109; *Haaretz*, at para. 32).

[20] The starting point for this consideration is the statement of claim, “which ... defines the issues and informs the opposing parties of the case they have to meet. [citation omitted] It frames the action for the purposes of analyzing the assumption and exercise of jurisdiction.” See *Haaretz*, at para. 21.

[21] Once jurisdiction has been put in issue, the plaintiff also bears an evidentiary burden at this stage, to substantiate the presumptive connecting factors. “Jurisdiction is not determined solely by the words chosen by the lawyer who drafted the pleading.” Although the motion judge does not assess the merits of the case at this stage, he or she must at least be satisfied of the presence of at least one “good arguable” supporting presumptive factor. See *Vahle et al. v. Global Work & Travel Co. Inc.*, 2019 ONSC 3624, at para. 26.²

[22] SFJ argues that the establishment of a presumptive connecting factor is “virtually automatic” in an Internet defamation case, relying on *Haaretz* (at para. 48). The plaintiff contends that it has met the low threshold by demonstrating that at least two presumptive connecting factors are engaged in this case. First, SFJ argues that the tort was committed in Ontario. The *situs* of the tort, according to the Supreme Court of Canada in *Haaretz*, at paras. 36, 106, 126, is wherever the alleged Defamatory Words are published or communicated to a third party, which occurs when and where they are “read, accessed or downloaded” by the third party. Second, SFJ contends that ANI Media carries on business in Ontario.

- a. Is it arguable that the tort of defamation was committed by the defendants in Ontario?

[23] In very general terms, the tort of defamation requires that the alleged ANI Defamatory Words to have conveyed, by any act, defamatory meaning (lowering the plaintiff’s reputation in the eyes of a reasonable person) to at least one third party who has received it. See *Crookes v. Newton*, 2011 SCC 47, at para. 16.

[24] The alleged ANI Defamatory Words include the following (and only) reference to Canada:

² SFJ argued that the *Vahle* case is not a defamation case and the court should exercise caution in any application of the comments about the need for evidence in that case as a result. However, there was evidence before the Supreme Court of Canada in the defamation cases that it has decided based on the presumptive connecting factors, including *Banro*, *Breeden* and *Haaretz*. Mere assertions in pleadings are not sufficient to establish the existence of arguable supporting presumptive factors. Consistent with this, SFJ has put forward some evidence in response to this motion.

According to reports, Pannun's account was suspended after a complaint by [the] Sikh community claiming that Pannun is radicalising Sikh youth with the help of illegal immigrants in the US and Canada.

[25] SFJ alleges that the ANI Defamatory words defamed not only Pannun but also the not-for-profit corporation, SFJ, incorporated in Ontario. SFJ alleges, (in paragraph 24 of the statement of claim) that the ANI Defamatory Words, by both their natural and ordinary meanings and by innuendo and implication, taken in context, meant and were understood to mean that:

- a. SFJ endorses terrorism;
- b. SFJ supports violent activities or causes;
- c. SFJ endorses hate campaigns against India;
- d. SFJ endorses threatening behaviour against police authorities;
- e. SFJ is an extremist organization;
- f. SFJ is a criminal organization;
- g. SFJ employs individuals convicted of terrorism-related offences; and
- h. SFJ is not a truly human rights advocacy group, but instead carrying out a strategic campaign on the behalf of the ISI.

[26] The Supreme Court of Canada in *Haaretz*, at para. 36, (citing *Editions Ecosociete Inc. v. Banro Corp.*, 2012 SCC 18, at para. 55) recognized that "...a single instance of publication is sufficient for the tort to crystallize ... The *situs* of Internet-based defamation is the place where the defamatory statements are read, accessed or downloaded by the third-party." SFJ pleads that thousands of individuals within Ontario have seen and/or have heard the Defamatory Words (including the ANI Defamatory Words), thereby damaging SFJ's reputation in Ontario.

[27] SFJ's evidence proffered to substantiate this allegation is that of a Toronto-based employee who is one of the directors and the affiant for SFJ on this motion (Mr. Jatinder Singh Grewal) and, on information and belief, the evidence of an SFJ volunteer who is said to have done the same (Mr. Ravinder Singh). Both are said to have downloaded and viewed the ANI Article from the *Business Standard* in Ontario.

[28] SFJ is an Ontario incorporated not-for-profit company and its representative has testified about certain advocacy, fundraising and lobbying activities that it carries out in Ontario, many of which target the Republic of India and its representatives of state. SFJ claims that the publication of the ANI Article on online forums accessible in Ontario has impacted its brand and ability to fundraise in Ontario. SFJ says it wants to defend its reputation in Ontario through this action.

[29] SFJ's employee (Grewal) further deposes that donors in Ontario have viewed the ANI Article and have contacted SFJ to discuss it and their concerns about it, particularly the allegation in the ANI Article that SFJ is supported by Pakistan's intelligence agency, ISI. Grewal says that

after the publication of the ANI Article ten donors cancelled their 2019 donations and donations in 2019 decreased from the prior year.

[30] The defendants challenge the sufficiency of SFJ's assertions, noting that the identity of these other persons in Ontario said to have downloaded and read the ANI Article from the *Business Standard* website and to have called to discuss it and cancel their donations has not been disclosed. The defendants argue that this is not admissible evidence on a contested evidentiary point on a motion, since the source of the affiant's "information" (the names of the donors) is not disclosed.

[31] In the absence of the identification of the source of information said to have come from donors, I agree that Rule 39.01(4) precludes SFJ from relying on that evidence for purposes of this motion. That evidence, information from donors that they accessed and read the ANI Article and that it caused them to be concerned, is clearly hearsay. That is precisely what the rule is intended to prevent: the introduction of inadmissible hearsay. See *Aker Biomarine AS et al. v. KGK Synergize Inc.*, 2013 ONSC 4897, at paras. 11 and 12.

[32] SFJ's representative acknowledged on cross-examination that the plaintiff has no evidence at all as to how many people in Ontario looked at the ANI Article or viewed it. The evidence in this case about the publication of the allegedly Defamatory Words to persons in Ontario other than the plaintiff itself is weaker than what was available in the cases of *Haaretz*, *Banro* and *Breeden v. Black*, 2012 SCC 19 (cases in which there was admissible evidence about many more than two persons who had accessed and viewed the impugned publications). However, SFJ maintains that it does not have to provide a list of all individuals who downloaded and read the ANI Article at this stage, and that it is enough that one person did, even if that person is Grewal, the SFJ director/affiant.

[33] I do not endorse the plaintiff's proposition that the Supreme Court of Canada's decision in *Haaretz* means that the establishment of a presumptive connecting factor is "virtually automatic" in an Internet defamation case. That said, the threshold for establishing the existence of a presumptive factor such as this is low.

[34] The basic elements of a claim for the commission of the tort of defamation in Ontario are present in this case, between the pleading, the evidence of Mr. Grewal about viewing the ANI Article (and of Mr. Singh's viewing of the ANI Article, on information and belief), and the inference that others in Ontario could have accessed the ANI Article in that same way. Given SFJ's incorporation and fundraising and lobbying activities in Ontario, there is also an inference that its reputation could have been harmed here if the alleged Defamatory Words were accessed and downloaded in Ontario. I find that it is at least arguable that Ontario is a *situs* of the alleged tort of defamation said to have been committed by ANI Media.

[35] One of the arguments advanced by ANI Media is that the ANI Article is primarily focused not on SFJ, but on Pannun in his personal capacity (and he lives and works in New York), as an element of the weakness of the presumptive connection to Ontario of this claim. However, SFJ is incorporated in Ontario, does carry out its activities in Ontario and is tied to Pannun in the ANI Article so that aspect of the connection to Ontario cannot be ignored. In this case, I have found the record is sufficient to establish the presence of an arguable presumptive connecting factor, namely that the tort of defamation was committed in Ontario against SFJ.

[36] However, the presumptive connection in this case is not overwhelming. There is limited admissible evidence about persons in Ontario having accessed and downloaded the alleged Defamatory Words, and the court is required to draw inferences of harm in the absence of any direct substantiation of the alleged harm to SFJ's reputation or brand in Ontario. This is a relevant consideration that I will come back to when I consider whether the presumption of jurisdiction in this case has been rebutted.

b. Is it arguable that ANI Media carries on business in Ontario?

[37] While not required in light of the existence of the first presumptive connecting factor, SFJ also argues that it can establish a second connecting factor, namely that ANI Media carries on business in Ontario.

[38] Although ANI Media is one of Southeast Asia's largest news agencies and producers of multi-media content, its core audience is Indian viewers. None of its correspondents have ever visited Ontario. ANI Media has no physical presence in Ontario. The question that I must decide is whether ANI Media engages in e-commerce or other business activities in Ontario.

[39] ANI Media acknowledges that it broadcasts its news content around the world *via* its YouTube Channel, and that Canada is one of the places where its media products are made available and downloaded. While Canadians are a small percentage of ANI Media's total viewers, between July 1 and December 31, 2019 there were 122,008 Canadian viewers on its YouTube channel. ANI Media has not taken steps to block Canadians or Ontarians from accessing its YouTube channel. For Canadians to be able to access it, it is contended that ANI Media would have needed to affirmatively grant permission for Canadians and Ontarians to do so.

[40] Further, ANI Media has an informal relationship with an Ontario-based television channel called TagTV. ANI Media allows TagTV to broadcast ANI Media's news programs available on its YouTube channel (South Asia News and My India) to Ontarians. As well, ANI Media has in the past created news articles with content of interest to Indian audiences who are in Ontario.

[41] SFJ concedes that a virtual presence or passive advertising in Ontario is not sufficient. The fact that ANI Media news programs and content is available and may be of interest to people in Ontario through various means is not enough to make out an arguable case that ANI Media carries on business in Ontario.

[42] However, SFJ argues that the combination of the informal arrangement with TagTV whereby ANI Media allows two of its programs to be re-broadcast in Ontario, the fact that its YouTube channel is accessible in Ontario and the availability of its publications on the Internet (some of which would be of interest to persons in Ontario) establishes that ANI Media is targeting and marketing to viewers in Ontario. SFJ contends that when the totality of ANI Media's engagement with the jurisdiction of Ontario is considered (as the British Columbia Court of Appeal did in *Equustek Solutions Inc. v. Google Inc.*, 2015 BCCA 265, at para. 52, *aff'd* 2017 SCC 34, at para. 37), there is enough to establish an arguable case that ANI Media carries on business in Ontario.

[43] ANI Media counters that its informal relationship with TagTV is passive and it does not receive any compensation for it (there is no direct commerce). It has no established content-

sharing relationships with media agencies or networks outside of India. TagTV is simply permitted to re-broadcast content from two of its programs that are already freely available for the public to download from its YouTube channel. Nor was the ANI Article published or reproduced by TagTV. Even if the informal arrangement with TagTV was to be characterized as a marketing initiative by ANI Media, the Supreme Court of Canada said in *Van Breda* (at paras. 87 and 114) that advertising alone in a jurisdiction is not enough.

[44] To establish a business presence in Ontario, there must be some commerce in Ontario. In *Banro*, that consisted of an office and commercial activities in Ontario. In *Google*, that consisted of collecting and analyzing data and information from individuals in British Columbia for targeted advertising. There is no evidence, or even an allegation, of any such commerce by ANI Media in Ontario. Its Internet activities have not been demonstrated to be actively targeted to individuals in Ontario. Making its content available to Ontarians on its YouTube channel or through permitted re-broadcasting by TagTV and including the occasional content that might be of interest to Ontarians is not enough to establish that ANI Media carries on business in Ontario.

[45] An arguable case has not been made out upon which ANI Media could be said to carry on business in Ontario. This is not a presumptive factor that can be relied upon by SFJ to establish a real and substantial connection between this action and the Province of Ontario.

B. Is the Presumptive Connection to Ontario Rebutted?

[46] If a presumptive factor exists to support a finding of jurisdiction *simpliciter* it may be rebutted. The Supreme Court of Canada is clear on this point, having restated it in *Haaretz* (at para. 42, quoting from *Van Breda* at para. 95):

The presumption of jurisdiction that arises where a recognized connecting factor – whether listed or new – applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points to only a weak relationship between them.

[47] In this case, the onus to rebut the presumption of the *situs* of the tort as a connecting factor is on the moving party defendant, ANI Media.

[48] In *Haaretz*, Justice Côté and Justice Abella disagreed about whether the mere fact that the alleged defamatory words were communicated to at least one person in Ontario (rendering Ontario a *situs* of the alleged tort of defamation) would give rise to a *de facto* irrebuttable presumptive connecting factor for any case of Internet defamation (see paras. 42, 44, 126-127).

[49] In my view, a presumption is, by definition, rebuttable. Where a presumptive connecting factor can be easily established, such as in an Internet defamation case, it becomes all the more important to consider whether it would be “reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction” and consider whether the presumption, which may be weak to begin with, is rebutted. See *Haaretz* at paras. 40 and 43, citing *Van Breda* at paras. 81, 92, 95 and 97.

[50] The Supreme Court of Canada made it clear in *Van Breda* (at para. 84) that: “The core of the real and substantial connection test is the connection that the plaintiff’s claim has to the forum and the connection of the defendant to the forum.”

[51] This assessment of reasonable foreseeability of being sued in a jurisdiction is considered to be an important check on the presumptive connecting factor of the commission of a tort in the jurisdiction where, as in a case of alleged Internet defamation such as this, there could be concerns about forum shopping. See *Haaretz*, at paras. 43, 168-175; See also *Van Breda*, at para. 92.

a. The Connection of SFJ’s Claims to Ontario

[52] The focus of the jurisdiction analysis is not upon the plaintiff *per se*, but rather on the plaintiff’s claims. The court must examine the nature of the claims being made to properly assess whether it would be reasonable to expect that the defendant would be called to answer those claims in Ontario.

[53] The Supreme Court of Canada uses the example of a case where the presumption of jurisdiction might be rebutted if a plaintiff had no reputation in the chosen forum, based on the logic that the protection of reputation is a primary purpose of defamation law. See *Haaretz*, at paras. 43-44. See also *Banro*, at paras. 57-58.

[54] SFJ’s arguments in this case against the rebuttal of the presumption of jurisdiction are very much focussed on its presence and activities in Ontario and the alleged need to protect its reputation in Ontario. Although it is admitted that SFJ was founded by Pannun in 2007 in New York City and that he, who lives and works in New York, is the face of the organization, it is a fact that SFJ established an office in Canada and incorporated in Ontario in 2011. Ontario is one of the jurisdictions where SFJ carries out its lobbying and fundraising activities.

[55] However, there is no evidence to support the claim that thousands of people in Ontario accessed and downloaded the ANI Article, only the evidence that it was accessed and downloaded in Ontario by an SFJ employee and an SFJ volunteer. Nor is there any admissible evidence of any harm to SFJ’s reputation or brand having been suffered by SFJ in Ontario. There are only allegations and inferences, that: (i) others in Ontario would have accessed and downloaded the ANI Article on the Internet; and (ii) SFJ would suffer harm here because of its presence in Ontario.

[56] SFJ alleges its reputation in Ontario requires protection because of the negative impact that the alleged Defamatory Words have had on its goodwill and brand, which it says it relies upon to attract donations. SFJ alleges donations have dropped since the ANI Article was published. However, there is no direct or admissible evidence from donors nor any financial information to back up these assertions. SFJ has only unsubstantiated assertions about damage to its reputation in Ontario (made in the statement of claim and by the SFJ affiant on this motion, who refused to provide particulars when asked on cross-examination).

[57] Although the connection is not strongly established in the evidence, an inference can be drawn that an Ontario incorporated not-for-profit organization would have some reputation in Ontario and an interest in protecting that reputation in Ontario. However, that SFJ may have a reputation to protect in Ontario is not the only relevant consideration in the court’s assessment of

the broad question of whether it would be fair or reasonable to expect the defendant to answer the proceedings in that jurisdiction.

[58] This claim is not about a single defamatory article, the ANI Article, having been accessed and downloaded in Ontario, or the implications of that having occurred. SFJ's claims are more broad reaching. SFJ pleads that this action addresses, and seeks to put an end to, a campaign of defamation that the defendants are alleged to have carried out. This campaign is said to be a malicious attempt to threaten SFJ's viability by impairing its ability to fundraise. The defendants are alleged to have disseminated the Defamatory Words with the intent to damage SFJ's brand in Ontario and around the world.

[59] The statement of claim alleges that SFJ's Referendum 2020 Project has made it a target of the Republic of India. The originator of the alleged smear campaign, the Republic of India, is immune from the jurisdiction of Ontario and from any judgment of this court under the *State Immunity Act*, R.S.C. 1985, c, S-18, at ss. 1-6, 3(2). This defendant to date has not been served, its witnesses cannot be compelled (under Indian law, according to the defendant's expert), and it may choose to never respond to a proceeding in Ontario. The other two media organizations (the *Tribune* and *India Today*) are not named as defendants, although articles published by all three organizations in India are said to have been part of the same campaign.

[60] The plaintiff's claim, at its core, seeks to address the alleged smear campaign against SFJ, orchestrated by the Republic of India and carried out through its media allies in India. The pleaded particulars of this smear campaign against SFJ include Indian government actors acting as anonymous sources to media outlets in India and anonymously defaming SFJ because the government sources knew that the media organizations would disseminate these defamatory statements. When considered in its proper context, the connection of SFJ's claims in this action to Ontario is remote.

b. The Connection of the Defendants to the Forum

[61] I have already ruled, in the jurisdiction analysis, that ANI Media does not have a presence in or connection to Ontario. There is no suggestion that any of the other defendants do.

c. Is it Reasonable to Call on ANI Media to Answer the Plaintiff's Claims in Ontario?

[62] I find that the essence of the plaintiff's claims is not sufficiently connected to Ontario to make it reasonable to expect ANI Media to respond to them here. It is not fair or reasonable to expect ANI Media to respond to a claim in Ontario about an alleged smear campaign orchestrated by the Republic of India (a state that has immunity from judgment in Ontario) involving multiple media organizations in India, the others of which are not named as defendants to this action in Ontario. The absence of these other key participants from the Ontario proceeding also renders it impossible for SFJ to achieve by this action part of the essential relief that it seeks, which is to permanently enjoin and restrain the defendants or any person acting on their behalves from their pursuit of this alleged smear campaign.

[63] An underlying purpose of the real and substantial connection test is to address "the risk of jurisdictional overreach". It must be applied in a manner that reflects the need for "order and fairness" and "the need for limits on assumptions of jurisdiction": *Vahle*, at para. 43, citing *Van*

Breda at paras. 22 and 27. The presumptive connecting factor in this case only establishes a weak link between the subject matter of the litigation and the jurisdiction of Ontario. That link is predicated on one aspect of the alleged defamation, the ANI Article said to have been published in Ontario in furtherance of the alleged smear campaign intended to harm SFJ. The alleged harm said to have been caused by that smear campaign is itself dependent upon various inferences that the court must make.

[64] At its core, this action seeks redress for harm said to have been caused by a campaign orchestrated by a sovereign state government in India carried out by intentions that they formed and actions that they undertook with the assistance of media organizations in India. There is a risk of jurisdictional overreach for the Ontario Superior Court of Justice to assume jurisdiction over these claims. In the interests of order and fairness, in these circumstances, I find that the presumption of Ontario's jurisdiction is rebutted.

C. Does the Forum of Necessity Doctrine Apply in this Case?

[65] This was an issue identified in the moving party's factum, presumably as a result of the nature of the responding evidence and position of SFJ. The Supreme Court of Canada explains the forum of necessity doctrine in *Van Breda* (at para. 100) as follows:

The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction ... it operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction.

[66] ANI Media argues that SFJ has not tendered evidence to support the contention that Ontario is a forum of necessity, despite the concerns raised about its ability to bring or participate in any proceeding in India after having been declared an unlawful association. Since SFJ has not raised this specifically or offered any law or argument in support of the application of this exception, I do not need to address it as a separate and distinct ground for this court to assume jurisdiction.

[67] SFJ's factual contentions, as to the implications of it and its witnesses participating in a proceeding in India after having been declared an unlawful association, are addressed in the *forum non conveniens* analysis, which is where SFJ raised them in its submissions.

D. Is there an Alternative Forum to Ontario that is Clearly More Appropriate for this Action – Is Ontario a *forum non conveniens*?

[68] Having found that Ontario does not have jurisdiction over the action, I do not need to engage in the *forum non conveniens* analysis. However, I will address the relevant forum factors briefly for completeness of the record.

[69] The factors that might justify a stay when considering the forum of convenience are intended to be different than the factors considered in the jurisdiction simpliciter analysis. See *Haaretz*, at para. 43.

[70] If the court finds that it does have jurisdiction over the plaintiff’s claims, the analysis shifts at this stage to the court’s consideration of whether the court *should* exercise its jurisdiction. The defendant has the burden of satisfying the court that an alternative forum is “clearly more appropriate”, in light of the characteristics of the proposed alternative forum. “A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation.” See *Van Breda*, at para. 109. See also *Haaretz*, at para. 47.

[71] According to the Supreme Court of Canada, even where jurisdiction may have been “established on a rather low threshold under the conflicts rules,” the burden on the defendant is still high. It is not a matter of flipping a coin. See *Van Breda* at para. 109.

[72] The Supreme Court of Canada has provided six relevant factors to consider in the *forum non conveniens* analysis (see *Van Breda*, at para. 105). They are:

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

[73] None of these factors are individually determinative. They must be considered globally. See *Breeden*, at para. 25.

- a. Comparative Convenience and Expense for the Parties and Witnesses:

[74] The comparative convenience of the parties and their witnesses is the focus of the *forum non conveniens* analysis in this case. ANI Media contends that India is clearly a more convenient forum than Ontario. The main argument in favour of India is that it is only there that the alleged role of the Republic of India in the alleged smear campaign that it orchestrated can be properly

adjudicated. The main argument in favour of Ontario is that the plaintiff and its representatives (and perhaps its witnesses) will not be able to participate in person in any proceeding in India while SFJ remains designated as an unlawful association.

[75] ANI Media relies on the opinion of an expert in the law of India, who has testified that all of the defence witnesses are in India and that the Indian government witnesses could not be compelled to testify in an Ontario proceeding, whereas they could be in an Indian proceeding.

[76] India's Unlawful Activities Tribunal found that SFJ is an unlawful association. The defendant's expert on Indian law deposed that consequently, anyone found to be a member of SFJ, or who participates in its activities, is punishable by fine and/or imprisonment. The defendant's expert has confirmed that anyone associated with SFJ could be arrested if they go to India. That would restrict the ability of SFJ to call witnesses in India

[77] The unavailability of witnesses to testify was a significant factor in the *Haaretz* case (at para. 70). I find that there is roughly equivalent comparative inconvenience to the witnesses in the opposing jurisdictions.

[78] However, there is a greater inconvenience to SFJ as a party in having to prosecute its claims in India than there is inconvenience to ANI Media as a party having to defend itself in Ontario, in that ANI Media's own representatives and employees could (at some expense) appear in Ontario, whereas SFJ's representatives and employees could not appear in India without facing the prospect of criminal prosecution. The defence expert also testified that it may not even be possible for SFJ to commence a proceeding in India while under this designation, which makes the inconvenience to SFJ pursuing its claims in India even greater.

[79] Thus, while the inconveniences to both parties' witnesses are comparably significant (albeit for different reasons), the inconvenience to SFJ as a party having to proceed in India is greater than the inconvenience to ANI Media as a party having to defend itself in Ontario. This factor would favour the prosecution of the claims in Ontario.

b. The Applicable Law

[80] It is agreed that the plaintiff's claim for defamation against ANI Media could be subject to Ontario law, as pleaded.

[81] The defendant's expert on the law of India deposed that there are no substantive differences between Canadian and Indian defamation law. The law of both countries is substantially similar. The same constituent elements must be made out for the tort: i) the words about which the plaintiff complains must be shown by the plaintiff to be defamatory; ii) the words at issue must refer to the plaintiff; and iii) the words must have been published to a third person. No evidence was tendered by either side about the law of conspiracy and how that might differ between the two jurisdictions.

[82] SFJ relies on the dissent's rationale in *Haaretz* (at paras. 209 and 215). SFJ argues that even if the alleged tort of defamation took place in both Ontario and India, if harm to reputation occurred in Ontario, Ontario law should apply.

[83] Under *lex loci delicti*, the applicable law factor will necessarily point to the chosen forum. Where the presumptive connecting factor is based on the *situs* of the tort, this duplicates the analysis from the jurisdiction question into the *forum non conveniens* analysis. Jurisdiction *simpliciter* and *forum non conveniens* analyses should be based on different factors. (*Haaretz*, at paras. 43, 90; *Van Breda*, at para. 56).

[84] The Supreme Court has said that, in cases where jurisdiction relies on the *situs* of the tort, the applicable law factor is therefore “of little value in determining whether an alternative forum is clearly more appropriate.” (See *Haaretz*, at paras. 88-90).

[85] There is no evidence that a court of India could not or would not apply the Ontario law of defamation if that is the law that is found to apply. I find this factor to be neutral in this case.

c. Multiplicity of Proceedings and Risk of Inconsistent Findings

[86] There is no parallel proceeding in India to this one. However, ANI Media argues that there is a risk of inconsistent findings between this proceeding and the proceedings of the Unlawful Activities Tribunal in India, by which SFJ was declared an unlawful association.

[87] The defence expert on Indian law has provided evidence about the proceedings in India in which SFJ was declared an unlawful association pursuant to the *Unlawful Activities (Prevention) Act, 1967*. ANI Media argues that findings may have been made in that proceeding that overlap with the issues raised in this Ontario proceeding, for example in addressing the defence of justification. However, the decision in that case was not provided to the court on this motion so it is not possible for the court to assess the likelihood of any overlapping issues and findings between this proceeding and that proceeding in India. The existence of this other proceeding on its own does not operate as a factor that favours India. I find this factor to be neutral in this case.

d. Enforcement Considerations

[88] The defence expert on the law of India has deposed that because Canada is not a reciprocating jurisdiction under the Indian *Code of Civil Procedure, 1908* for an Ontario judgment to be enforced in an Indian court, the plaintiff would have to initiate a lawsuit in India for recognition and enforcement, which would involve a full hearing and re-adjudication of the claim on its merits under Indian law.

[89] SFJ argues that it might not seek to enforce its judgment in India and rely upon the vindication of its reputation through an Ontario judgment, if granted. However, that does not address the second and important aspect of the relief that it seeks in its statement of claim, to put an end to the smear campaign through a permanent injunction restraining the defendants, because, as SFJ pleads, a finding of their liability to SFJ in this action is not likely to stop them from continuing with their campaign.

[90] While it may be cumbersome, the expert has not said that a judgment of the Ontario court could not be recognized and enforced in India. This factor nonetheless would favour the prosecution of these claims in India in the first instance.

e. Fairness and Efficiency

[91] The last factor to consider is the fair and efficient working of the Canadian legal system. The arguments on both sides are in large measure a repetition of the arguments about the relative inconvenience to the parties and witnesses and about enforcement.

[92] ANI Media argues that proceeding in Ontario will not afford it a fair opportunity to present its case (see *Haaretz*, at para. 47). ANI Media will be unable to compel the participation of the Republic of India, the alleged instigator of the conspiracy. Further, ANI Media will be left to defend the actions of the government of India that are the real target of this lawsuit, in which the true *lis* is between SFJ and the Republic of India. ANI Media argues that to proceed with an action in Ontario under these circumstances, which will have to be re-litigated in India at the enforcement stage at which the Indian government witnesses not compellable in Ontario may be able to testify, is not a fair and efficient use of Ontario's judicial process.

[93] SFJ counters this, arguing that its designation as an unlawful association effectively renders it impossible for SFJ to proceed with an action in India. SFJ argues that, in these circumstances, India cannot be considered a more appropriate forum than Ontario. The plaintiff will be denied access to justice altogether in that forum. Consequently, SFJ argues that fairness strongly favours Ontario as the forum.

[94] I have some difficulty with SFJ's position. The impediments to SFJ proceeding in India arise from a proceeding in India under the *Unlawful Activities (Prevention) Act, 1967*. The principles of comity and sovereignty require me to respect and give deference to the process and outcome of that proceeding.³ That said, and even though I do not consider the prosecution of this action in Ontario to be a fair and efficient use of Ontario's judicial resources (for the reasons outlined by ANI Media in its submissions), the implications of SFJ having been declared an unlawful association make it difficult for me to conclude that a forum exists in India that is in a "better position to dispose fairly and efficiently of the litigation." See *Van Breda*, at para. 109. See also *Haaretz*, at para. 47.

f. Conclusion on *forum non conveniens*

[95] The comparative convenience to the parties favours Ontario, enforcement favours India and none of the other *Van Breda* forum factors strongly tip the balance in favour of India as a clearly more appropriate forum in which to adjudicate SFJ's claims.

[96] In the end, if Ontario had jurisdiction over SFJ's claims, ANI Media has not met the high onus of establishing that India is clearly a more appropriate forum in which to adjudicate SFJ's claims.

³ *Van Breda*, at paras. 63, 74.

E. Disposition and Costs

[97] The motion is granted. The action is dismissed on the grounds that Ontario does not have jurisdiction over the plaintiff's claims.

[98] The parties to the motion agreed to exchange cost outlines after the hearing. I assume that exchange has taken place. I would hope the parties, who are both represented by very experienced counsel, will be able to reach an agreement on the costs of this motion and the action. However, if they are unable to do so, I will allow them an opportunity to make written cost submissions. If an agreement on costs is reached, counsel are asked to advise the court of such by May 8, 2020.

[99] Failing agreement on costs, each side may provide a written cost submission (not to exceed 3 pages double spaced) together with their cost outlines/bills of costs by May 15, 2020 and each may provide a written responding cost submission (not to exceed 1.5 pages double spaced) by May 22, 2020.

[100] Notwithstanding Rule 59.05 and in accordance with Rule 1.04, this endorsement and the resulting order for the dismissal of this action are effective from and after the date indicated below and enforceable without any need for the entry and filing of a formal order. Any party to this endorsement may nonetheless submit (with this PDF copy of my endorsement) a formal order for original signing, entry and filing if required for an appeal or motion for leave to appeal to an appellate court. Any party may also do so for any other reason when the Court returns to regular operations.

A handwritten signature in black ink, appearing to read "Kimmel J.", written in a cursive style.

Kimmel J.

Date: April 27, 2020