IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Giustra v. Twitter, Inc.*,

2021 BCSC 54

Date: 20210114

Docket: S194742

Registry: Vancouver

Between:

Frank Giustra

Plaintiff

And

Twitter, Inc.

Defendant

Before: The Honourable Mr. Justice Myers

Reasons for Judgment – Jurisdictional Challenge

Counsel for the Plaintiff:	Matt Woodley
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Place and Date of Hearing:	Vancouver, B.C.
	July 29-30, 2020
Written submissions received:	November 30, 2020
Place and Date of Judgment:	Vancouver, B.C.

January 14, 2021

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I. Introduction

[1] Tweets span international boundaries, making for jurisdictional issues with respect to the adjudication of legal claims relating to them.

[2] Mr. Giustra has brought this lawsuit against Twitter claiming damages and an injunction for defamatory tweets authored by others and relayed on Twitter's internet platform. Giustra has strong connections to both British Columbia and California. Twitter is based in California. The tweets were read in Canada and the United States and no doubt elsewhere. Does this court have jurisdiction to hear the claim? Twitter says it does not and if jurisdiction exists, I should decline to exercise it because California is a more convenient forum (the doctrine of *forum conveniens*). This judgment is concerned with that issue only; it does not deal with the merits of the claim.

[3] Many of the tweets concern Mr. Giustra's relationship to former president Bill Clinton. Amongst other things, some allege involvement in a supposed conspiracy known as "pizzagate". Many of tweets refer to a Canadian context, such as Mr. Giustra's involvement with the Boys Club (a local organisation of which he was a founding patron), and make personal attacks against Mr. Giustra, including accusing him of being in a pedophile ring. The tweets contain hashtags such as #Qanon, #pedogate and #LolitaExpress. In other words, while they may have a political backdrop or motivation, the tweets go far beyond political comment.

[4] The tort of defamation protects reputations. Mr. Giustra has a substantial profile and reputation in both Canada and the United States. This case illustrates the jurisdictional difficulties with internet defamation where the publication of the defamatory comments takes place in multiple countries where the plaintiff has a reputation to protect. The presumption is that a defendant should be sued in only one jurisdiction for an alleged wrong, but that is not a simple goal to achieve fairly for internet defamation.

[5] One of the significant factors in this case is that both parties acknowledge that under the law of the United States, Twitter would have no liability to Mr. Giustra pursuant to the freedom of speech protection in the First Amendment to the United States Constitution and two other statues. No such statutory protection exists in Canada. Whether the Canadian common law provides or should provide similar protection to a platform such as Twitter would be a matter for an ultimate trial and was not argued in this application.

[6] To be clear, this judgment addresses jurisdiction to hear this claim and not whether Twitter has any ultimate liability to Giustra.

II. Facts

A. The Parties

1. Mr. Giustra

[7] Mr. Giustra was born and raised in the Lower Mainland of British Columbia. He has been a Canadian all his life and lived in the Vancouver area for the most of it. His children were born in Vancouver and Giustra raises his family in his home in West Vancouver.

[8] Mr. Giustra began his career in the securities industry in Vancouver, and ultimately became the Chairman and CEO of Yorkton Securities, a leading natural resource investment bank with offices throughout Canada. Following seven years as Chairman of Endeavor Financial based in Vancouver, Mr. Giustra founded several BC-based resource companies. He continues to be actively involved in the investment and resource industry in British Columbia, including chairperson of Fiore Financial Corporation, a private equity firm which manages investments for clients in BC and around the world, and chairperson of Leagold Mining Corporation, which is a mid-tier gold producer, based in Vancouver.

[9] Mr. Giustra founded Lionsgate Entertainment in Vancouver, now one of the world's largest independent film companies. He remained on the board at various points since stepping down as Chair in 2003. He holds shares in Thunderbird Entertainment Group, which is a Vancouver-based company focused on content and distribution in the television and film sector. Mr. Giustra has founded Fiore Music and Westsonic Music Inc., Vancouver-based companies involved in the music industry.

[10] Mr. Giustra is also involved in several businesses local to Vancouver focusing on food and lifestyle. He is a shareholder in Fiore Arts and Collectibles, Fiore Farms, Fiore Properties, Modern Farmer Media Canada, Fiore Arts, which are all registered in British Columbia and operate out of Vancouver.

[11] Mr. Giustra has been and continues to be involved in philanthropic activities in Vancouver and elsewhere. Many of these have been reported in local and national news organizations including the Vancouver Sun, CBC News Vancouver and BCBusiness.ca. Recently, Nuvo Magazine, a Canadian lifestyle magazine based in Vancouver, published an extensive profile on Mr. Giustra's business and philanthropic involvement. American publications also refer to Giustra's Vancouver residence and Vancouver-based business ventures in the mining, investment and film industries.

[12] Giustra's affidavit attaches other media stories which have been published by local and national media concerning his business and philanthropic endeavours as well as his awards and achievements.

[13] Giustra has received a number of awards from local organizations including Douglas College, BCBusiness Top 100, and the Vancouver International Film Festival. News of the international awards that Giustra has received, including the Dalai Lama Humanitarian Award, has also been widely published in Vancouver.

[14] Giustra is a distinguished member of the Order of British Columbia, and has been inducted into the Business Laureates of British Columbia Hall of Fame. In 2019, he became a Member of the Order of Canada. News of these honours was published by media outlets in Vancouver, including the Vancouver Sun and CBC.

[15] That said, as emphasized by Twitter, Giustra also has significant ties to the United States. He is a manager of Sea to Sky Entertainment LLC, a business registered in California. He is also the lead director of Thunderbird Entertainment, Inc., a business incorporated in California with an office in Los Angeles, California. Thunderbird Entertainment also has a Hollywood profile, having worked with California based Alcon Entertainment to co-produce the 2017 film Blade Runner 2049.

[16] In addition to managing and directing companies that produce films in California, Giustra regularly travels to California where he appears at film premiers, attends social dinners, vacations, and spends time at his Beverly Hills home.

[17] Mr. Giustra writes opinion pieces concerning American politics. For example, he writes a regular column for HuffPost, an American news and opinion website and blog.

[18] Mr. Giustra has had a long relationship with former American president Bill Clinton. According to Giustra's LinkedIn Profile (put into evidence by Twitter), he co-founded the Clinton Giustra Enterprise Partnership with Bill Clinton. As it describes itself, it "focuses on social and economic development programs through impact investing, in parts of the work where poverty is widespread". It has projects in Haiti, South America, and Africa.

[19] In his notice of civil claim, Giustra states he is currently a member of the board of trustees of the Clinton Foundation, Bill Clinton's charitable foundation that operates in America and worldwide.

2. Twitter, Inc.

[20] Most readers will be familiar with Twitter and tweets and will therefore not need a detailed description of what Twitter does. Twitter describes its business as operating an online platform that allows users to post and interact with messages of up to 280 characters called "tweets". Public tweets can typically be viewed by anyone throughout the world who has access to the internet, even without creating a Twitter account.

[21] Twitter says that each day, over 145 million Twitter users send and share hundreds of millions of tweets around the world, containing messages touching on a broad array of topics. It does not mediate or review the tweets.

[22] Twitter filed evidence regarding its corporate structure and connections to British Columbia. It is a corporation headquartered in San Francisco, California. An officer of Twitter deposed that it has no employees or assets in British Columbia or Canada. However, it does have a Canadian subsidiary, Twitter Canada ULC, located in Toronto, that focuses primarily on marketing. Twitter Canada ULC has no involvement in the operations that make tweets accessible on the platform and had no specific involvement with the tweets that Giustra has complained of. Twitter did not disclose the direct or indirect ownership structure of Twitter Canada or the situs of the shares. Giustra says Twitter Canada may be an asset of Twitter Inc. located in Canada.

[23] For his part, Mr. Giustra filed an opinion of Professor Kietzmann, a business professor at University of Victoria. He reviewed public documents and web postings. and concluded that Twitter carries on business in British Columbia. That is a legal matter that he was not entitled or qualified to opine on. Moreover, it is based on substantial references to hearsay and double hearsay material. The report is inadmissible.

[24] There is no evidence as to the number of people in BC who would have accessed the subject tweets. Nor is there firm evidence of the number of Twitter users in BC. Twitter says it does not publish information by region and regards that information as commercially sensitive. It does say that it estimates the number of users in British Columbia to be 20% of the number estimated by Professor Kietzmann in his report. Although I said that the report was inadmissible, Twitter's reference to and reliance on the 20% user number makes that much admissible. That would put the approximate number of users in British Columbia at least at 500,000.

III. The tweets and This Lawsuit

[25] The amended notice of civil claim alleges:

Commencing in or around February 2015, the Plaintiff was targeted by a group who vilified the Plaintiff for political purposes in relation to the 2016 United States election. The targeted attack on the Plaintiff was part of an orchestrated campaign to discredit the Plaintiff in part because of his charitable and philanthropic work in support of the Clinton Foundation.

[26] The claim attaches an appendix listing 106 tweets. In its written argument it highlights the following as examples:

- Giustra, what do you mean "kids are the best", out harvesting kids with Bill, power corrupts and darkens your soul #pedogate #CIA #ObamaGate. (Appendix #25)
- That 'philanthropist' Mr. Giustra himself has been linked before to #pedo rings, though not successfully convicted & is always at the centre of any financial scandal concerning the #Clintons, including the latest #UraniumOne deal, is of course, just another coincidence. (Appendix # 65)
- Frank Giustra is linked to boysclubnetwork a group that molested 100s of boys! #KevinSpacey #briansinger #weinstein #Uranium1 #giustra #pizzagate #pedogate #elpida (Appendix # 53)
- @BoysClubNetwork @RadcliffeFdn @Frank_Giustra You do know they're involved in child trafficking, right? #NWO #globalism #Pizzagate #Pedogate #Trump #Clinton #FrankGiustra #ElpidaHouse (Appendix #64)
- @forthegood1992 @RadcliffeFdn @Frank_Giustra SICK people. #FrankGiustra put 1.5 million dollars into a "pizza" shell corporation from a slush fund foundation that runs camps for children. It's called 222 PIZZA EXPRESS (pedo code) #Pizzagate #QAnon #LolitaExpress (Appendix # 68)

- @Frank_Giustra Philanthropist/Gigolo/Pedophile/Criminal Another Soros puppet, making Soros Dreams come true (Appendix # 97)

- Please retweet. Pedos like Clinton Foundation board member, Frank Giustra have not only stolen & raped the children of Haiti; they've raped Haiti's resources. I believe Giustra is behind paying Michael Avenatti to try to bring down @realDonaldTrump https://t.co/p8sY4fj329 (Appendix # 100)

Further examples are set out below at para. 76.

[27] The amended notice of civil claim pleads that the Appendix is not an exhaustive list of the offending tweets but only a small sampling. However, a plaintiff claiming defamation must plead the specific words complained of. I therefore base this decision only on the tweets listed in the Appendix.

[28] The claim says that before the campaign, Mr. Giustra had a "valued and unblemished reputation in the Province of British Columbia and elsewhere in Canada and throughout the world." The parties' arguments in this jurisdictional challenge were focussed on BC and the United States.

[29] The claim alleges that "each Tweet has been accessed, downloaded and read by many people in British Columbia" and that they have damaged Giustra's professional and business reputation.

[30] Twitter has not filed a notice of response to civil claim: it obtained an order from a master extending the time for that until 21 days after the disposition of this application, including appeals. However, in argument it says it intends to defend primarily on the basis that it is not a publisher of the tweets. For several tweets it says it may raise the defence of fair comment.

[31] Although nothing hinges on the point, I pause here to question this practice. While deferring a response may be permissible, where the determination of a jurisdictional challenge may depend on what is to be alleged in a response it appears to me to be preferable that the defendant file its response so that the issues are better crystallized. Rule 21-8 permits this to be done without attorning to the jurisdiction. As it stands, I am left considering the application on the basis of what I am told Twitter intends to plead which is not completely satisfactory. There is some irony to that, given that Twitter takes the position that the court cannot restrict the scope of Giustra's claim as pleaded and that Mr. Giustra cannot apply to amend to narrow it (something he did not seek to do).

IV. Legal Framework

[32] The *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*] sets out the framework for court jurisdiction. The legislation adopted model legislation proposed by the Uniform Law Conference of Canada. It was meant to codify the common law.

[33] Section 3 sets out the circumstances when a court has territorial competence (jurisdiction *simpliciter*) over a person:

A court has territorial competence in a proceeding that is brought against a person only if

> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,

(b) during the course of the proceeding that person submits to the court's jurisdiction,

(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,

(d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or

(e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

This case largely hinges on subsection (e) – the real and substantial connection.

[34] Section 10 sets out presumptive factors establishing a real and substantial connection. Mr. Giustra argues that three are relevant to the arguments in this case:

10. Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding

. . .

(g) concerns a tort committed in British Columbia,

(h) concerns a business carried on in British Columbia,

(i) is a claim for an injunction ordering a party to do or refrain from doing anything

(i) in British Columbia, or

(ii) in relation to property in British Columbia that is immovable or movable property,

[35] If jurisdiction *simpliciter* is found, the court can decline to exercise it under the principles of *forum non-conveniens*. Determining jurisdiction *simpliciter* is a non-discretionary exercise: jurisdiction either exists or it does not. Determining the issue of *forum conveniens* is a discretionary exercise, but as with all discretionary matters, the determination must be made judicially, taking into the account the appropriate factors. A non-exclusive list of those factors are set out in s. 11:

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

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,

(b) the law to be applied to issues in the proceeding,

(c) the desirability of avoiding multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts,

(e) the enforcement of an eventual judgment, and

(f) the fair and efficient working of the Canadian legal system as a whole.

[36] The courts have held that a defendant may rebut the real and substantial connection even if one of the presumed factors has been established. This was recently described by the Court of Appeal in *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181:

[16] At the first stage of the analysis, the plaintiff must show that one of the connecting factors listed in s. 10 exists. The basic jurisdictional facts relied on by the plaintiff are taken to be true if pleaded (sometimes referred to as a presumption that the pleaded facts are true). The defendant challenging jurisdiction is entitled to contest the pleaded facts with evidence. If the defendant contests the pleaded facts with evidence, the plaintiff is required only to show that there is a good arguable case that the pleaded facts can be proven. The role of the chambers judge is not to prematurely decide the merits of the case or to determine whether the pleaded facts are proven on a balance of probabilities; the plaintiff's burden is low: *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at para. 34; *Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 20, leave to appeal ref'd (2013), [2012] S.C.C.A. No. 367 [*Fairhurst*]; *Environmental Packaging Technologies, Ltd. v. Rudjuk*, 2012 BCCA 343 at para. 26.

[17] At the second stage, if one of the connecting factors is established either on undisputed pleadings or on disputed pleadings but with a good arguable case, the "mandatory presumption" of a real and substantial connection (and, therefore, territorial competence) is triggered: *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at para. 20, leave to appeal ref'd [2010] S.C.C.A. No. 68 [*Stanway*]. This is, of course, distinct from the "presumption" that pleaded facts are true. At this stage, because the connecting factor has already been established, it is presumed that a real and substantial connection exists, and therefore that the court has territorial competence. The defendant may now attempt to rebut the presumption of real and substantial connection by establishing "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 only to a weak relationship between them": *Van Breda* at para. 95; *Canadian Olympic* at para. 24. However, the presumption is strong and "likely to be determinative": *Stanway* at paras. 20–22. The burden on the defendant to rebut the presumption is heavy: *Fairhurst* at paras. 32, 42; *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2014 BCSC 715 at para. 35, aff'd 2015 BCCA 200; *Mazarei v. Icon Omega Developments Ltd.*, 2011 BCSC 259 at para. 33. At this stage of the analysis, a connecting factor is already established: the defendant's task is to show why a real and substantial connection does not follow, despite the strong presumption that it does.

V. Analysis

A. Jurisdiction *simpliciter*

[37] I will deal first with the presumed connecting factor of a tort committed in the province.

[38] The governing authority regarding jurisdiction over internet defamation cases is the Supreme Court of Canada's decision in *Haaretz.com v. Goldhar*, 2018 SCC 28. At para. 36, the majority reiterated that the tort of internet defamation takes place where the defamatory statements are read, accessed or downloaded by a third party. Mr. Giustra's unchallenged allegation that the defamatory statements were read by persons in BC is therefore sufficient to establish the presumption of jurisdiction *simpliciter*. It is, then, up to Twitter to rebut the presumption.

Has Twitter rebutted the presumption?

[39] In *Haaretz*, the court grappled with the ease with which jurisdiction can be presumptively established in internet defamation cases and the corresponding utility of examining of whether the presumption should be rebutted. Justice Côté, writing also for Justices Brown and Rowe, noted:

[40] The ability to rebut the presumption of jurisdiction where there is only a weak relationship between the subject matter of the litigation and the forum serves as an important check on jurisdiction (Van Breda, at para. 95). A careful examination of this question is therefore of particular importance in Internet defamation cases, where a presumptive connecting factor can easily be established.

Building on its prior decision in *Black v. Breeden*, 2012 SCC 19 the court emphasized, at paras. 43-45 and 169-173, the consideration of whether it would be reasonable to expect the defendant to answer a claim in the jurisdiction.

[40] The facts in *Haaretz* are somewhat similar to the one at bar. The plaintiff, Mr. Goldhar, is a prominent Canadian business person. With business interests in both Canada and Israel, he was known, and therefore had reputations, in both countries. In fact, the court noted that due to his owning the Maccabi Tel Aviv Football team, he was a celebrity in Israel. He lived in Toronto, but also had a home in Israel.

[41] Haaretz is a prominent Israeli newspaper. It also publishes its stories on a web site.

[42] The article which was the subject of the lawsuit was published in hard copy and on Haaretz's web site. Only the latter was available in Canada. Its main thrust was Mr. Goldhar's operation of his Israeli soccer team, but it also referred to his Canadian business interests and management approach. The article was read by approximately 200-300 people in Canada and 70,000 people in Israel. Mr. Goldhar's statement of claim alleged the article caused him harm in Israel, Canada and the United States.

[43] The court rejected the submission that the presumption was rebutted. Justice Côté (Brown, Rowe JJ. concurring) noted:

[45] In the case at bar, the evidence fails to establish that Haaretz could not have reasonably expected to be called to answer a legal proceeding in Ontario. The pleadings indicate that Goldhar lives and operates his businesses in Ontario. Haaretz had knowledge of this fact, and the allegedly libellous article directly references Goldhar's Canadian residency and Canadian business practices. As such, this is not a case where the presumption of jurisdiction is rebutted.

[44] McLachlin C.J.C., Moldaver and Gascon JJ. dissented in the result based on *forum non conveniens*, but they were essentially in agreement with respect to whether the presumption of jurisdiction had been rebutted:

[172] In the present case, it was more than reasonably foreseeable that Haaretz would be sued in Ontario. The newspaper published an article attacking a Canadian who lives and does business in Ontario. We do not have to decide at this stage whether the statements published by Haaretz are libellous. We simply have to locate where the sting of the article truly is. In this respect, one must not be distracted by the remainder of the article; the heart of the dispute at hand is the corrosive and highly critical comments about Mr. Goldhar's management style, allegedly imported from his Canadian business.

[173] Furthermore, Haaretz made the article readily available not only to readers in Israel, but also to readers worldwide through online publication on its website. While it is true that defamation cases may raise forum shopping concerns, especially in the Internet context, the present case is clearly not one of forum shopping. It is entirely foreseeable that a Canadian citizen and resident would want to vindicate his Canadian reputation as the owner of his Canadian businesses in a Canadian court. The facts undeniably reveal a real and substantial connection between this case and Ontario. Therefore, the presumption of jurisdiction was not rebutted.

[45] In both this case and *Haaretz* the articles were published on a website that was accessed by people in the proposed jurisdictions. In both cases, the plaintiffs are international business persons with reputations in and connections to several countries.

[46] What, if anything, distinguishes the case at bar from *Haaretz* for the purposes of jurisdiction *simpliciter*? At root, the principle factor relied on by Twitter is that it is a platform which posts messages created by others. It cannot, therefore, be expected to defend actions in any jurisdiction in which an allegedly defamed person has a reputation and in which the offending tweet has been accessed.

[47] That is a somewhat circular argument, because it depends in part on the substantive law that might be applied, namely whether an un-mediated platform such as Twitter is legally responsible for content posted or tweeted by others. That is not a settled point in Canadian law and the point was not argued in this hearing. It is not something that should be determined in a jurisdictional challenge. In any event, in this case I think the point is answered (for the purposes of this application) by the fact that on December 9, 2016, solicitors for Mr. Giustra wrote jointly to Twitter’s Inc.’s general counsel, and Twitter Canada’s general manager complaining of the tweets. Although the letter did not specifically mention that Mr. Giustra’s reputation in Canada was being damaged, the letter came from a law firm in Toronto. Mr. Giustra’s notice of civil claim lists in its appendix 79 tweets sent subsequent to the letter,

and that is stated to be a small sample of the tweets. In short, for some of the tweets, Twitter was aware of their contents.

[48] Turning to the matter of reputation, Justice Côté noted its significance to the analysis of jurisdiction:

[44] Assuming that these principles are properly applied, the *situs* of the tort will not give rise to an irrebuttable presumption of jurisdiction in Internet defamation cases. While it is not appropriate to propose an exhaustive list of factors that can rebut the presumption of jurisdiction in these types of cases, it is not difficult to imagine circumstances in which it would not be reasonable to expect that the defendant would be called to answer a legal proceeding in a chosen forum. For example, evidence that a plaintiff has no reputation in the chosen forum may be a factor tending to rebut the presumption of jurisdiction in a defamation action. As the protection of reputation is the primary purpose of defamation law (*Banro*, at paras. 57-58), absence of reputation would tend to point to a weak relationship between the forum and the subject matter of the litigation. Indeed, this Court, in *Banro*, relied in part on the plaintiff's reputation in the chosen forum to conclude that it would be inappropriate to find that the presumption of jurisdiction had been rebutted in the circumstances of that case (para. 38).

[49] Similarly, McLachlin C.J.C., Moldaver and Gascon JJ. noted:

[173] Furthermore, Haaretz made the article readily available not only to readers in Israel, but also to readers worldwide through online publication on its website. While it is true that defamation cases may raise forum shopping concerns, especially in the Internet context, the present case is clearly not one of forum shopping. It is entirely foreseeable that a Canadian citizen and resident would want to vindicate his Canadian reputation as the owner of his Canadian businesses in a Canadian court. The facts undeniably reveal a real and substantial connection between this case and Ontario. Therefore, the presumption of jurisdiction was not rebutted.

[50] On the evidence, there can be no dispute that Mr. Giustra has a significant reputation in British Columbia. He also has strong ties to the province. The fact that he has a reputation in or connections to other jurisdictions does not detract from that. Giustra is not, as implied by Twitter, relying on his mere residence in British Columbia; rather he is relying on his reputation here.

[51] As I said above, the notice of civil claim alleges that each tweet has been read by many people in BC. There is no evidence as to the number of people in British Columbia who read the tweets but it appears there at least 500,000 twitter users in the province. In my view for the purposes of a jurisdictional challenge (where pleaded facts are taken to be correct unless challenged by evidence adduced by the defendant) Giustra has gone far enough in demonstrating damage to his reputation here. I do not agree with Twitter who argues that “of all places in the world, the Plaintiff’s reputation has not been harmed in B.C.”

[52] There is another similarity between this case and *Haaretz*. This is that Goldhar did not limit his claim to damages suffered to his Canadian reputation and neither does Giustra. At the hearing of the jurisdictional challenge, Goldhar’s counsel undertook not to claim damages to his Israeli reputation in the Ontario lawsuit. However, Côté J. held that Goldhar was bound by his pleadings. She therefore considered the claim as one for damages to Goldhar’s reputation in both Israel and Ontario.

Nevertheless, she concluded that there was jurisdiction *simpliciter* over the claim. She did decline jurisdiction, and I will deal that in the *forum conveniens* analysis, but the point here is that claimed reputational damage in more than one jurisdiction did not lead to a finding that jurisdiction over the claim did not exist.

[53] In the applicable law section below, I conclude that the *lex loci delicti* leads to the conclusion that tweets published in the United States and read there would be governed by U.S. law. Nevertheless, I think jurisdiction *simplicter* exists to deal with that in this claim because – given the BC tweets are properly before the court – there is a real and substantial connection between British Columbia and the facts on which the proceeding is based. As I discuss below, that approach avoids duplicative litigation in multiple jurisdictions.

[54] Finally, Twitter relies on the *Sikhs for Justice v. The Republic of India*, 2020 ONSC 2628, in which Kimmel J. concluded that the presumption of jurisdiction over an internet defamation claim had been rebutted. The plaintiff was a Sikh organization with offices in Toronto, London, New York and Washington. Its mission was to advocate for a referendum for an independent Sikh nation in Punjab. The lawsuit concerned an alleged defamatory article written by one of the two defendants, ANI Media Private Ltd., published in the hard copy and on-line versions of an Indian newspaper, which was not a defendant. The on-line version was accessed by one of the plaintiff's employees in Toronto. The claim alleged that the article was part of a smear campaign between ANI and the Indian government. ANI challenged jurisdiction. (India had not been served and would have been subject to sovereign immunity.)

[55] The main basis for finding that there was no jurisdiction was the allegation that the smear campaign was orchestrated by the Republic of India and carried out in India:

[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.

I think it is obvious that the case at bar is considerably different.

[56] I conclude that Twitter has not rebutted the presumption of a real and substantial connection based on a tort having been committed in the province. It is unnecessary for me to address the other

factors relied on by Mr. Giustra to establish a real and substantial connection and territorial competence. I will say, however, that I do not accept that Twitter does business in the province.

VI. Appropriate Forum

[57] The *CJPTA* sets out the framework for the *forum non conveniens* analysis:

Discretion as to the exercise of territorial competence

> 11(1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
>
> (b) the law to be applied to issues in the proceeding,
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> (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.

From the word “including”, it is clear the list of factors is non-exclusive.

[58] This is a codification of the common law of *forum conveniens*: *Teck Cominco Metals Ltd. v. Lloyd’s Underwriters*, 2009 SCC 11 at para. 22 and *Black* at para. 23. However, cases decided under the prior common law are relevant and frequently cited. And cases from *CJPTA* jurisdictions are frequently cited in jurisdictions where the uniform statute has not been implemented.

[59] Once again, the governing authority here is *Haaretz*.

[60] In *Haaretz*, the majority noted the importance of a robust *forum conveniens* analysis in internet defamation cases, in which jurisdiction *simpliciter* is easily established:

> [47] While the normal state of affairs favours exercising jurisdiction in the forum where it is properly assumed, this should never come at the cost of one party facing unfair or clearly inefficient proceedings. The purpose of *forum non conveniens*, as discussed above, is to temper any potential rigidity in the rules governing the assumption of jurisdiction and to "assure fairness to the parties and the efficient resolution of the dispute" (*Van Breda*, at para. 104). Where the evidence indicates that the alternative forum is in a better position to dispose fairly and efficiently of the litigation, the court

should grant the stay (*Van Breda*, at para. 109). This is especially true in cases where the evidence raises doubt as to whether proceeding in the chosen forum will provide the defendant with a fair opportunity to present its case.

[48] In light of the purpose of *forum non conveniens*, I agree with Pepall J.A. that, "given the ease with which jurisdiction *simpliciter* may be established in a defamation case, in a motion for a stay, a motion judge must conduct a robust and carefully scrutinized review of the issue of *forum non conveniens*" (para. 132). It is true that defamation cases involve a particularly rigid application of the rules governing the assumption of jurisdiction. As discussed above, the establishment of a presumptive connecting factor is "virtually automatic" in Internet defamation cases (Pepall J.A., at para. 127). Where there is no "real and substantial connection" to the chosen forum, a proper analysis at the rebuttal stage will alleviate *some* of the consequences of the rigid application of the rules governing the assumption of jurisdiction. That being said, there are some *other* consequences to the rigid application of these rules that can *only* be addressed in the *forum non conveniens* analysis. For example, where a plaintiff enjoys a reputation in multiple forums, publication may allow jurisdiction to be properly assumed in all of them, without regard to how fair or efficient it may be to proceed in the chosen forum. This is to be expected as, again, "the factors that would justify a stay in the *forum non conveniens* analysis should not be worked into the jurisdiction *simpliciter* analysis" (*Van Breda*, at para. 56). As the rebuttal stage fails to address *all* the consequences of the "virtually automatic" presumption of jurisdiction in defamation actions, it is appropriate for motion judges to be particularly attuned to concerns about fairness and efficiency at the *forum non conveniens* stage in these types of cases. This should not be understood as imposing a different standard or burden for defamation cases.

[61] Dealing with the considerations related to *forum non conveniens* is normally an exercise in comparing the pluses and minuses of proceeding with a trial in the forum selected by the plaintiff to the one advocated by a defendant. Yet, as I deal with in more detail below, both parties recognise that because of U.S. law, a trial will not take place in California. (They characterise this differently, but that is not relevant to this point.) This makes a review of some of the comparative factors somewhat artificial. Nevertheless, I will go through the points raised by Twitter in support of California as the convenient forum because they demonstrate that there is no practical difficulty which would make holding a trial here unfair to it.

A. Location of witnesses

[62] As I noted above, Twitter has not filed a response to Giustra’s notice of civil claim. However, it says it intends to defend primarily on the basis that it is not a publisher of the tweets.

[63] With respect to specific witnesses it intends to call, it has deposed that:

> 43. . . . Twitter anticipates that it may call evidence of witnesses from Twitter employees and former employees with the relevant knowledge that can speak to, among other things:

(a) The development and implementation of Twitter policies and Twitter Terms of Service, among other policies;

(b) Twitter's capacity and role as a platform that facilitates expression and how Twitter responds to requests to remove harassing or abusive content;

(c) The worldwide volume of tweets posted each day, and the inability of Twitter to monitor the hundreds of millions of tweets posted to the Twitter platform each day;

(d) Twitter's engineering capacity and capability from a technical standpoint of how the Twitter platform operates, the technical steps required of Twitter engineers to bounce tweets or suspend users, and the inability of Twitter to technically monitors hundreds of millions of tweets posted on the platform each day; and

(e) The corporate structure of Twitter, the number of employees in the Twitter offices, and information pertaining to the location, and responsibilities of those employees and offices.

44. Twitter may also call a director and/or a manager of the User Operations team and a director and/or a manager of the Trust & Safety team.

45. All of the employees described above work at Twitter's headquarters in San Francisco.

46. Twitter may call the current and former employees who were members of the Trust & Safety and User Operations teams that reviewed the Subject tweets and other tweets reported by the Plaintiff. Twitter has so far identified 21 specific Twitter witnesses with relevant knowledge:

(a) ten are Twitter employees currently working in San Francisco, California;

(b) three currently work in Manila, Philippines; and

(c) eight are former employees. Of those eight, seven were employed by Twitter in its San Francisco headquarters. One worked in Dublin, Ireland.

[64] Further Twitter says that it would also expect to call expert evidence in support of its defence that it is not a "publisher" of the content of its platform and to give evidence of a technical nature regarding social media platforms, the practical limitations on their ability to police content, and the implications for the industry. The expert(s) would likely be from California.

[65] Twitter also says that, for some of the tweets, it will raise the defence of fair comment. If the statements were made on a matter of public interest, then the comment would have to be one that a reasonable person could make on the basis of the facts. The underlying facts must be so notorious for the ordinary person to understand the facts upon which the comment was based. If the action was tried in British Columbia, Twitter would expect to call one or two witnesses to give evidence that the factual

basis underlying certain of the tweets was a matter of public interest and notoriously well known in the United States during the most recent Presidential election. In order to give this evidence based on first-hand knowledge, these witnesses would likely be residents of California or elsewhere in the United States.

[66] Twitter makes the point that it cannot compel witnesses who are unwilling to testify at all or who are unwilling to travel to British Columbia to testify.

[67] Mr. Giustra, in his argument (not in an affidavit) says that:

> 136. Further, while it is not possible for Giustra to know all of the witnesses he may call at a trial in British Columbia, since he does not have the benefit of reviewing Twitter's defence, we anticipate that most, if not all, of his witnesses will be located in the Province of British Columbia. Generally speaking, these witnesses would include:
>
> - Giustra himself, who is domiciled in British Columbia;
> - Witnesses to substantiate the damage to Giustra's reputation in British Columbia, who would all be located in British Columbia,
> - Witnesses to substantiate that the defamatory tweets can and have been read, accessed or viewed in British Columbia; and
> - Witnesses to prove that the defamatory tweets continue to be published by Twitter in British Columbia, notwithstanding Twitter's assertions otherwise.

[68] Giustra argues that there are mechanisms for Twitter to compel the evidence of California witnesses. However, as Twitter points out, that would entail a pre-trial deposition in California. Giustra has shown no mechanism to *compel* a live video appearance during the trial.

[69] Twitter argues that compelling the taking of testimony in advance of the trial by way of letters rogatory or other procedure, would provide Giustra several months advance notice of Twitter's case without Twitter being afforded the corresponding advantage. Further, Twitter would be compelled to anticipate the evidence of Giustra before he even opens his case.

[70] The Supreme Court in *Haaretz* held that the compellability of witnesses weighed heavily in favour of a trial in Israel: para. 70. The availability of pre-trial depositions was not a satisfactory alternative. However, most of the witnesses identified by Twitter are either current employees or former employees of Twitter, the majority being the former. With respect to potential experts, by definition, they would have to be hired based on their willingness to give evidence without compulsion. As I have said, Twitter has not identified any specific witnesses by name nor any who have indicating an unwillingness to participate.

[71] Assuming willingness to participate, there then remains the issue of the expense and inconvenience of Twitter's witnesses testifying in a trial here. That consideration should not be overstated. During these times of the COVID-19 pandemic, this court and others in Canada have developed the capability to effectively deal with the remote participation of witnesses in a trial. That might not be satisfactory in all cases or for all witnesses, but here there is nothing to indicate that this

case will involve close calls of credibility. Moreover, usually the concern about witnesses not being present in person is with their cross-examination. But Twitter is concerned about its own witnesses' convenience and obviously it will not be entitled to cross-examine them.

[72] Finally, Giustra has witnesses here who, if a trial were to take place in California, would have to travel there.

B. Documents

[73] Twitter argues that all of its documents will be in California.

[74] I place little or no weight on that. It is apparent from the evidence and the nature of the case that the bulk of the evidence will all be in native electronic format. Moreover, the location of documents can no longer be considered a significant factor given that even if they were in paper format they could be scanned. And, one cannot be a judge for any length of time and not observe that lawyers frequently have paper documents scanned for their own purposes. Trials here are frequently conducted with documents in electronic form only and particularly so during the COVID crisis. The location of documents may have been a potential major concern when the *CJPTA* was drafted, but that is no longer the case.

C. Tweets' connections to the U.S.A. vs. British Columbia

[75] Twitter says that the tweets' contents are American-centric. It points to the allegation in the amended notice of civil claim that I quoted above at para. 25 regarding the Mr. Giustra's involvement in the U.S election being the impetus for the tweets.

[76] However, as Giustra points out, while his charitable and philanthropic work in support of the Clinton foundation was the impetus of the libel against him published by Twitter, the notice of Civil Claim itemises tweets that are Canadian specific:

- Clinton Foundation, Frank Giustra, Justin Trudeau all in bed together and promoting Pedophilia. #ChildTrafficking
- @rosemurray @CharlieAngusNDP @ChiefDay If Chief Day wants to advocate for murdered and missing First Nations, he should probably start with another 1 of JT's pals in BC. #Frank #Giustra has a "foundation" for "at risk young boys" in BC. He helped the Clintons in Haiti. Helped Hillary with #U1. Buddies with JT.
- @paulacblades001 BC -
- Where PMJT [Prime Minister Justin Trudeau] likes to vacation.
- Where #Frank #Giustra has an "at-risk" charity for boys.
- Where there is an insanely high rate of murdered and missing First Nations people. (What happens to them?! Where do they go?!)
- ..... 🤔 ...??

- REFUGEE CHARITY USES PEDOPHILE LOGO – LINKED TO CLINTON FOUNDATION #Qanon Started by Frank Giustra - billionaire linked to "Clinton Cash" Mr. Giustra is a founding patron of the Boys Club Network, an at-risk youth mentoring support group in Vancouver, Canada…

- Frank Giustra is linked to boysclubnetwork a group that molested 100s of boys! #KevinSpacey #briansinger #weinstein #Uranium1 #giustra #pizzagate #pedogate #elpida

- Disney World #Pedogate Hmm It's always the creeps that love to be around the children. They're everywhere. Schools, Daycare, Childrens Foundations, Boys Clubs (Frank Giustra) Helping the Children in Haiti (Clinton Foundation) #QAnon

- @BoysClubNetwork @RadcliffeFdn @Frank_Giustra You do know they're involved in child trafficking, right? #NWO #globalism #Pizzagate #Pedogate #Trump #Clinton #FrankGiustra #ElpidaHouse

- CA #Swamp is coming to light!! #Frank #Giustra (#U1) Pedo! What's up with that Boys Club you founded and fund Frankie?

- Giustra...Canadian Boys Club...Radcliffe Fnd...Tent.org...Clinton Fdn...Kimmel...Uranium 1...(see this interesting set of pics! https://t.co/iO9h8fWD3g) FollowTheMoney #UraniumOne #PedoGate #PedoWood #QAnon @POTUS @realDonaldTrump @LizCrokin @IsaacKappy @RealJamesWoods

[77] In addition, there are multiple tweets which refer to Lionsgate Entertainment, the Vancouver-based film company that Giustra founded.

[78] The tweets impugn Giustra personally – that is not something that is geographically centred.

[79] As I said above, there is no firm evidence as to the number of people in British Columbia who would have accessed the tweets. Nor is there firm evidence of the number of Twitter users in British Columbia. However, Twitter acknowledges the number of users in British Columbia as at least 500,000.

D. Enforceability

[80] Twitter points out that Twitter has no assets here and argues says that a monetary judgment would have to be enforced against it in California, where a judgment for defamation would not be recognised. Nor would a California court enforce an injunction order and because Twitter has no presence in British Columbia, there is no way to enforce an injunction application against it here. It argues that this a factor in favour of declining jurisdiction. Twitter argues that the inability to enforce the judgment makes this proceeding "largely pointless".

[81] I will begin with *Haaretz*. Although that case involved a defamation action, it was not a situation where Israel – the proposed alternative forum and location of the defendant – would not recognise a

judgment for defamation, as is the case here. Rather, the concern was the prospect of separate proceedings in the alternative forum.

[82] McLachlin CJ, Moldaver and Gascon JJ., at para. 236, opined that enforcement was not a major consideration in defamation actions:

Finally, the "enforcement of judgment" factor was not considered by the motion judge or the majority in the Court of Appeal. The dissenting judge found that this factor favoured Israel. We disagree. In defamation cases, vindication of the plaintiff's reputation is often a primary concern, if not the primary concern. This stance often renders the enforcement of the final judgment irrelevant to the *forum non conveniens* analysis in defamation cases. As the Ontario Superior Court of Justice stated in *Barrick Gold Corp.*:

It is recognized in defamation cases that the vindication of one's reputation is as important as any monetary award of damages that might be obtained. For its purposes, Barrick may be quite content with a declaration by a court in Ontario that the statements made by the defendants are untrue even if it cannot recover any damages that might be awarded to it as a consequence. [para. 40]

[83] Justice Côté (Brown, Rowe JJ. concurring) at paras.81-83 noted that the enforceability of a judgment was a factor to consider in the *forum conveniens* analysis, pointing to the court's earlier judgments in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 and *Black*. Justice Côté did not agree that this was irrelevant in a defamation action. She concluded that the necessity of enforcement in Israel would lead to a multiplicity of proceedings and that this favoured Israel as the forum. Justice Abella at para. 138 simply remarked that this factor favoured Israel. Justices Karakatsanis and Wagner. did not comment on the issue.

[84] As I mentioned, *Haaretz* did not involve a foreign jurisdiction in which a defamation judgment was un-enforceable, but *Black* did. At para. 35, Justice LeBel, for the court, stated:

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

Even in the face of this, the court agreed with the lower courts that Ontario was the appropriate forum.

[85] Two things underlie the concern about enforceability. The first is the consideration of comity: namely should a court grant a judgment which a foreign court will not enforce because a judgment under our law offends the foreign jurisdiction's law. I will deal with the issue of comity later. The second concern is the possibility of multiple proceedings if the defendant has no assets here therefore necessitating the plaintiff launching enforcement proceedings in another jurisdiction. Here there appears to be no possibility of a multiplicity of proceedings because there would be no point in trying to enforce the judgment in California.

[86] Further - and nothing I have concluded hinges on this - Twitter has not deposed to the situs of the shares of its Canadian subsidiary. That may be an asset in Canada that can be executed against.

E. Applicable law

[87] The majority in *Haaretz* held that the law applicable to defamation cases is the law where the tort occurred (the *lex loci delicti* rule). In internet defamation cases the tort occurs where the words are read.

[88] While that remains the state of the law, in separate judgments, Abella and Wagner JJ. opined that the choice of law rule should be modified for internet defamation cases and proposed that the applicable law should be determined by where the plaintiff suffered the most substantial harm. Justice Côté with Brown and Rowe JJ. concurring, left it open for the Court in a later case to apply that test, but did not think the point had been sufficiently argued and therefore applied the *lex loci delicti* test. McLachlin C.J.C. with Moldaver and Gascon JJ. concurring concluded that the *lex loci delicti* rule should no longer apply to defamation. Justice Karakatsanis did not express an opinion on the issue.

[89] Both Côté and McLachlin JJ. (with the concurrences I mentioned) stated the choice of law point should not figure prominently in the analysis. Justice Karakatsanis also concluded that the applicable law should be given little weight where it was based on the *lex loci delicti* rule. She also noted that the relevance of the applicable law in the *forum non conveniens* analysis was the potential difficulty of a court having to apply foreign law. It was not a matter of assessing the comparative differences in the laws of the potential jurisdictions. On the other hand, Côté J. (at para. 89) recognised that in its prior decisions, the Court had only considered the applicable law in the chosen forum but felt, nonetheless, that "disregarding the applicable law in the alternative forum is inconsistent with the comparative nature of the *forum non conveniens* analysis." (I note that in *Haaretz* the main difference between Israeli and Canadian defamation law was that in Israel a trial by jury was not available).

[90] In *Haaretz*, Côté J. recognised that the *lex loci delicti* rule in internet defamation cases might result in situations where multiple courts may assume jurisdiction and apply their own laws:

[92] I recognize that in Internet defamation actions, where a tort may have occurred in multiple jurisdictions, the *lex loci delicti* rule may allow courts in multiple forums to assume jurisdiction and

apply their own law. In an interconnected world where international players with global reputations are defamed through global publications, this is unsurprising.

In a similar vein, Abella J. at para. 110 noted that a strict adoption of the *lex loci delicti* rule renders each publication of the alleged libel its own cause of action, again resulting in jurisdiction existing in multiple countries.

[91] A scenario *Haaretz* did not deal with was the possibility that a court could try a case applying several jurisdictions' laws to it. Nevertheless, that is a concomitant of the *lex loci delicti* rule. In the present case, the applicable law to tweets published in British Columbia would be B.C. law. The law applicable to tweets published in the United States would, under the *lex loci delicti* rule, be the governing law there. To state the same proposition in the negative, on the assumption that Twitter Inc. has no physical or business presence in Canada, I do not see in this case how B.C. law could be applied to tweets relayed by Twitter and published in the United States. That would be an extra-territorial and impermissible application of B.C. law.

[92] If the application of more than one jurisdiction's laws were not the approach, the result would be that a plaintiff would have to bring multiple actions against the same defendant in different jurisdictions (something the law of *forum conveniens* strives to avoid), or a plaintiff would have to choose one jurisdiction only with its applicable law and forego claims in the others. Neither of those is a satisfactory solution. To put the matter another way, it cannot be the case that a defendant in a defamation action involving publication in multiple countries can successfully assert that the action be tried in one jurisdiction only (to avoid multiplicity of litigation), with the trial being limited to the publication in that jurisdiction only. That would be allowing the defendant to have it both ways.

[93] I recognise that there may be some difficulty sorting out whether specific tweets were published in only one country and respective damage that flows from the locations of the tweets. Nevertheless, that is something that can best be worked out at a trial. As the Court for Appeal noted in *Knight v. Imperial Tobacco Canada Limited,* 2006 BCCA 235 in a different context:

[40] Although there may be elements of novelty and difficulty with the proposed methodology of damages calculation advanced by the respondent, it seems to me that it is appropriate for this issue to be left to be worked out in the laboratory of the trial court. Then, if and when the issue reaches this Court, we will have the benefit of a full record upon which to assess the appropriateness of any damages award that may be made pursuant to the proposed methodology.

[94] As I noted above, unlike Mr. Black in *Black,* Mr. Giustra did not undertake to limit his claim for damages to Canada. In its argument, Twitter correctly pointed out that the court in *Haaretz* said that a court should not accept such an undertaking and that therefore the court could not, on its own accord, do what the plaintiff itself was not entitled to do. However, that was only 3 judges: Côté, Brown and Rowe JJ. Four judges specifically disagreed: McLachlin C.J.C, Moldaver, Gascon and Karakatsanis JJ. Neither Wagner nor Abella JJ. expressed an opinion on the point. In any event, I do not consider that I am limiting or amending Mr. Giustra's claim. Foreign law must be pleaded by the party who alleges it. If foreign law is not raised, then the law of the forum applies. Mr. Giustra has not pleaded California law. Rather it is Twitter that argues (once again it has not filed a response) that it is applicable.

[95] All of this comes down to an answer to a major point raised by Twitter: that it would be a breach of comity to apply Canadian law to Twitter's conduct in the U.S. Under the *lex loci delicti* rule, that activity would be governed by U.S law. If Mr. Giustra can show that he suffered damage in the U.S. because of publication in Canada, that would be subject to Canadian law. That also would not be a breach of comity.

F. No liability under California or U.S. law – juridical advantage

[96] As I indicated above, under U.S. and California law, there is no dispute that Twitter would have no liability for defamation. Because that is not contentious, I will not go into detail as to why that is so. Suffice it to say that it arises from the First Amendment of the U.S. Constitution which, among other things, protects freedom of speech and of the press; the *Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act*, 28 USC (2010), which prohibits enforcement of libel judgments that do not comport with the United States' broad protections for freedom of speech; and Section 230 of the *Communications Decency Act of 1996*, 47 USC (1996), which protects freedom of speech on the internet by providing internet platforms such as Twitter with immunity against liability for tort claims arising from the dissemination of content from third-party users.[1]

[97] Mr. Giustra argues that because California bars a finding of liability against Twitter, there is no alternative forum at all. Twitter argues that California is an alternative forum, it is just that Giustra cannot succeed there because of the substantive law. This court should, under principles of comity, not use that as a factor in favour of assuming jurisdiction here.

[98] The matter may therefore be viewed through two lenses: no suitable alternative forum or the factor of juridical advantage.

[99] I begin by noting that this court has held that a defendant who raises a *forum conveniens* challenge must point to another alternative forum and cannot simply rely an argument that British Columbia is an inappropriate forum: *British Columbia v. Imperial Tobacco Canada Ltd*., 2005 BCSC 946 at 167-168, aff'd. 2006 BCCA 398. In fact, R. Holmes J. noted that the defendant ought to agree to attorn to the alternative jurisdiction it was proposing.

[100] Second, and more apt to the current case, a defendant challenging the forum, must establish that there is a *clearly* more appropriate forum. This was repeated frequently by Justice Sopinka in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board*), [1993] 1 S.C.R. 897. In fact, Justice Sopinka at para. 26 recognised (albeit more in the context of anti-suit injunctions) that there might be cases where there is no clearly more appropriate forum and, at para. 29, that the consequence might be parallel proceedings. In *Black*, LeBel J. concluded at para. 37 that both Ontario and Illinois were both appropriate forums, but that the defendants had not established Illinois as the clearly more appropriate forum and therefore upheld the chambers judge's refusal to decline jurisdiction. And in *Haaretz*,

McLachlin C.J.C., (Moldaver and Gascon JJ. concurring) was at pains to emphasize the *clearly* more appropriate rule. The other judges did not specifically deal with the point.

[101] The simple and obvious point here is that California cannot be an alternative forum at all much less the clearly more appropriate forum when the plaintiff would have no cause of action there for tweets *published in British Columbia* and *harm suffered in B.C.* to which B.C. law would apply under our conflict rules.

[102] Interestingly, in *Piper Aircraft v. Reyno* 454 U.S. 235, 255 n.22 (1981), the U.S. Supreme Court has said:

At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.

[103] Turning to look at this from the point of view of juridical advantage, it has been repeated frequently that juridical advantage is problematic and that an advantage to one party is often a disadvantage to the other. Nevertheless, as Sopinka J. noted in *Amchem* at p. 920, the connection to the jurisdiction a significant to the weight to be given to juridical advantage:

. . . The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.

[104] The nature and circumstances of the juridical advantage is obviously a factor as well. For example, as noted by the House of Lords in its seminal decision in *Spiliada Maritime Corp v. Cansulex Ltd.* [1986] UKHL 10 (the basis for our law of *forum conveniens*) the significance of a foreign limitation period having expired might depend on whether the defendant was negligent in not having filed suit in the foreign court.

[105] Two Court of Appeal decisions relied on by Mr. Giustra dealt with the issue of an action not being maintainable in the alternative forum, one dealing with the lack of a substantive cause of action in China, the other dealing with an expired limitation period.

[106] In *Huang v. Silvercorp Metals Inc.*, 2016 BCCA 100, Mr. Huang sued Silvercorp for his arrest, conviction and imprisonment which took place in China, where Silvercorp owned a mine together with the government of China. He sued for false imprisonment and defamation. Silvercorp argued that the more appropriate forum for the false imprisonment claim would be China. However, Chinese law did

not provide for a civil claim for false imprisonment. The Court of Appeal held this point was determinative of the appeal and agreed with the chambers judge that the action should proceed in BC:

[46] In my view, Silvercorp's submissions are answered by a broader consideration of the conceptual framework within which s. 11 operates. Section 11 contemplates an existing or similar proceeding, including the main elements of the claim, being continued in another more convenient jurisdiction. It is apparent from the chambers judge's findings of fact, the pleadings, the filed affidavits, and the expert opinions, that if Mr. Huang's false imprisonment claim does not proceed in British Columbia, it will not proceed at all.

. . .

[48] There is no private law tort equivalent proceeding available in China. The only proceeding available is an application for compensation made to the government of China for its wrongful imprisonment of Mr. Huang. This claim can only be pursued if Mr. Huang is declared innocent in a trial supervision proceeding. Silvercorp would not be a party to such a proceeding, nor is it clear that Silvercorp would be compellable in such a proceeding. As a result, Silvercorp's application is effectively a motion to strike Mr. Huang's pleading in this jurisdiction.

[49] In my view, the fact that Mr. Huang's claim (or a reasonably similar one) could not be pursued in China is determinative of this appeal. I see no error in the chambers judge's determination that there was a clear juridical advantage to proceeding in British Columbia. Other obvious and compelling factors are that both parties are in British Columbia; Mr. Huang is legally prohibited from entering China to participate at all in his own proceeding; and that the defamation aspect of the same claim is proceeding in British Columbia and is not the subject of a jurisdictional challenge.

[Emphasis in original.]

[107] In *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39, the plaintiff sued a B.C. company for battery and negligence arising out of his having been shot at the mine operated by the defendant's subsidiary in Guatemala. The one-year limitation period in Guatemala had expired. Garson J.A. noted that the cases have taken differing approaches to expired limitation periods in the potential foreign jurisdiction:

[91] In a *forum non conveniens* analysis, facts regarding limitation periods are considered under the "juridical advantage" factor: see *Tolofson v. Jensen*, [1992] 3 W.W.R. 743 (B.C. C.A.); *Gotch v. Ramirez*, [2000] O.J. No. 1553 (Ont. S.C.J.) at para. 16. Many courts have found that the expiration of a limitation period in the other jurisdiction is a juridical disadvantage to the plaintiff that weighs *against* granting a stay of proceedings based on *forum non conveniens*: see *Tolofson; Gotch; Butkovsky v. Donahue* (1984), 52 B.C.L.R. 278 (B.C. S.C.); *Ang v. Trach*, [1986] O.J. No. 1117 (Ont. H.C.); *Jordan v. Schatz*, 2000 BCCA 409 (B.C. C.A.) at para. 28. However, some courts have found that a plaintiff's failure to bring an action within time in the other jurisdiction militates against attaching any weight to the juridical advantage factor because, in some circumstances, a plaintiff could successfully oppose a defendant's *forum non conveniens* application in one jurisdiction by simply allowing the limitation period to expire in the other jurisdiction: see *Kennedy v. Hughes*, [2006] O.J. No. 3870 (Ont.

Master) at para. 12(v)-(vi); *Hurst v. Société Nationale de l'Amiante*, 2008 ONCA 573 (Ont. C.A.) at paras. 51-52.

[92] It appears that the weight attached to the juridical advantage factor when considering the expiration of a limitation period in another jurisdiction is a case-specific inquiry that turns on the facts.

[108] At para. 96, Garson J.A. concluded that the expired limitation period counted against Guatemala being a clearly more appropriate forum. She said she attached significant weight to that because it might be the plaintiff would not be able to pursue a claim in Guatemala at all. In coming to this conclusion, she noted that the plaintiff was not forum shopping.

[109] I note that although these decisions pre-dated *Haaretz*, nevertheless *Haaretz* did not change the analysis relating to *forum conveniens* other than to stress that it must be looked at closely in defamation cases where jurisdiction *simpliciter* can readily be established.

[110] As against these two authorities, Twitter relies on *Leon v. Volkswagen AG***,** 2018 ONSC 4265. In that case, the plaintiff, an Ontario resident, launched a proposed class action in Ontario for prospectus misrepresentation. The defendant did not do business in Ontario and the tort was not committed in Ontario. The shares were issued in Germany. Belobaba J. held that jurisdiction *simpliciter* did not exist.

[111] However, he went on to consider *forum conveniens*. The plaintiff stressed two advantages to bringing the action in Ontario that were not available in Germany, one of two proposed alternative jurisdictions. The first was the availability of class actions. Belobaba J. quickly dismissed that argument, noting that the courts have frequently held that other jurisdictions without class actions were preferable forums. The second advantage was a more liberal limitation period, so that more potential class members' claims would be captured. Justice Belobaba stressed international comity – as he had in his analysis of jurisdiction *simpliciter* – and noted that juridical advantage was a problematic concept. With respect to limitation periods, he stated:

[49] Parsing another country's procedural law to assess comparative advantage or disadvantage eviscerates the "attitude of respect for and deference to the legitimate actions of other states and their courts" that lies at the core of international comity. If international comity means anything, it means that in cases where the other country's legal system is otherwise legitimate, that this court should respect and accept the other country's legal system in its entirety, including any differences in litigation procedure and limitation periods.

[112] *Leon* is a significantly different case than the one here. The only connection to Ontario was that the plaintiff was resident and purchased shares there. Further, the case at bar does not involve parsing California law. Here the situation is stark: there is no liability under California law.

[113] Twitter argues that there is a preferable forum which has a cause of action for defamation; it is just that Mr. Giustra will lose because U.S. law does not recognise any liability of Twitter for this type of defamation claim. I think that is overly simplistic. It is somewhat analogous to what Brown J. observed in *Uber Technologies Inc. v. Heller*, 2020 SCC 16, a case dealing with the enforceability of an arbitration clause:

> [113] . . . there is no good reason to distinguish between a clause that *expressly* blocks access to a legally determined resolution and one that has the ultimate *effect* of doing so.
>
> [Emphasis in original.]

As Brown J. also noted at para. 115, public policy requires access to justice and that is not merely access to a resolution. These comments are not inapt to the *forum conveniens* issues here.

[114] This brings me to the consideration of comity, which is not so much a separate factor, but rather a principle which underlies private international law in general and the taking of jurisdiction.

[115] It goes without saying that comity does not prevent considering juridical advantage and disadvantage; otherwise, juridical advantage would not be a factor in the *forum non conveniens* analysis at all. As illustrated by *Garcia*, comity does not go so far as to dictate that a court must decline jurisdiction simply because the law of the alternative jurisdiction does not provide a cause of action. In fact, as noted in *Imperial Tobacco* at para. 187, courts have taken jurisdiction in the face of explicit foreign blocking statutes.

[116] As I have said above in the section dealing with the applicable law, tweets which were published in the United States would be dealt with under U.S. law pursuant to the *lex loci delicti* choice of law rule. Contrary to Twitter's argument, there is therefore no weighing of the fairness of the substantive law in the U.S. Under all the circumstances, taking jurisdiction cannot be seen as a breach of comity.

G. *Forum conveniens* concluding analysis

[117] Mr. Giustra, as I have shown, has close connections here. Tweets were published here. Many of the tweets refer to British Columbia. They go beyond the articles in the *Haaretz* case which primarily impugned Mr. Goldhar's business practices: here the tweets refer to Mr. Giustra's personal characteristics alleging, for example, pedophilia.

[118] Although the Supreme Court of Canada left open the possibility of it reconsidering the choice of law rule for defamation cases, I have approached this matter – as I think I am bound to – on the basis that the *lex loci delicti* rule applies, given that is the current state of the law. On this basis, British Columbia law would apply to tweets read in B.C.; California or U.S. law would apply to tweets read there.

[119] That being the case, there would be no breach of comity by this court assuming jurisdiction. It would not be ignoring California law, nor would it be making any evaluation of that law, as Twitter alleges. The court would be applying, in part, U.S. or California law. If Twitter is correct, Guistra will not be able to recover damages for tweets published in the U.S.

[120] Twitter has not presented the possibility of a court in California applying a similar analysis. On its argument, Mr. Giustra's claims, including that for damage arising from tweets published in Canada, would inevitably be dismissed.

[121] The following from *Black* is apt here:

[37] In the end, some of the factors relevant to the *forum non conveniens* analysis favour the Illinois court, while others favour the Ontario court. The *forum non conveniens* analysis does not require that all the factors point to a single forum or involve a simple numerical tallying up of the relevant factors. However, it does require that one forum ultimately emerge as *clearly* more appropriate. The party raising *forum non conveniens* has the burden of showing that his or her forum is *clearly* more appropriate.

Balancing all of the factors, I do not think that this court ought to decline jurisdiction.

VII. Conclusion

[122] I conclude that this court has jurisdiction over the claim and should not decline it.

[123] Having found jurisdiction based on the claim for damages, I find it unnecessary to deal with the claim for a permanent injunction.

[124] A final comment. A jurisdictional challenge, like most interlocutory motions, is not the place to finally resolve complex issues of law. This is particularly so in this case where *Haaretz* left several issues unresolved and the court was split on several issues. While I conclude that this court has jurisdiction over this case and do not simply leave it to be determined by the trial judge, that does not mean that he or she is bound by the conclusions of law that I have made.

"E.M. Myers J."

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[1] These statutes were referred to in Niemala *v. Malamas* 2015 BCSC 1024 at paras. 33-35