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COURT OF APPEAL FOR ONTARIO

DOHERTY, LASKIN AND BLAIR JJ.A.

B E T W E E N:

BARRICK GOLD CORPORATION	)	Kent E. Thomson for the appellant
	)	
Plaintiff (Appellant)	)	
	)	
- and -	)	
	)	
JORGE LOPEHANDIA and CHILE MINERAL FIELDS CANADA LTD.	)	No one appearing for the respondents
	)	
Defendants (Respondents)	)	
	)	
	)	Heard: December 2, 2003

On appeal from the judgment of Justice Katherine Swinton of the Superior Court of Justice dated March 12, 2003, on a motion for default judgment.

R.A. BLAIR J.A.:

> The Internet represents a communications revolution. It makes instantaneous global communication available cheaply to anyone with a computer and an Internet connection. It enables individuals, institutions, and companies to communicate with a potentially vast global audience. It is a medium which does not respect geographical boundaries. Concomitant with the utopian possibility of creating virtual communities, enabling aspects of identity to be explored, and heralding a new and global age of free speech and democracy, *the Internet is also potentially a medium of virtually limitless international defamation* [emphasis added].[1]

[1] Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 2001), at para. 24.02

[1] The issues on this appeal concern the damages that may be awarded in Internet defamation cases, and whether the remedy of injunctive relief should be granted in such circumstances.

INTRODUCTION

[2] Jorge Lopehandia has a grievance against Barrick Gold Corporation. The grievance emerges from a claim he asserts regarding one of Barrick's mining properties in Chile, known as the Pascua Lama project. Barrick insists that the grievance is unfounded.

[3] Following Barrick's refusal to settle the complaint in 2001, Mr. Lopehandia embarked upon what counsel for the appellant has accurately described as "a systematic, extensive and vicious campaign of libel . . . over an extraordinarily lengthy period " with the express purpose and intent of embarrassing Barrick and injuring its reputation. This campaign was conducted over the Internet, and involved the posting of hundreds of false and defamatory statements concerning Barrick on various websites.

[4] Barrick served a libel notice on October 8, 2002, after learning about the extent of the Internet campaign earlier that year. The campaign continued. Barrick served its statement of claim on October 31, 2002. Unrepentant, Mr. Lopehandia continued his campaign even more defiantly. Neither he nor his company defended the action, however, and the defendants were noted in default. On March 12, 2003, after a motion for default judgment, Swinton J. granted judgment, finding that the impugned statements were defamatory and awarding general damages for injury to Barrick's reputation in the amount of $15,000. She dismissed the claim for punitive damages and for injunctive relief.

[5] Barrick appeals the quantum of general damages awarded and the refusal to award any punitive damages or grant injunctive relief. I would allow the appeal for the reasons that follow.

FACTS

[6] Barrick is one of the largest producers of gold in the world. It has operating mines and development projects in Canada, the United States, Peru, Argentina, Tanzania, Australia, and Chile. It is incorporated pursuant to the laws of Ontario and has its head office in Toronto, Ontario.

[7] Barrick's shares are widely held. They trade under the ticker symbol "ABX" on the Toronto, New York, London and Swiss Stock Exchanges and the Paris Bourse.

[8] Mr. Lopehandia is a businessman who resides in North Vancouver, British Columbia. He is an officer and director, and the directing mind of the defendant Chile Mineral Fields Canada Ltd., a British Columbia corporation with head offices in Vancouver and purporting to deal in precious-base metals and strategic minerals. It is a deemed fact in this case that the actions of Mr. Lopehandia at issue in the proceeding were undertaken by him in his personal capacity and in his capacity as an officer, director and representative of CMFCL.

[9] Barrick obtained its interest in the Pascua Lama Project in 1994. Through a Chilean subsidiary it also acquired mining claims near the Project, known as the "Amarillo Claims", from two individuals named Rodolfo Villar Garcia ("Villar") and Alejandro Moreno ("Moreno"). The Pascua Lama Project is an important Barrick holding as its estimated gold reserves represent approximately 25% of Barrick's worldwide gold reserves.

[10] In January 2001, Barrick received a letter from Mr. Lopehandia claiming that he and three other individuals (including Villar) were the beneficial owners of the Amarillo Claims and that the Pascua Lama Project had been fraudulently obtained by Barrick. He threatened to sue and to commence "an all out war" against Barrick if his demands for the payment of U. S. $3 million were not met within ten days. The campaign was to include complaints to various governmental, financial and regulatory authorities about the Company. In a letter dated January 11, 2002, he stated:

> Since my time left is short; should we not Agree to Agree in 10 days; my actions will be very swift and unfortunately because of your profile; and Action will result to be extremely serious to the stance and Public Image of Barrick's Gold in Chile. Perhaps even in the world.

[11] Barrick investigated the allegations. It then notified Mr. Lopehandia that they were unfounded in its view, and that Barrick would not accede to his demands.

[12] True to his word, Mr. Lopehandia embarked upon an Internet campaign by posting a blizzard of messages on "bulletin boards" or "message boards" on various Internet web sites. The web sites in question are dedicated to providing information to those interested in the gold mining industry, including those interested in investing in the stocks of gold or gold-industry companies. Some of the web sites are dedicated to discussions concerning Barrick specifically. The web sites include www.lycos.com (in the financial markets message board sections dedicated to Barrick and another company, Durban Roodeport Deep Limited ("Durban Deep")); www.yahoo.com and www.yahoo.ca (in the

financial markets message board section dedicated to Barrick); www.siliconinvestor.com; www.theminingweb.com; and www.miningindia.com.

[13] The messages and e-mails complained of filled nine thick volumes of exhibits before the motions judge. They fall into three categories, chronologically, namely:

a) statements published between July 31, 2001 and October 8, 2002 (the date of service of the libel notice) – 7 volumes;

b) statements published after service of the libel notice but before the issuance of the statement of claim on October 30, 2002 – 1 volume; and

c) statements published after service of the statement of claim and before the hearing on February 14, 2003 – 1 volume.

[14] Barrick attempted to file an additional volume of messages published after the hearing but before judgment. The motions judge declined to accept this evidence. It is unnecessary to resolve the debate over whether she was correct in doing so, as the additional evidence would simply have confirmed her finding that Mr. Lopehandia will continue to make defamatory statements against Barrick.

[15] The motions judge correctly found that the voluminous statements published by Mr. Lopehandia were defamatory of Barrick and, on the deemed facts, published with malice. Indeed, the libel was of a most serious nature. The libellous campaign was conducted over a prolonged period of time and in the face of – and in defiance of – Barrick's protests and attempts to obtain redress. As well as attacking and undermining Barrick's claim to ownership of the Pascua Lama Project – a serious allegation in itself, given the proportionate significance of the Project to the company's overall gold reserves – the many postings accused Barrick of a long list of criminal misconduct. The list is extensive, comprising allegations of fraud, tax evasion, money laundering, manipulation of world gold prices for Barrick's own benefit, misrepresentation to government officials, improperly influencing government officials, obstruction of justice, pursuing organized crime, attempted murder, arson, and genocide and crimes against humanity.

[16] It is true, as the motions judge found, that the messages are "emotional, often incoherent, rambling and highly critical of Barrick, its officers, directors and employees". Nevertheless, the postings clearly conveyed the meaning in the allegations listed above. Some examples will suffice:

www.theminingweb.com
May 26, 2002
Comments posted to two Articles:
i) "Barrick dusts off $1.6bn projects";
ii) "Barrick's Australian headache"

Barrick Gold never owned Pascua Lama and has assumed a posture of Financial Fraud just like ENRON on its audited financials re: Chile.

Acting in contempt, Barrick "got Pascua" in March 1997 for US$25, frauded the rest and "created US$ billions with the largest orebody in the planet".

However, Barrick forgot Chile and its Judicial system re: Civil Law of simulation of Contracts and Imaginary transactions.

Barrick engaged in documented fraud and theft of mining property rights and intellectual mining discoveries in Chile.

Homestake is guilty of the same sin with a parallel embargo in Maricunga Gold, III Region, Chile.

Barrick, tied to ENRON via Trizechann it's third largest real state provider. (Peter Munk), engaged itself in a POLICYof terror manipulation of Gold price and Gold markets, financial suffocation to Chilean miners and fraud at Exchanges worldwide, to try to corner the world GOLD Markets.

End result?

Over hedging and falsely reporting to IRS and SEC regarding Chile, losses, Audited Financials, cost of Pascua Lama, the US$25 fraud, the string of coverup frauds thereof related is incredibly long and detailed…

Barrick and Associates, are today, short 20 million ounces of Gold and 592 million ounces of Silver, plus damages and punitive damages re Pascua Lama.

We, the real owners of Pascua Lama, will not give up and will pursue JUSTICE and satisfaction for the immoral crimes committed against us since 1996 in Chile and worldwide.

Forensic Audit for Barrick Gold re: Minera Nevada S.A. activities and financial dealings (its Chilean clone-aside of Barrick Chile S.A.)

Barrick GUILTY of the largest Gold fraud since Bre-X. Jorge Lopehandia Legitimate owner, co-owner of Pascua Lama, 111 Region, Chile.

www.lycos.com:
July 12, 2002
Message Board: Drooy (Durban Deep)
Chileans, killed most Junior mining companies with the hedging programs, 'WHEREBY BARRICK MAKES MONEY WITH THE BANKS, ONLY IF GOLD PRICES ARE LOW AND EVERYONE ELSE LOSSES MONEY & GOLD".

. . .

Mining is a highly scientific endeavour and DOES NOT RESPOND WELL to Market Prices Manipulation! However, 1,000's of little & medium miners are dead or close to it in Chile.

Similarly in Africa, Barrick's genocidal policy and theft policy of "MEASURING LESS OUNCES TO PAY LESS in Tanzania (Theft of 3+ million ounces in one pass)",

Barrick burned the country of Tanzania. Barrick is a DEVIL Killer.

So the reality?

A bunch of majors are today, more worried about he overall reserves and firing as many as possible to "HAVE THE ANALYSTS PUMP UP THEIR STOCK"!

What is the POLICY THEN? BRUTALITY or Business?

More like – GENOCIDE and control through force, financial suffocation, bank fraud, contract fraud & MONOPOLY?

Get a mental and ethics UPGRADE Gold fellaws!

…

When it comes to GOLD, Barrick uses crime to GET IT!

Barrick will be brought to justice WORLDWIDE!

Write off Barrick's worldwide reserves obtained since 1996 (after the Pacua Fraud) as "product of crime" or "fruits belonging to a Chilean Law Suit".

Barrick is running on:

"Stolen Gold, Stolen Silver, Stolen cash, influence peddling, geological fraud, Stock Exchange Fraud, Accounting Fraud, Auditing Fraud, Internet Fraud, Material Facts suppression,

False Public releases and false propaganda and media releases.

www.lycos.com

August 9, 2002

Message Board: ABX (Barrick Gold)

…

But neither Barrick nor Minerva S.A…..own "Pascua Lama" in Chile…. NEVER DID since 1996.

All the "TAXABLE EXPENSES" of ABX in Chile since 1997 to date are a FICTIONAL FABRICATION to MONEY LAUNDER and to PAUNDER shareholders MONEY!

We just feel SORRY for the Pension Funds, Pension Plans, Banks, Institutional Investors and shareholders at large, that believed this CRIMINAL GANG, when they purported to be…

BUILD TO LAST…….

More like BUILT on CRIME, THEFT, GENOCIDE and cheating on taxes worldwide

This Stock – Barrick et al….are a FRAUD!!!!!!!!!!

Jorge Lopehandia

www.yahoo.com

October 31, 2002

Re: Pascua mine & project

EMBARGOED

By : peterisatheif

Barrick is under Civil and Criminal Investigation in Chile since June 2001.

Barrick "closed - Pascua 200" after I adverted Patrick Garver Tory's law Firm et al, of my Legal situation with Barrick's John Lill President of Barrick 2 Ltd – Barrick Chile and President of Minera Nevada S.A.

Barrick was the MAGNET used by John Lil to attract me 1996, Minera Nevada S.A. is the vehicle of FRAUD to steal Pascua in March 04, 1997 for US$25 equivalent.

> June 2001 Injunction (Embargo) in the form of medida Prejudicial precautoria, was decreed.
>
> Barrick has sued me at lycos and is reading these Boards.
>
> I am being sued for SLANDER for speaking the Documented TRUTH of Record, as per Chilean Mining Code.
>
> Not the cooked and rigged "financials of Barrick"
>
> even if it was for decency, check at goldsextant's website the Gold peak and bull 1996, KILLED by ABX et al, at the inneficience of their Legal Mining Department.
>
> With CASH to shoot from the HIP and deceit to USA and Canadian leaders, Barrick has rigged and stolen the wealth of the world.
>
> They do NOT own and IOTA of our Gold.
>
> In Chile, they are one away from JAIL, all of them.
>
> In Canada, I am being sued and the plot has thickened.
>
> Barrick's books are WORSE Than ENRON.
>
> I can PROVE IT in a Court of LAW.

[17] There is evidence that Mr. Lopehandia's numerous postings were read by users of the Internet, including people in Ontario, and that they have prompted enquiries from Barrick's shareholders, from financial analysts, and from regulatory agencies including the Toronto Stock Exchange. These enquiries continue. Moreover, Mr. Lopehandia's messages have elicited their own constituency of support and encouragement, thus amplifying the spread of the defamation throughout the Internet.

[18] The motions judge discounted Barrick's evidence about the harm to its reputation as lacking in detail, and in some respects unsupported. She concluded that Mr. Lopehandia's statements "come across as a diatribe or a rant" and were unlikely to be taken seriously by a reasonable reader, "especially those who are said to have read the material, such as stock analysts or individuals working for the TSE." She held that the defamatory words, notwithstanding their repetition, had not caused any serious damage to Barrick's business reputation. At paragraph 44 of her decision, she concluded:

> Given that the main concern in the litigation was to vindicate the corporation's reputation and the lack of any evidence of adverse economic impact, but recognizing that general damages for libel are at large, and that there have been

> hundreds of repetitions of the libelous statements, I award general damages of $15,000.00 for damage to reputation.

[19] The motions judge then went on to consider and reject Barrick's claims for punitive damages and injunctive relief.

THE STANDARD OF REVIEW

[20] Appellate courts should not lightly interfere with damage awards, particularly the award of a jury or judge alone in a defamation case where damages are "at large": see *Hill v. Church of* Scientology, [1995] 2 S.C.R. 1130 at 1194-1196; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at 37-38; and *Hodgson v. Canadian Newspapers Co.* (2000), 49 O.R. (3d) 161 at para. 60. In *Botiuk,* at 38, Cory J said:

> Perhaps the cautionary note expressed in *Hill* bears repeating. Namely, that appellate courts should, for the reasons expressed in *Hill*, proceed with restraint and caution before making any variation in assessments of damages in libel cases.

[21] In *Hill*, Cory J. relied heavily upon the decision of this court in Walker *v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 (C.A.). There, Robins J.A. observed (at 110):

> An appellate court is not entitled to substitute its own judgment on the proper amount of damages for the judgment of the jury. The question is not whether the court would have awarded a smaller sum than was awarded by the jury; nor is the question whether the size of the verdict was merely too great. The question is whether the verdict is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate or, put another way, whether the verdict is so exorbitant or so grossly out of proportion to the libel as to shock the court's conscience and sense of justice.

[22] *Walker* and *Hill* involved jury awards. There appears to be little jurisprudence in Ontario as to the standard that applies to appellate review of judge-alone damage awards in defamation cases. In my view – even though the bywords remain "caution" and "restraint" – an appellate court has more flexibility in reviewing an award of damages for defamation made by a judge alone than in the case of one made by a jury. When *Hill* was before this court, the court acknowledged the general rule in England "that an appellate

court might more readily overturn an award by a judge sitting alone than an award by a jury: see *Blackshaw v. Lord*, [1984] Q.B. at p. 27".[2]

[23] It makes sense that the standard of review should be somewhat different in such a case. When examining a jury award, in the absence of errors in the charge to the jury, the court is limited to a consideration of the amount in question. No reasons are provided for the damage calculation, and there is a purpose therefore in focusing on whether the award is inordinately high or low. In the case of a judge alone, however, the court has the benefit of the judge's reasons for arriving at the quantum of damages, and, as well as considering quantum, can determine whether there have been any errors in law or in principle, or whether the judge has misapprehended or misapplied the facts. As the British Columbia Court of Appeal noted in *Brown v. Cole*, [1998] B.C.J. No. 2464 at para. 50, "error of law and serious misapprehension of the evidence go, almost without saying, as grounds for interference by a provincial appellate court".

[24] Courts in other provinces have considered this question. They have generally concluded that appellate courts should only reluctantly interfere with judge-alone defamation awards but that they may do so where the judge has made an error in law, applied a wrong principle, seriously misapprehended the evidence, or made an award that is inordinately high or low. See *Brown v. Cole, supra*; *Safeway Stores Ltd. v. Harris*, [1948] 2 W.W.R. 211 (Man. C.A.); *Langille v. McGrath*, [2001] N.B.J. No. 414 (N.B.C.A.) at paras. 22-24; and *Farrell v. St. John's Publishing Co. Ltd*., [1986] N.J. No. 19.

[25] I accept the following statement from the decision of the Newfoundland Court of Appeal in *Farrell*, at 13, as an accurate outline of the law:

> In assessing damages in a libel action a judge, sitting without a jury, has a great deal of latitude and the Court of Appeal will not readily interfere with his award unless it is satisfied that he arrived at his figure either by applying a wrong principle of law or through a misapprehension of the facts or that the amount awarded was so extremely high or so low as to make it an entirely erroneous estimate of the damages. (See Flint v. Lovell, [1935] 1 K.B. 354 at 360; Associated Newspapers v. Dingle, [1964] A.C. 371 at 393 applying Davies v. Powell Duffryn Associated Collieries Ltd. [1942] A.C. 601 and Nance v. British Electric Railway Co. Ltd., [1951] A.C.601).

[2] The Court of Appeal citation for *Hill v. Church of Scientology of Toronto* is (1994), 18 O.R. (3d) 385 at 430

[26] This court has effectively applied that standard in the past, even if not acknowledging it specifically. In *Royal Bank of Canada (c.o.b. Chargex) v. Battistella* [1994] O.J. No. 1717, it increased the plaintiff's award on the basis that the trial judge had erred by assessing general damages based only on the plaintiff's economic loss without incorporating an element for injured feelings. *Botiuk, supra*, was the reverse (see [1993] O.J. No. 239 (C.A.)). The court interfered with the trial judge's award of general damages not only because it thought the damages inordinately high but also because he had failed to include an element of lost professional business in the damages.[3] Finally, in *Hodgson* at para. 60 the court relied on the fact "there was no error in principle in taking [the] aggravating factors into account when assessing general damages" in deciding not to interfere with the trial judge's award of general damages.

[27] With the foregoing principles in mind, then, I turn to an examination of the damages awarded in this case.

ANALYSIS

General Considerations Concerning Internet Defamation

[28] Is there something about defamation on the Internet – "cyber libel", as it is sometimes called – that distinguishes it, for purposes of damages, from defamation in another medium? My response to that question is "Yes".

[29] The standard factors to consider in determining damages for defamation are summarized by Cory J. in *Hill* at p. 1203. They include the plaintiff's position and standing, the nature and seriousness of the defamatory statements, the mode and extent of publication, the absence or refusal of any retraction or apology, the whole conduct and motive of the defendant from publication through judgment, and any evidence of aggravating or mitigating circumstances.

[30] In the Internet context, these factors must be examined in the light of what one judge has characterized as the "ubiquity, universality and utility" of that medium. In *Dow Jones & Company Inc. v. Gutnick* [2002] HCA 56 (10 December 2002), that same judge – Kirby J., of the High Court of Australia -- portrayed the Internet in these terms, at para. 80:

> The Internet is essentially a decentralized, self-maintained telecommunications network. It is made up of inter-linking small networks from all parts of the world. *It is ubiquitous,*

[3] The Court of Appeal ruled that the trial judge had erroneously awarded special damages, which had not been pleaded. The Supreme Court of Canada subsequently restored the award of special damages: *supra*, at 37-39.

> *borderless, global and ambient in its nature. Hence the term "cyberspace".*[4] *This is a word that recognizes that the interrelationships created by the Internet exist outside conventional geographic boundaries and comprise a single interconnected body of data, potentially amounting to a single body of knowledge.* The Internet is accessible in virtually all places on Earth where access can be obtained either by wire connection or by wireless (including satellite) links. *Effectively, the only constraint on access to the Internet is possession of the means of securing connection to a telecommunications system and possession of the basic hardware* [emphasis added].

[31] Thus, of the criteria mentioned above, the mode and extent of publication is particularly relevant in the Internet context, and must be considered carefully. Communication via the Internet is instantaneous, seamless, inter-active, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed: see *Vaquero Energy Ltd. v. Weir*, [2004] A.J. No. 84 (Alta. Q.B.) at para. 17.

[32] These characteristics create challenges in the libel context. Traditional approaches attuned to "the real world" may not respond adequately to the realities of the Internet world. How does the law protect reputation without unduly overriding such free wheeling public discourse? Lyrissa Barnett Lidsky discusses this conundrum in her article, "Silencing John Doe: Defamation and Discourse in Cyberspace", (2000) 49 Duke L.J. 855 at pp. 862-865:

> Internet communications lack this formal distance. Because communication can occur almost instantaneously, participants in online discussions place a premium on speed. Indeed, in many fora, speed takes precedence over all other values, including not just accuracy but even grammar, spelling, and punctuation. Hyperbole and exaggeration are common, and "venting" is at least as common as careful and considered argumentation. The fact that many Internet speakers employ online pseudonyms tends to heighten this sense that "anything goes," and some commentators have likened cyberspace to a frontier society free from the conventions and constraints that limit discourse in the real world. While this view is undoubtedly overstated, certainly the immediacy and

[4] *Dow Jones,* at footnote 100. The term was coined by Gibson, *Neuromancer*, (1984) at 51: see also Harasim (ed.), *Global Networks*, (1993) at 9.

> informality of Internet communications may be central to its widespread appeal.
>
> *Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation*. Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again. *The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that "the truth rarely catches up with a lie"*. The problem for libel law, then, is how to protect reputation without squelching the potential of the Internet as a medium of public discourse [emphasis added].

[33] These characteristics differentiate the publication of defamatory material on the Internet from publication in the more traditional forms of media, in my opinion.

[34] It is true that in the modern era defamatory material may be communicated broadly and rapidly via other media as well. The international distribution of newspapers, syndicated wire services, facsimile transmissions, radio and satellite television broadcasting are but some examples. Nevertheless, Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of individuals and corporations, by the features described above, especially its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility. The mode and extent of publication is therefore a particularly significant consideration in assessing damages in Internet defamation cases.

General or Compensatory Damages

[35] In my respectful opinion, the motions judge misapprehended the evidence, and erred in principle, in arriving at her award of $15,000 for general and compensatory damages. She did so in five ways. First, her conclusion that a reasonable reader was unlikely to take what Mr. Lopehandia said seriously was contrary to the evidence. Secondly, that conclusion misjudged the target audience and the nature of the potential impact of the libel in the context of the Internet. Given the centrality of these two aspects

of her findings to her reasons, they constitute both palpable and overriding error: see *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.), at paras. 289-307. Thirdly, she erred in treating the defamatory statements made against the directors, officers, and employees of Barrick as irrelevant to the damages to Barrick's reputation. Fourthly, she failed to take into account the refusal of Mr. Lopehandia to retract or to apologize. Finally, she erred in reducing the damages she might otherwise have ordered on the basis that her decision would play a significant role in vindicating Barrick's reputation.

[36] These flaws sufficiently undermine the award that it must be set aside and reconsidered, in my view.

Not Taking the Libel Seriously

[37] The motions judge's conclusion that a reasonable reader was unlikely to take what Mr. Lopehandia said seriously, because of its emotional and intemperate nature and because of his use of capitals and pronunciation, lies at the heart of her finding that the defamatory messages did not cause any serious damage to Barrick's business reputation. In my view it is a finding of fact, or an inference drawn from the facts, that is not supported by the evidence.

[38] The notion that Mr. Lopehandia's Internet dialogue style – a style that may not be taken seriously in a traditional medium such as a newspaper – may undermine the credibility of his message has some appeal to those of us who are accustomed to the traditional media. However, as I have noted, the Internet is not a traditional medium of communication. Its nature and manner of presentation are evolving, and there is nothing in the record to indicate that people did not take Mr. Lopehandia's postings seriously. In fact, the uncontradicted evidence is to the contrary.

[39] For instance, several individuals took the messages seriously enough to contact Barrick by e-mail themselves. On October 25, 2001, Monique Lafleche of The Mining Association of Canada forwarded a Lopehandia message to alert Barrick to the situation. On February 18, 2002, an individual named Jim Versa referred Barrick to two websites where postings could be found. One of these websites, www.goldhaven.com, contained a defamatory posting by Mr. Lopehandia and a response posting from *another individual* referring Mr. Lopehandia to a different website where he could "relate his experience with the crooks at Medinah [Minerals]". Barrick received a number of communications from John Hartley, one of its shareholders, stating that as a shareholder he was extremely upset that Barrick had not taken action against Mr. Lopehandia. In an e-mail dated September 5, 2002, Mr. Hartley said:

> Since I wrote you on Friday August 29th, I have read a lot more of the outrageous slander against BARRICK and its Top Management, written by "Gadfly" Lopehandia on the

> Message Boards of ABX and MDMN at Finance.lycos.com website.
>
> In my opinion this is going much too far and must come to an end very soon now, *because it is affecting the credibility, the image and the prestige of* your Great Mining Company and its Top Management.
>
> It is really becoming a torture for me and many fellow ABX shareholders, to see that nobody is reacting nor sueing [*sic*] this chilean-canadian reckless pimp, *who dares to challenge an exemplary leading international gold company called BARRICK, to whom we trusted our savings investment*.
>
> We definitely don't like to see BARRICK treated openly as a "COWARD CORPORATION", "CESSPOOL OF CRÈME AND THEFT", "MONEY LAUNDERER THEIVES", etc, etc; and to see statements like "BARRICK OWES AN APOLOGY TO MR. GEORGE BUSH SENIOR AND TO HIS SONE, THE PRESIDENT OF THE UNITED STATES", "BARRICK GOLD'S REIGN OF FRAUD MUST STOP NOW", "BARRICK IS THE NEXT ENRON" AND THE LIKE.
>
> When we read this slander we suffer indignation and our blood starts to boil. Please find a way to stop this crap.
>
> BARRICK WAS BUILT TO LAST *AND IN BARRICK WE TRUSTED OUR SAVINGS.*
>
> [Italics and underlining added; block capitals in original]

[40] There is evidence as well that the Toronto Stock Exchange contacted Barrick during 2002 to enquire about Mr. Lopehandia's defamatory statements. An inquiry of that nature from a regulatory agency governing a public company is not to be taken lightly.

[41] In addition to the specific communications referred to, the evidence of Mr. Garver, the Executive Vice-President and General Counsel of the appellant, is that "Barrick continues to receive complaints and inquiries from concerned shareholders, analysts and other members of the public as a direct result of the Lopehandia defamatory postings".

[42] Finally, the record shows that many users of the message boards and bulletin boards have responded to and replied to Mr. Lopehandia's messages. Some invited and encouraged him to go to other websites with his message, thus expanding the scope of the

campaign of libel against Barrick, and wishing him well: "may you find your mark", said one of them.

[43] These various communications demonstrate that individuals with a variety of interests in Barrick, and one major regulatory agency, were genuinely concerned about what Mr. Lopehandia had to say. There was no evidence to the contrary. In those circumstances, I find the motions judge's conclusion that people were unlikely to take Mr. Lopehandia's messages seriously, to be contrary to the evidence.

The Internet Context

[44] Secondly, the motions judge failed to appreciate, and in my opinion misjudged, the true extent of Mr. Lopehandia's target audience and the nature of the potential impact of the libel in the context of the Internet. She was alive to the fact that Mr. Lopehandia "[had] the ability, through the Internet, to spread his message around the world to those who take the time to search out and read what he posts" and indeed that he had "posted messages on many, many occasions". However, her decision not to take the defamation seriously led her to cease her analysis of the Internet factor at that point. She failed to take into account the distinctive capacity of the Internet to cause instantaneous, and irreparable, damage to the business reputation of an individual or corporation by reason of its interactive and globally all-pervasive nature and the characteristics of Internet communications outlined in paragraphs 28-33 above.

[45] Had the motions judge taken these characteristics of the Internet more fully into account, she might well have recognized Barrick's exposure to substantial damages to its reputation by reason of the medium through which the Lopehandia message was conveyed.

The Defamatory Remarks against Officers, Directors and Employees

[46] Thirdly, the motions judge erred in dismissing the defamatory statements against the officers, directors and employees of Barrick as irrelevant to her determination of damages respecting Barrick. At paragraph 32 of her reasons she stated:

> In assessing the plaintiff's damages, I have only considered the damage to the corporation's reputation. While the affidavit of Mr. Garver and the factum speak of the libel to Barrick and its officers, directors and employees, the only party to this action is Barrick. *Therefore, any defamatory statements regarding any of the officers, directors or employees which have caused damage to their reputations are irrelevant to the calculation of damages in this case*. If

> their reputations have been damaged, it is for them to pursue their own actions [emphasis added].

[47] However, a significant element in Mr. Lopehandia's defamatory campaign against Barrick consisted of lengthy attacks on the integrity and bona fides of its various officers, directors and employees. A corporation can only act through such individuals. False and defamatory statements concerning the people who are responsible for supervising and conducting the affairs of the corporation – particularly a public corporation such as Barrick – must inevitably affect the business reputation of the corporation, as well as that of the individuals. The authors of P.F. Carter-Ruck and H.N.A. Starte, *Carter-Ruck On Libel and Slander*, 5th ed. (Butterworths: London, 1997), at 197-198, state:

> It is probable that a statement which reflects upon the honesty of the directors of a company, which is calculated by the imputations to which it gives rise to lead third parties no longer to deal with the company, would also entitle the company to seek substantial damages.

[48] I agree. Here, Mr. Lopehandia's campaign was admittedly designed to embarrass Barrick and to influence people to stop dealing with the company. A substantial part of the campaign consisted of the defamatory comments directed at the officers, directors and employees of Barrick for that purpose. While it is true that these individuals would have had to commence their own actions if they wished to recover damages for injury to their own personal reputations, these statements were relevant to the injury to Barrick's reputation. Had the motions judge thought about them in that context, she might well have been persuaded to award substantially higher general damages.

No Retraction or Apology

[49] Fourthly, when considering the question of general or compensatory damages, the motions judge did not take into account Mr. Lopehandia's refusal to retract or apologize. She correctly recognized that, while corporations are entitled, without proof of damage, to compensatory damages representing the amount necessary to vindicate the company's business reputation, they cannot receive compensation for injured feelings – and therefore are not entitled to aggravated damages. She also held, properly, that a corporation is entitled to recover more than nominal damages but that compensatory damages may be lower for a corporation than damages received by an individual (who is entitled to receive compensation both for injury to reputation and for injury to feelings): *Walker v. CFTO, supra*, at 113-114. However, there is a caveat to the latter principle. It is to be found in the following passage from Carter-Ruck on *Libel and Slander*, *supra* at p. 197 (quoted with approval from the 3rd ed. by Robins J.A. in *Walker, supra* at 113-114):

> Limited companies, and other corporations, may also be awarded general damages for libel or slander, without adducing evidence of specific loss. However, it is submitted that in practice, in the absence of proof of special damage, or at least of a general loss of business, a limited company is unlikely to be entitled to a really substantial award of damages. As was made clear by Lord Reid in *Lewes v. Daily Telegraph Ltd*., 'A company cannot be injured in its feelings; it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money.' . . . . *That there is an entitlement to general damages which are more than nominal damages is certain, but the amount likely to be awarded to a corporation may be small in commercial terms, unless the defendant's refusal to retract or apologize makes it possible to argue that the only way in which the reputation of the company can be vindicated in the eyes of the world is by way of a really substantial award of damages* [emphasis added].

[50] The motions judge acknowledged the repetition of the defamatory statements by Mr. Lopehandia and that "normally, repetition of the libelous statements would increase the damages". However, she discounted the impact of the repetitious statements on the basis of her conclusion that they were unlikely to be taken seriously. She held that a large award of damages was not necessary to vindicate the plaintiff's reputation.

[51] Repetition, however, is only one factor to be considered in determining what award of damages is required to vindicate a plaintiff's reputation. Mr. Lopehandia's clear refusal to retract his statements, or to apologize for them – and, indeed, his dogged pursuit of the libelous campaign even after commencement of the proceedings – is an aggravating factor in this case, and a different factor than the repetition of the libel. The motions judge found that Mr. Lopehandia would likely continue his defamatory statements. Had she considered the lack of retraction and apology, along with repetition, in the context of determining whether "a really substantial award of damages" was required to vindicate Barrick's reputation in the circumstances, she might well have come to a different conclusion than she did.

The Judgment as Vindication

[52] Finally, the appellant submits the motions judge erred in reducing the damages Barrick would otherwise have been entitled to in the circumstances on the basis that her decision would play a significant role in vindicating Barrick's reputation. To the extent the motions judge may have done so, I agree. While Robins J.A. acknowledged in

Walker, at 115, that a "judgment enables the plaintiff publicly to brand the defamatory publication as false or groundless, and, when there is no actual damage, can perform the vindicatory function of this cause of action", he was not directing his mind to a *reduction* in damages that might otherwise be appropriate, as I read his reasons. It is readily apparent that a successful judgment in a defamation case will be of assistance to the plaintiff in vindicating the plaintiff's reputation. However, there is authority for the proposition that such a consideration should not form the basis for decreasing the amount of damages that are reasonably required to vindicate the reputation of a person or corporation: see *Safeway Stores Ltd. v. Harris,* [1944] 4 D.L.R. 187 (Man. C.A.) at 202-203; *Associated Newspapers Ltd. v. Dingle*, [1964] A.C. 371 (H.L.). I have difficulty accepting the concept that an otherwise appropriate damage award should be reduced on the principle that the judgment itself will operate as some form of vindication for the plaintiff. As Lord Morton of Henryton noted in *Associated Newspapers*, at 404, "a judge cannot tell how widely his judgment will be reported and read, nor can he tell how far the plaintiff's general reputation will be improved by his complimentary remarks." Here, it is impossible to say, for instance, that Barrick's judgment will receive the same degree of publication and diffusion on the Internet as Mr. Lopehandia's postings have received.

[53] Respectfully, then, I believe the motions judge's award of general damages in the amount of $15,000 is seriously undermined by errors in law and principle and by a misapprehension of the evidence regarding the impact of the libel and its Internet context. The award should be set aside and the amount reconsidered in light of the foregoing principles. Had the motions judge taken the abovementioned factors into account I am far from satisfied that her award would have been as low as it was.

Punitive Damages

[54] The motions judge dismissed Barrick's claim for punitive damages on several grounds. Relying on the decision of the Supreme Court of Canada in *McElroy v. Cowper-Smith*, [1967] S.C.R. 425, she decided that "the emotional and unreasoned tenor of [Mr. Lopehandia's] messages" was such that "no reasonable business person or investor would take him seriously", thus mitigating the claim for punitive damages. In addition, she held that there was no evidence of real vulnerability on the part of Barrick, which she viewed as "the powerful party here", and that this was not a case of Mr. Lopehandia abusing power. Finally, the motions judge concluded that her compensatory award, including costs, would be a sufficient deterrent to prevent the repetition of his conduct.

[55] The key principles regarding punitive damages, of which the motions judge was aware, are outlined below. For the reasons that follow, however, she erred in dismissing the claim, in my view.

[56] Appellate courts have greater scope and discretion in reviewing awards for punitive damages than is the case for awards of general or compensatory damages. Appellate review is based upon the court's estimation as to whether the punitive damages serve a rational purpose. See *Hill v. Church of Scientology, supra*, at 1208-1209; *Whiten v. Pilot Insurance Co.* (2002), 209 D.L.R. (4th) 257 (S.C.C.) at 288-289.

[57] Cory J. described punitive damages in the following fashion in *Hill* at 1208:

> Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[58] In *Whiten*, at 287-289, Binnie J. reviewed comparative principles regarding punitive damages in various common law jurisdictions, and outlined a number of factors that he found to be "consistent with Canadian practice and precedent". The following observation is particularly apt to the present circumstances:

> . . . [T]here is a substantial consensus that coincides with Lord Pratt C.J.'s view in 1763 that the general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation (or, as Cory J. put it in *Hill, supra*, at para. 196, they are "the means by which the jury or judge expresses its outrage at the egregious conduct").
>
> . . . [A]ll jurisdictions seek to promote rationality. In directing itself to the punitive damages, the court should relate the facts of the particular case to the underlying purposes of punitive damages and ask itself how, *in particular*, an award would further one or other of the objectives of the law, and what is the lowest award that would

> serve the purpose, i.e., because any higher award would be irrational.
>
> . . . [T]he governing rule for quantum is *proportionality*. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation). Thus, there is broad support for the "if, but only if" test formulated, as mentioned, in *Rookes, supra*, and affirmed here in *Hill, supra* [emphasis in original].

[59] With these principles in mind, I am satisfied that the motions judge erred in failing make an award of punitive damages for the reasons that follow.

[60] First, her reliance on the decision of the Supreme Court of Canada in *McElroy v. Cowper-Smith* was misplaced in the circumstances, and was influenced again by her flawed conclusion that the repeated libels of Mr. Lopehandia would not be taken seriously by readers. *McElroy* involved a single defamatory letter circulated to three clergymen and several religious organizations. The defendant was known to be temporarily unstable and given to making unreasoned and extravagant statements about the plaintiffs (who were a lawyer and an insurance executive). Although the majority of the court recognized the serious damage that can be done to the reputation of a professional person from allegations of misconduct and dishonesty, and that punitive damages may be warranted in some such circumstances, they concluded that reasonable business people – the plaintiffs' clientele – would not likely be affected in their dealings with the plaintiffs "by statements coming from the source which they did in this case". Since the libel had not been published to business people, but only to the clergymen and religious organizations, who were very familiar with both the plaintiffs and defendants, punitive damages were not warranted in the circumstances.

[61] Such is not the case here. Mr. Lopehandia is not known to the unlimited numbers of persons who may have viewed his avalanche of defamatory postings on the Internet. He holds himself out to be a person of substance, knowledgeable in matters relating to the mining industry in Chile, where Barrick's Pascua Lama Project is located, and a representative of many Chilean mining families and other affected persons worldwide. On the evidence referred to earlier, it is apparent that various individuals and organizations, and at least one regulatory agency, were taking his libelous campaign seriously. In my view, *McElroy* does not assist on the question of punitive damages in this case.

[62] Secondly, while vulnerability is a factor to be considered by the court in assessing punitive damages – see *Whiten* at pp. 300-301 – the motions judge misread that factor in the context of this case, in my respectful opinion. Barrick is not "the powerful party" in the context of the Internet. The impact of the Internet is to neutralize whatever "power" Barrick may have had, in terms of a communication battle with Mr. Lopehandia. In reality it is Barrick that is vulnerable to publications of this nature, and Mr. Lopehandia who is abusing his power. The Internet is one of the most powerful tools of communications ever invented and, as the Collins text cited at the outset of these reasons indicates, it is "potentially a medium of virtually limitless international defamation".

[63] Thirdly, the motions judge's conclusion that her compensatory award would operate as a deterrent to Mr. Lopehandia's repeated publications is inconsistent with her own observation that "he has not done so". She found that, in spite of her judgment, "Mr. Lopehandia will continue to make defamatory statements". With respect, an award of general damages in the amount of $15,000 is insufficient to fulfill the dual role of compensation plus punishment and deterrence in the circumstances of this case.

[64] Finally, punitive damages are simply required in a case such as this, in my view. Mr. Lopehandia's conduct is malicious and high handed. It is unremitting and tenacious. It involves defamatory publications that are vicious, spiteful, wide-ranging in substance, and world-wide in scope. They involve the very type of misconduct that – in the words of Cory J. in *Hill* at 1208 – is "so malicious, oppressive and high-handed that it offends the court's sense of decency", calling for an award of punitive damages as a "means by which the jury or judge expresses its outrage at the egregious conduct of the defendant". While it is always important to balance freedom of expression and the interests of individuals and corporations in preserving their reputations, and while it is important not to inhibit the free exchange of information and ideas on the Internet by damage awards that are overly stifling, defendants such as Mr. Lopehandia must know that courts will not countenance the use of the Internet (or any other medium) for purposes of a defamatory campaign of the type engaged in here.

[65] I would therefore set aside the decision of the motions judge not to award punitive damages in favour of the appellant.

Quantum

[66] The appellant does not seek a new trial on damages. Both in its notice of appeal and in its factum, it asks for an order awarding Barrick substantial general and punitive damages. The action was not defended. In the circumstances, therefore, this court can proceed on the basis that there is consent to our determining the appropriate damages to be awarded.

[67] Having regard to all of the factors referred to above, and the principles to be assessed in determining damages, as outlined in *Hill* and set out earlier in these reasons, I would set aside the award of the motions judge and substitute for it the following award:

For general damages: $75,000.00
For punitive damages: $50,000.00

Injunctive Relief

[68] The motions judge dismissed Barrick's claim for a permanent injunction restraining Mr. Lopehandia from disseminating, posting on the Internet or publishing further defamatory statements concerning Barrick or its officers, directors or employees. She did so on the basis that the court did not have jurisdiction to make such an order, because in her view, (a) service was not properly made with respect to the claim for injunctive relief pursuant to rule 17.02(i) of the *Rules of Civil Procedure*, (b) there was no evidence Mr. Lopehandia had any assets or presence in Ontario, and (c) the claim for injunctive relief, being a claim *in personam*, should have been pursued against Mr. Lopehandia in British Columbia, where the courts have the ability to supervise any injunctive relief given.

[69] Rule 17.02 provides that:

> A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,
>
> (g) in respect of a tort committed in Ontario;
>
> (h) in respect of damage sustained in Ontario arising from a tort, wherever committed; or
>
> (i) for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario.

[70] The motions judge accepted jurisdiction over the action for damages for libel based upon the provisions of rule 17.02(g) and (h). However, she concluded that the claim for injunctive relief did not fall within rule 17.02(i) because the injunctive relief was not claimed with respect to acts by a party in Ontario.

[71] There are two problems with this approach. First, even if it is unclear on the evidence that Mr. Lopehandia is doing or refraining from *doing* anything in Ontario, he is, in his campaign of libel, doing something *affecting personal property* in Ontario.

Barrick's goodwill – which includes as an important component what on the record is its unblemished corporate reputation in Ontario – constitutes "personal property". The result of Mr. Lopehandia's conduct is to affect that goodwill or personal property negatively. Barrick's claim therefore falls within the provisions of rule 17.02(i). Secondly, there is evidence that Mr. Lopehandia is doing something in Ontario in connection with the publication of the libel. Although the motions judge concluded there was no evidence he had an Internet service provider in Ontario, at least one of the bulletin boards that he utilizes – the Yahoo site – is located in this Province. The affidavit of Mr. Garver shows that users of the Internet in Ontario and elsewhere can access that message board through seamless connections maintained by Yahoo Canada Inc., the offices of which are located in downtown Toronto.

[72] Consequently, I am satisfied that Barrick's claim for injunctive relief does fall within the provisions of rule 17.02(i).

[73] The more troubling point respecting the claim for injunctive relief is the *in personam* nature of the remedy, the marginal presence of the defendant in the jurisdiction, and the concerns about enforceability of such an order. The motions judge was correct to be worried about this. Courts have traditionally been reluctant to grant injunctive relief against defendants who are outside the jurisdiction. The reason for this is explained by Robert J. Sharpe in his text, *Injunctions and Specific Performance*, Looseleaf Edition (Toronto: Canada Law Book, November 2002), at 1-54 to 1-55:

> Claims for injunctions against foreign parties present jurisdictional constraints which are not encountered in the case of claims for money judgments. In the case of a money claim, the courts need not limit assumed jurisdiction to cases where enforceability is ensured. Equity, however, acts *in personam* and the effectiveness of an equitable decree depends upon the control which may be exercised over the person of the defendant. If the defendant is physically present, it will be possible to require him or her to do, or permit, acts outside the jurisdiction. The courts have, however, conscientiously avoided making orders which cannot be enforced. The result is that the courts are reluctant to grant injunctions against parties not within the jurisdiction and the practical import of rules permitting service *ex juris* in respect of injunction claims is necessarily limited. Rules of court are typically limited to cases where it is sought to restrain the defendant from doing anything *within the jurisdiction*. As a practical matter the defendant "who is doing anything within the jurisdiction" will usually be physically present within the jurisdiction to allow ordinary service [emphasis in original].

[74] As the motions judge noted, however, courts do in some circumstances permit service of claims outside the jurisdiction seeking to prevent publication in the jurisdiction of libelous material originating outside the jurisdiction: see Sharpe, *supra*, at 1-55; *Tozier and Wife v. Hawkins* (1885), 15 Q.B. 680. This is one such case, in my view. Moreover, it is also a case where there is a sufficient connection, actual and potential, between the parties and Ontario to justify the granting of a permanent injunction as sought. Not only is there a real and substantial connection between Barrick and Ontario, but there is a connection between the publication of the libel by Mr. Lopehandia and Ontario as well.

[75] Mr. Lopehandia is ordinarily resident in British Columbia, but there is no way to determine from where his postings originate. They could as easily be initiated in an Internet café in downtown Toronto or anywhere else in the world, as in his offices in Vancouver. Given the manner in which the Internet works, it is not possible to know whether the posting of one of Mr. Lopehandia's messages on one of the bulletin boards in question, or the receipt of that message by someone accessing the bulletin board, traveled by way of a server in Ontario to or from the message board.[5] It may have, however. The highly transmissible nature of the tortious misconduct at issue here is a factor to be addressed in considering whether a permanent injunction should be granted. The courts are faced with a dilemma. On the one hand, they can throw up their collective hands in despair, taking the view that enforcement against such ephemeral transmissions around the world is ineffective, and concluding therefore that only the jurisdiction where the originator of the communication may happen to be found can enjoin the offending conduct. On the other hand, they can at least protect against the impugned conduct re-occurring in their own jurisdiction. In this respect, I agree with the following observation of Kirby J. in *Dow Jones*, at para. 115:

> Any suggestion that there can be no effective remedy for the tort of defamation (or other civil wrongs) committed by the use of the Internet (or that such wrongs must simply be tolerated as the price to be paid for the advantages of the medium) is self-evidently unacceptable.

[76] Here, at least one of the bulletin boards utilized by Mr. Lopehandia for the dissemination of his campaign against Barrick is operated by Yahoo Canada Inc. in Toronto. The posting of messages on that board constitutes at least an act done by the defendant that affects Barrick's reputation, goodwill, and personal property in Ontario, and arguably constitutes an act done by him in Ontario. The courts in Ontario must have jurisdiction to restrain such conduct. Even if an injunction may only be enforced in this Province against Mr. Lopehandia if he enters the Province personally, there are two

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[5] For a brief discussion of the features of the Internet and how it works, see *Dow Jones & Company Inc. v. Gutnik*, [2002] H.C.A. 56 at 16-17; and Collins, *The Law of Defamation and the Internet, supra*, Chapter 2.

reasons why the injunction may nonetheless be effective. The first is that it will operate to prevent Yahoo from continuing to post the defamatory messages: *McMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048; *Attorney-General v. Times Newspapers Ltd*., [1991] 1 A.C. 191 (H.L.). Secondly, it may be enforceable in British Columbia, where Mr. Lopehandia resides: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; J.-G. Castel and Janet Walker, *Canadian Conflict of Laws*, 5th ed. (looseleaf) (Butterworths: Toronto, 2004), at 14-31.

[77] Barrick's shares trade on the Toronto Stock Exchange. It is an Ontario corporation with its head offices and employees, and a business reputation, here. Indeed, the protection and vindication of that reputation in Ontario is what gives rise to the court's mandate in cases of this nature. These factors point to a real and substantial connection between Barrick and Ontario rather than to a jurisdictional link with the defendant. However, they suggest that if the appellant were to take an injunction granted by this Court to British Columbia – where Mr. Lopehandia does have a physical presence – and seek to enforce it there, in this "post-*Morguard* era", the order might be enforced against him by the courts of that Province. The argument for enforcement would be based upon the principles of order and fairness and upon what Professor Hogg has referred to as "an implicit full faith and credit rule in the Constitution of Canada" as a result of the Supreme Court of Canada's decision in *Morguard*: see P.W. Hogg, *Constitutional Law of Canada*, looseleaf ed., vol 1 (Carswell: Toronto, 1998), s. 13.5 at 13-20 to 13-21; *Morguard, supra*; *Muscutt et al. v. Courcelles et al* (2002), 60 O.R. (3d) 20 (C.A.); Edward Mazey, *The Enforcement of Labour Orders outside the Jurisdiction of Origin* (2002), 59 U.T. Fac. L. Rev 25, at 37-38. It is not for this court to usurp the role of the courts in another province, of course. However, the British Columbia Court of Appeal has held in two relatively recent cases that jurisdiction based upon the "real and substantial connection" test may be satisfied where the province asserting jurisdiction has a real and substantial connection with the subject matter of the litigation or the cause of action asserted: *Pacific International Securities Inc. v. Drake Capital Securities Inc.* (2000), 194 D.L.R. (4th) 716 (B.C.C.A.) at 722; *Cook v. Pardcel, Mauro, Hultin & Spaanstra, P.C.* (1997), 143 D.L.R. (4th) 213 (B.C.C.A.) at 219; see also *Braintech, Inc. v. Kostiuk* (1999), 171 D.L.R. (4th) 46 (B.C.C.A.). Such is the case here.

[78] I would set aside the decision of the motions judge in this regard and grant a permanent injunction as requested, restraining the defendants from disseminating, posting on the Internet or publishing further defamatory statements concerning Barrick or its officers, directors or employees.

Pre-Judgment Interest

[79] Finally, the appellant submits the motions judge erred in failing to address Barrick's entitlement to pre-judgment interest pursuant to s. 128 of the *Courts of Justice*

Act, which it seeks to have awarded as of September 1, 2002 (the month after it became aware of the Lopehandia campaign). The judgment provides for post-judgment interest from the date of the judgment, March 12, 2003.

[80] The motions judge did not deal with the issue of pre-judgment interest, either in her main reasons for judgment or in the supplementary reasons respecting costs. It cannot be said, therefore, that she exercised her discretion with respect to pre-judgment interest.

[81] I would grant the appellant pre-judgment interest at the *Courts of Justice Act* rate from October 25, 2002, the date upon which the statement of claim was issued. Barrick took all reasonable steps to encourage Mr. Lopehandia to cease his libellous campaign. He not only ignored these demands, he became even more determined in his efforts to continue. In fact he has persisted in the campaign, at ever higher levels of intensity, at least up to the time of trial, and, as noted, the motions judge "[had] no doubt that Mr. Lopehandia will continue to make defamatory statements". In my view it is appropriate that pre-judgment interest should run from the date the action was commenced.

DISPOSITION

[82] I would accordingly allow the appeal, set aside the judgment of the motions judge and in its place order:

(a) that the defendants pay to the plaintiff general damages in the amount of $75,000.00;

(b) that the defendants pay to the plaintiff punitive damages in the amount of $50,000;

(c) that the defendants are permanently restrained from disseminating, posting on the Internet or publishing in any manner whatsoever, either directly or indirectly any defamatory statements concerning Barrick or its officers, directors or employees, all as claimed in paragraph 2 of the notice of motion for judgment before the motions judge.

[83] Barrick is entitled to its costs of the appeal on a partial indemnity basis. Brief written submissions may be made in that regard within thirty days of the release of this decision.

"R.A. Blair J.A."
"I agree J.I. Laskin J.A."

DOHERTY J.A. (Dissenting):

[84] I have had the benefit of reading the reasons of Blair J.A. I join in those reasons in all respects save one. I do not agree that the trial judge misapprehended the evidence or erred in principle in awarding the appellant $15,000.00 for general and compensatory damages. I would not set aside that part of her judgment.

[85] As my colleague observes, the award made by the trial judge is entitled to deference in this court as are the findings of fact upon which it is based. It is also germane to observe that the amount awarded at trial, $15,000.00, is well beyond the range of nominal damages and is within the range established by earlier cases of corporate libel where the libel does not cause actual economic loss to the corporation.

[86] In *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 at 113, Robins J.A. said:

> A company whose business character or reputation (as distinct from the character or reputation of the persons who compose it) is injuriously affected by a defamatory publication is entitled, without proof of damage, to a compensatory award representing the sum necessary to publicly vindicate the company's business reputation. …

[87] To determine the quantum of the award necessary to publicly vindicate a corporation's business reputation, a trial judge must have regard both to the nature of the statements and their impact on those who have heard or read the statements.

[88] In the present case, the trial judge described the statements as diatribes or rants. She concluded at para. 38:

> … They [the libellous statements] do not leave a reader with the impression that the writer has a credible case against Barrick. Rather, they leave the impression of someone with a grievance, who is emotional and highly intemperate in expressing his views.

[89] After considering the nature of the statements, the trial judge turned to their impact on those who read them. She held at para. 39:

> … In my view, a reasonable reader is unlikely to take what is said seriously – especially those who are said to have read the material, such as stock analysts or individuals working for the TSE. In assessing damages, one must consider the impact of the messages on the estimation of the plaintiff among right

> thinking members of society. While Mr. Lopehandia's words are defamatory, I do not believe that they have caused any serious damage to Barrick's business reputation.

[90] The trial judge's finding that a reasonable reader was unlikely to take the statements seriously was a finding of fact. This court cannot interfere with that finding absent clear and palpable error. If the finding stands, I do not think there is any basis upon which to interfere with the quantum awarded. Put bluntly, where the libellous statements are not likely to be taken seriously by any reasonable person, $15,000.00 is ample to vindicate a company's business reputation.

[91] My colleague, Blair J.A., finds clear and palpable error both in the trial judge's assessment of the nature of the statements and in her conclusion that they were not likely to be taken seriously. As to the nature of the statements, my colleague notes the stylistic difference between Internet dialogue and statements in more traditional media. I am happy to take his word for this. I cannot, however, assume that the trial judge was unaware of this distinction and failed to consider it in arriving at her conclusion that the manner in which the allegations were made tended to undermine their credibility. I take her conclusion to be arrived at with a full understanding of the nature of the medium in which the statements were made.

[92] Blair J.A. also finds that the trial judge's conclusion that the libellous statements were not likely to be taken seriously by reasonable people was contrary to the evidence. My colleague refers to the evidence at paras. 38 to 48 of his reasons. The trial judge was alive to this evidence (paras. 34-35). She drew a much different inference. In her assessment, the evidence offered in support of the damages was neither detailed nor convincing. The trial judge noted that there were only two named individuals identified who had complained about the statements and only one of the thousands of the appellant's shareholders who was identified as registering complaints with the appellant. The trial judge also observed that the appellant had failed to provide any details concerning the nature of the inquiry made by the Toronto Stock Exchange. Based on this record, it could well be that the Toronto Stock Exchange acknowledged the falsity of the allegations in the inquiry it made.

[93] The non-specific evidence concerning the impact of the statements combined with the trial judge's finding as to the nature of the statements, led the trial judge to find that the statements were not likely to be taken seriously by any reasonable person. I think the evidence was open to the interpretation given to it by the trial judge. The fact that other interpretations, more favourable to the appellant, were also available on the evidence, does not justify appellate intervention.

[94] I am satisfied that the trial judge made no clear and palpable error in coming to the conclusion that reasonable persons were not likely to take the libellous statements seriously. I am further satisfied that considered in the light of that factual finding, it cannot be said that an award of $15,000.00 for compensatory damages is inordinately low.

[95] I need not address the other specific errors identified by Blair J.A. I will, however, refer briefly to two. In holding that the trial judge erred in coming to the conclusion that reasonable persons would not take the statements seriously, Blair J.A. indicates that the trial judge failed to consider the Internet's capacity to cause "instantaneous irreparable damage to the business reputation of an individual or corporation". I do not agree that the trial judge failed to consider this possibility. The possibility identified by my colleague arises, however, only if the information being disseminated on the Internet is reasonably capable of belief. The trial judge's finding that the statements would not be taken seriously rendered the Internet's capacity to cause harm to a company's business reputation irrelevant.

[96] My colleague also concludes that the trial judge erred in holding that the defamatory statements made against officers and officials of the appellant were irrelevant to the calculation of the appellant's damages. I agree with Blair J.A. that the trial judge erred in so holding. However, I do not think that this error warrants any variation in the damage assessment given that I would uphold the trial judge's finding that the statements were not likely to be taken seriously by any reasonable person.

[97] I would dispose of the appeal as proposed by Blair J.A. except that I would affirm the trial judge's judgment awarding $15,000.00 for general and compensatory damages.

"D.H. Doherty J.A."

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