Canadians may need to pursue internet defamation lawsuits abroad

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Introduction

Is a Canadian citizen, who is allegedly defamed in an online article published in their home province by a foreign newspaper, entitled to vindicate their reputation in the courts of the province where they live and maintain business, and where the effect of the article's comments is most prominent? No, according to the majority of the Supreme Court of Canada in *Haaretz.com v Goldhar*.(1)

While a majority of the court concluded that Ontario had jurisdiction *simpliciter*, it also found, contrary to the courts below, that Israel was the more appropriate forum for trial proceedings. The plaintiff's claim was thus stayed in favour of litigation in the courts of Israel.

The Supreme Court confirmed that it is relatively easy for Canadian courts to assert jurisdiction over international disputes. Even where an allegedly defamatory post is authored overseas, jurisdiction will almost certainly be asserted over the foreign defendant if the article is read in Canada and relates to a person with reputational interests in Canada. In this regard, a majority of the Supreme Court refused to adopt the most substantial harm test (ie, whether the plaintiff suffered comparatively more or less harm in the foreign jurisdiction) to determine whether a court may have presumptive jurisdiction over a dispute. The *lex loci delecti* (ie, the law of the place where the tort occurred) will continue to ground presumptive jurisdiction. The good news, then, is that the court has maintained a jurisdiction *simpliciter* framework that remains relatively predictable.

On the other hand, the Supreme Court's decision has likely created uncertainty in several other respects. Exercising discretion, the motion judge had concluded that Israel was not a more appropriate forum than Ontario. That decision was entitled to deference by appellate courts in the absence of:

- an error in principle;
- failure to apprehend or take into account material evidence; or
- failure to reach a reasonable decision.

Despite this, the majority of the Supreme Court decided to reweigh the evidence and, based on its own view of the record, impose a new decision. It reviewed the statement of claim in detail and found that the complaint was not confined to Ontario. The Supreme Court's decision arguably clouds the issue of which party bears the burden of proving that requiring the foreign defendant to answer a claim in Canada would result in unfairness.(2) Regarding letters rogatory, in particular, parties may be required to lead expert evidence on whether the foreign jurisdiction will honour such requests. The consequences for any plaintiff in Canada contemplating a proceeding against a foreign defendant are significant:

- Canadian plaintiffs must now pay greater attention when drafting their claim, as it may be

subjected to strict jurisdictional analysis.(3)

- An undertaking by the plaintiff to limit the scope of a claim to only those damages sustained in Canada may no longer be accepted by Canadian judges, further reinforcing the need for tightly drafted pleadings that are mindful of jurisdiction.(4)
- Expert evidence will almost certainly be required on the issue of whether Canadian letters rogatory will be accepted in the foreign jurisdiction.(5)
- Although decisions of motion judges regarding *forum non conveniens* have traditionally been entitled to deference, this decision appears to invite appellate courts to disagree with the weighting applied by the motion judge to *forum non conveniens* factors.(6)
- In the context of jurisdiction disputes, it may be advisable to prepare detailed proposed witness lists to summarise not only the place of residence of each proposed witness, but also each witness's expected evidence, indicating the relevance of the evidence.(7)

Facts

In 2011, the Israeli newspaper *Haaretz* published an article criticising Mitchell Goldhar, a successful Canadian businessman and owner of the most decorated Israeli football club. A print version of the article was widely disseminated in Israel and an online version, published in both Hebrew and English, attracted approximately 200 unique views from users in Canada.

Goldhar brought an action in the Ontario Superior Court of Justice against *Haaretz* for libel. In response, *Haaretz* brought a motion to stay or dismiss the action on the basis that:

- the Ontario court lacked jurisdiction over the dispute;
- Israel was clearly the more convenient forum to hear the action; and
- the action was an abuse of process.

Procedural history

The motion judge held that the lawsuit should be allowed to proceed(8) in Ontario, on the following conditions:

- that Goldhar's damages would be limited to the reputational harm he suffered in Canada; and
- that Goldhar would pay the travel and accommodation expenses of *Haaretz*'s witnesses, the majority of which resided in Israel.

In allowing the matter to proceed in Ontario, the motion judge applied the framework previously established by the Supreme Court in *Club Reports Ltd v Van Breda*(9) for determining whether a court should assume jurisdiction over a matter involving a foreign defendant:

- Did the Ontario court have jurisdiction *simpliciter* over the defendant (ie, was there a sufficient real and substantial connection between the subject matter of the litigation and Canada to allow a Canadian court to assert jurisdiction over the defendant)?
- If so, should it nevertheless exercise its discretion to stay the action in favour of a proceeding in another clearly more appropriate forum?

The motion judge concluded that because the alleged tort occurred in Canada (through publication of the article on the Internet and readership by individuals located in Ontario) jurisdiction *simpliciter* was established. The motion judge further concluded that the action should proceed in Ontario.

The Court of Appeal upheld the motion judge's order in a 2-1 decision, holding that the fact that the article had been read by a small number of people in Ontario, relative to Israel, did not determine whether a Canadian court had jurisdiction. The dissenting judge found that Israel was a clearly more convenient forum and proposed that a most substantial harm test should replace the *lex loci delicti* when determining choice of law in international defamation cases.

Decision

Six of the nine Supreme Court judges agreed that the Ontario proceeding should be stayed in favour of litigation in Israel. The judges that formed the majority arrived at this conclusion in different

ways.

Justices Côté, Brown, Rowe and Karakatsanis

The decision of Justice Côté (Justices Brown and Rowe concurring) favoured the traditional two-step approach set out in *Van Breda* and the continued application of the *lex loci delicti* when determining whether there was a real and substantial connection on which to base jurisdiction.

Côté held that, because the alleged tort had occurred in Canada, a presumptive connection to the jurisdiction had been established. This presumption can be rebutted, for instance, if the plaintiff has no reputation in the jurisdiction.(10) However, in this case, Goldhar had a reputation in Ontario and the alleged defamatory article directly referenced his Canadian residency and businesses.(11)

Regarding the motion judge's *forum non conveniens* analysis, Côté affirmed that the burden was on the defendant to satisfy the motion judge that an alternative forum was clearly more appropriate by establishing that it would be more fair and efficient to proceed in that forum.(12) Given the ease with which jurisdiction *simpliciter* can be established in cases of internet defamation, Côté cautioned that a robust *forum non conveniens* analysis must take place and that motion judges must be "particularly attuned to concerns about fairness and efficiency".(13)

Côté confirmed that lower court decisions regarding *forum non conveniens* are entitled to deference, but an appellate court may intervene where there is:

- an unreasonable conclusion;
- error in principle; or
- misapprehension or failure to take into account material evidence.(14)

With this in mind, Côté identified six errors in the motion judge's *forum non conveniens* analysis and, (15) as such, replaced the motion judge's analysis with her own:

- Comparative convenience for the parties – this factor favoured Israel (not disputed by the parties).
- Comparative convenience and expense for the witnesses – this factor heavily favoured Israel, particularly as almost all of *Haaretz*'s proposed witnesses resided in Israel and the evidence "did not allow the courts below to ensure that *Haaretz* would be able to compel its witnesses to testify if the trial proceeded in Ontario".(16) Further concern was raised with respect to Goldhar's undertaking to pay the travel expenses of *Haaretz*'s witnesses, as this might permit a wealthy plaintiff to sway the analysis in a manner "inimical to the foundational principles of fairness and efficiency undermining this doctrine".(17)
- Loss of legitimate juridical advantage – this factor favoured Ontario, but Côté suggested that this should not weigh heavily in the analysis.(18)
- Fairness – this factor favoured Israel. Goldhar had a multi-jurisdictional reputation and would suffer "no significant unfairness by having to bring a libel claim in Israel for comments that were written and researched in Israel and that pertain primarily to his reputation and business in that jurisdiction".(19) In this regard, the motion judge had failed to ensure that both parties were treated fairly by not weighing Goldhar's interest in vindicating his reputation in Ontario against the significant unfairness that trial in Ontario would impose on *Haaretz*.(20)
- Enforcement – this factor slightly favoured Israel, as *Haaretz* had no assets in Ontario.
- Applicable law – this factor favoured Ontario, but Côté suggested that this should be given little weight. Significantly, Côté held that the analysis of applicable law, given the comparative nature of the *forum non conveniens* analysis, should consider the law of the alternative forum in addition to the law of the chosen forum.(21) She refused to apply the proposed most substantial harm test due to her reluctance to change the existing private international law framework.(22) According to Côté, the most substantial harm test would not have clearly favoured either forum, as Goldhar had a substantial reputation in both Israel and Ontario.(23)

In the result, Côté held that Goldhar's action should be stayed in favour of the more convenient forum, Israel.

Karakatsanis largely adopted the reasoning of Côté, for separate reasons, with one exception; as part of the *forum non conveniens* analysis, Karakatsanis held that consideration of applicable law should

not be expanded to include consideration of the applicable law of the alternative forum – such consideration would unduly lengthen the analysis and not aid in determining whether a domestic court would have to apply foreign law at trial.(24)

Justices Abella and Wagner

Justice Abella held that the most substantial harm should replace the *lex loci delicti* as a presumptive connecting factor in the jurisdiction *simpliciter* analysis for internet defamation cases. This test, according to Abella, is more realistic in the internet age and helps to avoid the risk of lawsuits being brought in whatever jurisdiction an allegedly defamatory online article was opened. Wagner did not agree with the application of this proposed test to jurisdiction *simpliciter*.(25)

In considering the *forum non conveniens* analysis factors, Abella was concerned that a single download might be sufficient to establish applicable law in internet defamation cases.(26) As with jurisdiction *simpliciter*, her preference was to consider the place where the plaintiff suffered the greatest harm to their reputation (as opposed to law of the place of publication).(27) With reference to Australia and European jurisdictions, Abella called for a multi-factor contextual approach to determining where the most substantial harm was suffered.(28)

Wagner agreed with Abella's application of a most substantial harm test; while there may be cases in which it will be challenging to identify the place of most substantial harm, "the range of possibly applicable law for a given dispute will be much narrower than with *lex loci delicti* and will be determined on a more principled basis".(29)

Ultimately, Abella and Wagner each favoured a trial in Israel, particularly given the financial strain a trial in Ontario would place on *Haaretz*.(30)

Dissenting reasons of Justices McLachlin, Moldaver and Gascon

Written by Chief Justice McLachlin, the dissent rejected much of the majority's analysis and held that the only *forum non conveniens* factors that favoured a trial in Israel were:

- comparative convenience;
- expense for the parties; and
- convenience for the witnesses.(31)

The dissent disagreed with Côté's characterisation of errors made by the motion judge. Some of these errors, according to McLachlin, were simple differences in weighing up factors and were at odds with the deference to be afforded to the motion judge.(32) In general the dissent disagreed with the approach of the majority, which undermined stability, increased costs and uncertainty and set the tone for further appellate intervention in jurisdiction decisions.(33)

On the issue of jurisdiction *simpliciter*, the dissent opined that the *situs* of the tort was sufficient to establish a presumptive jurisdictional connection; even in the case of internet libel, "the sting of the defamation is felt in the place where it is read".(34)

According to McLachlin, *Haaretz* could not rebut the presumption of jurisdiction in this case, finding that it was reasonably foreseeable that Goldhar might seek to vindicate his reputation in Ontario. The existing standard for jurisdiction *simpliciter* was far from the automatic assumption of jurisdiction based on a single download, as was suggested by Abella.(35)

On the dissent's *forum non conveniens* analysis, considerable emphasis was given to the history and selection of a "clearly more appropriate forum" as being the standard for exercising judicial discretion to stay a proceeding.

The dissent would not have adopted a most substantial harm test for applicable law in defamation cases, out of concern that such a rule would be highly subjective and result in the proliferation of costly mini-trials.(36) The dissent also expressed concern regarding the majority's analysis that one party might be able to manipulate the witness factor by providing a list of foreign-domiciled witnesses in order to sway the *forum non conveniens* analysis, without providing any further indication of their relevance or expected evidence.(37)

Comment

This case helpfully affirms the test for jurisdiction *simpliciter* in internet defamation cases. However, at the same time it muddies the waters regarding the circumstances in which a court might exercise discretion to stay a proceeding in Canada in favour of trial in another jurisdiction, including when an appellate court might deem it appropriate to overturn a motion judge's decision on the issue.

The Supreme Court's decision shows that the judiciary remains divided on how best to adapt existing private international law principles to the modern reality of borderless communications. While *Haaretz.com v Goldhar* may not be the final word in this debate, it stands for now. Litigants in matters involving foreign defendants are left with increased uncertainty regarding the appropriate forum for their claim and would be wise to examine jurisdictional issues with increased scrutiny.

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Endnotes

(1) *Haaretz.com v Goldhar*, 2018 SCC 28, para 151.

(2) *Ibid*, para 63.

(3) *Ibid*, paras 20-22, 24, 78, and 132.

(4) *Ibid*, para 23.

(5) *Ibid*, paras 50 and 64.

(6) *Ibid*, para 179.

(7) *Ibid*, paras 223-224 and 227.

(8) For full commentary on the procedural history of this case, please see "Ontario court assumes jurisdiction over Israeli publisher in online defamation claim" (also published in *Internet and E-Commerce Law in Canada*, v16, no 8, December 2015) and "Court of Appeal affirms jurisdiction over Israeli publisher".

(9) 2012 SCC 17.

(10) *Haaretz*, para 44.

(11) *Ibid*, para 45.

(12) *Ibid*, para 46.

(13) *Ibid*, para 48.

(14) *Ibid*, para 49.

(15) The errors identified by Côté were: finding that letters rogatory could be used to compel Israeli witnesses to testify in Ontario; giving too much weight to Goldhar's undertaking to fund travel and accommodation expenses of foreign witnesses in accordance with rates provided in the rules; unreasonably discounting *Haaretz*'s proposed witnesses and the relevance of their evidence; failing to consider Goldhar's significant reputation in Israel; failing to weigh Goldhar's interest in vindicating his reputation in Ontario against the unfairness a trial in Ontario would impose on *Haaretz*; and failing to consider the question of enforcement.

(16) *Haaretz*, para 63.

(17) *Ibid*, para 66.

(18) *Ibid*, para 76.

(19) *Ibid*, para 78.

(20) *Ibid*, para 79.

(21) *Ibid*, para 89.

(22) *Ibid*, para 91.

(23) *Ibid*, para 94.

(24) *Ibid*, para 100.

(25) *Ibid*, para 147.

(26) *Ibid*, para 117.

(27) *Ibid*, para 109.

(28) *Ibid*, paras 114-116.

(29) *Ibid*, para 145.

(30) *Ibid*, paras 133-139.

(31) *Ibid*, para 238.

(32) *Ibid*, para 179.

(33) *Ibid*, para 180.

(34) *Ibid*, para 166.

(35) *Ibid*, para 171.

(36) *Ibid*, paras 196 and 199-201.

(37) *Ibid*, para 227.
