

• ONTARIO COURT ASSUMES JURISDICTION OVER ISRAELI PUBLISHER IN ONLINE DEFAMATION CLAIM •

Michael D. Schafler and Thomas Wilson
Dentons

A recent Ontario Superior Court of Justice decision *Goldhar v. Haaretz.com* [*Goldhar*]¹ cautions publishers of online content in non-Canadian jurisdictions that they may have to defend defamation proceedings in Canadian courts.

Facts

In November 2011, Israel's oldest daily newspaper, *Haaretz*, published an article about Mitchell Goldhar, a successful Canadian businessman and owner of the most decorated football club in Israel, Maccabi Tel Aviv Football Club. The article was critical of Goldhar.

Although a print version was not available in Canada, *Haaretz* posted the article online in both Hebrew and English.² The article attracted 216 unique views from users located in Canada, although more than 216 Canadians likely read the article.³

Shortly after the article was published, Goldhar brought an action in the Ontario Superior Court of Justice against *Haaretz*, alleging that it was libellous. In response, *Haaretz* brought a motion to stay or dismiss the action on three grounds:

- The court lacked jurisdiction;
- Ontario was not the most convenient forum to hear the action (*forum non conveniens*); and
- The action was an abuse of process.

Decision

The court allowed Goldhar to continue his action in Ontario, ordering that

- Goldhar's damages would be limited to damages to reputational harm suffered within Canada; and
- Goldhar would be required to pay travel and accommodation expenses for *Haaretz's* witnesses.⁴

The court applied the framework established by the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*⁵ for determining whether a court should assume jurisdiction over a foreign defendant:

- Did the Ontario court have jurisdiction *simpliciter* (*i.e.*, the ability to assert jurisdiction over an out-of-province defendant) over the defendant?
- If the Ontario court had jurisdiction *simpliciter*, should it nevertheless exercise its discretion to stay the action if another forum was clearly more appropriate for hearing the action?⁶

In its jurisdiction *simpliciter* analysis, the court first acknowledged a presumptive connecting factor between the subject matter of the litigation and the proposed forum—namely, that the alleged tort of defamation had been committed in Ontario.⁷ With a presumptive connecting factor in place, the burden shifted to *Haaretz* to prove that the connecting factor did not point to any real relationship between the subject matter of the litigation and Ontario. Citing *Éditions Écosociété Inc. v. Banro Corp.*,⁸ in which the Supreme Court held that even a small amount of publication in the proposed forum was enough

to establish jurisdiction *simpliciter*, the court was not persuaded by *Haaretz's* submission that since a far greater number of people had read the article in Israel than in Ontario, there was no substantive connection between the alleged defamation and Ontario.⁹

After concluding that it had jurisdiction *simpliciter*, the court turned to *Haaretz's* submissions on *forum non conveniens* (“inconvenient forum”). To persuade the court to stay the action, *Haaretz* was required to demonstrate that another jurisdiction (Israel) was the clearly more appropriate forum. In refusing to grant a stay, the court considered a number of factors:

- Both the location of witnesses and the location of the parties (in light of the fact that Goldhar regularly visited Israel) favoured the action being brought in Israel.¹⁰
- Applicable law (*i.e.*, the law of the place where the tort occurred) favoured the action being brought in Ontario.¹¹
- Loss of juridical advantage to the plaintiff favoured the action being heard in Ontario. Although an expert witness for *Haaretz* testified that there was a more plaintiff-friendly libel regime in Israel,¹² Goldhar’s counsel pointed to the availability of jury trials and the lack of a public figure defence in Ontario as juridical advantages that would be surrendered should the action be tried in Israel.¹³ In determining that loss of juridical advantage favoured the action continuing in Ontario, the court refused to engage in an analysis of the relative juridical advantages of having the action heard in Ontario versus Israel: a plaintiff need show that there is only a loss of juridical advantage, not a net loss.¹⁴

- Recognising the historical importance of reputation in Canadian defamation law, fairness to the parties favoured the trial of the action in Ontario.¹⁵

Comment

In the Internet era, anyone can—within minutes—distribute written material to a global audience. The opportunities presented by this new communication technology are often matched by attendant risks. *Goldhar* demonstrates that Canadian courts will not hesitate to require international publishers of online content to defend actions brought in Canada. Before publishing potentially libellous material, prudent publishers should note the common sense approach adopted in this case:

The defendants published an article about a Canadian businessman’s ownership of an Israeli soccer team that impugned his reputation. There is no surprise or injustice to the plaintiff’s attempt to vindicate his reputation in Ontario, where he lives and works.¹⁶

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[*Editor’s note:* **Michael Schafler** co-leads Dentons Canada’s Litigation and Dispute Resolution group and is a Global Practice Leader for Dentons’ global Litigation and Dispute Resolution group. His practice focuses on sophisticated commercial litigation and arbitration, emphasizing securities litigation, including class actions, auditor’s liability, regulatory and appellate energy cases, and insider trading and proxy contests. You can reach him at <michael.schafler@dentons.com> or (416) 863-4511.

Thomas Wilson is an associate in Dentons Canada’s Litigation and Dispute Resolution group. A recipient of the Osgoode Hall Law School Dean’s Gold Key Award, his practice involves a variety of corporate, commercial, and

civil litigation matters. You can reach him at <thomas.wilson@dentons.com> or (416) 863-4511.]

¹ *Goldhar*, [2015] O.J. No. 1084, 2015 ONSC 1128.

² *Ibid.*, paras. 6 and 12.

³ *Ibid.*, paras. 12–15.

⁴ *Ibid.*, para. 77.

⁵ [2012] S.C.J. No. 17, 2012 SCC 17.

⁶ *Goldhar*, *supra* note 1, para. 17.

⁷ *Ibid.*, paras. 18–20.

⁸ [2012] S.C.J. No. 18, 2012 SCC 18.

⁹ *Goldhar*, *supra* note 1, para. 21.

¹⁰ *Ibid.*, paras. 29–33 and 41–42.

¹¹ *Ibid.*, paras. 46–51.

¹² *Ibid.*, para. 53.

¹³ *Ibid.*, paras. 55 and 60.

¹⁴ *Ibid.*, para. 62.

¹⁵ *Ibid.*, paras. 64–65.

¹⁶ *Ibid.*, para. 62.

• IS IT LEGAL TO USE COMPETITORS' TRADEMARKS AS PART OF SEO STRATEGIES? CANADIAN COURT FINDS USE OF A COMPETITOR'S TRADEMARK AS A KEYWORD IS NOT ACTIONABLE •

Catherine Lovrics and Tamara Céline Winegust
Bereskin & Parr LLP

In Canada, there have been only a few Canadian cases dealing with use of competitors' trademarks in search engine optimization (SEO)—for example, as keywords and metatags. The recent trend is (1) holding such use not actionable under trademark law on the basis that consumers are unlikely to be confused by search engine results alone and (2) also rejecting “initial interest” confusion type arguments. The issue, however, is not settled at Canadian law.

In *Vancouver Community College v. Vancouver Career College (Burnaby) Inc.*,¹ the Supreme Court of British Columbia considered whether the defendant's use of the plaintiff's trademarks VCC and VANCOUVER COMMUNITY COLLEGE in keyword advertising, including Google AdWords, constituted passing off. The court found it was not, based on users retaining the ability to choose from the results returned by a search, the content of the defendant's website not containing any “confusing material”, and on the keywords not being visible to users. The court found that search results alone are not likely to lead to confusion, since a user controls what terms are searched and can still pick and

choose between results, so devices that manipulate search results (such as keywords) are unlikely to cause confusion. Acknowledging that confusion is assessed as a matter of “first impression”, the court held that a “first impression” in the context of keywords or AdWords does not arise until a user has actually accessed the website located by the search. Therefore, a user must actually go to a website before the issue of confusion can arise. The court also found that since metatags are not displayed on screen, they have “no potential cause for confusion” and are “irrelevant”. In this case, the defendant's website itself did not display the plaintiff's marks, so there was no risk of confusion.

This follows the recent Federal Court decision in *Red Label Vacations Inc. v. 411 Travel Buys Limited* (currently under appeal),² where the court found use of other's trademarks in metatags not to be passing off or trademark infringement. The court found that since the metatags were not visible to the searcher, there was no potential for a misrepresentation “to the public”. The court also commented that whether or not there was