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SCC lesson: In a multijurisdictional defamation dispute, the statement of claim must sufficiently focus on the plaintiff's Canadian reputation

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On June 6, 2018, the Supreme Court of Canada released its decision in *Haaretz.com v. Goldhar,* 2018 SCC 28. The appeal to Canada's top court involved a multijurisdictional Internet defamation case. The Court, in what was a splintered decision, reinforced that in such a case, in order for Ontario to be found the appropriate forum, the statement of claim must sufficiently focus on the plaintiff's Canadian reputation.

Haaretz, a newspaper that publishes in print in Israel and online worldwide, appealed the lower court decisions, which had permitted Goldhar, a Canadian resident and business owner, to sue Haaretz for libel in Ontario.

While almost all judges agreed that Ontario courts had jurisdiction over the proceeding, the majority allowed Haaretz's appeal, finding that Israel was clearly the more appropriate forum. There were four separate majority opinions with lead majority reasons delivered by Justice Côté (backed by Justices Brown and Rowe), and the remaining majority opinions delivered separately by each of Justices Abella and Karakatsanis and now Chief Justice Wagner. Former Chief Justice McLachlin wrote the dissenting reasons (backed by Justices Moldaver and Gascon).

Justice Côté's reasons suggest that a plaintiff's failure to sufficiently plead and particularize the existence of a substantial reputation in Ontario and focus on harm to that reputation may thwart a plaintiff's success on a jurisdiction motion. Had Goldhar narrowed his statement of claim in a manner that focused on his Ontario business interests and his Ontario reputation, and had he specifically undertook in his statement of claim not to commence similar proceedings in other jurisdictions, the pendulum may have swung in his favour.

At the outset of her reasons, Justice Côté stressed the importance of defining the scope of the action in the jurisdiction *simpliciter* and *forum non conveniens* analyses (para. 20). In what would constitute a severe blow to Goldhar's position, Justice Côté found that Goldhar's amended statement of claim ("Amended Claim") "was never limited to libellous statements pertaining to his Canadian business or damage to his Canadian reputation" (para. 20). In relation to the Amended Claim, Justice Côté, in particular, commented:

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1. While it states that Goldhar is a "business owner and operator," the Amended Claim mentions only his business in Israel specifically (para. 22);

2. The natural and ordinary meaning of the article in the Amended Claim fails to identify any connection to Goldhar's Canadian business (para. 22);

3. The list of "alleged factual errors and fabrications in the article" in the Amended Claim "does not identify any such errors or fabrications relating to Goldhar's Canadian business practices, but it does specifically identify statements pertaining to his management of Maccabi Tel Aviv…" (para. 22);

4. The Amended Claim "makes no mention of the article's claim that "Goldhar's management model was imported directly from his main business interest — a partnership with Wal-Mart to operate shopping centers in Canada" even though this is the passage that is said to provide the connection between the allegedly libellous statements and Goldhar's Canadian business reputation" (para. 22); and

5. The Amended Claim, while stating that damage to Goldhar's reputation will continue to be suffered in Israel, Canada, and the United States, never singles out Canada as the "the forum where reputational harm has been suffered for the purposes of this action" (para. 22).

Justice Abella also observed that five out of six of the defamatory statements "concern Mr. Goldhar's conduct and reputation in Israel, not Canada" (para. 132). This observation swayed Justice Abella in finding that the place of most substantial harm to Goldhar's reputation is Israel and, accordingly, Israeli law should apply (para. 131).

Although Goldhar provided an undertaking to restrict his damages to only those suffered in Canada, Justice Côté found that it could not act to limit the scope of his claim (para. 23). Justice Côté also noted that Goldhar's undertaking did not "preclude a future action from being commenced in Israel to recover damages there" and a possible future action in Israel detracts from an important consideration at the *forum non conveniens* analysis: The avoidance of a multiplicity of legal proceedings and of conflicting decisions (para. 23).

Justice Côté found that the undertaking provided by Goldhar was materially different than the one considered in *Breeden v. Black*, 2012 SCC 19, another multijurisdictional Internet defamation case (para. 23). In that case, the plaintiff, Conrad Black, undertook "not to bring any libel action in any other jurisdiction" and "limited his claim to damages to his reputation in Ontario" (per Lebel J. in *Black*, para. 33). Unlike Goldhar, Black, while initially claiming damages to his worldwide reputation, later amended his claim, restricting it to damage to his Ontario reputation.

Chief Justice McLachlin, in dissent, disagreed entirely with Justice Côté on the undertaking issue, noting that, "subsequent representations and undertakings that limit the scope of the

plaintiff's action are relevant to the overall determination" (para. 162). She also found that Goldhar's undertaking ensures that there will be no conflicting decisions and that there is no risk of a multiplicity of proceedings since Goldhar took the position before the Court that "it would be an abuse of process for him to sue in another jurisdiction" (para. 235).

Critical of Justice Côté's overly formalistic approach, Chief Justice McLachlin found that Justice Côté's parsing of each line of the claim in "an effort to show that his concern about his business reputation in Canada is simply an afterthought" ignores those parts of the Amended Claim that connect Goldhar and the article with Ontario and discounts the undertaking provided by Goldhar to limit his claim to his Canadian reputation (para. 163).

Justice Côté's refusal to permit Goldhar's undertaking to narrow the scope of his pleading had a significant impact on her Honour's approach to the fairness factor in the *forum non conveniens* analysis. Justice Côté found that the motion judge erred by failing to consider Goldhar's "significant reputation in Israel" as his claim was never limited to damages sustained to "his reputation in Ontario or to statements pertaining to his business in Ontario" (para. 78). Indeed, Justice Côté refers back to the Amended Claim, which confirms that Goldhar "saw himself as enjoying a significant reputation in Israel" (para. 78). Referring back to the Amended Claim, Justice Côté found that Goldhar "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" (para. 78).

Chief Justice McLachlin disagreed, finding that fairness "strongly supports allowing Mr. Goldhar to vindicate his reputation in the jurisdiction where he maintains his reputation, and where the sting of the article was felt by him" (para. 214) and his "reputation in Israel is not material to the analysis" (para. 219).

It is important to note, as Chief Justice McLachlin did, that this was not a forum shopping case and Goldhar's action was not an abuse of process: Goldhar, a long-time resident of Ontario with his main business interest there, brought a legitimate claim for defamation and it was reasonably foreseeable that Haaretz would have to answer the claim in Ontario when it decided to publish the defamatory statements (para. 219).

Given the plurality of reasons in this case, it is unlikely to be the last word on multijurisdictional Internet defamation issues. The clear lesson from this decision is that the statement of claim must focus on a plaintiff's Canadian reputation and the damage to it in Canada. This focused approach will serve to ensure that a plaintiff is able to vindicate his or her reputation in the chosen forum.