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Editor-in-Chief: Professor Michael A. Geist, University of Ottawa, Faculty of Law
Technology Counsel, Osler, Hoskin & Harcourt LLP

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• CYBER-LIBEL: THE MORE THINGS CHANGE THE MORE THEY REMAIN THE SAME •

Peter Ruby and Jason Wadden
Goodmans LLP, Toronto

Recently, three decisions of the Ontario courts and, tangentially, a decision of the Supreme Court of Canada, addressed cyber-libel.¹ These cases are noteworthy both for their consideration of the features that make the Internet different from other publication media and their application of long-standing jurisdiction principles and defamation concepts. The courts in these cases addressed the Internet's distinct features not by adopting a new legal framework specifically tailored for the Internet, but instead by considering such features in a principled manner within the existing legal framework.

The Ontario decisions also indicate a rejection of the U.S. approach to Internet jurisdiction set out in *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*² ("Zippo") and followed by the British Columbia Court of Appeal in *Braintech, Inc. v. Kostiuik*³ ("Braintech"). Rather than develop a new framework tailored to matters arising on the Internet, the Ontario courts applied the Supreme Court of Canada's "real and substantial connection" test enunciated in *Morguard Investments Ltd. v. De Savoye*⁴ ("Morguard") and recently applied in the Internet context.

In particular, in *Barrick Gold Corporation v. Lopehandia*⁵ ("Lopehandia"), the Court of Appeal for Ontario for the first time dealt with the defamation law and jurisdictional issues arising in a cyber-libel case. The court concluded that cyber-libel should be assessed in light of the increased power of its authors, and the different norms, standards of discourse, and behaviour that have developed on the Internet.

Each of these four cases are described below.

BARRICK GOLD v. LOPEHANDIA

In *Lopehandia*, Barrick moved for default judgment against the defendant Lopehandia, but was awarded by the motions judge only a fraction of the damages sought for defamatory statements made on the Internet.


• In This Issue •

CYBER-LIBEL: THE MORE THINGS CHANGE THE MORE THEY REMAIN THE SAME

Peter Ruby and Jason Wadden.....41

INDUSTRY CANADA RELEASES PRINCIPLES FOR ELECTRONIC AUTHENTICATION

Simon Hodgett.....47

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Please address all editorial inquiries to:

Verna Milner, Journals Editor
 LexisNexis Canada Inc.
 Tel. (905) 479-2665; Toll-Free Tel. 1-800-668-6481
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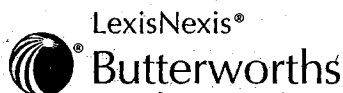
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The Court of Appeal, by majority, allowed the appeal with extensive reasons for its decision, increased the total amount of the damages awarded to Barrick eight-fold, awarded punitive damages, and granted a permanent injunction against Lopehandia. The court found that the motions judge had made a number of palpable and overriding errors with respect to the evidence that were based upon erroneous presumptions about the effect and nature of the Internet. While the court was divided concerning whether or not it should interfere with the inferences drawn on by the motions judge from the evidence, it unanimously found that it had jurisdiction to entertain the action and to order a permanent injunction against the defendant notwithstanding that the defendant resided in British Columbia.

FACTS

Barrick was one of the largest producers of gold in the world. Its head office was located in Toronto, Ontario, its shares traded on the Toronto Stock Exchange (among other exchanges) and the majority of its officers and directors were resident in Toronto. Lopehandia was a resident of Vancouver, British Columbia.

In January 2001, Lopehandia sent a letter to Barrick claiming that he and three other individuals were the beneficial owners of certain Chilean mining claims owned by Barrick and alleging that Barrick had fraudulently acquired these claims at their expense. Lopehandia threatened to sue and commence an "all out war" against Barrick if Barrick did not pay him \$3 million within ten days. Barrick refused and Lopehandia posted hundreds of defamatory allegations on a number of different Internet bulletin boards and Web sites over an extended period of time. The on-line postings included allegations that that Barrick had engaged in accounting fraud, tax evasion, money laundering, manipulation of world gold prices, arson, murder, genocide, and crimes against humanity. Lopehandia also alleged that Barrick's Chilean property was or was going to be subject to a judicial embargo. He repeatedly compared Barrick to ENRON, Worldcom and Bre-X. Both the Court of Appeal and the motions judge concluded that the statements posted by Lopehandia were libelous statements of the most serious nature.

Most of Lopehandia's defamatory statements were posted to popular Yahoo! and Lycos on-line

message boards dedicated to discussions regarding Barrick and other gold mining/producing companies. The Yahoo! message boards could be seamlessly accessed from the Yahoo! Canada Web site, although they appeared to be hosted on Yahoo!'s U.S. Web site. Yahoo! Canada Inc. carried on business from its offices in Toronto.

After Lopehandia ignored Barrick's demands that he cease his cyber-libel, it commenced a defamation action against him in Ontario. Lopehandia did not defend the action, but rather continued his libelous campaign and mocking Barrick for having commenced the action.

JURISDICTION OVER PUBLICATIONS ON THE INTERNET

The question of whether the Ontario courts had jurisdiction in respect of the cyber-libel was not directly at issue in *Lopehandia* because Lopehandia was deemed to have admitted that Ontario did have jurisdiction in the matter. However, the Court of Appeal considered whether it could or should issue a permanent injunction against Lopehandia, who resided outside its geographic jurisdiction.

The court held that the motions judge erred, on jurisdiction grounds, by not granting the injunction. First, the court found that Barrick had met the Ontario test for service of a claim outside Ontario. The court held that because one of the bulletin boards on which Lopehandia was posting messages could be accessed seamlessly through a Web site run by Yahoo! Canada, which was also located in Ontario, and "[t]he 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...". The court adopted the existing law which considers a company's goodwill to be personal property.

The Court of Appeal stated that there is "something" about defamation on the Internet that distinguishes it from defamation in another media. It stated that when assessing damages in the context of the Internet, the factors considered to assess damages in libel cases must be examined in light of the "ubiquity, universality and utility" of the Internet.

Second, the court accepted Barrick's arguments that a permanent injunction should issue against the defendant because there was a real and substantial connection between Barrick and Ontario.⁶ The court also accepted that there was a real and substantial connection between Lopehandia's publication of the libelous statements and Ontario because Barrick was located in Ontario, the cyber-libel had been read in Ontario, the cyber-libel affected personal property (*i.e.*, Barrick's goodwill) in Ontario, and there was some evidence that some of the statements were accessible through a Web site operated by a company that was also located in Ontario. In particular, the court suggested that where the statements were uploaded onto the Internet was not a particularly important factor because the cyber-libel could have been posted onto the Internet from Toronto or elsewhere.

Third, the court adopted the observation made by the High Court of Australia in *Dow Jones Inc. v. Gutnick* ("*Gutnick*") that it would be unacceptable if courts could not give an effective remedy to a victim of defamation simply because the defamatory statements appeared on the Internet. The court granted the injunction against Lopehandia, noting:

- the injunction could be enforced against Lopehandia if he comes to Ontario;
- the injunction, although not directed specifically against Yahoo!, would prevent Yahoo! from permitting Lopehandia to post the defamatory messages; and
- an Ontario injunction granted by an Ontario court over a person residing in British Columbia may be enforceable in British Columbia where there is a real and substantial connection to Ontario.

DAMAGES FOR INTERNET DEFAMATION

The Court of Appeal stated that there is "something" about defamation on the Internet that distinguishes it from defamation in another media. It stated that when assessing damages in the context of the Internet, the factors considered to assess damages in libel cases must be examined in light of the "ubiquity, universality and utility" of the Internet.⁸

The court found the mode and extent of publication to be particularly relevant where the publica-

tion occurs on the Internet. It held that because communication via the Internet is "instantaneous, seamless, inter-active, blunt, borderless, far-reaching and impersonal", traditional approaches attuned to the "real-world" might not be adequate. The anonymous nature of the Internet might itself create a greater risk that defamatory remarks are believed.⁹ The court noted that there were other forms of communication that occur internationally in a very rapid manner (for example, the international distribution of newspapers, radio and satellite television broadcasting), but that Internet defamation remains distinguished from its other "less pervasive cousins", both in terms of its potential to damage the reputation of individuals and corporations and its absolute and immediate worldwide ubiquity and accessibility. Quoting from an article, the court also recognized that given the ease with which a defamatory statement can be republished and circulated on the Internet, it is particularly difficult for a person defamed to ensure that the truth "catches up with a lie".¹⁰ The anonymous nature of the Internet might itself create a greater risk that defamatory remarks are believed.

The court also recognized that distinct dialogue norms exist between individuals on bulletin boards and chat rooms on the Internet. Therefore, the norms of communication established in the traditional forms of media cannot be used to evaluate the credibility of statements published on the Internet. The court, by majority, overturned the motions judge's finding that people might not believe the postings given that many of the defendant's postings would be seen as a diatribe or rant (the statements were emotional and intemperate) and because of the unorthodox use of capitals and punctuation.

The motions judge had declined to award punitive damages because she was of the view that Barrick was not the vulnerable party in its relationship with Lopehandia (a requirement for punitive damages). A majority of the Court of Appeal disagreed, finding the motions judge had misapplied the vulnerability factor by failing to consider the power that the use of the Internet gives to an individual:¹¹

The court also recognized that distinct dialogue norms exist between individuals on bulletin boards and chat rooms on the Internet. Therefore, the norms of communication established in the traditional forms of media cannot be used to evaluate the credibility of statements published on 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. Lopenhandia 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".

The majority concluded that the motions judge had committed a reviewable error by failing to appreciate and misjudged the true extent of Lopehandia's target audience and the nature of the potential impact of the libelous statements in the context of the Internet. The minority concluded that the motions judge had taken into account these factors, and that her inferences should not be disturbed.

BARRICK v. BLANCHARD

A cyber-libel and defamatory press release campaign was commenced by the defendant Blanchard and Co., a Louisiana retail dealer in precious metals and rare coins, against Barrick. Barrick commenced an action for defamation in Ontario and was met with a motion by the defendants seeking the dismissal of the action for lack of jurisdiction, among other things. The court dismissed Blanchard's motion and allowed the action to proceed in Ontario.

JURISDICTION OVER PUBLICATIONS ON THE INTERNET

The court found that it had jurisdiction on the basis of the various means by which Blanchard published the defamatory statements, including the publications of the statements on the Internet.

Blanchard claimed that in issuing the press releases in question it did not intend to publish the allegations in Canada. The court concluded that parties must realize that it is near impossible to restrict a publication to only one forum. Specifically, the judge held that it is "naïve" to think, given the integration of media channels between Canada and the United States, that a publication in the United States will be heard or read (and therefore "published") within the borders of only one country.

The court likened publication to placing a product into the "stream of commerce"¹² and found that this

rationale also applied to the defendants' statements that were published on the Internet. The court concluded that in posting the defamatory statements on the Internet, Blanchard knew that it might cause damage to Barrick in Ontario and, therefore, there was a real and substantial connection to Ontario. The court considered the intent of the defendants and the impact of the defamation in the plaintiff's home jurisdiction to be factors in assessing the real and substantial connection.

Interestingly, the court found that Blanchard had taken steps to avoid having the allegedly defamatory statement published by press release in Ontario and thus be sued in Ontario, but concluded that "[i]t is not unreasonable in those circumstances for the defendants to be subject to the very outcome with which they were concerned once they published their statements in the manner in which they did".

The court addressed the policy interests involved in assessing Internet jurisdiction, explicitly preferring the *Gutnick* approach (defamation occurs where the defamatory statement is downloaded) to the U.S. approach (jurisdiction lies only where the Web site is created/maintained and the host server is located):

The court concluded that in posting the defamatory statements on the Internet, Blanchard knew that it might cause damage to Barrick in Ontario, and therefore, there was a real and substantial connection to Ontario.

I will say that I prefer the reasoning of the High Court of Australia to that of the U.S. decisions. I say so for two reasons. First, the approach reflected in the Dow Jones decision, while admittedly exposing people who post material on the Internet to a wide expanse of liability, establishes a rule that would have had [sic] its effect a strong incentive for people who do post such material to ensure that it is fair and accurate and responsible in its content. The U.S. approach, on the other hand, has the very real risk of becoming a licence for people to post whatever outrageous and malicious material they wish without any real fear of being called to account.

BANGOURA v. WASHINGTON POST

The defendants brought a motion for an order staying a defamation action and setting aside service of the claim outside Ontario.

The plaintiff was an "international public servant" who was formerly employed by the United Nations.

In January 1997, the Washington Post ran a series of articles in which it was alleged that the plaintiff was guilty of various forms of misconduct while he held office with the United Nations, including sexual harassment, financial improprieties and nepotism. These articles were published in both the Washington Post's print and on-line editions. At the time the articles were first published, the plaintiff was stationed in Kenya. Shortly thereafter, he relocated to Canada and commenced the action sometime after arriving in Canada. The Washington Post's only presence in Ontario was a small office that was only used by several journalists.

Upon finding that service was validly affected, the motions judge considered the factors set out in *Muscutt v. Courcelles*,¹³ in order to determine whether there was a real and substantial connection to Ontario. Finding that there was a real and substantial connection between the action and Ontario, he dismissed the motion for a stay, for reasons similar to those in *Blanchard*.¹⁴

First, the court held that the plaintiff was entitled to sue in Ontario despite his not being a resident in Canada at the time the publication was first made, because Ontario was where the damage to his reputation had the greatest impact.

Second, the court also held, similarly to *Blanchard*, that the prevalence of certain American media, including the Washington Post, suggested that there was a connection to Ontario. He also held that there was a connection between the defendants and Ontario because, objectively, it was reasonably foreseeable that the Washington Post's story would inflict harm on the plaintiff wherever he resided.

SOCAN v. CANADIAN ASSOCIATION OF INTERNET PROVIDERS

In this appeal of a decision of the Copyright Board, the Supreme Court of Canada considered whether Canadian copyright legislation extended to transmission of copyright infringing material over the Internet. This issue was important in that case to determine whether Internet service providers would be liable for copyright infringement under Canadian law.

The Court rejected the approach of the court below, which had ruled that only if copyright infring-

ing material was located on a host server in Canada would the Canadian copyright regime apply. Instead, the Court adopted a holistic approach to the issue, attempting to impose a uniform jurisdictional paradigm that would apply to the enforcement of foreign judgments, copyright, defamation, obscenity, and otherwise.

Applying the same reasoning to the defamation context indicates that the location of the server is but one factor influencing the outcome of the real and substantial connection test. This is how the court in *Lopehandia* dealt with the use of a server in Canada to post the defamation — as one of many factors considered by the court.

THE ONTARIO PERSPECTIVE ON CYBER-LIBEL JURISDICTION: GUTNICK PREFERRED OVER ZIPPO

In each of the *Lopehandia*, *Blanchard* and *Washington Post* decisions the courts adopted *Gutnick*. In *SOCAN*, the Supreme Court of Canada also cited *Gutnick*. In particular, in *Blanchard* the court acknowledged the concern expressed by the British Columbia Court of Appeal in *Braintech*, which echoed the concerns expressed in *Zippo* that there would be a crippling effect on freedom of expression if a person could be haled into any court in the world in which a statement published on the Internet could be read. However, Justice Nordheimer explained that the appropriate balance is struck by considering all the factors under the real and substantial connection test, for the following reasons:¹⁵

The fact that a Web site on which defamatory statements are published only contains information that can be read, as opposed to offering some other form of interactivity cannot relieve the defamer of culpability.

First, the approach reflected in the [*Gutnick*] decision, while admittedly exposing people who post material on the Internet to a wide expanse of liability, establishes a rule that would have had its effect a strong incentive for people who do post such material to ensure that it is fair and accurate and responsible in its content. The U.S. approach, on the other hand, has the very real risk of becoming a licence for people to post whatever outrageous and malicious material they wish without any real fear of being called to account.

In *Washington Post*, Justice Pitts, consistent with *Gutnick*, adopted the plaintiff's position that in in-

ternational defamation cases, jurisdiction is to be based on where the harm is felt. He adopted the following passage from the plaintiff's factum:¹⁶

[I]n considering the real and substantial connection test, in the context of allegedly false and injurious communications over the Internet, the location of the plaintiff is a key factor that receives greater weight than other factors. This is the case because damage to the reputation and actual pecuniary loss is the key element in such an action, and a plaintiff will experience damages most keenly in the jurisdiction in which they reside. Moreover, those who publish via the Internet are aware of the global reach of their publications, and must consider the legal consequences in the jurisdiction of the subject of their articles.

These comments also appear consistent with the comments in *Lopehandia* that a person who finds itself the target of cyber-libel must be able to seek and obtain relief, and that courts can and should provide protection within their sphere of jurisdiction, particularly in the target's home forum.

The Ontario courts appear to have rejected the interactivity spectrum approach to jurisdiction described in *Zippo* and relied upon in *Braintech*. That approach is unworkable in the context of cyber-libel and improperly relied upon factors that are extraneous to the actions and harm that are involved in defamation cases. A determination of whether a Web site is "passive" or "active" is completely irrelevant in the defamation context. A defamatory statement published on a Web site will appear just the same, and cause injury just the same, whether or not the Web site is completely passive, or whether the Web site has some features that make it interactive. The fact that a Web site on which defamatory statements are published only contains information that can be read, as opposed to offering some other form of interactivity, cannot relieve the defamer of culpability.

CONCLUSION

While the Ontario courts have recognized some of the unique features of cyber-libel, they appear to have declined to create new legal principles to ad-

dress those features. Instead, the courts have applied tried and true legal principles — taking cyber-libel in stride.

[Editor's note: Peter Ruby and Jason Wadden practise in the Toronto office of the law firm Goodmans LLP. Peter Ruby is also a member of the adjunct Faculty of the University of Toronto teaching Telecommunications and Internet Law.]

¹ The Ontario cases are *Barrick Gold Corporation v. Lopehandia*, [2004] O.J. No. 2329 (C.A.) (QL) (“*Lopehandia*”); *Barrick Gold Corporation v. Blanchard and Co.*, [2003] O.J. No. 5817 (S.C.J.) (QL) (“*Blanchard*”) and *Bangoura v. Washington Post*, [2004] O.J. No. 284 (QL), 235 D.L.R. (4th) 564 (C.A.) (“*Washington Post*”). The Supreme Court of Canada decision is *Society of Composers, Authors, and Music Publishers of Canada v. Canadian Association of Internet Providers*, [2004] S.C.J. No. 44 (QL), 2004 SCC 45 (“*SOCAN*”).

² 952 F. Supp. 1119 (Dist. Ct. 1997). The *Zippo* test to determine whether a court can accept jurisdiction in respect of Internet activity originating outside of the forum is dependant upon where the impugned Web site lies on a spectrum of “passive” to “active” character.

³ [1999] B.C.J. No. 622 (QL), 171 D.L.R. (4th) 46 (C.A.) (QL); leave to appeal to the S.C.C. denied, [1999] S.C.C.A. No. 236 (QL).

⁴ [1990] S.C.J. No. 135 (QL), [1990] 3 S.C.R. 1077.

⁵ [2004] O.J. No. 2329 (C.A.) (QL). *Lopehandia* is only the second appellate court decision to address Canadian courts’ jurisdiction with respect to cyber-libel.

⁶ This is well established jurisdictional test also applied to Internet activities in *SOCAN* (as noted below). As

well, a court may grant an injunction to cease the publication of defamatory statements that originate outside of the jurisdiction. See Sharpe, *Injunctions and Specific Performance*, looseleaf ed. (Aurora, Ont.: Canada Law Book, November 2002) at 1-54 to 1-55; *Tozier and Wife v. Hawkins* (1885), 15 Q.B. 680.

⁷ [2002] HCA 56.

⁸ These factors 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 mitigation circumstances.

⁹ Citing para 32, *Vaquero Energy Ltd. v. Weir*, [2004] A.J. No. 84 at para. 17 (Q.B.) (QL). Justice Doherty, in dissent, suggested that the Internet’s capacity to cause harm to reputation depended upon whether statements were capable of belief in the first place.

¹⁰ Citing para. 33, Lidsky, “Silencing John Doe: Defamation and Discourse in Cyberspace”, (2000) 49 Duke L.J. 855 at pp. 862-865.

¹¹ Referring at para. 63 to Collins, “The Law Defamation and the Internet” (Oxford University Press, 2001), at para. 24.02.

¹² A party will be liable for tortious conduct where it was objectively or reasonably foreseeable that harm could be caused to the plaintiff in the forum once a product is placed into the stream of commerce; *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393.

¹³ [2002] O.J. No. 2128 (QL), 60 O.R. (3d) 20 (C.A.).

¹⁴ The defendants filed an appeal to the Ontario Court of Appeal on February 16, 2004. At the time of writing, the appeal has not been heard.

¹⁵ *Blanchard*, at para. 52.

¹⁶ *Washington Post*, para. 22.

• INDUSTRY CANADA RELEASES PRINCIPLES FOR ELECTRONIC AUTHENTICATION •

Simon Hodggett

Osler, Hoskin & Harcourt LLP, Toronto

INTRODUCTION

On May 13, 2004, the Honourable Lucienne Robillard, Minister of Industry released *Principles for Electronic Authentication: A Canadian Framework*¹ (the “Principles”). The Principles are the culmination of two years’ work by a working group consisting of representatives of industry, government

and consumer groups. They continue Industry Canada’s efforts to promote electronic commerce by both the promulgation of guidelines and legislative initiatives and by participating in ongoing dialogues at the international level. The Principles are not legislation and do not appear to foreshadow legislative action. At present, the federal government does not appear to have a legislative agenda to enforce uni-