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## Internet Defamation Jurisdiction: A Canadian Perspective on Dow Jones v. Gutnick



Internet jurisdiction has finally been squarely addressed by the top court of a common law country. On December 10, 2002, Australia's highest court concluded that a defamation claim commenced by an Australian resident against a US publisher of an online publication would be heard in Australia. The court considered submissions that the internet was a revolutionary technology and that the court should adopt an internet jurisdiction approach focusing on where the allegedly defamation material was uploaded to the internet. The High Court of Australia did not accept these submissions and instead applied well accepted legal principals to arrive at its conclusion, rejecting an internet-specific jurisdictional paradigm for defamation claims.

The Australian legal principles relied upon by the court are similar, but not identical to those in Canada[1]. As a result, it is likely that the Australian decision would be persuasive should a similar dispute arise in Canada and is likely to be preferred by Canadian courts over the American internet jurisdiction jurisprudence, at least in the defamation context. Specifically, the High Court of Australia's jurisdictional focus on where a plaintiff's reputation is harmed would likely be emulated in Canada.

### The Facts

In *Dow Jones & Company Inc. v. Gutnick*[2], the High Court of Australia was confronted with a factual situation favourable to Australian jurisdiction. Joseph Gutnick was a businessman living in the Australian State of Victoria about whom an article appeared in both the printed magazine Barron's and its internet version, *Barron's On-Line*. The article made allegedly defamatory comments about Gutnick related to his financial and religious activities. The article was authored and edited in Dow Jones' offices in New York and uploaded to Dow Jones' servers in New Jersey, from where it was made available over the internet throughout the world, including Australia.

Gutnick commenced a legal action in Victoria for defamation and, despite his also having business dealings elsewhere, he undertook not to sue anywhere but Victoria and did not claim for damage to his reputation outside Victoria.

Dow Jones challenged the jurisdiction of the Australian court and took the position that the claim should be heard in the US. The High Court of Australia concluded that the Victoria court clearly had jurisdiction over the dispute pursuant to Victoria's civil procedure rules, that the defamation law of Australia was such that its courts were an appropriate place to exercise jurisdiction and that this was not an appropriate case to change the common law in a manner that would result in the court declining jurisdiction.[3]

### The Applicable Australian Legal Principles and Policies

In Australia, a court has jurisdiction over a foreign dispute if the matter at issue falls within one of the categories enumerated in the local rules of civil procedure. Dow Jones was served with the defamation claim pursuant to the civil procedure rules of Victoria - which allowed

for service on a foreign defendant for a tort committed, or damages suffered, within Victoria. The court concluded that regardless of the location of the tort (which was in dispute), it had jurisdiction as damage was clearly alleged to have occurred in Victoria. The other ground of jurisdiction, where the tort was committed, was less straightforward. The court found, after much analysis, that the defamation against Gutnick (place of publication) occurred in Victoria and, as a result, the Victoria court had jurisdiction under both service rules.

The Australian courts also refused to decline jurisdiction. An Australian court will decline to exercise jurisdiction, once it is properly established, only if the court's exercise of jurisdiction is "clearly inappropriate". In this regard, the High Court of Australia identified a number of relevant factors - most importantly the choice of law applicable to the dispute. The court also considered the potential vexation that might arise from multiple proceedings, any defences available to the publisher related to the reasonableness of its conduct, the reputation of the plaintiff where the defamation was published (substantial damages may only be available where the plaintiff has a reputation[4]) and the practical ability of a plaintiff to enforce a judgment only where the defendant has assets.

Much of the court's analysis concerned choice of law applicable to the dispute. The law applicable to a defamation claim is the law where publication of the defamatory comment occurred. In Australia, the tort of defamation is focused upon publication causing damage to reputation and each communication of the defamatory material gives rise to a separate cause of action. As a result, publication occurs (and the choice of law is) where a person's reputation is harmed by the defamation, not where the defendant originates the comment. Since Gutnick's reputation was harmed in Victoria, the court reasoned that the place of publication was in Victoria, the law of Victoria was applicable and, therefore, the Victoria court's jurisdiction was not "clearly inappropriate".

Dow Jones argued that Australia should depart from this approach and that it should find that the place of publication (and therefore the choice of law) was where the publisher acted, not where the plaintiff's reputation was harmed. It asked the High Court of Australia to alter the established common law in this respect. Dow Jones' argument was premised on both legal and policy grounds.

The legal submission concerned Dow Jones' proposal that Australia accept, at least for internet defamation, the "single publication rule" prevalent in the United States which provides that the entire edition of a newspaper, magazine, etc. is considered a single publication, gives rise to a single cause of action and the choice of law is the law where the publisher acted[5]. It was argued by Dow Jones that if Australia changed its law to accept the single publication rule, the applicable law could only be the place Dow Jones uploaded the defamatory material to its server in New Jersey - not where the damage to the plaintiff's reputation was incurred (the State of Victoria). The High Court of Australia rejected this argument and refused to change Australia's defamation law (which was codified in some Australian states), finding that the applicable law was the law of Victoria, where the damage to Gutnick's reputation occurred. This conclusion was facilitated by Gutnick undertaking not to sue elsewhere and the fact that his claim for damages was confined to his reputation in Victoria.

The High Court of Australia also found on policy grounds that it should not decline to exercise jurisdiction, including:

- while publishers should be certain of what legal regime will apply to the statements they make, this does not mean they must be subject to only one jurisdiction. In the usual case, identifying the person about whom the materials are to be published will readily identify the defamation law to which that person may resort;
- the Australian courts can preclude a multiplicity of proceedings under the doctrines of *res judicata* and estoppel;
- in deciding whether an Australian court is a clearly inappropriate forum, a very significant consideration is whether that court or another court can determine the whole controversy. In the circumstances, the Australian court clearly could determine the whole controversy because Gutnick limited the action to the State of Victoria;
- the internet does not pose a different problem than other widely disseminated communications, such as radio and television;
- common law defences for the publisher can be developed to reflect the reasonableness of its conduct in the context of its local law;
- legal rules should be technologically neutral;
- if plaintiffs were precluded from suing publishers anywhere but where the publisher uploaded

the defamatory material, publishers would be incented to locate their activities in jurisdictions with defamation laws favourable to publishers;

- because of the vastly disproportionate location of internet servers in the United States, if plaintiffs were precluded from suing publishers anywhere but where the publisher uploaded the defamatory material, an American legal hegemony would result; and
- Gutnick was not engaged in forum shopping.

The court confronted the risk that a publisher's "speech" will be chilled if it risks being subject to defamation proceedings in multiple foreign jurisdictions. The court reasoned that this risk was balanced by (i) the fact that substantial damages would only be likely in the locations where the plaintiff had a reputation and (ii) the ability of a publisher to ignore foreign proceedings and instead locally seek to preclude the enforcement of any foreign judgement.

## Canadian Legal Principles

Some of the legal principles relied upon by the High Court of Australia also exist in Canada, while others differ. However, enough essential similarities exist to conclude that a Canadian court, if confronted by similar facts as those in Dow Jones & Company Inc. v. Gutnick, would arrive at the same conclusion.

### JURISDICTION SIMPLICITER

In Canada, the question of jurisdiction (sometimes labelled jurisdiction *simpliciter*) and the discretion to refuse to exercise jurisdiction (labelled forum non conveniens) are distinct issues. Canadian courts are typically provided with jurisdiction simpliciter over foreign defendants through their rules of civil procedure. For example, in Ontario the R*ules of Civil Procedure*[6] allow for service on foreign defendants without leave of the court:

17.02 (g) in respect of a tort committed in Ontario;...
(h) in respect of damage sustained in Ontario arising from tort, breach of fiduciary duty or breach of confidence wherever committed;...

The High Court of Australia only briefly examined the rules permitting service on foreign defendants (similar to Rule 17.02 above), quickly concluding that it had jurisdiction, at the very least, because the damage to Gutnick's reputation occurred in Australia.

Unlike the situation in Australia, in Canada application of the rules of civil procedure is not enough. A Canadian court only has jurisdiction *simpliciter* if the case has a "real and substantial connection" to Canada[7]. Thus, a Canadian court could not take the direct jurisdictional approach adopted by the High Court of Australia (damages in Australia always give rise to Australian jurisdiction *simpliciter*), but instead would have to evaluate whether a real and substantial connected existed on the facts before it.

One real and substantial connection generally accepted by the courts is, if the tort was committed in Canada. In Canada, the tort of defamation occurs where the defamatory words are published, i.e., read and understood by a third person: "The tort consists in making a third person understand actionable defamatory matter"[8].

The focus of Dow Jones in *Dow Jones & Company Inc. v. Gutnick* was an attempt to persuade the High Court of Australia that the place of publication should be where the publisher acted, i.e., in New Jersey where its servers were located. Canada like Australia, has not adopted the single publication rule prevalent in the US, but no longer[9] allows multiple actions for the same publication, even if it is communicated many times. In *Thomson v. Lambert*[10] the Supreme Court of Canada refused to allow a plaintiff to bring a second action against a publisher for a communication following in the normal course from a publication that was the subject of a previous defamation action. Where a plaintiff has a complete remedy available, he or she cannot pursue one action on the basis of one incident of publication and then sue again based on another incident of publication. To do otherwise would be an abuse of process[11].

The Canadian and Australian approaches are not dissimilar. In Australia, a multiplicity of proceedings is controlled by the doctrines of vexation, *res judicata* and estoppel, as well as part of the consideration of the *forum conveniens*. In Canada, this approach has been incorporated into the principle enunciated in *Thomson v. Lambert*. Thus, in Canada, while one can only sue once on a series of publications, the place of publication remains the location where the plaintiff's reputation was harmed. Neither country has adopted an approach to defamation focussing on the act of the publisher to determine where the tort of defamation was committed.

*Dow Jones & Company Inc. v. Gutnick* concerned damage to Gutnick's reputation in Victoria because he limited his claim in this respect and undertook not to sue elsewhere, making the jurisdictional question easier to address. Nevertheless, the High Court of Australia noted in *obiter dicta* the possibility of multiple claims wherever a plaintiff's reputation is harmed - giving rise to lawsuits in multiple jurisdictions. While no Canadian court has addressed this question, the answer, extrapolating from *Thomson v. Lambert*, is likely that a Canadian court would entertain a claim where a plaintiff's reputation in Canada was harmed as long as a previous action has not been brought in another jurisdiction that could provide a complete remedy - subject of course to the real and substantial connection test being met.

Where damage is sustained in Canada but the tort was committed elsewhere, that damage alone may not be sufficient to give a Canadian court jurisdiction *simpliciter* - all the relevant factors must be taken into consideration assessing whether a real and substantial connection exists[12]. However, in an instructive defamation case, *Pindling v. National Broadcasting Corp.*[13], the Prime Minister of the Bahamas, Pindling, sued in Ontario the US television network NBC and several Canadian cable television and satellite undertakings for defamation. Pindling had previously sued NBC in the Bahamas, but NBC had not appeared. The court concluded that it had jurisdiction, in part because the tort of defamation was committed in Ontario because NBC's defamatory statements were heard and understood in Canada (rebroadcast by the cable and satellite companies). Thus, where the tort occurred may be a more important jurisdictional factor in defamation actions than in other contexts.

Given the focus of Canadian defamation law on the harm to a person's reputation it is not surprising that such a factor is given considerable weight in defamation cases in assessing the existence of a real and substantial connection. For example, in one Ontario case[14] the plaintiff's business reputation was in the United States; he only had a cottage property in Canada and the defamatory comments at issue largely concerned his business dealings. In those circumstances, the Ontario court found no real and substantial connection existed and refused jurisdiction.

The only Canadian appellate case addressing internet jurisdiction arose on peculiar facts. In *Braintech, Inc. v. Kostiuk*[15] a company located in British Columbia (with an office in Texas) sued in Texas for internet defamation a resident of British Columbia. Although there was no evidence that anyone in Texas had read the defamatory materials (no reputational harm in Texas), the Texas court accepted jurisdiction and granted default judgment. However, the B.C. Court of Appeal refused to allow the enforcement of that judgment on the basis that under US law Braintech had not established the required "minimum contacts" with Texas because the internet website in question was merely passive and because Texas was not an appropriate forum. This result can be explained on the basis that on the facts, Braintech had no real and substantial connection to Texas where the default judgment was issued: the only, minimal, connections were Braintech's office in Texas and the passive availability of the defamatory comments to Texans over the internet. No harm was proved to have occurred to Braintech's reputation in Texas.

#### FORUM NON CONVENIENS

In Australia, jurisdiction is declined when the Australian courts are a "clearly inappropriate forum". In Canada, "…the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff"[16]. The Supreme Court of Canada has concluded that the various forum non conveniens tests applied in a uniform manner in many common law jurisdictions, including Australia.[17]

In light of the shared emphasis of Canada and Australia on the location where a plaintiff's reputation is harmed (the place of publication), it is likely that a Canadian court considering the same facts as in *Dow Jones & Company Inc. v. Gutnick* would not conclude that there existed a more appropriate forum, applying many of the same considerations reviewed by the High Court of Australia. For example, in *Kitakufe v. Oloya,*[18] an Ontario court found Ontario to be a convenient forum for an internet defamation action even though the defamatory material was published in a Ugandan newspaper, part of which was available on the internet.

One additional factor is of note: in Canada, a juridical advantage is a relevant factor for the *forum non conveniens* analysis. Since Australian and Canada law strikes a balance more favourable to plaintiffs in defamation actions than US law, that advantage may be considered in assessing whether another forum is more appropriate.[19]

## A Practical Consideration: Enforcement

The High Court of Australia and the Supreme Court of Canada have recognized that the ship of local jurisdiction can founder on the shoals of enforcement: awards for damages for defamation may not be enforced by the courts of the jurisdiction where the publisher has assets. Local courts, particularly in the defamation context, sometimes refuse to enforce foreign judgments rendered on a legal basis different from the local law. As the place of publication dictates the choice of law for the dispute, a court's conclusion that publication occurs where the defamatory materials are understood (thus allowing the lawsuit to proceed in the jurisdiction of publication), may undermine enforcement of a judgement based on that conclusion.

This is particularly the case with regard to the enforcement of defamation judgements rendered against US companies, a fact recognized by the court in *Dow Jones & Company Inc. v. Gutnick*. When the foreign defamation standards are anti-ethical to U.S. speech protections, as embodied in the US Constitution, US courts tend to refuse to enforce awards based on such standards.[20]

## Conclusion

The resolution of internet jurisdiction issues flow directly from substantive legal doctrines as they exist in individual countries. In light of the substantial similarities between the law of defamation in Canada and Australia, it is likely that the decision of the High Court of Australia in *Dow Jones & Company Inc. v. Gutnick* would be persuasive to a Canadian court confronted by similar facts.

This is in marked contrast to the approach of courts in the US to multi-jurisdictional internet defamation disputes. For example, only three days after the ruling in *Dow Jones & Company Inc. v. Gutnick*, the US Court of Appeals Fourth Circuit arrived at a very different conclusion to that of the High Court of Australia. In *Young v. New Haven Advocate*[21] a Virginian prison warden was allegedly defamed by two Connecticut newspapers on an internet website. Although it was clear from the defamatory material that the newspapers knew the warden was located in Virginia and the article could harm his reputation there, the court found that the newspapers had very little commercial activity in Virginia and that their business was not targeted at Virginia. On that basis, the court (located in Virginia) dismissed the case for lack of jurisdiction.

The court's decision in that case appears to have been driven by the fact that the focus of US defamation law is on the actions of the publisher, not the harm to the plaintiff. At least in the defamation context, a "targeting" or "aiming" approach to internet jurisdiction only appears to make sense in a publisher-focused regime where the tort is committed where the publishers acts. In Australia and Canada, where the actions of the publisher are not central to determining the location of the tort, an approach that requires targeting as a pre-requisite to jurisdiction is considerably less appropriate.

**For more information on this topic, or any other IT related issues, please contact Peter Ruby at 416.597.4184 or pruby@goodmans.ca**

1 This article does not address the statutory requirements for defamation actions in Canada. However, it is noted that provincial legislation may require that prior notice of the defamation be given to an internet publisher within a short time. See *Weiss v. Sawyer*, [2002] O.J. No. 3570 (C.A.)

2 [2002] HCA 56 (10 December 2002)

3 The High Court of Australia's judgment was unanimous, although the court issued three sets of reasons for judgment. This article does not distinguish between the three sets of reasons as they are largely consistent and merely highlight different aspects of the analysis.

4 Substantial damages have been awarded in Canada for internet defamation. See *Reichmann v. Berlin*, [2002] O.J. No. 2732 (S.C.) (QL).

5 A leading US case in this respect is *Gregoire v. G.P. Putnam's Sons* (1948), 81 N.E. 2d 45 (N.Y.C.A. 1948).

6 R.R.O. 1990, Reg. 194, as amended

7 *Jordan v. Schatz* (2000), 189 D.L.R. (4th) 62 (B.C.C.A.)

8 *Newson (Chief Provincial Firearms Officer Jenner) v. Kexco Publishing Co.*, [1995] B.C.J. No. 2666 at para. 21 (C.A.) (QL); *Jenner v. Sun Oil Company Limited et al.*, [1952] O.R. 240 at 251 (H.C.); *Direct Energy Marketing Ltd. v. Hillson*, [1999] A.J. No. 695 (Q.B.) (QL). The location of the tort may be the same or different from the choice of law (the plaintiff's reputation may have been harmed in multiple jurisdictions), also a factor pointing to a real and substantial connection. One irony related to this approach may be that in defamation

cases general damages are presumed and need not be proved, but to establish publication in Canada, some local damage may need to be proved. See Hill v. Church of Scientology of Toronto (1995), 126 D.L.R. (4th) 129 (S.C.C.)

[9] The former law was set out in *Lambert v. Roberts Drug Stores, Ltd.*, [1933] 2 W.W.R. 508 (Man.C.A.)

[10] [1938] S.C.R. 253 at 267-268 per Duff C.J.

[11] *Ibid* at 273 per Davis J.

[12] In *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), in the context of an inter-provincial dispute, the Ontario Court of Appeal identified the factors relevant in assessing whether a court should assume jurisdiction against an out-of-province defendant on the basis of damage sustained in Ontario where the tort was committed elsewhere. These factors were also applied in the international context in *Lemmex v. Bernard* (2002), 60 O.R. (3d) 54 (C.A.)

[13] (1984), 49 O.R. (2d) 58 (H.C.J.) ("*Pindling*")

[14] Olde v. Capital Publishing Ltd. Partnership (1996), 5 C.P.C. (4th) 95 (Ont. Gen Div.)

[15] (1999), 171 D.L.R. (4th) 46 (C.A.) leave to appeal refused [1999] S.C.C.A No. 236 (S.C.C.)

[16] *Anchem Products Inc. v. British Columbia (Workers' Compensation Board)* (1993), 102 D.L.R. (4th) 96 at 111 (S.C.C.) ("*Anchem*")

[17] *Ibid*, at 108-109 and 111-112

[18] *Kitakufe v. Oloya*, [1998] O.J. No. 2537 (Gen Div.) (QL). Jurisdiction *simpliciter* was not addressed in this case.

[19] *Anchem*, *supra; Pindling*, *supra*

[20] *New York Times v. Sullivan*, 376 U.S. 254 (U.S.S.C. 1964); *Bachchan v. India Abroad Publications Inc.*, 585 N.Y.S. 2d 661 (Sup. Ct. NY Co. 1992). *Dow Jones & Company Inc. v. Harrods, Limited*, 2002 U.S. Dist. Lexis 19516 (U.S. Dist. Crt.) is, similarly, an example of a US publisher seeking to prevent a defamation action from proceeding against it in a foreign court.

[21] File No. 01-2340 (4th Cir. December 13, 2002)