Court File No. CV-18-00610489-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ELISA ROMERO HATEGAN

Plaintiff

-and-

ELIZABETH MOORE FREDERIKSEN and BERNIE FARBER

Defendants

FACTUM OF THE PLAINTIFF/RESPONDING PARTY, ELISA ROMERO HATEGAN

Date: December 12, 2019

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PART I - OVERVIEW

1. The Plaintiff, Elisa Romero Hategan ("**Ms. Hategan**") has a unique life story — she is a gay, Jewish, former white supremacist. She served as the female face of Canada's most-prominent hate group — the Heritage Front (the "**Heritage Front**") — throughout its most infamous period (1991-1993). Her subsequent defection and evidence was essential to the hate group's downfall. Since emerging from hiding in 2011, Ms. Hategan's life mission has been to harness her cautionary tale to educate on the dangers of hate and promote tolerance.

2. Ms. Hategan alleges that the Defendant, Elizabeth Moore Frederiksen ("**Ms. Moore**"), with the assistance of the Defendant, Bernie Farber ("**Mr. Farber**"), has appropriated and exploited significant aspects of Ms. Hategan's life story for their own gain. Ms. Hategan brought this claim against the Defendants seeking damages for, *inter alia*, wrongful appropriation of personality, civil conspiracy, injurious falsehood, and unlawful interference with economic interests. To date, the action has not progressed beyond the delivery of pleadings. No affidavits of documents have been delivered and no examinations for discovery have been conducted.

3. The Defendants bring these summary judgment motions seeking dismissal of this action. In addition, Ms. Moore seeks judgment in respect of her Counterclaim (defined below) against Ms. Hategan.

4. This case is simply **not** appropriate for summary judgment. It is not amenable to a fair and just final determination on the merits via summary judgment. These motions should be dismissed.

5. This case is factually and legally complex, involving many different torts, several of which are *rarely* determined by summary judgment. There is a factual matrix spanning decades and significant credibility issues that require a trial to untangle.

6. On this motion, the Court would be required to make extensive determinations on a long list of genuine issues, with significant inconsistencies, contradictions, and credibility issues, all on a voluminous record without the benefit of *viva voce* evidence.

7. This case is also at a very early stage, which significantly prejudices Ms. Hategan's ability to properly respond. The Defendants are **moving for judgment *prior* to documentary discovery**. It is unfair and unjust to consider judgment against Ms. Hategan without affording her the opportunity to obtain the significant, relevant documents in the Defendants' possession, control and power.

8. Further, as noted in Ms. Moore's factum, there is a companion action against other defendants relating to central issues in this case that will likely be consolidated into one proceeding in the normal course. These motions for summary judgment run the risk of inconsistent findings.

9. As this Court recently noted — citing the Court of Appeal for Ontario's remarks in *Baywood Homes Partnership v. Haditaghi*:[1]

> While summary judgment can operate as a timely, fair, and cost-effective means of adjudicating a civil dispute, it has its limits. **Not all civil disputes are amenable to a final adjudication on the merits by summary judgment. In certain cases, adjudication exclusively on a written record poses a risk of substantive unfairness.** Great care must be taken "to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial".
>
> [Emphasis added]

10. This caution is apt — there is a serious risk of substantive unfairness to Ms. Hategan in adjudicating exclusively on a decontextualized written record, without the benefit of documentary

[1] *Muralla v Qazi*, 2017 ONSC 2339 at para. 8 [*Muralla*], Book of Authorities of the Responding Party/Plaintiff ("**RBOA**"), Tab 1; 2014 ONCA 450 at para. 44 [*Baywood*], RBOA at Tab 2

discovery or *viva voce* evidence, and relying on extensive motion materials and transcripts from cross-examinations, much of which was produced by a (then) self-represented party — Ms. Hategan.

11. As this Court has emphasized, there are civil disputes that are simply not amenable to a final adjudication on the merits through the summary judgment process — this is one of those cases.

12. For the reasons set out above and elaborated upon below, the Defendants' motions for summary judgment should be dismissed, so that this matter may proceed to the documentary and oral discovery phase and ultimately, trial.

PART II - SUMMARY OF FACTS

HERITAGE FRONT MOUTHPIECE TURNED STAR WITNESS: MS. HATEGAN'S DRAMATIC LIFE

The Heritage Front

13. The Heritage Front was a white supremacist group formed by Wolfgang Droege ("**Droege**") and Grant Bristow ("**Bristow**") in 1989 that grew to be one of Canada's leading white supremacist groups. The Heritage Front had several principal tactics to spread its hateful messages, including having a young, female spokesperson.[2]

Ms. Hategan's Recruitment, Grooming, and Rise

14. Prior to joining the Heritage Front, Ms. Hategan was a recent immigrant from Romania struggling to adjust to her new Canadian life under the care of — or lack thereof — her widowed,

[2] Paras. 10-11 of the Fresh as Amended Statement of Claim dated February 11, 2019 (the "**Claim**"), Responding Motion Record ("**RMR**"), Tab 2

abusive mother. Ms. Hategan had a very troubled upbringing. She ran away from her mother at age 14, dropped out of school, and lived in a group home where, at times, she was the only white resident.[3]

15. Motivated by bullying from others at the home, and the resentment she developed towards racialized peoples, Ms. Hategan contacted an American white supremacist group that connected her to the Heritage Front.[4]

16. She was recruited at 16, and as a fresh, female face, the Plaintiff was groomed and quickly given increasing responsibility, including, *inter alia*:[5]

(a) acting as official media spokeswoman and public speaker;

(b) writing features for the group's propaganda magazine, "Up Front";

(c) recording messages for the Heritage Front telephone hotline (a central recruiting tool); and

(d) recruiting new members.

17. Ms. Hategan was ***the only*** female face of Canada's most-prominent hate group throughout its most infamous term (1991-1993).[6]

Ms. Hategan Defects, Takes Down the Heritage Front, and Goes into Hiding

18. In 1993, the Plaintiff testified and turned evidence against the Heritage Front's leadership

[3] Affidavit of Elisa Romero Hategan affirmed August 20, 2019 ("**Hategan Affidavit**") at paras. 3-9, RMR, Tab 1, pp. 2-4

[4] Hategan Affidavit at paras. 7 and 10, RMR, Tab 1, pp. 3-4

[5] Para. 20 of the Claim, RMR, Tab 2; Hategan Affidavit at paras. 14, 18-19, RMR, Tab 1, pp. 5-7

[6] Hategan Affidavit at para. 18, RMR, Tab 1, pp. 6-7

and defected.[7]

19. Ms. Hategan's defection and brave role as star witness was essential to the downfall of the Heritage Front, but placed her in the crosshairs of violent extremists. She was forced into a life of hiding and poverty until 2011.[8]

Ms. Hategan Becomes an Award-Winning Anti-Racism Advocate and Author

20. Since re-emerging in 2011, Ms. Hategan has made it her life mission to harness her cautionary life story in order to educate others on the dangers of hate and promote tolerance and understanding.[9] She has become an expert on anti-racism, extremist political movements, and terrorist recruitment tactics, and authored a 2014 memoire, "Race Traitor", which details her experiences surrounding the Heritage Front. She is regularly invited as a keynote speaker and guest on prominent media outlets, and has won multiple prestigious grants and awards.[10]

MS. MOORE'S "LIVED EXPERIENCE" AND MR. FARBER'S ASSISTANCE

Marked Similarities: Ms. Moore's "Lived Experience"

21. Ms. Moore is also a speaker on racism and extremism. She is currently on the Advisory Board of the Canadian Anti-Hate Network.[11]

22. At the core of this litigation are curious similarities between Ms. Hategan's gripping life story and what Ms. Moore describes as her "lived experience", including Ms. Moore's claims that

[7] Hategan Affidavit at paras. 45-46 and 49-51, RMR, Tab 1, pp. 20-21
[8] Hategan Affidavit at paras. 44-45, 52-53, 56-57 RMR, Tab 1, pp. 18, 21, and 22-23
[9] Para. 4 of the Claim, RMR, Tab 2
[10] Para. 3 of the Claim, RMR, Tab 2
[11] Para. 6 of the Claim, RMR, Tab 2

inter alia:

(a) she was an official member, and one of the few prominent female spokespeople in, the Heritage Front;[12]

(b) she was a disenfranchised, troubled youth from a difficult home;[13]

(c) she joined the Heritage Front as a teenager in high school;[14]

(d) she joined because she was surrounded by different races and "felt like the only white girl";[15]

(e) she was the female public face of the Heritage Front;[16]

(f) she maintains a Jewish home;[17]

(g) her "defection" and "voice" played a role in shutting down the Heritage Front;[18] and

(h) her departure from the Heritage Front placed her in significant danger.[19]

23. Ms. Hategan believes that these claims are untrue, were lifted from her own life story, and are false or embellished as they relate to Ms. Moore. She views Ms. Moore's involvement in the Heritage Front and its ultimate collapse as nominal, at best.[20] Ms. Hategan believes that she was the only young woman who played any role in the collapse of the Heritage Front.[21]

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[12] Affidavit of Elizabeth Frederiksen affirmed July 24, 2019 ("**Moore Affidavit**") at paras. 5-6, Moore's Motion Record ("**MR**"), Tab 3, pp. 101-102

[13] Moore Affidavit at para. 64(a), MR, Tab 3, pp. 132-133; Hategan Affidavit at para. 197, RMR, Tab 1, p. 84

[14] Hategan Affidavit at paras. 70, 103, 159, 176, 197, RMR, Tab 1, pp. 27, 39, 67

[15] Moore Affidavit at para. 64(b), MR, Tab 3, p. 133; Hategan Affidavit at paras. 160 and 206, RMR, Tab 1, pp. 67 and 88

[16] Hategan Affidavit at paras. 158 and 187, RMR, Tab 1, pp. 66-67 and 79-80

[17] Moore Affidavit at para. 64(h), MR, Tab 3, p. 134

[18] Moore Affidavit at para. 36, MR, Tab 3, p. 111

[19] Hategan Affidavit at para. 162, RMR, Tab 1, p. 69; Moore Affidavit at para. 64(f), MR, Tab 3, p. 134

[20] Hategan Affidavit at para. 161, RMR, Tab 1, pp. 68-69

[21] Hategan Affidavit at para. 51, RMR, Tab 1, p. 20

24. Ms. Moore has portrayed these marked similarities as follows:

> "We were both recruited into the same radical, extremist organization at a young age and were two of the very few women in the organization. We have both since left the group and we both use our experiences to warn about the dangers of fascism, hate and white supremacy in Canada."[22]

25. However, what Ms. Moore minimizes as parallel experiences, Ms. Hategan views as appropriation of her life story at a time when public awareness of, and interest in, white supremacy has soared.[23]

Ms. Moore Profits from Her "Lived Experience"

26. Ms. Hategan is troubled by this alleged appropriation not only on a principled basis, but also on a financial basis. Ms. Moore has, and continues to, exploit her startlingly similar "lived experience" for financial gain as a public speaker and expert on extremism and anti-racism.[24]

27. Ms. Hategan claims that Ms. Moore has directed opportunities away from her. She also claims that Ms. Moore has made disparaging comments about her with a view to, and/or with the effect of, adversely impacting opportunities for Ms. Hategan to harness her life story as an educator, public speaker and anti-racism expert through contracts and/or other public venues.[25]

Mr. Farber's Assistance to Ms. Moore

28. The Defendant, Mr. Farber, is a friend and colleague of Ms. Moore. He was the head of the former Canadian Jewish Congress until 2011, and is the current Chair of the Canadian Anti-Hate

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[22] Moore Affidavit at para. 38, MR, Tab 3, pp. 111-112
[23] Hategan Affidavit at para. 156, RMR, Tab 1, pp. 65-66
[24] Hategan Affidavit at para. 289, RMR, Tab 1, p. 125
[25] Hategan Affidavit at para. 131, RMR, Tab 1, pp. 53-54

Network.[26]

29. Ms. Hategan claims that Mr. Farber actively participated in Ms. Moore's appropriation and interference with Ms. Hategan's economic relations.[27]

THE ACTION, THE DEFENCES, AND THE COUNTERCLAIM

30. Ms. Hategan commenced this action by Statement of Claim issued December 10, 2018,[28] followed by a Fresh as Amended Statement of Claim dated February 11, 2019 (adding Mr. Farber as a Defendant), claiming, *inter alia*, general, punitive, and aggravated damages for injurious falsehood, civil conspiracy, wrongful appropriation of personality, and unlawful interference with economic interests (the "**Claim**").[29]

31. Ms. Moore delivered a Statement of Defence and Counterclaim dated January 8, 2019,[30] followed by a Fresh as Amended Statement of Defence and Counterclaim dated March 12, 2019 (the "**Moore Amended Defence and Counterclaim**" and alternatively, the "**Counterclaim**").[31] On this motion, Ms. Moore is also seeking leave to amend this pleading via a Fresh as Amended Statement of Defence and Counterclaim dated July 24, 2019.[32]

32. In her Counterclaim, Ms. Moore is seeking, *inter alia*, general, punitive, and aggravated damages for defamation, invasion of privacy, appropriation of likeness and personality, and

[26] Para. 7 of the Claim, RMR, Tab 2
[27] Hategan Affidavit at paras. 288-299, RMR, Tab 1, pp. 125-129
[28] Exhibit H to the Moore Affidavit, MR, Tab H, p. 276
[29] Exhibit J to the Moore Affidavit, MR, Tab J, p. 330
[30] Exhibit I to the Moore Affidavit, MR, Tab I, p. 298
[31] Exhibit K to the Moore Affidavit, MR, Tab K, p. 359
[32] Notice of Motion, MR, Tab 1; Tab 2 of MR.

interference with economic relations.[33]

33. Ms. Farber delivered a Statement of Defence dated July 24, 2019 (the "**Farber Defence**").[34]

34. Ms. Hategan delivered a Statement of Defence of Elisa Romero Hategan dated April 1, 2019 in respect of the Counterclaim.

THE EVIDENCE ON THE MOTION

35. Ms. Hategan and Ms. Moore have collectively filed over 1,800 pages of materials in respect of this motion — Ms. Hategan's Motion Record is nearly 1,000 pages long and Ms. Moore's are nearly 850 pages in total.

36. Both Ms. Hategan and Ms. Moore were cross-examined in respect of this motion,[35] and delivered answers to undertakings.[36] The examination of Ms. Moore is recorded in a nearly 160-page transcript.

37. Mr. Farber did not file ***any*** evidence in respect of this motion. He submitted a motion record consisting only of his Notice of Motion dated July 24, 2019, the Claim, and the Farber Defence.

PART III – THE ISSUES AND THE LAW

A. THE ISSUES

38. The following issues are to be determined on this motion:

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[33] Para. 31 of Tab 2 and Exhibit K to the Moore Affidavit; para. 37 of Tab I to the Moore Affidavit

[34] Tab 3 of Mr. Farber's Motion Record

[35] Cross-Examination of Elisa Romero Hategan on September 17, 2019; Cross-Examination of Elizabeth Moore Frederiksen on September 17, 2019 (the "**Moore Exam**")

[36] Tabs 13-14 of Moore's Supplemental Motion Record dated October 11, 2019

(a) whether there is a genuine issue requiring a trial with respect to Ms. Hategan's claims against (i) Ms. Moore; and (ii) Mr. Farber;

(b) whether there is a genuine issue requiring a trial with respect to Moore's Counterclaim; and

(c) whether Moore should be granted Leave to amend the Moore Amended Defence and Counterclaim.

B. THE LAW

The Summary Judgment Test

39. After delivering a statement of defence, a defendant may move with evidence for summary judgment dismissing all or part of the claim against them.[37] A court shall grant summary judgment if there is no genuine issue requiring a trial.[38]

40. Summary judgment motions are not designed to eliminate trials, but rather to determine when trials are unnecessary because the summary process provides an appropriate means for effecting a fair and just determination of the issues. Accordingly, the summary process is inappropriate — and there is a genuine issue requiring a trial — when the court in unable to reach a fair and just determination on the merits in a summary manner because:

(a) it cannot make the necessary findings of fact and apply the law to those facts given the nature of the issues and the evidence required; and

(b) the process is not a proportionate, more expeditious, and less expensive means of achieving a just result.[39]

41. The leading case on summary judgment is *Hryniak v. Mauldin*. At para. 66, Karakatsanis

[37] R.R.O. 1990, Reg. 194, s. 20.01(3) [*Rules*]

[38] *Rules*, 20.04(2)-(2.1)

[39] *Hryniak v. Mauldin*, 2014 SCC 7, at paras. 49-50 [*Hryniak*], RBOA, Tab 3

J. wrote:[40]

> On the motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

42. In his seminal civil procedure text, the Honourable Justice Perell noted that the "full appreciation test" from *Combined Air Mechanical Services Inc. v. Flesch*[41] ("***Combined Air***") remains useful in identifying cases that are appropriate for summary judgment. In *Combined Air*, the Court of Appeal measured when the trial process was necessary by examining the special forensic resources available at trial to make dispositive findings on the issues and reach a fair and just determination. It emphasized that the trial experience — an extensive, comprehensive, and immediate exposure of a trial judge to the evidence in the presence of lawyers presenting competing narratives — enables the trial judge to gain an appreciation of the issues and the evidence that is simply not available to a judge asked to decide a case on a summary basis.[42]

43. Courts have highlighted the limits of adjudicating disputes in a summary manner (in the absence of a full trial "where the trial judge sees and hears it all") and the inherent, corresponding risks of unfairness that can result.[43] Summary judgment has its limits. Not all civil disputes are

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[40] *Ibid* at para. 66

[41] 2011 ONCA 764, RBOA, Tab 4 [*Combined Air*]

[42] The Law of Civil Procedure in Ontario, Third Edition, LexisNexis Canada Inc. (Toronto: 2017) at p. 636, RBOA, Tab 5; *Combined Air, supra,* at paras. 46-55, RBOA, Tab 4

[43] *Baywood, supra,* RBOA, Tab 2

amenable to a final adjudication on the merits by summary judgment and in certain cases, adjudication exclusively on a written record poses a risk of substantive unfairness.[44]

Evidence on a Summary Judgment Motion

44. To grant summary judgment, the court must be of the view that sufficient evidence has been presented on all relevant points to allow him or her to draw the inferences necessary to make dispositive findings.[45]

45. As set out above, the summary judgment rule requires a defendant to "move **with supporting affidavit material or other evidence**". **The moving party** bears the evidentiary burden of demonstrating that there is no genuine issue requiring a trial.[46]

46. In *Sanzone v. Schechter*, Justice Brown of the Court of Appeal set aside summary judgment dismissing an action given the absence of evidence from the moving party defendants in support of their defence, stating that the defendants "were not entitled to rely merely on the allegations in their statement of defence… [they] were required to put their best evidentiary foot forward."[47] Justice Brown explained as follows:[48]

> [27] … **in the present case the moving party dentists did not file *any* evidence going to the merits of their defence**. They did not file their own affidavits explaining the treatment they gave the appellant, nor did they file an affidavit or report from a qualified expert on the issue of the standard of care. Instead, they filed affidavits from two associates in their counsel's office: one recounting the

[44] *Muralla, supra*, RBOA, Tab 1

[45] *Hryniak, supra* at para. 94, RBOA, Tab 3

[46] *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Ont. Gen. Div.) [*Pizza Pizza*], RBOA, Tab 6; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, 28 O.R. (3d) 423 (Ont. Gen. Div.) [*Transamerica*], RBOA, Tab 7

[47] 2016 ONCA 566 at para. 24, RBOA, Tab 8

[48] *Ibid* at paras. 27 and 32-33

> procedural history of the action; the other providing information about Dr. Shafer's qualifications.
>
> …
>
> [32] In the present case, **given the absence of evidence from the moving party dentists in support of their defence, the motion judge should have addressed the threshold question of whether the respondents had discharged their evidentiary obligation as moving parties under rule 20 to put their best foot forward by adducing evidence on the merits**. In my respectful view, the motion judge erred in failing to address that question.
>
> [33] If the respondent dentists had filed evidence dealing with the merits of their defence in support of their summary judgment motion, it would have been open to the motion judge to treat the appellant's failure to deliver a compliant expert's report as a basis to dismiss her action. **In light of the respondents' failure to file any such evidence [on the merits of their defence], <u>it was not open to the motion judge to grant summary judgment</u>. He erred in so doing.**
>
> [Emphasis added]

C. <u>MS. HATEGAN'S CLAIMS RAISE GENUINE ISSUES REQUIRING A TRIAL</u>

47. Ms. Hategan respectfully submits that summary judgment is not appropriate in this case (against either Defendant), given that, *inter alia*:

(a) There are **major credibility issues** dating back decades. In many respects, Ms. Hategan and Ms. Moore have diametrically opposed observations and evidence about the factual history of their respective lives, and memories fade over time. In fact, Ms. Moore could not recall significant details of her involvement with the Heritage Front on cross-examination.[49] There are a great deal of inconsistencies and contradictions in the voluminous evidence filed on this motion. These issues can and should only be resolved by way of trial, where live, *viva voce* testimony enables the trier of fact to properly assess credibility, and observe the parties' complete demeanour – face, body language, and / or voice.

(b) There are **complex and overlapping legal issues** involving multiple torts and various limitation periods within a context of highly-unique factual circumstances spanning decades. Ms. Hategan's life story — which she claims has been misappropriated for profit – is extraordinary. These facts and issues are novel. Applying the applicable torts to these circumstances will be a novel exercise. Further, the alleged torts in this case are rarely adjudicated via summary judgment.

[49] The Moore Exam, *inter alia*, q. 14, 97, 115 and 150

In particular, summary judgment has rarely been granted in defamation cases.[50]

(c) There is a **substantial risk of inconsistent findings in the companion action** which also has not proceeded beyond the discovery stage. Ms. Moore concedes in her factum that the claims in this action and the companion action are very similar.[51] Both of these cases should proceed in tandem, whether by way of consolidation or a trial one-after-the-other.

(d) There has been **no documentary production** to-date. Some of the torts in this action include issues of malice, conspiracy, intentions, etc. It is patently unfair to assume that Ms. Hategan has put her best foot forward when the Defendants have not disclosed all relevant documents (rather, only those documents that support their positions). Ms. Hategan should have the benefit of documentary discovery *prior* to significant motions seeking dismissal of her case and granting judgment against her on the Counterclaim.

48. This is not a straightforward case that has little, if any, conflicting evidence, and/or a limited number of witnesses.[52]

49. Even with an extensive record, it cannot be said that this case is "document-driven" or that it is a case involving "limited contested evidence" such that the efficiency rationale may be served by granting summary judgment.

50. Ms. Hategan accepts that she must "put her best foot forward" and "lead trump or risk losing".[53] Quite commendably, she has indeed done so largely without assistance of counsel. However, she simply does not have access to the documentation that would ordinarily form part of the discovery machinery contemplated by the *Rules of Civil Procedure*.

51. Generally, the court is entitled to assume that the record on a motion for summary judgment

[50] *Baglow v. Smith*, 2012 ONCA 407 at paras. 24 and 32, RBOA, Tab 9

[51] Moore's Factum at para. 42

[52] *Sampogna v. Smithies*, 2012 ONSC 610, at para. 9, RBOA, Tab 10

[53] *Combined Air*, *supra.* at para 56, RBOA, Tab 4; *Pizza Pizza*, *supra*, RBO, Tab 6

contains all of the evidence the parties would present at trial.[54] However, there are exceptions to this principle, including when motions are brought in advance of documentary discovery. In light of the intentional torts pleaded, it is critical for Ms. Hategan to obtain the relevant documentation in the Defendants' possession, control, and power relevant to any matter at-issue in the litigation — not merely the documentation placed before the Court to support the Defendants' positions.

52. On less complicated facts in *Yang v. The Christian World Korea Inc.*,[55] Justice Wilson, while presiding over Civil Practice Court, refused to schedule a summary judgment motion in a defamation case and directed the parties to attend a chambers appointment. Thereafter, at the chambers appointment, Justice Myers determined that the summary judgment motion was premature and directed the parties to discoveries prior to any summary judgment motion being brought.

53. The sentiment in this case should be the same. This motion is premature and unfairly prejudices Ms. Hategan.

Claims against Ms. Moore

Wrongful Appropriation

54. Since 1973, Ontario's courts have recognized a common law tort of wrongful appropriation of personality, which protects a plaintiff's personality from wrongful use.[56] The law in Canada is settled that a defendant may be liable for the tort of wrongful appropriation of personality if she or he exploits the plaintiff's name, reputation, likeness, or some other component of the plaintiff's

[54] *Transamerica*, *supra*, at para. 24, RBOA, Tab 7; *Dawson* v. *Rexcraft Storage and Warehouse Inc.*, 1998 CanLII 4831 (Ont. C.A.), RBOA, Tab 11

[55] *Yang v. The Christian World Korea Inc.*, 2019 ONSC 6131 at paras. 13(j) and 13(k), RBOA, Tab 12

[56] *Krouse v. Chrysler Canada Ltd*., (1974), 1 O.R. (2d) 225 (Ont. C.A.), RBOA, Tab 13

individuality or personality.[57] The cause of action is proprietary in nature and the interest protected is that of the individual in the exclusive use of his or her own identity insofar as it is represented by their name, reputation, likeness or other value.[58]

55. There are genuine issues requiring a trial to make a determination on this issue. Ms. Hategan alleges that Ms. Moore has appropriated her personality — her *unique* life story, her *individuality*, and her reputation — for commercial gain.

56. It is not in dispute that Ms. Hategan is an award-winning author and public speaker. She authored her own memoire in 2014 entitled "Race Traitor", and is regularly invited as a keynote speaker and guest on various prominent media outlets. This is how Ms. Hategan earns a living.

57. Of note, "celebrity status" is not required to satisfy the tort, though Ms. Hategan is a public figure falling within the narrow ambit of the tort that Ms. Moore asks the Court to adopt. In *Hay v Platinum Equities Inc.*,[59] the Alberta Court of Queen's Bench found that the tort of appropriation of personality was made out even when the plaintiff was not a public figure or celebrity. The key excerpts are set out below, and apply equally to this case:

> [70] All the cases referred to me by counsel on the tort of appropriation of personality involved famous or well-known celebrities – a professional football player[31], a star water-skier[32], a world class figure skater[33], a famous wealthy aristocrat[34], a radio personality/commentator[35]. **This begs the question of whether this tort should be applied to a "non-celebrity".**
>
> …
>
> [72] In ***Rothschild***, the judge was dealing with an interlocutory motion for an injunction. At paragraph 5 he says simply:

[57] *Joseph v Daniels*, 1986 CanLii 1106 (BCSC) at para. 14, RBOA, Tab 14

[58] *Ibid*

[59] *Hay v. Platinum Equities Inc*., 2012 ABQB 204 at paras. 70 –73, RBOA, Tab 15

> Further there has been appropriation of personality. **One cannot commercially exploit another's name or likeness without his permission**. In my view the tort of appropriation of personality has been committed and must be enjoined. [emphasis added in original]
>
> **[73] Applying these principles to the case at hand, I find that despite the lack of "celebrity" of the plaintiffs, the tort of appropriation of personality has been made out. A professional's name and reputation is entitled to be protected from unauthorized commercial exploitation every bit as much as a celebrity's name and likeness…**
>
> [Emphasis added]

58. Ms. Hategan's reputation and unique life story should be protected from commercial exploitation by Ms. Moore. Ms. Moore generates profits and Ms. Hategan has testified she has lost business opportunities as a result (paid speaking engagements, etc.). A deep dive into the life experiences of these two individuals — with evidence from sources other than Ms. Hategan and Ms. Moore — is required to adjudicate this issue in a fair and just manner, and such a process can only be achieved through the machinery of the full discovery and trial procedures.

59. In her factum, Ms. Moore suggests that taking Ms. Hategan's claims at their highest (i.e. accepting all of her evidence) leads to a likely result that the claims have no merit. With respect, the opposite is true. Ms. Hategan's position is quite simple — Ms. Moore lifted facts, storylines and key pieces of Ms. Hategan's life story and falsely passed them off as her own "lived experience" for commercial profit and to the detriment of Ms. Hategan.

60. This is precisely what this tort is designed to protect, lying in the gap not covered by copyright and trademark infringement. In effect, the tort allows an individual to control the commercial use of his or her name, image, likeness, voice, reputation, or other aspects of his or her identity.

Civil Conspiracy / Injurious Falsehood

61. A conspiracy requires two or more parties to agree to do something, whether explicitly or implicitly, that is wrong or illegal. The tort of conspiracy can be proven in the following two ways:[60]

> I. First, where the plaintiff shows that the predominant purpose of the defendants conduct is to cause injury to the plaintiff, whether the means used by the defendants are lawful or unlawful; or,
>
> II. Second, where the plaintiff shows that conduct is directed towards the plaintiff (alone or together with others), the conduct of the defendants is unlawful and the defendants know or should know when the circumstances that injury to the plaintiff is likely to result.

62. Ms. Hategan's evidence in this respect is limited. However, as noted above, this action is pre-discovery. According to Ms. Moore's own evidence, Mr. Farber and Ms. Moore worked closely together for years cultivating Ms. Moore's brand, which Ms. Hategan claims included appropriating aspects of Ms. Hategan's life story.

63. Ms. Hategan denies that there are "no facts, circumstances or particulars from which a trier of fact would be able to infer that the Defendants entered into an agreement with each other to purposefully injure the Plaintiff…"[61] Ms. Hategan's unique life story was known to Ms. Moore and Mr. Farber. To succeed in the anti-racism space, it would be in Ms. Moore and Mr. Farber's interest to hyperbolize Ms. Moore's role in, and against, the Heritage Front in a manner akin to Ms. Hategan's experience.

64. Adjudicating this tort at this early-stage is substantively prejudicial to Ms. Hategan, especially since Mr. Farber has not submitted any affidavit evidence, has not produced any emails,

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[60] *Goldentuler v. Mercedes-Benz*, 2013 ONSC 4150 at para. 17, RBOA, Tab 16

[61] Moore Factum at para. 68

correspondence, or documentation, and has not been subjected to cross-examination.

65. The "bad blood" between the parties is palpable. It is reasonable to infer that Ms. Moore may be motivated by malice. Accordingly, **a trial is necessary.**

Claims are Not Statute Barred

66. In her factum, Ms. Moore states that Ms. Hategan's claims are statute-barred. She relies on purported knowledge of appropriation in February 2015, and the Claim being issued December 10, 2018.

67. Ms. Hategan's claims are not statute-barred. The key provisions of the *Limitations Act, 2002* are set out below:[62]

> *Definitions*
>
> 1. In this Act,
>
> […]
>
> "claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission;
>
> […]
>
> BASIC LIMITATION PERIOD
>
> *Basic limitation period*
>
> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> *Discovery*
>
> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,

[62] S.O. 2002, c. 24, Sched. B, at ss. 1, 4, and 5

> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> **(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it;** and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> *Presumption*
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.
>
> […]

68. Ms. Hategan's claims are not discrete. Whereas some opportunities dating back to the 1990s may not be actionable *per se* due to the passage of time, Ms. Moore's appearances, statements and conduct from 2017 – 2019 certainly are. In the voluminous record before this Court, there are events and circumstances that are not statute-barred by any objective measure.

69. Further, even the interactions dating back to 2015 — upon which Ms. Moore relies to defeat Ms. Hategan's Claim — are not so clear-cut. Discoverability is a live-issue that cannot be resolved in this case on summary judgment.

Claims against Mr. Farber

70. Ms. Hategan repeats, adopts, and relies on her submissions above in support of her position that Mr. Farber's summary judgment motion should be dismissed. However, Mr. Farber's motion suffers from a more significant flaw.

71. As alluded to above, Mr. Farber has not put forth any evidence on this motion, despite his clear obligation as moving party. He has not produced a single document. This omission is

profound and the unfairness arising therefrom is pronounced. An adverse inference should be drawn for the purposes of this motion that evidence from Mr. Farber, by way of affidavit or examination, would not have assisted him on this motion.

72. In essence, Mr. Farber piggy-backed off of Ms. Moore's motion, pursuing judgment through Rule 20, without any attempt to satisfy his evidentiary burden, and thereby shielded himself from cross-examination.

73. In an apparent acknowledgment of the weakness of Mr. Farber's motion for summary judgement, he moves in his Notice of Motion under Rule 21 in the alternative, although there is no direct reference to Rule 21 in his factum nor does it set out the test for dismissal under this rule. It does not appear that Mr. Farber is relying on Rule 21 on this motion. He is seeking summary judgment.

74. Nevertheless, in the rare reported instances of parties moving for summary judgment also relying on Rule 21 as alternative relief, courts have found it more appropriate to focus on, and determine the summary judgment motion given, *inter alia*, the extensive records typically put forth on summary judgment motions, as deficiencies in pleadings can be cured through amendments.[63]

75. Fairness dictates that his motion be dismissed so that the parties may proceed to documentary and oral discovery, and ultimately, trial.

D. MS. MOORE'S COUNTERCLAIM RAISES GENUINE ISSUES REQUIRING A TRIAL

76. For the reasons set out above, Ms. Moore's motion for judgment on her Counterclaim

[63] *Afzal v. Royal College of Physicians and Surgeons of Canada*, 2019 ONSC 5346 at para. 12, RBOA, Tab 17

should be dismissed on predominantly the same grounds.

77. There are genuine issues of discoverability (certain allegations of defamation are 2 years prior to the presumptive limitation period). There are genuine issues pertaining to damages (whether recoverable, and if so, the quantum). There are genuine issues regarding the alleged causes of action (ironically, similar to the issues litigated in the main action). There are also various affirmative defences to the defamation claim that have been or will be pleaded, including justification, fair comment, and responsible communication on matters of public interest.

78. Regarding the defamation claim specifically, the trier of fact must determine whether the impugned expressions are statements of fact or statements of opinion, and then proceed to consider each and every defence available. Of note, for the defence of fair comment, the Supreme Court of Canada has stated that the test is whether anyone could honestly have expressed the defamatory comment on the facts:[64]

> [235] In *WIC Radio* the Supreme Court stated that the test is whether anyone could honestly have expressed the defamatory comment on the proven facts. The addition of a qualitative standard such as "fair minded" was rejected. Binnie J. quoted with approval from a decision of *the High Court of Australia in Channel Seven Adelaide Pty. Ltd. v. Manock* (2007), 241 A.L.R. 468 at paragraph 3:
>
> > The protection from actionability which the common law gives to fair and honest comment on matters of public interest is an important aspect of freedom of speech. In this context, "fair" does not mean objectively reasonable. The defence protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. <u>The word "fair" refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts.</u> (emphasis added)

[64] *Baglow v. Smith*, 2015 ONSC 1175 at para. 235, RBOA, Tab 18

E. GRANTING LEAVE TO AMEND

79. Ms. Hategan does not oppose Ms. Moore's request to amend the Moore Amended Defence and Counterclaim. However, Ms. Moore's proposed amendments emphasize Ms. Hategan's contention that summary judgment is not appropriate.

80. Ms. Hategan requests Leave to respond accordingly, including by delivering an amended Statement of Defence to the Counterclaim and a Reply.

81. This matter should proceed to documentary disclosure, with detailed affidavits of documents from all parties based on the "four corners" of the amended pleadings.

F. CONCLUSION

82. This is not an appropriate case for summary judgment for all of the reasons articulated above. There are disputes that are simply not amenable to a final adjudication on the merits through the summary judgment process — this is one of those cases. Accordingly, these motions should be dismissed.

PART IV - ORDER REQUESTED

83. Ms. Hategan requests an order dismissing the summary judgment motions, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 12, 2019

David Elmaleh / Aaron Rosenberg
RE-LAW LLP
Lawyers for the Plaintiff / Defendant by Counterclaim (Responding Party), Elisa Romero Hategan

SCHEDULE 'A'
LIST OF AUTHORITIES

TAB	DOCUMENT
1.	*Muralla v Qazi*, 2017 ONSC 2339
2.	*Baywood Homes Partnership v. Haditaghi* 2014 ONCA 450
3.	*Hryniak v. Mauldin*, 2014 SCC 7
4.	*Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764
5.	*The Law of Civil Procedure in Ontario*, Third Edition, LexisNexis Canada Inc. (Toronto: 2017)
6.	*Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Ont. Gen. Div.)
7.	*Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, 28 O.R. (3d) 423 (Ont. Gen. Div.)
8.	*Sanzone v. Schechter*, 2016 ONCA 566
9.	*Baglow v. Smith*, 2012 ONCA 407
10.	*Sampogna v. Smithies*, 2012 ONSC 610,
11.	*Dawson* v. *Rexcraft Storage and Warehouse Inc.*, 1998 CanLII 4831 (Ont. C.A.)
12.	*Yang v. The Christian World Korea Inc.*, 2019 ONSC 6131
13.	*Krouse v. Chrysler Canada Ltd*., (1974), 1 O.R. (2d) 225
14.	*Joseph v Daniels*, 1986 CanLii 1106 (BCSC)
15.	*Hay v. Platinum Equities Inc*., 2012 ABQB 204
16.	*Goldentuler v. Mercedes-Benz*, 2013 ONSC 4150
17.	*Afzal v. Royal College of Physicians and Surgeons of Canada*, 2019 ONSC 5346
18.	*Baglow v. Smith*, 2015 ONSC 1175

SCHEDULE 'B'
TEXT OF STATUTES, REGULATIONS & BY – LAWS

Courts of Justice Act

R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE

To Plaintiff

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (1).

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just. R.R.O. 1990, Reg. 194, r. 20.01 (2).

To Defendant

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (3).

…

DISPOSITION OF MOTION

General

20.04 (1) Revoked: O. Reg. 438/08, s. 13 (1).

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence. O. Reg. 438/08, s. 13 (3).

Limitations Act, 2002

S.O. 2002, CHAPTER 24

SCHEDULE B

Definitions

1 In this Act,

"adverse effect" has the same meaning as in the Environmental Protection Act; ("conséquence préjudiciable")

"assault" includes a battery; ("voies de fait")

"claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission; ("réclamation")

"contaminant" has the same meaning as in the Environmental Protection Act; ("contaminant")

"discharge" has the same meaning as in the Environmental Protection Act; ("rejet", "rejeter")

"environmental claim" means a claim based on an act or omission that caused, contributed to, or permitted the discharge of a contaminant into the natural environment that has caused or is likely to cause an adverse effect; ("réclamation relative à l'environnement")

"natural environment" has the same meaning as in the Environmental Protection Act. ("environnement naturel") 2002, c. 24, Sched. B, s. 1.

…

Basic limitation period

4 Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.

Discovery

5 (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).

Demand obligations

(3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made. 2008, c. 19, Sched. L, s. 1.

Same

(4) Subsection (3) applies in respect of every demand obligation created on or after January 1, 2004. 2008, c. 19, Sched. L, s. 1.

ELISA ROMERO HATEGAN - and-	**ELIZABETH MOORE FREDERIKSEN et al**	
Plaintiff	*Defendant(s)*	Court File No.: 18-00610489-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT

TORONTO

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