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| | August 28, 2023 28 août 2023 |
| | Kadara Thompson |
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Court File no. T-1452-23

FEDERAL COURT

BETWEEN:

CARYMA SA'D

Plaintiff

- and -

MORGAN YEW, CANADIAN ANTI-HATE NETWORK, AND JOHN OR JANE DOE

Defendants

MOTION RECORD OF THE DEFENDANTS

(Motion to Strike Statement of Claim)

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TO: THE ADMINISTRATOR
Federal Court Registry

Thomas D'Arcy McGee Building
90 Sparks Street, 5th floor
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AND TO: **FREDERICK WU**
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Tab 1

FEDERAL COURT

BETWEEN:

CARYMA SA'D

Plaintiff

- and -

MORGAN YEW, CANADIAN ANTI-HATE NETWORK, AND JOHN OR JANE DOE

Defendants

NOTICE OF MOTION

(Motion to Strike Statement of Claim)

TAKE NOTICE THAT the Canadian Anti-Hate Network (“CAHN”) and Morgan Yew (collectively, the “Defendants”) will make motion to the Federal Court under rule 369(1) of the *Federal Courts Rules* (SOR/98-106).

THIS MOTION IS FOR:

1. Leave to bring this motion in writing under Rule 369;
2. An Order striking Caryma Sa'd's (the “Plaintiff”) Statement of Claim dated July 12, 2023 (the “Statement of Claim”), in its entirety, without leave to amend, pursuant to Rule 221(1)(a), (c) and (f) of the *Federal Courts Rules*;
3. An Order prohibiting the Plaintiff from re-filing the Statement of Claim against the Defendants, or in the alternative, requiring that the Plaintiff comply with any and all cost orders made in respect of this action before re-filing the Statement of Claim against the Defendants;
4. In the alternative, an Order extending the period of time within which the Defendants must file their Statement of Defence and Counterclaim, if any, to thirty (30) days from the disposition of this motion;
5. Costs of this motion awarded at the highest allowable basis; and
6. Such further and other relief as this Honourable Court deems just.

THE GROUND FOR THE MOTION ARE:

1. The Plaintiff has commenced this action against the Defendants seeking declaratory relief, damages and injunctions pursuant to subsections 7(a) and 7(d) of the *Trademarks Act* RSC, 1985, c. T-13 and sections 36 and 52 of the *Competition Act*. RSC, 1985, C. C-34.
2. The Statement of Claim relates almost entirely to the Plaintiff's cancelled public speaking event, and the opinion-based article written and/or published by the Defendants. This proceeding is a vexatious attempt to rob the Defendants' of their right to freedom of expression under the guise of erroneous and baseless allegations of wrongdoing under the *Trademarks Act* and the *Competition Act*.
3. The facts pleaded in the Statement of Claim is made up of speculative assumptions, sweeping conclusions, bald allegations and argument centered on discrediting the reputation of the Defendants, with no material allegations of fact that support the asserted conclusions. Without the requisite material facts, the Statement of Claim must be struck.
4. The Statement of Claim is plainly deficient on its face as it:
 - a. discloses no reasonable cause of action (Rule 221(1)(a));
 - b. is scandalous, frivolous and vexatious (Rule 221(1)(c)); and
 - c. is otherwise an abuse of the process of the Court (Rule 221(1)(f)).
5. It is plain and obvious that the Statement of Claim discloses no reasonable cause of action. The Statement of Claim is devoid of the material facts necessary to establish any wrongdoing under subsections 7(a) and 7(d) of the *Trademarks Act*, and sections 36 and 52 of the *Competition Act*. Critically absent from the Statement of Claim are non-speculative material facts required to establish:
 - a. That the alleged false and misleading statement(s) tended to discredit the business or goods or services of the Plaintiff (7(a) *Trademarks Act*; 52 *Competition Act*);
 - b. That the Plaintiff is a competitor of CAHN (7(a) *Trademarks Act*; 52 *Competition Act*);

- c. That the alleged false and misleading statement(s) resulted in damage to the Plaintiff causally linked to such statements (7(a) *Trademarks Act*; 52 *Competition Act*);
 - d. That the description ANTI-HATE is used by CAHN in association with services (7(d) *Trademarks Act*);
 - e. That the description ANTI-HATE is used in connection with intellectual property (7(d) *Trademarks Act*);
 - f. That the description ANTI-HATE is false in a material respect (7(d) *Trademarks Act*);
 - g. That the description ANTI-HATE is likely to mislead the public as to the (i) character, quality, quantity or composition, (ii) the geographical origin, or (iii) the mode of the manufacture, production or performance of CAHN's services (7(d) *Trademarks Act*);
 - h. That the alleged false description ANTI-HATE resulted in damage to the Plaintiff causally linked to such description (7(d) *Trademarks Act*);
 - i. That the impression of the relevant consumer would be that the impugned statements are false or misleading (7(a) *Trademarks Act*; 52 *Competition Act*);
 - j. That the Defendants were promoting a business interest in using the alleged false and misleading representations (52 *Competition Act*); and
 - k. That the Defendants knowingly or recklessly made a representation to the public that is false or misleading in a material respect (7(a) *Trademarks Act*; 52 *Competition Act*).
6. In addition to being devoid of any reasonable cause of action, the Statement of Claim is equally scandalous, frivolous, vexatious and otherwise an abuse of process as a result of the failure to meet the minimum level of factual disclosure mandated by the *Federal Courts Rules* and applicable jurisprudence.
 7. There is no amendment that the Plaintiff can make to cure the deficiencies of the Statement of Claim and a statement of defence cannot be drafted in response.
 8. This motion can be fairly heard and determined by the Court in writing pursuant to Rule 369 of the *Federal Courts Rules*.

THE FOLLOWING DOCUMENTARY EVIDENCE are relied upon:

9. The Statement of Claim;
10. The Affidavit of Karhema Etienne, dated August 25, 2023; and
11. Such further and other material as counsel may advise and this Honourable Court may permit.

DATED AT Ottawa, Ontario, this 28th day of August, 2023.



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Solicitor for the Plaintiff

Tab 2

Court file no. T-1452-23

**FEDERAL COURT**

BEEN:

CARYMA SA'D

Plaintiff

- and -

MORGAN YEW, CANADIAN ANTI-HATE NETWORK,
and JOHN OR JANE DOE

Defendants

**STATEMENT OF CLAIM
SIMPLIFIED ACTION**

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules, serve it on the plaintiff's solicitor or, if the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court

WITHIN 30 DAYS after the day on which this statement of claim is served on you, if you are served in Canada or the United States; or

WITHIN 60 DAYS after the day on which this statement of claim is served on you, if you are served outside Canada and the United States.

TEN ADDITIONAL DAYS are provided for the filing and service of the statement of defence if you or a solicitor acting for you serves and files a notice of intention to respond in Form 204.1 prescribed by the Federal Courts Rules.

Copies of the Federal Courts Rules, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date: 12-JULY-2023

Issued by: Alice Prodan Gill

Address of local office:
200-180 Queen St W
Toronto, ON M5V 3L6

TO: **CANADIAN ANTI-HATE NETWORK**
439 University Ave, 5th floor
Toronto, ON M5G 1Y8
Canada

TO: **MORGAN YEW**

CLAIM

1. The plaintiff claims against the defendants, by way of simplified action:
 - a. A declaration affirming the plaintiff's right to be free from all defendants' false or misleading remarks, under the *Trademarks Act*, RSC 1985, c T-13, s 7(a), and the *Competition Act*, RSC 1985, c C-34, s 52;
 - b. A declaration that the defendant Canadian Anti-Hate Network ("CAHN") uses false descriptions likely to mislead the public in its representations with the word mark ANTI-HATE, contrary to the *Trademarks Act*, s 7(d);
 - c. General damages of \$50,000;
 - d. Aggravated and exemplary damages of \$50,000;
 - e. An interim, interlocutory, and permanent injunction restraining the defendant CAHN's false or misleading remarks in respect of the plaintiff;
 - f. An interim, interlocutory, and permanent injunction mandating that CAHN disclose to the plaintiff John or Jane Doe's identity(ies);
 - g. An interim, interlocutory, and permanent injunction restraining the defendant John or Jane Doe's false or misleading remarks in

respect of the plaintiff as based on CAHN and Mr Yew's publications;

- h. An interim, interlocutory, and permanent injunction restraining the defendant CAHN's use of ANTI-HATE as a trademark element;
- i. Costs of this action; and
- j. Such further and other relief as this Honourable Court deems just.

Background: the parties

1. The plaintiff Caryma Sa'd ("**Ms Sa'd**") is an individual residing in Toronto, Ontario, of Muslim upbringing and Indo-Palestinian ethnic descent. She is a lawyer practising mainly residential landlord-tenant dispute resolution. She is also an independent journalist regularly documenting public protests and fringe social movements, publishing her photographs and videos on social media with her commentary. She also authors political cartoons shared through the same media. She posts on Twitter (or "tweets") under the Twitter name <@CarymaRules> and is regularly interviewed by mainstream media outlets for her expertise on extremism and other social issues.

2. The defendant Canadian Anti-Hate Network (“**CAHN**”) purports to be an antifascist and antiracist advocacy group based in Toronto, Ontario, organized as a not-for-profit corporation pursuant to the laws of Canada. As published on CAHN’s website <antihate.ca>, CAHN’s mission is stated as being “to monitor, research, and counter hate groups by providing education and information on hate groups to the public, media, researchers, courts, law enforcement, and community groups.”
3. The defendant Morgan Yew (“**Mr Yew**”) is an individual and independent journalist residing in Toronto, Ontario. Mr Yew has published with CAHN.
4. The defendant John or Jane Doe (“**Mx Doe**”) is the one or more individuals comprising CAHN’s network, acting on CAHN’s behalf, acting at CAHN’s direction, or otherwise under CAHN’s control or influence. Mx Doe’s identity(ies) is (or are) within CAHN’s actual or constructive knowledge.
5. Ms Sa’d, Mr Yew, and CAHN are all journalistic entities documenting right-wing politics and extremism.

Background: CAHN is opaque and amorphous

6. CAHN is a business. CAHN employs staff. CAHN solicits donation revenue online. From 2020 to 2022, CAHN received public grant

monies from the Department of Canadian Heritage to monitor hate-promoting groups and individuals, including by publishing articles on hate groups and important hate influencers (the “**Canadian Heritage Grant**”).

7. CAHN is the public-facing hub of a nascent activism-industrial complex in Canada. CAHN leadership leverage their CAHN credentials in bidding for lucrative diversity and inclusion consulting contracts. Pursuant to its Canadian Heritage Grant, CAHN was:
 - a. held to content quotas in publishing articles about online hate-promoting groups and influencers;
 - b. subject to quantity of articles published and distributed as a performance metric; and
 - c. subject to quantity of social media engagement and impressions as a performance metric.

In essence, CAHN was and is an antifascism-themed content marketing firm incentivized to prioritize content quantity over content quality. CAHN's business model does not anticipate ever exhausting the supply of alleged fascists to publish about. To CAHN, there must always be clickbait or the business fails.

8. CAHN does not meet reasonable expectations of a so-called anti-racist organization. For example, despite espousing social justice ideals,

CAHN is operated and governed by a white and male majority in both its management and its board of directors.

9. True to its corporate name, however, CAHN does operate as a network. CAHN's sphere of control or influence extends beyond the entity itself to include:
 - a. CAHN's associated quasi-journalists or journalists;
 - b. CAHN's advisory board;
 - c. CAHN's provision of comments to mainstream news reporting media.
10. CAHN holds itself out as hosting leading expertise and research in hate groups, hate speech, and hate crimes in the Canadian context. Yet, CAHN withholds and refuses to disclose expert identities, expert credentials, or research methodologies. Several CAHN personalities have not appeared in person or on video anywhere. Peter Smith, Elizabeth Simons, and Hazel Woodrow, for example, may be pseudonyms or imagined personalities concocted to project continuity of expertise where there is none.

CAHN sought to collaborate with Ms Sa'd

11. On or about April 7, 2021, Ms Sa'd published a political comic about unsavoury right-wing personality Christopher Saccoccia (also known as

Chris “**Sky**”) that resulted in immediate and unexpected backlash. Sky encouraged his hundreds of thousands of social media followers to brigade Ms Sa’d’s online accounts and business profiles with hateful messages and one-star reviews. Ms Sa’d persevered with comics, videos, and commentary about Sky, using humour to galvanize public opinion against his negative behaviour.

12. On or about April 9, 2021, CAHN corresponded with Ms Sa’d by way of Twitter’s direct messaging (“**DM**”) regarding Ms Sa’d’s political cartoons: “Hey! We’d like to chat about maybe bringing you on board for a cartoon a week, based on that week’s content. Is that something you have interest/capacity for?” Over the next week, Ms Sa’d and CAHN discussed further, but ultimately Ms Sa’d declined to provide political cartoon content as CAHN had invited.
13. On or about April 11, 2021, CAHN contacted Ms Sa’d by DM in response to a website’s defamation directed at Ms Sa’d which she had been tweeting about. CAHN advised her to “archive that cyber hate website crap” to preserve the statements for evidence. CAHN dissuaded Ms Sa’d from engaging with the author of the defamatory material, stating: “We made the decision to ignore him long ago and it’s largely worked... it may be better to just let him sit and yell into the void. Giving him attention is exactly what he wants.”
14. On April 14, 2021, CAHN sent Ms Sa’d a DM linking their latest article about Chris Sky entitled *The Antisemitic, Islamophobic, Racist*

Conspiracy Theorist Dominating the International Anti-Mask Movement is Canadian.

15. On or about May 25, 2021, CAHN contacted Ms Sa'd by DM again to probe for information on a Law Society of Ontario bencher. In response, Ms Sa'd confirmed his identity as a member of a bencher-electoral slate called "StopSOP". A couple of days later, CAHN advised it was "digging into the StopSOP people" and asked for recommendations of "friendly benchers" who would be open to conversation.
16. There are no noteworthy journalistic works by Mr Yew published before July 2021.

Cancelled event at Toronto Chinatown

17. Ms Sa'd's business includes public commentary and engagement events. On or about July 5, 2021, Ms Sa'd announced her intention to run one such event: a comedy night on July 10, 2021, wherein Ms Sa'd would interview and roast the outspoken and unsavoury anti-masker Chris Sky, along with hosting five comics and a local Chinese pastor to speak. Her aim was to advocate and educate through entertainment, in compliance with COVID restrictions, and to allow Sky's absurdity to lampoon itself. The plan was to have the event at the Chinatown Centre, 222 Spadina Avenue, Toronto, in its private courtyard adjacent to a

retail unit rented by Ms Sa'd to keep seating and audio-visual equipment for hosting shows. Ms Sa'd's law office is based in the same building.

18. On July 6, 2021, CAHN sent a further DM to Ms Sa'd expressing concern over the planned event, explaining that Sky "has spread extremely dangerous ideas, and brought countless people in, radicalizing them to those ideas, since his rise". Ms Sa'd responded: "I want to be clear that I'm not setting up a 'debate', nor will he be provided an opportunity to spout his rants. My objective is to get him to further entrench divisions in the anti-masker movement, with a side of mockery. [...] [P]eople seem to respond well to my infotainment approach. [...] I'm hopeful his big mouth can be weaponized against him."

19. In the afternoon of July 10, 2021, CAHN sent Ms Sa'd DMs espousing further concern: "To be straightforward, we don't agree with the event." CAHN further expressed worry that far-right personalities were commenting on Ms Sa'd's Instagram posts.

20. In the evening of July 10, 2021, activists styling themselves as "community defenders" or "community protectors" blockaded access to the private venue. Ms Sa'd cancelled the event out of safety concerns. A dialogue among uninvited third parties, a handful of would-be attendees, and blockaders then devolved into a physical altercation, despite Ms Sa'd's event security detail.

21. Their self-styled titles notwithstanding, these purported defenders/protectors were not acting on behalf of any community. However, tweets self-identifying by these titles from these individuals continue to discuss this incident to the present day.

22. Mr Yew was among these so-called defenders. When it was evident the event was cancelled, and after physical altercations ensued, Mr Yew spotted Ms Sa'd and said to her: "Caryma, you're so fucked!"

23. On July 13, 2021, Ms Sa'd released a statement explaining and apologizing for the event's outcome.

24. Also on July 13, 2021, Mr Yew and CAHN published an article about Ms Sa'd and her cancelled event on CAHN's website <antihate.ca>, which was false or misleading in, at least, the following statements:

| CAHN's statement | Missing context |
|---|--|
| <p>"Caryma blames the blockade, and not her event, for the ensuing violence."</p> | <p>The blockade prevented lawful access to the courtyard through physical intimidation. Some blockaders wore helmets and goggles, which signalled readiness for physical confrontation. Several faces were covered with bandanas.</p> <p>Ms Sa'd feared for her safety and cancelled the show to avoid putting staff, performers, and guests at risk. The blockade did not disperse when the event was cancelled. It remained in place even when continuing became unsafe.</p> |

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| <p>“Not only is this event not permitted by the mall board of directors, the potential for an audience would be against public health codes, and the risk of Sky's anti-mask supporters being present puts those who are most marginalized in our community at risk”</p> | <p>Ms Sa'd rents a store in the mall courtyard, and she had permission from the Chinatown Centre board of directors to host the event on the stage.</p> <p>She invited 25 guests, which followed the rules for outdoor gatherings. About one or two dozen hopeful audience members showed up uninvited. These individuals would have been safely accommodated in the upstairs plaza if the event had not been cancelled.</p> <p>The blockade itself did not comply with public health regulations, both in terms of size and lack of distancing.</p> <p>The courtyard is unlit after dark and rarely used. The risk of harm was overstated considering the event was scheduled to take place two hours after the mall closed at an otherwise low-traffic time.</p> |
| <p>“Many, many more Saccoccia fans ultimately showed up, and nobody was trespassed.”</p> | <p>Ms Sa'd invited 25 guests, only a handful of whom were aligned politically with Chris Sky. Her guests were part of the crowd and cannot all be fairly described as “Saccoccia fans.”</p> <p>About one or two dozen hopeful audience members showed up uninvited. These individuals would have been safely accommodated in the upstairs plaza if the event had not been cancelled.</p> <p>At least two trespass notices were handed out, but security was instructed to desist once it became</p> |

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| | <p>apparent the efforts were futile. Ms Sa'd was unwilling to put the guards at risk of physical confrontation.</p> |
| <p>"Holding a large banner reading 'Mask it or Casket,' demonstrators tell CAHN their plan was to remain silent and non-confrontational, and to prohibit entry for as long as it was safe to do so."</p> | <p>The blockade was confrontational with people who tried accessing the courtyard. The blockade shoved invited guests when attempting to use the access staircase. The blockade told an intimidated and fearful performer: "There's no comedy happening here tonight." The blockade also intimidated, scared, and denied access to a store owner with no connection to the event.</p> <p>The blockade did not disperse when Ms Sa'd cancelled the event. The blockade continued even when physical altercations began, irrespective of safety.</p> |
| <p>"Denying a platform to hatemongers is not divisive, controversial, or contradictory to free expression. In fact, it bolsters expression."</p> | <p>Differing views exist on the effectiveness of de-platforming, and what that even entails.</p> <p>Ms Sa'd herself helped de-platform Chris Sky from Instagram. He lost over 250,000 followers when his primary and secondary accounts were banned, in part due to targeted harassment against her account.</p> <p>The event was not structured as a rally in support of Chris Sky, or even as a debate. Rather, the program overall was designed to mock and subvert his message. Hosting comedy performances and conducting interviews was Ms Sa'd's chosen form of political expression.</p> |

| | |
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| <p>“Sa’d referred to demonstrators bringing ‘weapons,’ which it turned out were taiko drumming sticks from someone who had arrived from practice.”</p> | <p>Drumsticks can be used as weapons. A performer saw members of the blockade use a bike, baton, and walking stick as a weapon.</p> |
| <p>“Sa’d has been parroting anti-anti-fascist talking points we more commonly associate with the far-right. She repeatedly describes them as ‘violent,’ ‘militant,’ shares the unsubstantiated claim they brought weapons, and complains that the anti-racists have ‘censored’ her.”</p> | <p>Ms Sa’d does not support fascist or racist ideologies.</p> <p>Her characterization of the blockade and its impact was reasonable and accurate in the circumstances.</p> |

25. Further excerpts from the article are consistent with the framing above.

Overall, the article misleads its audience to conclude:

- a. That Ms Sa’d supports fascism;
- b. That Ms Sa’d is a racist;
- c. That Ms Sa’d lied about the blockade’s violence;
- d. That Ms Sa’d jeopardized the Chinatown community’s safety.

26. The article does not disclose Mr Yew’s personal bias. Mr Yew actively participated in the blockade and had previously published statements that Ms Sa’d is a “bad actor” with no conscience, implying Ms Sa’d is not part of the “actual community” and comparing Ms Sa’d to far-right American media personality Andy Ngo.

27. In the days that followed, CAHN tweeted a summary of its article, linking to commentary from various Twitter personalities.
28. In or about the end of July 2021, Ms Sa'd corresponded with CAHN corporate director Richard Warman about the above-noted misleading elements and biases, among others. Eventually, on or about August 5, 2021, CAHN ceded to minor revisions of a handful of passages. While revising the article to more closely correlate with some facts, the revisions do not materially change the misleading character of the article. What is more, after revision, the editorial note simply stated: "Following publication of this article, further information was provided by Caryma Sa'd, and the article was updated accordingly." CAHN refused to expressly specify what updates were amended into the article.
29. The article remains publicly visible and is a continuing act.
30. Ms Sa'd continued to attend and document public protests and fringe social movements. In early 2022, she began covering the emergence of counter-protests in response to right-wing protesters.
31. From time to time, CAHN publishes materials geared towards counter protesters, or self-styled "community defenders" and "community protectors." CAHN specifically encourages counter protesters to "ice out fake journalists" at events through noisemaking, and the use of banners and flags to create visual and physical barriers. CAHN holds no authority to distinguish fake from real journalists.

32. Ms Sa'd has been subjected to in-person harassment at rallies by counter-protesters employing such tactics.

33. The fallout arising from the defendants' conduct includes online sexism and racism being directed at Ms Sa'd for the last two years. Mx Doe is/are among the online personalities who persist in impugning Ms Sa'd.

Trade libel and unfair competition

34. The CAHN and Mr Yew's article and tweets are actionable under the *Competition Act*, s 36, and the *Trademarks Act*, s 7(a). The conduct is contrary to the *Competition Act*, s 52, and the *Trademarks Act*, s 7(a). CAHN and Mr Yew's business interests include:

- a. Discrediting a competing journalist;
- b. Attempting to establish CAHN as an exclusive source for anti-fascist journalism;
- c. Retaliation for failing to collaborate with CAHN so as to motivate other journalists covering right-leaning movements to participate with CAHN;
- d. Mr Yew's enhanced credibility as an anti-fascist journalist in taking down Ms Sa'd, a credible and known progressive media personality.

35. As CAHN's conduct in fact promoted hateful conduct against Ms Sa'd, a member of an equity-seeking minority group, CAHN's use of any sign as a trademark that includes ANTI-HATE is a description that is false and likely to mislead the public as to services CAHN provides, in a manner contrary to the *Trademarks Act*, s 7(d).

36. CAHN's network of control or influence includes Mx Doe, who is/are (an) online and in-person actor(s) propagating accusations of Ms Sa'd's alleged racism or fascism on the basis of Mr Yew and CAHN's publications.

The plaintiff proposes this action be tried in Toronto.

July 12, 2023



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Toronto, ON M5H 1A1

Fred Wu (LSO# 73101W)
416-639-7639
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Solicitor for the plaintiff

Tab 3

Court file No.: T-1452-23

FEDERAL COURT

BETWEEN:

CARYMA SA'D

Plaintiff

- and -

MORGAN YEW, CANADIAN ANTI-HATE NETWORK,
and JANE or JOHN DOE

Defendants

AFFIDAVIT OF KARHEMA ETTIENNE

I, Karhema Ettiienne, of the City of Ottawa, in the Province of Ontario, AFFIRM AND SAY:

1. I am employed as a litigation paralegal by MBM Intellectual Property Law LLP ("MBM"), the solicitors for the Defendants, Canada Anti-Hate Network and Morgan Yew. I have been employed by MBM in this capacity since July 10, 2023. I have personal knowledge of all the matters to which I depose in this affidavit, unless otherwise stated.
2. On August 23, 2023, I accessed the Federal Court webpage located at the URL <https://www.fct-cf.gc.ca/en/court-files-and-decisions/court-files> and entered in "Caryma" in the " Search by party name" search field, and took a screenshot of all listed court actions. A copy of the screenshot listing such court actions is attached hereto as **Exhibit "A"**.
3. I then clicked the magnifying glass under the column entitled "More" for the entry listed as court file no. T-1452-23 and took a screenshot of the provided information. A copy of this screenshot is attached hereto as **Exhibit "B"**.

4. I repeated this process for the entries listed as court file nos. T-1365-23 and T-1220-23 and took screenshots of the resulting pages. Copies of these screenshots are attached hereto as Exhibits "C" and "D", respectively.

5. I make this Affidavit for the purpose of this proceeding and for no other improper purpose.

| | |
|--|---|
| <p>AFFIRMED BEFORE ME at Ottawa, Ontario, this <u>25th</u> day August, 2023</p> <p><i>Fangji Wang</i></p> <hr/> <p>Commissioner for Oaths</p> | <p><i>Karhema Etienne</i></p> <hr/> <p>KARHEMA ETTIENNE</p> |
|--|---|



Exhibit "A" to the
Affidavit of Karhema Ettienne affirmed
this 25th day of August, 2023

Fanqi Wang

A COMMISSIONER, etc.



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Federal Court



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Exhibit "B" to the
Affidavit of Karhema Ettienne affirmed
this 25th day of August, 2023

Fangqi Wang

A COMMISSIONER, etc.



Recorded Entry Information : T-1452-23

Type : Federal Court

Type of Action : Federal Court

Nature of Proceeding : Trade Mark - Passing Off

Filing Date : 2023-07-12

Office : Toronto Language : English

Recorded Entry Summary Information

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| 2 | 2023-08-11 | Ottawa | Consent on behalf of Plaintiff and Defendants: Morgan Yew, Canadian Anti-Hate Network to a 15-day extension of time to serve and file their Statement of Defence pursuant to Rule 7(1)(2) of the Federal Courts Rules. filed on 11-AUG-2023 | |
| 1 | 2023-07-12 | Toronto | Statement of Claim filed on 12-JUL-2023 Tariff simplified action - \$50.00 | |

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Exhibit "C" to the
Affidavit of Karhema Ettienne affirmed
this 25th day of August, 2023

Fangqi Wang

A COMMISSIONER, etc.



Recorded Entry Information : T-1365-23

Type : Federal Court **Type of Action :** Federal Court
Nature of Proceeding : Copyright Infringement [Actions] **Filing Date :** 2023-06-30
Office : Toronto **Language :** English

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





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Exhibit "D" to the
Affidavit of Karhema Ettienne affirmed
this 25th day of August, 2023

Fanqi Wang

A COMMISSIONER, etc.



Recorded Entry Information : T-1220-23

Type : Federal Court

Type of Action : Federal Court

Nature of Proceeding : Copyright Infringement [Actions]

Filing Date : 2023-06-13

Office : Toronto Language : English


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| 2 | 2023-07-13 | Toronto | Order dated 13-JUL-2023 rendered by The Honourable Madam Justice Elliott Matter considered without personal appearance The Court's decision is with regard to Letter from Plaintiff dated 29-JUN-2023 Result: granted 1 - The Plaintiff may serve the Defendant by using Instagram direct message. 2 - The Plaintiff may also serve the Defendant by using public post to Twitter, tagging Canada Proud at <@WeAreCanProud>. 3 - In accordance with subrule 136(3) of the Rules, service by each of the above means shall refer to this Order authorizing such substitutional service. Filed on 13-JUL-2023 entered in J. & O. Book, volume 1603 page(s) 453 - 455 Interlocutory Decision | |
| null | 2023-06-29 | Toronto | Letter from Plaintiff dated 29-JUN-2023 Requesting an Order for Substituted Service of the Statement of claim pursuant to Update #9 and Consolidated Practice Direction(Oct 24,2022)at subparagraph 22(D). received on 29-JUN-2023 | |
| 1 | 2023-06-13 | Toronto | Statement of Claim filed on 13-JUN-2023 Tariff simplified action - \$50.00 |  |

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Tab 4

FEDERAL COURT*BETWEEN:***CARYMA SA'D****Plaintiff**

- and -

MORGAN YEW, CANADIAN ANTI-HATE NETWORK, AND JOHN OR JANE DOE**Defendants****WRITTEN REPRESENTATIONS**

(Motion to Strike Statement of Claim)

OVERVIEW

1. This is a motion to strike the Plaintiff's statement of claim dated July 12, 2023 (the "Statement of Claim"), in its entirety. The Statement of Claim discloses no reasonable cause of action, is scandalous frivolous and vexatious, and is otherwise an abuse of process.
2. The Statement of Claim is devoid of the material facts that establish the constituent elements required to establish a cause of action pursuant to subsections 7(a) and 7(d) of the *Trademarks Act*, RSC, 1985, c. T-13 and sections 36 and 52 of the *Competition Act*, RSC, 1985, C. C-34.
3. The entirety of the Statement of Claim consists of speculative assumptions, sweeping conclusions, bald allegations and arguments centered on discrediting the reputation of the Defendants. The facts pleaded are wholly irrelevant to the asserted causes of action and relate to the Plaintiff's upset surrounding a cancelled public speaking event, and the Defendants' opinion-based article relating to same.

4. The Statement of Claim has no prospect of success, and its deficiencies are incurable by amendment. As such, the Statement of Claim should be struck in its entirety without leave to amend, with costs awarded to the Defendants on the highest allowable basis.

PART I - FACTS

5. On July 12, 2023, the Plaintiff issued the Statement of Claim against the Defendants, Morgan Yew and the Canadian Anti-Hate Network (“CAHN”)¹ The Plaintiff seeks relief in respect of sections 7(a) and 7(d) of the *Trademarks Act*, and sections 36 and 52 of the *Competition Act*.
6. The Defendants have not yet defended the within action.
7. The Statement of Claim is devoid of the requisite material facts necessary to satisfy a cause of action under sections 7(a) and 7(d) of the *Trademarks Act*, and under sections 36 and 52 of the *Competition Act*. Rather, the Statement of Claim makes bald, vague and ungrounded allegations that do not link the asserted allegations to an actionable wrong committed by the Defendants.
8. Critically absent from the Statement of Claim are non-speculative material facts required to establish:
 - a. That the alleged false and misleading statement(s) tended to discredit the business or goods or services of the Plaintiff (7(a) *Trademarks Act*; 52 *Competition Act*);
 - b. That the Plaintiff is a competitor of CAHN (7(a) *Trademarks Act*; 52 *Competition Act*);
 - c. That the alleged false and misleading statement(s) resulted in damage to the Plaintiff causally linked to such statements (7(a) *Trademarks Act*; 52 *Competition Act*);
 - d. That the description ANTI-HATE is used by CAHN in association with services (7(d) *Trademarks Act*);
 - e. That the description ANTI-HATE is used in connection with intellectual property (7(d) *Trademarks Act*);

¹ Statement of Claim dated July 12, 2023 (“Statement of Claim”), Defendants’ Motion Record (“DMR”) Tab 2, p 5-21.

- f. That the description ANTI-HATE is false in a material respect (7(d) *Trademarks Act*);
 - g. That the description ANTI-HATE is likely to mislead the public as to the (i) character, quality, quantity or composition, (ii) the geographical origin, or (iii) the mode of the manufacture, production or performance of the CAHN's services (7(d) *Trademarks Act*);
 - h. That the alleged false description ANTI-HATE resulted in damage to the Plaintiff causally linked to such description (7(d) *Trademarks Act*);
 - i. That the impression of the relevant consumer would be that the impugned statements are false or misleading (7(a) *Trademarks Act*; 52 *Competition Act*);
 - j. That the Defendants were promoting a business interest in using the alleged false and misleading representations (52 *Competition Act*); and
 - k. That the Defendants knowingly or recklessly made a representation to the public that is false or misleading in a material respect (7(a) *Trademarks Act*; 52 *Competition Act*).
9. Rather than including the requisite material facts, the Statement of Claim consists of speculative assumptions, sweeping conclusions, bald allegations and arguments targeting the Defendants' credibility and reputation. For instance, the Statement of Claim includes the following assertions:

[...] In essence, CAHN was and is an antifascism-themed content marketing firm incentivized to prioritize content quantity over content quality. CAHN's business model does not anticipate ever exhausting the supply of alleged fascists to publish about. To CAHN, there must always be clickbait or the business fails.²

[...]

CAHN does not meet reasonable expectations of a so-called anti-racist organization. For example, despite espousing social justice ideals, CAHN is operated and governed by a white and male majority in both its management and its board of directors.³

² Statement of Claim, para 7, DMR, Tab 2, p 10.

³ Statement of Claim, para 8, DMR, Tab 2, p 10-11.

10. Likewise, paragraph 34 of the Statement of Claim absurdly lists the alleged business interests of the Defendants as:

- a. Discrediting a competing journalist;
- b. Attempting to establish CAHN as an exclusive source for anti-fascist journalism;
- c. Retaliation for failing to collaborate with CAHN so as to motivate other journalists covering right-leaning movements to participate with CAHN; and
- d. Mr. Yew's enhanced credibility as an anti-fascist journalist in taking down Ms. Sa'd, a credible and known progressive media personality.⁴

11. Moreover, the only alleged false/misleading statements included in the Statement of Claim originate from an opinion-based article concerning the Plaintiff's cancelled event, allegedly written and/or published by the Defendants (the "Article").⁵ Paragraph 24 of the Statement of Claim purportedly lifts certain allegedly false and misleading statements from the Article (the "Statements") and presents them alongside the Plaintiff's "missing context".⁶ One of the Statements, alleged to be false or misleading, is the following: *"Denying a platform to hatemongers is not divisive, controversial or contradictory to free expression. In fact, it bolsters expression."*⁷

12. Paragraph 25 of the Statement of Claim provides a baseless opinion that the Article's "framing" misleads its audience to conclude:

- a. That Ms. Sa'd supports fascism;
- b. That Ms. Sa'd is a racist;
- c. That Ms. Sa'd lied about the blockade's violence;
- d. That Ms. Sa'd jeopardized the Chinatown community's safety.⁸

13. Notably, the Statement of Claim does not assert that the Plaintiff's opinion-based statements included at paragraph 25 originate from the Defendants.

14. The Statement of Claim clearly articulates that the Plaintiff takes issue with *"the [alleged] misleading character of the [A]rticle"*.⁹ Other than articulating the Plaintiff's dissatisfaction

⁴ Statement of Claim, para 34, DMR, Tab 2, p 20.

⁵ Statement of Claim, para 24, DMR, Tab 2, p 15-18.

⁶ Statement of Claim, para 24, DMR, Tab 2, p 15-18.

⁷ Statement of Claim, para 24, DMR, Tab 2, p 15-18.

⁸ Statement of Claim, para 25, DMR, Tab 2, p 18.

with the character and framing of the Article, the Statement of Claim does not assert any material fact relating to how each of the Statements is perceived by the public and how each Statement caused damage to the Plaintiff.

15. Since June 2023, the Plaintiff has initiated at least three actions in the Federal Court against various parties including the Defendants, Canada Proud, and the Broadbent Institute.¹⁰

PART II - ISSUES

16. The issues on this motion are as follows:

- a. Whether leave should be granted to bring this motion in writing under Rule 369 of the *Federal Courts Rules*, SOR /98-106;
- b. Whether it is plain and obvious that the Statement of Claim discloses no reasonable cause of action pursuant to Rule 221(1)(a) of the *Federal Courts Rules*;
- c. Whether the Statement of Claim is scandalous, frivolous or vexatious pursuant to Rule 221(1)(c) of the *Federal Courts Rules*;
- d. Whether the Statement of Claim is otherwise and abuse of process of the Court.
- e. Whether leave to amend the Statement of Claim should be granted; and
- f. Whether the Plaintiff should be prohibited from re-filing the Statement of Claim against the Defendants.

PART III – SUBMISSIONS

Motion to Strike Can be Fairly Determined in Writing

17. A motion to strike can be fairly heard and determined by the Court in writing.¹¹ Rule 369 of the *Federal Courts Rules* imposes no express limits on the Court's broad discretion to dispose of a motion in writing.¹² The questions in dispute on this motion are straightforward

⁹ Statement of Claim, para 28, DMR, Tab 2, p 19.

¹⁰ Affidavit of Karhema Etienne, affirmed August 25, 2023 (“Etienne Affidavit”) Exs A, B, C and D, DMR, Tab 3-A, 3-B, 3-C and 3-D, p 22-35.

¹¹ *Karlsson v MNR* (1995), 97 FTR 75, 1995 CarswellNat 386 at para 11 (FCTD), Defendants’ Book of Authorities (“DBOA”), Tab 19.

¹² *Federal Courts Rules*, SOR/98-106, r 369, DBOA, Tab 2; *Alexion Pharmaceuticals Inc v Canada (AG)*, 2016 FC 998, 2016 CarswellNat 5531 at para 16, DBOA, Tab 6; *Benitez v Canada (Minister of Citizenship & Immigration)*, 2006 FCA 279, 2006 CarswellNat 2587 at para 12, DBOA, Tab 11.

and can be fairly disposed of more expeditiously in writing, without the delay and additional expense of an oral hearing.

Powers of the Court to Strike Pleadings

18. Pursuant to Rule 221(1) of the *Federal Courts Rules*, on motion, the Court may at any time order that a pleading be struck out with or without leave to amend on the ground that it:
- a. discloses no reasonable cause of action;
 - b. is scandalous, frivolous or vexatious; or
 - c. is otherwise an abuse of the process of the Court.¹³
19. Where the defects in a pleading cannot be remedied by an amendment, the pleading should be struck without leave to amend.¹⁴

The Statement of Claim Discloses No Cause of Action – R. 221(1)(a)

20. A pleading will be struck pursuant to Rule 221(1)(a) when it is plain and obvious that the claim discloses no reasonable cause of action¹⁵ and there is no reasonable prospect of success.¹⁶ The Statement of Claim must plead sufficient material facts.¹⁷ In assessing the presence of a reasonable cause of action, the Court assumes that the facts as pleaded are true.¹⁸ The rule mandating the presumption of truth does not require that allegations based on assumptions and speculations be taken as true because the very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.¹⁹
21. The Statement of Claim is riddled with speculative conclusions, the Plaintiff's baseless opinion of the business interests of the Defendants and the Plaintiff's fabricated conclusions on what the Statements communicate.²⁰ These assumptions and speculative conclusions

¹³ *Federal Courts Rules*, *supra* note 12, r 221(1), DBOA, Tab 2.

¹⁴ *Collins v R*, 2011 FCA 140, 2011 CarswellNat 1234 at para 26, DBOA, Tab 13.

¹⁵ *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42, 2011 CarswellBC 1968 at para 17 [*Knight*], DBOA, Tab 20.

¹⁶ *Knight*, *supra* note 15 at para 17, DBOA, Tab 20.

¹⁷ *Federal Courts Rules*, *supra* note 12, r 174, DBOA, Tab 2; *Mancuso v Canada (Minister of National Health and Welfare)*, 2015 FCA 227, CarswellNat 12205 at para 16 [*Mancuso*], DBOA, Tab 22.

¹⁸ *Inuit Tapirisat of Canada v. Canada (AG)*, [1980] 2 SCR 735, 1980 CarswellNat 633 at para 4, DBOA, Tab 18.

¹⁹ *Operation Dismantle Inc v R*, [1985] 1 SCR 441, 1985 CarswellNat 151 at para 27, DBOA, Tab 25.

²⁰ Statement of Claim, paras 7, 8, 24, 25, DMR, Tab 2, p 10-11, 15-18.

cannot be deemed to be true as they do not provide any material fact supportive of a cause of action. On its face, the true grievance characterized in the Statement of Claim is the overall “character” and “framing” of the Article, rather than any alleged false or misleading statement.²¹

22. To disclose a reasonable cause of action, a claim must:

- a. allege facts that are capable of giving rise to a cause of action;
- b. disclose the nature of the action is to be founded on those facts; and
- c. indicate the relief sought, which must be of a type that the action could produce, and the Court has jurisdiction to grant.²²

23. A pleading must plead material facts satisfying every element of the alleged causes of action.²³ In *Mancuso v Canada*, the Federal Court of Appeal explained that what constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered, and that the plaintiff has the obligation to plead with sufficient detail the constituent elements of each cause of action or legal ground raised.²⁴

24. The Statement of Claim does not disclose the requisite material facts to satisfy the elements of a cause of action under subsections 7(a) and 7(d) of the *Trademarks Act*, and sections 36 and 52 of the *Competition Act*.

No Material Facts to Support Claim under section 7(a) of the *Trademarks Act*

25. Subsection 7(a) of the *Trademarks Act* stipulates that no person shall “*make false or misleading statement tending to discredit the business, goods or services of a competitor.*”²⁵

26. The application of section 7(a) of the *Trademarks Act* must be limited to creating a cause of action relating to false and misleading statements made about a trademark or other

²¹ Statement of Claim, paras 25 and 28, DMR, Tab 2, p 18-19.

²² *Fox Restaurants Concepts LLC v 43 North Restaurant Group Inc*, 2022 FC 1149, 2022 CarswellNat 6625 at para 8 [Fox], DBOA, Tab 17, citing *Oleynik v Canada (AG)*, 2014 FC 896, 2014 CarswellNat 3715 at para 5, DBOA, Tab 24.

²³ *Fox*, supra note 22 at para 9, DBOA, Tab 17.

²⁴ *Mancuso*, supra note 17 at paras 17-18, DBOA, Tab 22.

²⁵ *Trademarks Act*, RSC 1985, c T-13, s 7(a), DBOA, Tab 4.

intellectual property owned by the Plaintiff.²⁶ There are no material facts pleaded that demonstrate that the Statements were made in association with some intellectual property owned by the Plaintiff. No amendment can cure this deficiency.

27. In any event, the requirements for the statutory cause of action created under subsection 7(a) of the *Trademarks Act* are:

- a. A false and misleading statement;
- b. Tending to discredit the business, goods or services of a competitor; and
- c. Resulting damage, causally linked to the alleged wrongful activity, i.e. the false or misleading statements.²⁷

28. The Statement of Claim pleads no material facts relating to how the Statements tended to discredit the business or goods or services of the Plaintiff.

29. Moreover, there is no material fact in the Statement of Claim that supports the notion that the Plaintiff is in any way a “competitor” of CAHN. This fact cannot be reasonably alleged. It is trite law that in order to give rise to a statutory cause of action under subsection 7(a) of the *Trademarks Act*, the statements in issue must be made to discredit the business, goods or services of a “competitor”. The Federal Court of Appeal in *Advantage Products Inc v Excalibre Oil Tools Ltd*, stated that “when it is apparent that there is no basis to find that the false or misleading statements were made on behalf of a **competitor**, motions to strike have been granted because the statement of claim did not disclose a reasonable cause of action [emphasis added].”²⁸

30. In the context of subsection 7(a) of the *Trademarks Act*, the term “competitor” or “competition” has been described as “a situation when two or more businesses seek customers in the same market-place.”²⁹ The Statement of Claim describes CAHN as “an

²⁶ *Canadian Copyright Licensing Agency v Business Depot Ltd*, 2008 FC 737, 2008 CarswellNat 1887 at para 27 [*Canadian Copyright*], DBOA, Tab 12.

²⁷ *Energizer Brands, LLC v Gillette Company*, 2023 FC 804, 2023 CarswellNat 2366 at para 169 [*Energizer*], DBOA, Tab 16; *Living Sky Water Solutions Corp v ICF Pty Ltd*, 2018 FC 876, 2018 CarswellNat 5654 at para 15 [*Living Sky*], DBOA, Tab 21.

²⁸ *Advantage Products Inc v Excalibre Oil Tools Ltd*, 2019 FCA 121, 2019 CarswellNat 14692 at para 3, DBOA, Tab 5, citing *Dufort Testing Services Ltd v Berube*, [2005] OJ No 5208, 2005 CarswellOnt 7042 (ONCA) at para 7, DBOA, Tab 14; and *Canadian Copyright*, *supra* note 26, DBOA, Tab 12.

²⁹ *Canadian Copyright*, *supra* note 26 at para 21, DBOA, Tab 12.

antifascists and antiracists advocacy group based in Toronto, Ontario, organized as a non-for-profit corporation pursuant to the laws of Canada,” while the Plaintiff is described as a practicing lawyer, and an independent journalist.³⁰ CAHN and the Plaintiff may both be advocates for particular causes, however that does not make them competitors i.e. a not-for-profit is not a journalist.

31. In *Canadian Copyright Licensing Agency v Business Depot Ltd*,³¹ the Federal Court upheld the decision to strike a counterclaim asserting subsection 7(a) of the *Trademarks Act* where the alleged false and misleading statements were made by a not-for-profit organization in a press release. The parties were clearly not competitors (office supply store vs not-for-profit) and the alleged false and misleading statements did not relate to any intellectual property owned by the Plaintiff by counterclaim.
32. The third prong on the test requires some proof of damage. Unlike subsection 7(b) of the *Trademarks Act*, damages under subsection 7(a) of the *Trademarks Act* cannot be presumed.³² The Statement of Claim pleads no material facts relating to damage that has occurred as a direct result of the Statements. The Plaintiff’s bald assertion at paragraph 33 of the Statement of Claim regarding alleged ensuing online sexism and racism purportedly resulted from the Defendants’ alleged conduct characterized at paragraph 31, and is not specific to any of the Statements.³³
33. The Statement of Claim therefore fails to allege the constituent elements of the statutory prohibition under subsection 7(a) of the *Trademarks Act*.

No Material Facts to Support Claim under section 7(d) of the *Trademarks Act*

34. Subsection 7(d) of the *Trademarks Act* provides that no person shall “*make use, in association with goods or services, of any description that is false in a material respect and likely to mislead the public as to the (i) character, quality, quantity or composition, (ii) the geographical origin, or (iii) the mode of the manufacture, production or performance [...] of the goods or service.*”³⁴

³⁰ Statement of Claim, paras 1 and 2, DMR, Tab 2, p 8-9.

³¹ *Canadian Copyright*, *supra* note 26, DBOA, Tab 12.

³² *Energizer*, *supra* note 27 at para 170, DBOA, Tab 16.

³³ Statement of Claim, paras 31 and 33, DMR, Tab 2, p 19-20.

³⁴ *Trademarks Act*, *supra* note 25, s 7(d), DBOA, Tab 4.

35. Subsection 7(d) of the *Trademarks Act* is intended to prohibit the misuse of a description by a person in association with offering *his or her* goods or services to the public.³⁵ There is a requirement of involvement or connection to intellectual property,³⁶ and a requirement to establish a causal link between the use of false and misleading statement and the alleged damage.³⁷ The Statement of Claim provides no material facts that the description ANTI-HATE is used in connection with intellectual property.
36. The sole basis of the Plaintiff's subsection 7(d) of the *Trademarks Act* allegation is CAHN's alleged "*use of any sign as a trademark that includes ANTI-HATE.*"³⁸ The bald assertion that CAHN's conduct "*in fact promoted hateful conduct against Ms. Sa'd*"³⁹ is not a fact, but rather an argumentative, sweeping conclusion that does not plainly and obviously support a cause of action under subsection 7(d) of the *Trademarks Act*. There are no other facts, material or otherwise, pleaded in respect of this provision.
37. Where a statement of claim consists of sweeping conclusions with no allegation of fact to support the conclusions, bald allegations, speculation and argument, the pleading will be struck for lacking a reasonable cause of action.⁴⁰
38. The Statement of Claim includes no material facts that the description ANTI-HATE is false in a material respect; that the description ANTI-HATE is likely to mislead the public as to the (i) character, quality, quantity or composition, (ii) the geographical origin, or (iii) the mode of the manufacture, production or performance of the CAHN's services; or that the alleged false description ANTI-HATE resulted in damage to the Plaintiff causally linked to such description.

³⁵ *Living Sky*, supra note 27 at para 27, DBOA, Tab 21, citing *Vapor Canada Ltd, v MacDonald*, [1977] 2 SCR 134, 1976 CarswellNat 428, DBOA, Tab 26.

³⁶ *Living Sky*, supra note 27 at paras 21-22, DBOA, Tab 21.

³⁷ *Vidéotron Ltée v Konek Technologies Inc*, 2023 FC 741, 2023 CarswellNat 1678 at para 122, DBOA, Tab 27; *EAB Tool Company Inc v Norske Tools Ltd*, 2017 FC 898, 2017 CarswellNat 6150 at para 76, DBOA, Tab 15.

³⁸ Statement of Claim, para 35, DMR, Tab 2, p 21.

³⁹ Statement of Claim, para 35, DMR, Tab 2, p 21.

⁴⁰ *Badawy v 1038482 Alberta Ltd*, 2018 FC 807, 2018 CarswellNat 4076 at paras 12-14, DBOA, Tab 9, affirmed in *Badawy v 1038482 Alberta [sic] Ltd*, 2019 FCA 150, 2019 CarswellNat 14697 at para 24 [*Badawy 2019*], DBOA, Tab 10, citing *Murray v Canada (Public Service Commission)* (1978), 21 NR 230, 1978 CarswellNat 149 (FCA) [*Murray*], DBOA, Tab 23.

39. As such, the constituent factual elements required to establish a cause of action under subsection 7(d) in relation to the ANTI-HATE description are not plainly made out in the Statement of Claim, warranting the claim to be struck out.

No Material Facts to Support Claim under sections 36 and 52 of the *Competition Act*

40. Subsection 52(1) of the *Competition Act* provides that “No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.”⁴¹

41. Subsection 52(1) combined with subsection 36(1)(a) of the *Competition Act* creates a statutory cause of action, albeit limited, to proven loss or damage, and costs.⁴²

42. The test under subsection 52(1) of the *Competition Act* is the same as the test under section 7(a) of the *Trademarks Act*, with the exception that subsection 52(1) requires that the representation be made with knowledge of or recklessness as to its falsity.⁴³

43. There are no material facts pleaded that establish that the Defendants were promoting a business interest in using the Statements. As stated above, the only allegations relating to an alleged business interest are nonsensical and wholly speculative, e.g., discrediting a competing journalist and “taking down” Ms. Sa’d.⁴⁴

44. Additionally, the Statement of Claim contains no material fact establishing that the Defendants made the Statements knowing them to be false or misleading or that the Statements were made recklessly. The Statements listed at paragraph 24 of the Statement of Claim are plainly opinion-based. Crucially, in paragraph 24, the Plaintiff does not deny the truth of the Statements but rather provides alleged “missing context”.⁴⁵

⁴¹ *Competition Act*, RSC 1985, c C-34, s 36(1)(a) and s 52(1), DBOA, Tab 1.

⁴² *Energizer*, *supra* note 27 at para 173, DBOA, Tab 16.

⁴³ *Alliance Laundry Systems LLC v Whirlpool Canada LP*, 2019 FC 724, 2019 CarswellNat 2052 at para 79, DBOA, Tab 7.

⁴⁴ Statement of Claim, para 34, DMR, Tab 2, p 20.

⁴⁵ Statement of Claim, para 24, DMR, Tab 2, p 15-18.

45. What is false and misleading is contextual and the general impression is to be assessed from the perspective of a consumer to whom the representation is targeted.⁴⁶ The Statement of Claim is equally devoid of any material fact that speaks to the general impression of a consumer in assessing the Statements.

46. As the Plaintiff has failed to plead the necessary material facts to support any cause of action under sections 36 and 52 of the *Competition Act*, this claim should be struck.

Declaratory Relief Requires Factual Foundation in Statement of Claim

47. In addition to damages and injunctions, the relief pleaded in the Statement of Claim includes a declaration affirming the Plaintiff's right to be free from all the Defendants' false and misleading remarks under subsection 7(a) of the *Trademarks Act* and section 52 of the *Competition Act*; and a declaration that CAHN uses false descriptions likely to mislead the public in its representations with the word mark ANTI-HATE, contrary to subsection 7(d) of the *Trademarks Act*.⁴⁷

48. A plaintiff's right to seek free-standing declarations does not translate into a licence to circumvent the rules of pleading. Declaratory relief cannot be decided in a vacuum and requires adequate factual grounding which must be set out in the Statement of Claim.⁴⁸

49. The Court cannot be satisfied that the requirement of a "real issue" for declaratory relief be satisfied absent facts being pleaded which indicate the real issue and its nexus to the plaintiff and its claim for relief.⁴⁹

50. For all the reasons previously canvassed relating to the lack of factual basis, the declaratory relief sought in the Statement of Claim ought to be struck in its entirety.

The Statement of Claim is Scandalous, Frivolous and Vexatious – R. 221(1)(c)

51. A pleading which fails to sufficiently reveal the facts on which a claim is based to make it possible for a defendant to answer it or for the court to regulate the proceedings is

⁴⁶ *Energizer*, *supra* note 27 at para 178, DBOA, Tab 16.

⁴⁷ Statement of Claim, para 1 (relief), DMR, Tab 2, p 7-8.

⁴⁸ *Mancuso*, *supra* note 17 at para 32, DBOA, Tab 22.

⁴⁹ *Mancuso*, *supra* note 17 at para 35, DBOA, Tab 22.

fundamentally ‘vexatious’ within the legal sense of that word.⁵⁰ For all the reasons outlined above with respect to the deficiency of material facts under Rule 221(1)(a), the Statement of Claim should be equally struck in its entirety on the basis that it is vexatious.

52. The Statement of Claim is primarily centered on excerpts from the Article. Respectfully, in the circumstances, the *Trademarks Act* and the *Competition Act* are not the proper vehicles to challenge such activity. The Plaintiff is quite clearly attempting to impede the Defendants fundamental freedom of expression and right to fair comment. After the Article was published on July 13, 2021, the Plaintiff chose not to sue for libel, over which the Federal Court has no jurisdiction, and regardless, the two-year limitation period has since expired.⁵¹

53. The action is an attempt to warm-up a stale libel claim, brought under the guise of the *Trademarks Act* and the *Competition Act*, and in doing so, the Plaintiff is wrongly attempting to reach an otherwise unreachable result before the Federal Court.

The Statement of Claim is an Abuse of Process – R. 221(1)(f)

54. An abuse of process arises from allegations without an evidentiary foundation.⁵² In *Mancuso v Canada*, Justice Rennie stated that “a defendant has the right to have the abusive claim struck before being subjected to an intrusive and costly discovery process.”⁵³ The Statement of Claim amounts to an abuse of process because it is devoid of any evidentiary foundation. The Defendants ought not be subjected to defending a baseless, vexatious proceeding.

55. Since June 2023, the Plaintiff has initiated at least two other actions in the Federal Court against other organizations including Canada Proud, and the Broadbent Institute.⁵⁴

56. Striking the Statement of Claim in its entirety will attenuate the Plaintiff’s abuse of the Court process.

⁵⁰ *Badawy 2019*, *supra* note 40 at para 24, DBOA, Tab 10, citing *Murray*, *supra* note 40 at para 13, DBOA, Tab 23.

⁵¹ *Limitations Act, 2002*, SO 2002, c 24, Sched B, s.4, DBOA Tab 3.

⁵² *Astrazeneca Canada Inc v Novopharm Ltd*, 2010 FCA 112, 2010 CarswellNat 1099 at para 5, DBOA, Tab 8.

⁵³ *Mancuso*, *supra* note 17 at para 43, DBOA, Tab 22.

⁵⁴ Etienne Affidavit, Exs A, B, C and D, DMR, Tab 3-A, 3-B, 3-C and 3-D, p 22-35.

Conclusion

57. The Statement of Claim lacks the requisite material facts to support any reasonable cause of action, is scandalous, frivolous and vexatious, and is otherwise an abuse of the Court's process. It has zero prospect for success and should be struck in its entirety. Further, the deficiencies in the pleading cannot be remedied by amendment. The Plaintiff should be prohibited from amending the Statement of Claim and given the frivolous nature of the allegations contained in the Statement of Claim, the Plaintiff should also be prohibited from re-filing it against the Defendants.

PART IV – ORDER SOUGHT

58. The Defendants request that this Court:

- a. Grant leave to bring this motion in writing under Rule 369;
- b. Issue an Order striking Statement of Claim dated July 12, 2023, in its entirety, without leave to amend, pursuant to Rule 221(1)(a), (c) and (f) of the *Federal Courts Rules*;
- c. Issue an Order prohibiting the Plaintiff from re-filing the Statement of Claim against the Defendants, or in the alternative, requiring that the Plaintiff comply with any and all cost orders made in respect of this action before re-filing the Statement of Claim against the Defendants;
- d. In the alternative, issue an Order extending the period of time within which the Defendants must file their Statement of Defence and Counterclaim, if any, to thirty (30) days from the disposition of this motion;
- e. Costs of this motion awarded at the highest allowable basis; and
- f. Such further and other relief as this Honourable Court deems just.

All of which is respectfully submitted at Ottawa, Ontario, this 28th day of August, 2023.



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PART V – LIST OF AUTHORITIES

Legislation

Competition Act, RSC 1985, c C-34.

Federal Courts Rules, SOR/98-106.

Limitations Act, 2002, SO 2002, c 24, Sched B, s.4.

Trademarks Act, RSC 1985, c T-13.

Case law

Advantage Products Inc v Excalibre Oil Tools Ltd, 2019 FCA 121, 2019 CarswellNat 14692.

Alexion Pharmaceuticals Inc v Canada (AG), 2016 FC 998, 2016 CarswellNat 5531.

Alliance Laundry Systems LLC v Whirlpool Canada LP, 2019 FC 724, 2019 CarswellNat 2052.

Astrazeneca Canada Inc v Novopharm Ltd, 2010 FCA 112, 2010 CarswellNat 1099.

Badawy v 1038482 Alberta Ltd, 2018 FC 807, 2018 CarswellNat 4076.

Badawy v 1038482 Alaberta [sic] Ltd, 2019 FCA 150, 2019 CarswellNat 14697.

Benitez v Canada (Minister of Citizenship & Immigration), 2006 FCA 279, 2006 CarswellNat 2587.

Canadian Copyright Licensing Agency v Business Depot Ltd, 2008 FC 737, 2008 CarswellNat 1887.

Collins v R, 2011 FCA 140, 2011 CarswellNat 1234.

Dufort Testing Services Ltd v Berube, [2005] OJ No 5208, 2005 CarswellOnt 7042 (ONCA).

EAB Tool Company Inc v Norske Tools Ltd, 2017 FC 898, 2017 CarswellNat 6150.

Energizer Brands, LLC v Gillette Company, 2023 FC 804, 2023 CarswellNat 2366.

Fox Restaurants Concepts LLC v 43 North Restaurant Group Inc, 2022 FC 1149, 2022 CarswellNat 6625.

Inuit Tapirisat of Canada v Canada (AG), [1980] 2 SCR 735, 1980 CarswellNat 633.

Karlsson v MNR (1995), 97 FTR 75, 1995 CarswellNat 386 (FCTD).

Knight v Imperial Tobacco Canada Ltd, 2011 SCC 42, 2011 CarswellBC 1968.

Living Sky Water Solutions Corp v ICF Pty Ltd, 2018 FC 876, 2018 CarswellNat 5654.

Mancuso v Canada (Minister of National Health and Welfare), 2015 FCA 227, 2015 CarswellNat 12205.

Murray v Canada (Public Service Commission) (1978), 21 NR 230, 1978 CarswellNat 149 (FCA).

Oleynik v Canada (AG), 2014 FC 896, 2014 CarswellNat 3715.

Operation Dismantle Inc v R, [1985] 1 SCR 441, 1985 CarswellNat 151.

Vapor Canada Ltd, v MacDonald, [1977] 2 SCR 134, 1976 CarswellNat 428.

Vidéotron Ltée v Konek Technologies Inc, 2023 FC 741, 2023 CarswellNat 1678.