

e-document	T-1452-23-ID 10	
F I L E D	FEDERAL COURT COUR FÉDÉRALE  September 06, 2023 06 septembre 2023	D É P O S É
Nicole Hradsky		
TOR	9	

Court file no. T-1452-23

**FEDERAL COURT**

BETWEEN:

CARYMA SA'D

Plaintiff/Respondent

- and -

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

Defendants/Moving parties

**MOTION RECORD OF THE PLAINTIFF/RESPONDENT**  
(DEFENDANTS' MOTION TO STRIKE OUT STATEMENT OF CLAIM)

September 6, 2023

**FREDERICK WU**  
**PROFESSIONAL CORPORATION**  
1 King St W, Suite 4800, Box 229  
Toronto, ON M5H 1A1

**Fred Wu** (LSO# 73101W)  
416-639-7639  
fred@wulaw.ca

Solicitor for the plaintiff/respondent

TO: **COURTS ADMINISTRATION SERVICE**  
Federal Court of Canada  
200-180 Queen St W  
Toronto, Ontario  
M5V 3L6

AND TO: **MBM INTELLECTUAL PROPERTY LAW LLP**  
1400-275 Slater St  
Ottawa, Ontario  
K1P 5H9

**Scott Miller** <smiller@mbm.com>  
**Deborah Meltzer** <dmeltzer@mbm.com>

613-557-0762

Solicitors for the defendants/moving parties

Court file no. T-1452-23

**FEDERAL COURT**

BETWEEN:

CARYMA SA'D

Plaintiff/Respondent

- and -

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

Defendants/Moving parties

**WRITTEN REPRESENTATIONS OF THE PLAINTIFF/RESPONDENT  
(DEFENDANTS' MOTION TO STRIKE OUT STATEMENT OF CLAIM)**

**OVERVIEW**

1. The defendants bring this motion to strike out the plaintiff's statement of claim issued July 12, 2023 (the "**Statement of Claim**"). This motion should be dismissed for three key reasons. First, the moving parties' demands exceed the established standard of pleading sufficiency. R 175 provides that pleading law is permissive, not mandatory. Second, the alleged insufficiency depends on allegedly bald speculation or absurdity. An Ontario court has already found against a defendant related and supporting facts, despite the ostensible improbability of those facts. The facts alleged are capable of proof. Third, the remainder of this motion's subject-matter should be dismissed for want of jurisdiction under R 298, as all but expressly excepted motions should be brought by way of pre-trial conference in this simplified action.
2. This Court should also consider the procedural context. While the moving parties contend discovery is unduly onerous for the Statement

of Claim in issue, the plaintiff commenced this proceeding by way of simplified action. The moving parties need only elect to agree to simplified action under R 292(c) in order to avoid onerous discovery. Further, and in any event, the moving parties' concerns were more properly addressed by a demand for particulars, yet they never attempted same.

3. This motion should be dismissed. Any purported defects are curable by way of particulars. In the alternative, this Court should grant leave to amend the Statement of Claim, as any purported defects are discrete and remediable. In any event, the moving parties should bear the plaintiff's costs in this motion.

#### **PART I – FACTS**

4. The moving parties contend that every material fact pleaded in every element of every cause of action alleged is “speculative” or “bald”,<sup>1</sup> among other descriptors.

#### **PART II – ISSUES**

5. The plaintiff joins with the moving parties' submission as to the issues:
  - a. Whether leave should be granted to bring this motion in writing under R 396;
  - b. Whether it is plain and obvious that the Statement of Claim discloses no reasonable cause of action pursuant to R 221(1)(a);
  - c. Whether the Statement of Claim is scandalous, frivolous, or vexatious pursuant to R 221(1)(c);

---

<sup>1</sup> Defendants' Motion Record (“DMR”), Tab 4, Defendants' Written Representations at paras 7, 8.

- d. Whether the Statement of Claim is otherwise an abuse of process under R 221(1)(f);
  - e. Whether leave to amend the Statement of Claim should be granted;
  - f. Whether the plaintiff should be prohibited from re-filing the Statement of Claim as against the defendants.
6. The plaintiff does not oppose a 30-day extension from the disposition of this motion for the defendants to plead over the Statement of Claim.

### **PART III – SUBMISSIONS**

7. The moving parties misconstrue the Statement of Claim in a wilfully blind manner, inconsistent with established standards of sufficiency for pleading under the *Federal Courts Rules*. To the defendants, this motion is a low-risk, high-reward venture. To the plaintiff, this motion is an abuse of process calculated to drive up legal costs.
8. **The plaintiff does not oppose hearing under R 369.** The plaintiff does not oppose the moving parties regarding the written hearing of this motion.
9. **The Statement of Claim discloses a reasonable cause of action so should not be struck out under R 221(1)(a).** The plaintiff does not dispute whether material facts should be pleaded under R 174. However, the core of the moving parties' grounds under R 221(1)(a) is that the Statement of Claim fails to plead legal conclusions. Yet, pursuant to R 175, pleading law is not mandatory.<sup>2</sup> The moving parties' argument cherry-picks from the Statement of Claim so as to exclude pleaded facts from every legal element, and so as to effectively require

---

<sup>2</sup> *Federal Courts Rules*, SOR/98-106, R 175 {Plaintiff's Book of Authorities ("PBOA"), Tab 1}.

the plaintiff to plead evidence. Respectfully, the moving parties' submissions cannot be taken at face value.

10. Per the moving parties' own authority, the Federal Court of Appeal held "[t]here is no bright line between material facts and bald allegations [... ]t is the responsibility of a motions judge, looking at the pleadings as a *whole*, to ensure the pleadings define the issue with sufficient precision to make the pre-trial and trial proceeding both manageable and fair."<sup>3</sup>
11. The Federal Court of Appeal also considered and clarified obligations to plead legal conclusions in *Harmony Consulting Ltd v GA Foss Transport Ltd*.<sup>4</sup> "Although the purpose of pleadings (and this includes particulars) is to narrow the scope of issues to be decided at trial so that the opposite party can prepare for trial, pleadings are also intended to deal only with the material facts upon which the parties rely to establish their legal positions. [... A]llegations as to the law [...] never bind the Court on such issues."<sup>5</sup> In that case, while copyright ownership was never expressly pleaded to, the parties understood from the remainder of the pleading that copyright ownership was in issue.<sup>6</sup> Here, the Statement of Claim does not expressly link every material fact to a legal element, but such pleading is optional<sup>7</sup> and is without prejudice in any event.
12. The Federal Court of Appeal went on to affirm the standard of sufficiency in pleading material facts in *Brantford Chemicals Inc v Merck & Co*.<sup>8</sup> "[I]f a pleading contains enough information to allow the opposing

---

<sup>3</sup> Defendants' Book of Authorities ("**DBOA**"), Tab 22, *Mancuso v Canada*, 2015 FCA 227 at para 18 [emphasis added].

<sup>4</sup> 2012 FCA 226 [*Harmony Consulting*] {PBOA, Tab 3}.

<sup>5</sup> *Harmony Consulting*, 2012 FCA 226 at para 41, citing *Federal Courts Rules*, R 175 {PBOA, Tab 3}.

<sup>6</sup> *Harmony Consulting*, 2012 FCA 226 at para 42 {PBOA, Tab 3}.

<sup>7</sup> *Federal Courts Rules*, R 175 {PBOA, Tab 1}.

<sup>8</sup> 2004 FCA 223 [*Brantford Chemicals*] {PBOA, tab 4}.

party to know with some certainty the case to be met, the pleading should not be struck.”<sup>9</sup>

13. This Court is bound by the overarching appellate concern—fair notice. Here, the Statement of Claim already gives the moving parties that fair notice. To the extent the Statement of Claim asserts legal conclusions, and the defendants seek clarity on which facts are alleged to correspond with which legal element, the defendants’ proper route is to seek particulars, not a motion to strike out the Statement of Claim.<sup>10</sup>

14. With reference to the moving parties’ litany of purported legal deficiencies,<sup>11</sup> the following makes clear the existing Statement of Claim meets fair notice purposes of pleading, without limitation and subject to any subsequent particulars:

<b>Defects alleged in moving parties’ written representations at para 8</b>	<b>Sufficiency of Statement of Claim</b>
(a.) False or misleading statement tending to discredit the plaintiff	See paragraphs 24, 26-29, 31 for allegations surrounding the defendants’ discrediting statements. Even if such statements are not false, they may be misleading. The plaintiff need not expressly plead the word “misleading” for the Court to hold such statement to be same. In any event, the plaintiff pleads the word “misleads” at paragraph 25.

<sup>9</sup> *Brantford Chemicals*, 2004 FCA 223 at para 2 {PBOA, Tab 4}.

<sup>10</sup> See e.g. *Norac Systems International Inc v Massload Technologies Inc*, 1996 CarswellNat 1206 at para 18 (FCTD, per Nadon J as he then was) {PBOA, Tab 5}.

<sup>11</sup> DMR, Tab 4, Defendants’ Written Representations at para 8.

<p>(b.) Plaintiff is a competitor</p>	<p>See paragraph 5. See generally allegations regarding to social media (e.g. Twitter) conduct a shared audience; the audience is the customer to journalistic entities. See also paragraphs 11-15 where the plaintiff alleges the defendants approached the plaintiff to collaborate on similar or like-minded projects; the moving parties and the plaintiff operate in the same industry.</p> <p>Regardless, “competitor” should not be so narrowly construed as to exclude potential market entrants in the defendants’ commercial or non-profit sector.</p>
<p>(c.) Causing damages</p>	<p>Factual causation is not an element of the cause of action, only legal causation: “Neither actual deception nor actual resulting damage need be proved. It is sufficient that the defendant’s practice was likely to mislead the public and involved an appreciable risk of detriment to the plaintiff, whether in diversion of sales or impairment of his credit or commercial repute.”<sup>12</sup></p>
<p>(d.) defendant’s use of ANTI-HATE use in association with services  (e.) ANTI-HATE is used in connection with intellectual property</p>	<p>While not expressly pleaded, this fact is heavily implied at paragraphs 1 and 35. The existing pleading is sufficient to plead over or to demand narrow particulars. Alternatively, this is a discrete defect suitable for cure by amendment: that ANTI-HATE forms part of the defendant’s unregistered word mark used as a trademark in</p>

<sup>12</sup> 599960 *Ontario Inc v Taylor Steel Inc*, 2000 CarswellOnt 432 at para 20 (Ont Sup Ct J), aff’d 2001 CarswellOnt 4102 (Ont CA) {PBOA, Tab 2}. See also *Federal Courts Rules*, R 64 (making available declaratory relief “whether or not any consequential relief is or can be claimed”) {PBOA, Tab 1}.



	<p>the meaning of the <i>Trademarks Act</i>. See also the pleaded web address at paragraph 2, another such word mark used as a trademark. This would all be, however, pleading as to legal conclusions.</p>
(f.) ANTI-HATE is false	<p>At paragraphs 32, 33, and 35, the plaintiff alleges the defendant Canadian Anti-Hate Network in fact promotes hate, making its unregistered ANTI-HATE word mark element a false representation.</p>
<p>(g.) ANTI-HATE is likely to mislead</p> <p>(h.) ANTI-HATE use caused damage to the plaintiff</p> <p>(i.) impression of the relevant consumer of ANTI-HATE is false or misleading</p>	<p>These are not questions of fact, but questions of law: “Neither actual deception nor actual resulting damage need be proved. It is sufficient that the defendant's practice was likely to mislead the public and involved an appreciable risk of detriment to the plaintiff, whether in diversion of sales or impairment of his credit or commercial repute.”<sup>13</sup></p> <p>If ANTI-HATE is used in association with pro-hate services, that misleads the public as to the character, quality, or mode of performance of the services. Again, the plaintiff is not required to plead this legal conclusion pursuant to R 175. The defendant does not require same to be pleaded expressly or, alternatively, could seek same by way of particulars demand. In any event, if struck, the defect is discrete and remediable by amendment.</p>

<sup>13</sup> 599960 *Ontario Inc v Taylor Steel Inc*, 2000 CarswellOnt 432 at para 20 (Ont Sup Ct J), aff'd 2001 CarswellOnt 4102 (Ont CA) {PBOA, Tab 2}. See also *Federal Courts Rules*, R 64 (making available declaratory relief “whether or not any consequential relief is or can be claimed”) {PBOA, Tab 1}.

(j.) defendants were promoting business interest	See paragraphs 6, 7 alleging the link between the defendants' public discrediting statements and a business interest in respect of monies flowing from the Canadian Heritage Grant. See also paragraph 34.
(k.) defendants' knowledge or recklessness	See paragraph 28 for allegations going to the defendants' knowledge or recklessness. By revising away from the first version of the article in issue, while refusing to publish the scope of the retraction or revision, the defendants' show knowledge or recklessness in a false or misleading representation.

15. Many more facts are available, but the plaintiff has not had any opportunity to respond by way of particulars. All purported gaps could have been addressed by way of particulars.

16. To whatever extent the moving parties contend the allegations against the defendants are “nonsensical”, such nonsense arises from the defendants' conduct—not the pleading *per se*. That nonsense is the reason why this action must be tried. As the Supreme Court of Canada articulated, “Actions that yesterday were deemed hopeless may tomorrow succeed. [...] Therefore, on a motion to strike, it is not determinative that the law has not yet recognized a particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. *The approach must be general and err on the side of permitting a novel but arguable claim to proceed to trial.*”<sup>14</sup>

---

<sup>14</sup> DBOA, Tab 20, *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 21 [emphasis added].

17. While the moving parties contend the allegations in the Statement of Claim are incapable of proof, the Ontario Superior Court of Justice has already made supporting findings of fact regarding the defendant Canadian Anti-Hate Network.<sup>15</sup>

- a. That Canadian Anti-Hate Network has obtained financial support;<sup>16</sup>
- b. That Canadian Anti-Hate Network assisted a violent political movement;<sup>17</sup>
- c. That Canadian Anti-Hate Network used its financial support to influence a violent political movement;<sup>18</sup> and
- d. That violent political movement was “Antifa”,<sup>19</sup> so named for its anti-fascist motivations.<sup>20</sup>

18. Canadian Anti-Hate Network is an organization that accepts money and assists a violent political movement against purported fascists. This is not speculative; this is already law. While this Court may well read the plaintiff’s allegations as far-fetched, just as the above is facially far-fetched, another court has already determined that supporting allegations were capable of proof and, indeed, proven.

19. **The Statement of Claim should not be struck out for purported scandalous, frivolous, or vexatious allegations under R 221(1)(c).** The mere fact that the allegations may have been actionable for defamation does not preclude actionability under the *Trademarks Act* or *Competition Act*, especially where the parties have business interests or commercial purposes in the same field serving the same customers.

---

<sup>15</sup> *Warman v Kay* (2022), Court File No SC-20-156136 (Ont Sup Ct J, Sm Cl Ct) {PBOA, Tab 6}.

<sup>16</sup> *Warman v Kay* at para 20 {PBOA, Tab 6}.

<sup>17</sup> *Warman v Kay* at paras 93, 97 {PBOA, Tab 6}.

<sup>18</sup> *Warman v Kay* at paras 20, 94 {PBOA, Tab 6}.

<sup>19</sup> *Warman v Kay* at para 97 {PBOA, Tab 6}.

<sup>20</sup> “Antifa”, Merriam-Webster Dictionary (2023) {PBOA, Tab 7}.

20. In any event, as this proceeding was brought by way of simplified action, this Court has no jurisdiction to strike out the Statement of Claim on this ground, pursuant to R 298(1),<sup>21</sup> especially not without seeking removal of this proceeding from the operation of simplified action procedure under R 298(3)(a).<sup>22</sup>

21. **The Statement of Claim should not be struck out as a purported abuse of process under R 221(1)(f).** While the moving parties cite Justice Rennie in *Mancuso v Canada* in his opining against abuse of process in the face of “an intrusive and costly discovery process”,<sup>23</sup> that case is distinguishable from the present motion. Here, the plaintiff commenced this proceeding by way of simplified action, which entails only 50 written questions for discovery.<sup>24</sup> The moving parties need only elect to agree to simplified action under R 292(c) in order to avoid intrusive and costly discovery.<sup>25</sup>

22. The plaintiff's other actions are wholly immaterial to this motion.

23. Again, and in any event, as this proceeding was brought by way of simplified action, this Court has no jurisdiction to strike out the Statement of Claim on this ground either, pursuant to R 298(1),<sup>26</sup> and not without seeking removal of this proceeding from the operation of simplified action procedure under R 298(3)(a).<sup>27</sup>

#### **PART IV – ORDER SOUGHT**

24. The plaintiff respectfully requests from this Court an Order:

---

<sup>21</sup> *Federal Courts Rules*, R 298(1) {PBOA, Tab 1}. See also *Federal Courts Rules*, R 298(2) {PBOA, Tab 1}.

<sup>22</sup> *Federal Courts Rules*, R 298(3)(a) {PBOA, Tab 1}.

<sup>23</sup> DMR, Tab 4, Defendants' Written Representations at para 54.

<sup>24</sup> *Federal Courts Rules*, R 296 {PBOA, Tab 1}.

<sup>25</sup> *Federal Courts Rules*, R 292(c) {PBOA, Tab 1}.

<sup>26</sup> *Federal Courts Rules*, R 298(1) {PBOA, Tab 1}. See also *Federal Courts Rules*, R 298(2) {PBOA, Tab 1}.

<sup>27</sup> *Federal Courts Rules*, R 298(3)(a) {PBOA, Tab 1}.

- a. Dismissing this motion;
- b. Awarding the plaintiff costs of this motion; and
- c. Such further and other relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED AT TORONTO, ONTARIO,  
THIS 6<sup>TH</sup> DAY OF SEPTEMBER, 2023.

September 6, 2023



---

**FREDERICK WU**  
**PROFESSIONAL CORPORATION**  
1 King St W, Suite 4800, Box 229  
Toronto, ON M5H 1A1

**Fred Wu** (LSO# 73101W)  
416-639-7639  
fred@wulaw.ca

Solicitor for the plaintiff

TO: **COURTS ADMINISTRATION SERVICE**

Federal Court of Canada  
200-180 Queen St W  
Toronto, Ontario  
M5V 3L6

AND TO: **MBM INTELLECTUAL PROPERTY LAW LLP**

1400-275 Slater St  
Ottawa, Ontario  
K1P 5H9

**Scott Miller** <smiller@mbm.com>  
**Deborah Meltzer** <dmeltzer@mbm.com>

613-557-0762

Solicitors for the defendants/moving parties

## PART V – LIST OF AUTHORITIES

### LEGISLATION

*Federal Courts Rules*, SOR/98-106

### JURISPRUDENCE

*599960 Ontario Inc v Taylor Steel Inc*, 2000 CarswellOnt 432 (Ont Sup Ct J),  
aff'd 16 CPR (4th) 576 (Ont CA)

*Harmony Consulting Ltd v GA Foss Transport Ltd*, 2012 FCA 226

*Merck And Co v Brantford Chemicals Inc*, 2004 FCA 223

*Norac Systems International Inc v Massload Technologies Inc*, 1996  
CarswellNat 1206 (FCTD)

*Warman v Kay* (2022), Court File No SC-20-156136 (Ont Sup Ct J, Sm CI Ct)

### SECONDARY SOURCES

“Antifa”, Merriam-Webster Dictionary (2023) as accessed from  
<<https://www.merriam-webster.com/dictionary/antifa>> on September 6, 2023