

Federal Court



Cour fédérale

Date: 20210127

Docket: T-977-20

Toronto, Ontario, January 27, 2021

PRESENT: Case Management Judge Angela Furlanetto

BETWEEN:

GRAHAM SCHREIBER

Plaintiff

and

**JEFFREY LEVEE, ERIC ENSON, JENNIFER L. SWIZE,
JEREMY ENGLE, HOWARD RUBIN, PAUL MCGRADY,
AMANDA KATZENSTEIN, KRISTINA ROSETTE, J. SCOTT EVANS,
STEPHEN COATES, LORI SCHULMANN, DAVID TAYLOR,
BYRON HOLLAND, KEITH DRAZEK, RUBENS KUHL,
EMILY TAYLOR, VIKRAM KUMAR, BENNY SAMUELSEN,
JAMES BLADEL, GARTH BRUEN, MARK CARVELL,
HEATHER DRYDEN, JEFF IFRAH, ADR FORUM,
FRANCIS GURRY, TWITTER,
THE UNITED KINGDOM INTELLECTUAL PROPERTY OFFICE,
JOE SIMS, WALTER KELLY, BRIAN WINTERFELDT,
ABIGAIL RUBINSTEIN, GRIFFIN BARNETT,
MARC TRACHTENBERG, IAN BALLON, GREG SHATAN,
KATHY KLEIMAN, DOUG ISENBERG, MARY WONG,
LESLEY COWLEY, RICHARD PLATER, NICK W SMITH,
VOLKER GREIMANN, PETERDENGATE THRUSH,
SHANE TEWS, JONATHON NEVETT, KEITH DRAZEK,
JUSTYNA (BECKY) BURR, LAUREEN KAPIN,
HEATHER FORREST, TIMOTHY HYLAND,
WORLD INTELLECTUAL PROPERTY ORGANIZATION,
GOOGLE, LINKEDIN – LINKEDIN CANADA,
LOUIS TOUTON, TARA ZURAWSKI, SARAH DEUTSCH,
ROBERT SMITH, KIRAN MALANCHARUVIL,
DAVID BARGER, WENDY MANTELL, PHIL CORWIN,
PAUL MCGRADY, BRETT FAUSETT, JOHN BERRYHILL,**

**NICK PHILIPS, NICK WOOD, MICHELE NEYLON,
SALLY COSTERTON, JORDAN CARTER,
PETER LARSEN, JEFF NEUMAN, MILTON MUELLER,
SUZANNE RADELL, ROBERT (BOBBY) FLAIM,
DANIEL (DANNY) MARTI, DAVID DEITCH,
FACEBOOK**

Defendants

ORDER

UPON motions by the defendants: 1) James Bladel; 2) Jeff Ifrah, Keith Drazek, Timothy Hyland, Phil Corwin and David Deitch (“American Defendants”); 3) Marc Trachtenberg, David Barger, Amanda Katzenstein, Paul McGrady and Ian Ballon (“Greenberg Defendants”); and 4) Facebook Canada Ltd. (“Facebook”) [collectively the Moving Party Defendants”] for an order to strike the statement of claim, without leave to amend; with each of the four groups of defendants requesting costs;

AND UPON reading the motion records filed by the Moving Party Defendants and the responding materials filed by the Plaintiff;

AND UPON hearing the submissions of the Moving Party Defendants and the Plaintiff at the hearing convened on December 10, 2020;

This action was commenced on August 24, 2020 and names some 75 defendants, including individuals, at least one former U.S. Judge, private corporations such as Facebook, Twitter, Google and LinkedIn, organizations such as the World Intellectual Property Organization and government bodies such as the United Kingdom Intellectual Property Office.

The statement of claim takes issue with the global administration of domain names and the operation and functioning of the Internet Corporation for Assigned Names and Numbers (“ICANN”). The Plaintiff indicates his displeasure with a U.S. proceeding dealing with a domain name in which he was involved, that was dismissed by the U.S. Court in Alexandria, Virginia in 2012; although the scope of that proceeding is unclear from the statement of claim. In this claim, the Plaintiff seeks declaratory relief that, amongst other things, he “and other victims”

- i) ...have been harmed, in [various degrees] by the “Kingpins” listed for: Conspiracy to, Aiding, Abetting, Harboring & Flanking a .COM Domain Name & Sub-Domain Name Extortion / Racket, wherein Domain Names have been [passing off] as National ccTLDs and under the World. Wide. Web’s .COM meant to carry and communicate a business Trademark TM to a global consumer audience – Online
- ii) Was denied Federal & State protection under the U.S. Lanham Act ACPA, for my Common Law Rights, applicable to Landcruise.COM which equals a TM right and also my right to U.S. Federal protection, having had a USPTO® along with a CIPO®.

The Plaintiff asks for:

- A) The ownership assignment to me, by the Court, of all .COM Domain Names owned by CentralNic, or their “arms length” owners entities and those domain names recently sold, when they divested themselves of the Infringing, Diluting, Blurring, Misleading & Confusingly similar, quasi-cc.COMs sold in their divestment
- B) \$5,000,000.00 USD [from each conspiring Defendant] which is the applicable relief stated, in: 18 U.S. Code §2320. Trafficking in counterfeit goods or services.

This order relates to the four motions brought by the Moving Party Defendants. As the grounds for relief were overlapping, the four motions were heard together at a special sitting of the Court conducted by videoconference on December 10, 2020.

While the submissions for the motions raise various grounds upon which the statement of claim should be struck, the following four grounds were the primary focus of the oral argument at the hearing of the motions:

- (a) the Federal Court does not have jurisdiction over the claim;
- (b) the Plaintiff does not have standing;
- (c) the claim raises no reasonable cause of action (Rule 221(1)(a); and
- (d) the claim is scandalous, frivolous and/or vexatious (Rule 221(1)(c).

For the reasons set out herein, I find that the statement of claim should be struck on all four grounds noted above and should be struck as against all defendants named in the claim, with costs awarded to the Moving Party Defendants.

I note that the Greenberg Defendants also raised issues relating to the service of the statement of claim. I do not consider it necessary to go into this ground, or any additional grounds raised in the parties' written materials or at the motion, based on the conclusions reached on the four issues above.

Jurisdiction

To strike a statement of claim at a preliminary stage for want of jurisdiction, it must be plain and obvious that the Federal Court does not have jurisdiction over the claim: *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54 at para 54 (“*Windsor (City)*”); *Alberta v. Canada*, 2018 FCA 83 at para 20.

The jurisdiction of the Federal Court is conferred by statute. Under the three-prong test set out in *ITO – International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, at p. 766 (“*ITO*”), the Federal Court has jurisdiction when: (1) a statute grants jurisdiction to the Federal Court; (2) federal law nourishes the grant of jurisdiction and is essential to the disposition of the case; and (3) that federal law is constitutionally valid.

As stated in *Windsor (City) supra* at paras 25-26, before assessing whether the three-part test in *ITO* is met, the essential nature or character of the claim must be determined on a “realistic appreciation of the practical result sought by the claimant”. “Jurisdiction is not to be assessed in a piecemeal or issue-by-issue fashion.” The statement of claim should not be read blindly at its face meaning. Rather, the Court must “look beyond the words used, the facts alleged and the remedy sought and ensure...that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court”.

In this case, the claim asserts conspiracy, extortion, racketeering, trafficking and passing off by what is described as a “cartel of kingpins” from “Governments, influential people as lobbyists in the U.S.A. at the District of Columbia, Virginia, in Canada, the UK and Globally” and within ICANN. The Plaintiff alleges that “Kingpins” who are and were lawyers and law

firms representing ICANN, along with accredited registries have “committed, aided, abetted, harboured and flanked perjury” that allowed the “racket to continue” and that social media corporations, such as Facebook and Twitter have “conspired to trafficking my Common Law.COM and my lapsed USPTO Federally Registered Mark/Trademark”. The Plaintiff refers to being denied Federal and State protection under the “U.S. Lanham Act ACPA” for common law rights in association with Landcruise.com and refers to being denied “U.S. Federal protection” despite having registered trademark rights in the U.S. and Canada. However, the allegations are made broadly and the Plaintiff does not seek relief in respect of any specific domain names and trademarks. Instead, he seeks relief broadly, taking issue with the handling of domain names within ICANN and requesting the assignment of ownership of all .com domain names, along with seeking damages for racketeering, trafficking and extortion, citing U.S. law.

The Plaintiff cites 18 U.S. Code § 2320 in association with the allegations of racketeering and trafficking; 15 U.S. Code § 1125 and “Canadian Law” in association with the allegation of passing off; 18 U.S. Code § 1621, s. 131(1) of the Canadian *Criminal Code* and “United Kingdom: Perjury Act 1911” in association with the allegations of perjury; and cites the *U.S. Racketeer Influenced and Corrupt Organizations Act* (“RICO Act”). The only provision of a Canadian statute referenced is s. 131(1), which is understood to be referring to the *Criminal Code*.

The essential nature of the Plaintiff’s claim is based on alleged breaches of U.S. law and relate to individuals that are not resident in Canada and organizations that are not based in Canada. The Plaintiff has not referred to any acts conducted by any defendant in Canada.

While the Plaintiff asserts passing off and perjury and loosely makes reference to “Canadian law”, the Plaintiff does not plead any facts that support an allegation of passing off or of perjury. Further, the Plaintiff does not have standing to prosecute a criminal proceeding and the Federal Court does not have inherent jurisdiction over a claim for perjury under s.131 of the *Criminal Code*.

The claim appears to be based primarily on allegations of conspiracy and racketeering. However, the common law tort of conspiracy is not the subject of any federal statutory framework and does not fall within the legislative jurisdiction of federal Parliament: *Kealey v. R.*, 2003 FCT 754 at para 7. The Plaintiff acknowledges that the relief associated with racketeering is based on the U.S. *RICO* Act and not on Canadian law.

The Plaintiff makes reference to various treaties: USMCA (United States-Mexico-Canada Agreement), TPP (Trans-Pacific Partnership) and Madrid Protocol as supporting his ability to bring his claim in the Federal Court and to impose penalties under the U.S. *RICO* Act. However, the fact that Canada is a signatory to various international treaties is insufficient to connect the assertions made to a cause of action under Canadian law. As stated in *Entertainment Software Assoc. v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para 80:

...international instruments cannot become Canadian law without domestic legislative action. Put another way, international instruments are not self-executing in Canadian domestic law. They must be incorporated into Canadian domestic laws by legislation that adopts the international instrument in whole or in part or enacts standards borrowed from or related to the instrument.

The Plaintiff has not asserted any corresponding Canadian domestic law in support of his claim. It is not up to the defendants or the Court to guess at the Plaintiff's allegations; this must be clear from the Plaintiff's pleading.

Further, as noted by the Moving Party Defendants, section 8(2) of the *Canada-United States-Mexico Agreement Implementation Act* S.C. 2020, c.1 states that no cause of action or proceeding of any kind is to be taken on the basis of the provisions of the Agreement without the consent of the Attorney General of Canada. The Plaintiff has not met this requirement of section 8(2). Further, there is no standing afforded in association with domain names under Article 20.27 of the USMCA.

The Plaintiff alleges at paragraph 1(d) of its statement of claim:

Because the Canadian Court and the Canadian Government have [only recently] begun to seriously recognize Domain Names as Intellectual Property, integral to business on the World.Wide.Web of .COMmerce and joined the Madrid Protocol, last year, this Court [must] hear this case; and grant some administrative leniency / kindness to the Pro Se Plaintiff, when it comes to “speaking truth and power” against Attorneys who know how to game-the-system, with procedural dexterity, which if not furnished, will permit the extortion to continue, after this “canary in the coal mine” suffocates.

This rationale for bringing the claim before the Federal Court is not grounded with reference to any statutory provisions under Canadian law. There is nothing in the statement of claim as constituted that indicates any real nexus to Canada. The fact that the Plaintiff is resident in Canada and that he may have once had a Canadian trademark pending is not enough.

The Plaintiff does not make reference to any Canadian statute that grants jurisdiction to the Federal Court over the relief sought. There is no body of federal law that relates to the Plaintiff's allegations and Canadian federal law is not essential to the disposition of the claim. The laws relied upon are not laws of Canada, but instead foreign laws. The *ITO*-test has not been met.

In my view, it is plain and obvious that the whole of the claim suffers from want of jurisdiction and should be struck.

Does the Plaintiff have Standing to bring the Claim

The issue of standing addresses who is entitled to bring a case to the Court for decision. As stated by the Supreme Court of Canada in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524 at para 1 ("*Downtown Eastside*");

Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government.

There are two types of standing: private interest standing and public interest standing. To satisfy the requirement for private interest standing, the person bringing the claim must be "affected or aggrieved or otherwise have an interest sufficient to engage the assistance of the courts"; the person must be seeking "to protect his private rights or contest the right asserted against him by another person": *Munzel v. R.*, [1998] FCJ NO. 1231 at paras 6-7; *aff'd* (1998),

157 FTR 275. To satisfy public interest standing, the Court must consider whether: a) the case raises a serious justiciable issue; b) the party bringing the action has a real stake or genuine interest in its outcome; and c) in all circumstances, the proposed suit is a reasonable and effective means to bring the case to court: *Downtown Eastside* at paras 2 and 37.

In this case, none of the relief requested by the Plaintiff or facts pleaded suggest that the Plaintiff is seeking to protect any existing private rights. The Plaintiff loosely asserts that he has a trademark in Canada and the U.S. and once had rights to a domain name, but does not plead or assert any of these rights and does not seek any relief in association with any private interest rights. There is no private interest standing.

Further, there is insufficient basis to support a claim for public interest standing. As set out in *Downtown Eastside* at para 42, to constitute a serious justiciable issue, the question must be a “substantial constitutional issue” and must be “far from frivolous”. While the Plaintiff expresses his disagreement and frustration with the administration of domain names and the functioning of ICANN, the Plaintiff has pled insufficient facts to establish an important and substantial constitutional issue pertaining to the public interest or any reasonable cause of action for that matter.

Further, the Plaintiff does not have a real stake in the outcome. While the Plaintiff requests the transfer of ownership of all .com domain names and damages for alleged breaches of U.S. law, he has not pleaded any facts to establish entitlement to this relief. Personal disagreement with the administrative structure for domain names is insufficient.

The claim is not a reasonable and effective way to bring a challenge to the global administration of domain names before the Court, particularly as the issues are not presented in a manner suitable for judicial determination in an adversarial setting and the claim is based on U.S. law and foreign defendants.

Rule 221(1) (a) – Does the Claim Disclose a Reasonable Cause of Action

The law relating to motions to strike is well settled. A claim will be struck only in the clearest of cases. On a motion to strike a claim as disclosing no reasonable cause of action, the moving party must establish that it is “plain and obvious” that the claim has no reasonable prospect of success: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 17 (“*Imperial Tobacco*”); *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959 at p. 980. A motion to strike has been described as a “valuable housekeeping measure essential to effective and fair litigation”: *Sivak v. Canada*, 2012 FC 272 at para 15 (“*Sivak*”); *Imperial Tobacco supra* at paras 17 and 19.

The allegations made in a statement of claim must be supported by material facts addressing the constituent elements of each cause of action or legal ground raised, such that the defendants and the Court know on what basis the specific allegations are made: Rules 174 and 181 of the *Federal Courts Rules*; *Mancuso v. Canada (Minister of National Health and Welfare)*, 2015 FCA 227 at paras 16-19 (“*Mancuso*”).

In determining whether to strike a claim as disclosing no reasonable cause of action, the allegations of fact in the statement of claim must be taken as true, unless patently ridiculous or incapable of proof: *Imperial Tobacco supra* at para 24; *Scheuer v. Canada* 2016 FCA 7 at

para 12. Where no material facts, or insufficient material facts, are pleaded to support a claim against a party, there is no reasonable cause of action and the claim must be dismissed: *Sivak supra* at para 26.

In this case, the Plaintiff baldly asserts conspiracy, racketeering, trafficking, extortion, passing off and perjury. The Plaintiff raises these issues broadly, does not plead material facts to support the constituent elements of these causes of action, and has not identified with any clarity which defendants are asserted to have committed each of these acts and how. The who, when, where, how and what are not pleaded: *Mancuso supra* at para 19. It is insufficient to suggest that further details will be forthcoming during discovery. The material facts must be in the pleading itself.

I agree with the Moving Party Defendants that it is plain and obvious that none of the allegations made have a reasonable prospect of success:

- The allegations that the defendants have aided, abetted, harboured and flanked a domain name extortion, the trafficking of counterfeit marks or perjury are not supported by any material facts to establish the alleged conspiracy. There are no coherent facts alleged as to the relationship between the co-conspirators, the agreement between them, the purpose or objects of the alleged conspiracy, the overt acts done, including when and how they were done, and the alleged injury or damage arising from the conspiracy: *Al Omani v. Canada*, 2017 FC 786 at para 85-94. Further, there are jurisdictional issues associated with basing one's claim on an allegation of conspiracy as noted above: *Kealey v. R.*, 2003 FCT 754 at para 7.

- The allegation of racketeering and trafficking is not supported by material facts and is premised on the U.S. *RICO* Act and international treaties, without establishing a connection to any Canadian law that would ground the action.
- The allegation of perjury is not supported by materials facts as to which defendants are asserted to have committed perjury, how, or when. Further, perjury does not exist as a civil cause of action in Canada (*A.S. v. Macri*, 2010 ONCA 99 at para 38) and the Federal Court lacks jurisdiction, and the Plaintiff standing, to raise perjury under the *Criminal Code*.
- The allegation that second level country code domain names are “passing off” as top level domain names is misplaced and is not an allegation of passing off that can meet the requirements of the legal test. None of the requirements for a cause of action in passing off under Canadian law are pleaded in the statement of claim: *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 SCR 120.

The statement of claim in this case is a lengthy discourse without sufficient material facts to support a reasonable cause of action in this Court. There is no foundation for the causes of action asserted and the claim must be struck as disclosing no reasonable cause of action.

Rule 221(1)(c) – Is the Claim Scandalous, Frivolous and/or Vexatious?

Allegations in a statement of claim may be struck as vexatious under Rule 221(1)(c) where they are so deficient in material facts that the defendant does not know how to answer the claim and the Court is unable to regulate it; where the claim raises inflammatory, unsupported attacks; and where the claim includes irrelevant, argumentative portions, inserted for colour:

Kisikawpinootewin v. Canada 2004 FC 1426 at para 8-9; *Sivak supra* at para 89; *Carten v. Canada*, 2009 FC 1233 at para 64, 67.

In his statement of claim, the Plaintiff refers to the defendants as being “Kingpins” within a “Cartel” and makes unparticularized assertions of perjury against defendants “who are and were Lawyers” and their law firms. He refers to defendant lawyers as being “puppeteers” who have forfeited attorney client privilege, have a conflict of interest and who have “flanked a Perjury, to support the racketeering.” He alleges that social media corporations, including Facebook, have been “willfully blind” conspirators. The allegations are baldly asserted and are not supported by any coherent facts upon which a defence can be based. The Plaintiff alleges instead that the discovery process will enlighten the Court.

The Plaintiff acknowledges posting material through social media platforms, which might be perceived by the defendants as defamatory, slanderous and libellous and invites the defendants to bring a lawsuit against him if they so choose:

I’ve made statements via those Social media resources which would, if they were untrue, subject me to a singular lawsuit or multiple lawsuits from the Defendants listed, for: Defamation, Slander and Libel.

As yet, these well taunted Defendants have all conspired together, in collective silence, anticipating that their grandeur any my insignificance would, maintain safe passage, for them to continue.

As the vast majority of the Defendants are well schooled, powerful U.S. Attorneys, it’s my expectation that the Court oblige them to address the charges here stated, or collectively for their defence, they must File a lawsuit with this Court, charging me for what could be [but aren’t] remarks constituting Defamation, Slander & Libel against them, which again, I’ve posted on some of the Defendants own clients, Social Media Platforms.

The statement of claim is inflammatory and argumentative. By its nature, it raises serious allegations and issues without supporting facts and without the ability for a proper defence. The claim is frivolous and vexatious in nature and is also struck on this additional ground.

Is there Any Basis to Grant Leave to Amend

Where a statement of claim, like the one in this case, contains deficiencies that are too numerous and significant to be corrected by amendment, the claim should be struck without leave to amend: *Gagné v. Canada*, 2013 FC 331 at para 22. Moreover, deficiencies such as jurisdiction and lack of standing, which are fundamental to the claim itself, cannot be overcome by amendment. Indeed, there was no argument from the Plaintiff as to how he could amend his pleading to overcome all of the deficiencies raised.

The statement of claim shall be struck in its entirety, without leave to amend.

Costs

Each of the Moving Party Defendants asked for costs and submitted a Bill of Costs in association with their request.

The American Defendants seek a lump sum, indemnity-based costs award in the amount of \$12,514.75. They assert that this is not a case where dismissing the action and relying on the Court Tariff is sufficient to deter the Plaintiff. The American Defendants assert that an indemnity award is justified in this case where there are repeated inflammatory, spurious and abusive attacks on the defendants.

The defendant James Bladel seeks a lump sum award of costs in the amount of \$6,725.49 based on a substantial indemnity of the actual costs for the motion (90% of its actual costs). Mr. Bladel relies on two Federal Court decisions on motions to strike in support of his request. The first decision, *Thompson Bey v. Kershman*, 2016 FC 1093, was an action against a judge of the Ontario Superior Court and his spouse that was struck on multiple grounds and was the third of a group of claims in the same Court. Costs were awarded in the amount of \$5,000, payable forthwith, as a deterrent. In the second decision, *Shebib v. Canada*, 2016 FC 539, the Court ordered costs in the amount of \$5,000 to be paid to multiple defendants where, on the facts of that case, the plaintiffs were found to be “careless and even reckless” in the naming of the defendants.

The Greenberg Defendants and Facebook seek costs in the amount of \$2,373 and \$3,051 respectively, relying on calculations based on the top end of column III of the Court’s Tariff. The calculations differed in the amount of motion time claimed for the hearing of the motion.

In this case, the Plaintiff’s claim has been struck on multiple grounds. It can best be described as a wide-spread attempt by the Plaintiff to express his displeasure and frustration with his experience in his prior lawsuit in the U.S. and with the domain name system. I agree with the Moving Party Defendants that this type of claim, which names defendants at will, without material facts to support the assertions made, should be deterred. Accordingly, I consider it appropriate to award costs payable forthwith. However, bearing in mind that the Plaintiff is a self-represented litigant, I will exercise my discretion to award costs in an amount more in line with that requested by the Greenberg Defendants and Facebook, adjusted for the hearing time of 1.5 hours and the middle of column III of the Tariff.

Costs will accordingly be awarded to each of the Moving Party Defendants in the amount of \$1,500, payable forthwith.

THIS COURT ORDERS that:

1. The statement of claim is struck in its entirety, without leave to amend.
2. Each of the following groups of defendants: 1) the Greenberg Defendants, 2) the American Defendants, 3) Facebook; and 4) James Bladel, are awarded costs in the amount of \$1,500 (CAD), payable forthwith.

“Angela Furlanetto”
Case Management Judge