

Court No.:

T-1411-07

FEDERAL COURT

BETWEEN:

ROBIN BANERJEE, doing business as
CALL OF THE WILD

Plaintiff

AND:

CHRISTOPHER FRAGASSI, doing business as
CALL OF THE WILD,
CALL OF THE WILD PHOTOGRAPHY,
CALL OF THE WILD EXPEDITIONS
and
RYAN BENNETT, doing business as
CALL OF THE WILD,
CALL OF THE WILD ENTERPRISES

Defendant



STATEMENT OF CLAIM

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.

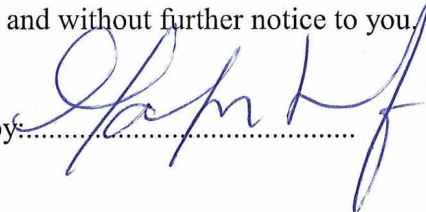
IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Court Rules, 1998*, serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the *Federal Court Rules, 1998*, 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).

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

Issued by:.....


NANCY LAFONTANT
REGISTRY OFFICER
AGENT DU GREFFE

Address of local office: 90 Elgin Street
Ottawa, ON
K1A 0H9

TO: The Administrator
Federal Court

AND TO: Christopher G. Fragassi
1009 Cook Street
Victoria, B.C. V8V 3Z6
Canada

200 - 911 Yates Street
Victoria, B.C. V6B 5A1
Canada

AND TO: Ryan Bennett
1009 Cook Street
Victoria, B.C. V8V 3Z6
Canada

200 - 911 Yates Street
Victoria, B.C. V6B 5A1
Canada

1. THE PLAINTIFF CLAIMS:

- a. An order that Canadian trade-mark registration TMA 690836 for Call Of The Wild be struck or, in the alternative, amended (hereinafter sometimes referred to as the “Trade-mark Registration”);
- b. A declaration that as between the parties:
 - i. the trade-marks and trade name CALL OF THE WILD and CALL OF THE WILD & Design (hereinafter, sometimes referred to as the “Plaintiff’s Trade-marks and Trade Name”) are valid, that is, the plaintiff had adopted and used the trade-marks and trade name, CALL OF THE WILD and CALL OF THE WILD and Design, such that, as of the date of advertisement of application number 1301871 to register the alleged trade-mark, namely, Call Of The Wild (hereinafter sometimes referred to as the “Alleged Trade-mark”), the Plaintiff’s Trade-marks and Trade Name, had not been abandoned;
 - ii. the plaintiff is the proper applicant for the registration of the trade-marks, CALL OF THE WILD and CALL OF THE WILD and Design;
 - iii. the defendants have caused confusion between their wares, services, or business and the wares, services, or business of the plaintiff;
 - iv. the defendants have made false or misleading statements tending to discredit the business, wares or services of the plaintiff.
- c. An order enjoining the defendants, their employees, servants, brokers, agents, and assigns, and all those over whom they exercise control from:
 - i. causing confusion with Plaintiff’s Trade-marks and Trade Name;
 - ii. using as a trade-mark, trade name, or otherwise the words, CALL OF THE WILD, and any words that are confusingly similar thereto, including, but not limited to: CallOfTheWild.com, Call Of The Wild & Design, Call Of The Wild Expeditions, Call Of The Wild Photography, and Call of The Wild Enterprises (hereinafter sometimes referred to as “Defendants’ Confusingly Similar Expressions”);

- iii. directing attention to their wares, services and business in such a manner as to cause confusion between the wares, services or business of the plaintiff;
 - iv. passing off their wares, or services as and for those of the plaintiff;
 - v. making false or misleading statements tending to discredit the business, wares, or services of the plaintiff.
- d. an order for delivery up to the plaintiff of all wares, documents and other things in the possession, custody, or control of the defendants that are contrary to the plaintiff's rights in the trade-marks and trade name, CALL OF THE WILD and CALL OF THE WILD & Design.
- e. an order that the defendants pay to the plaintiff the damages he has suffered by reason of the defendants' illegal activities, or an accounting of the defendants' profits, as the plaintiff may elect after a proper reference thereto;
- f. an order that the defendants pay to the plaintiff punitive, or exemplary damages for their deliberate and unlawful use of the plaintiff's proprietary rights and for the unlawful appropriation of the plaintiff's goodwill;
- g. costs on a solicitor - client basis;
- h. pre-judgment and post-judgment interest in respect of any pecuniary amount ordered against the defendants;
- i. any further and other relief as the plaintiff may be entitled to and which to this Honourable Court may seem just.

THE PARTIES

2. The plaintiff, Robin Banerjee, doing business as CALL OF THE WILD, is a sole proprietor with a head office at 23 Edward Street, Markham, Ontario, L3P 2N9, Canada.
3. The defendant, Christopher Fragassi, doing business as Call Of The Wild, or Call Of The Wild Expeditions, or Call Of The Wild Photography is a sole proprietor with an office at:
 - a. 1009 Cook Street, Victoria, British Columbia, V8V 3Z6, Canada; and, or
 - b. 911 Yates Street, Suite 200, Victoria, British Columbia, V6B 5A1, Canada.
4. The Defendant, Ryan Bennett, doing business as Call of the Wild, or Call Of The Wild Enterprises, is a sole proprietor with an office at:
 - a. 1009 Cook Street, Victoria, British Columbia, V8V 3Z6, Canada; and, or
 - b. 911 Yates Street, Suite 200, Victoria, British Columbia, V6B 5A1, Canada.

THE PLAINTIFF'S BUSINESS

5. The plaintiff has carried on business in Canada since at least 1993 in association with the trade name and trade-marks CALL OF THE WILD and CALL OF THE WILD and Design. The plaintiff has used and continues to use the CALL OF THE WILD and CALL OF THE WILD and Design trade-marks:
 - a. since 1993 in association with services: wilderness tourism; wilderness tour guide; expedition services, including: fishing outfitting services, canoe trips, hiking, camping, wildlife photography; educational services in the field of: wildlife protection, environmental preservation, outdoor survival techniques; transportation services to and from wilderness locations;
 - b. since April, 1997 in association with services: wilderness expedition services, including: snowshoeing trips, snowmobiling trips, skiing trips, winter camping, dog sledding trips; educational services in wilderness winter survival techniques;
 - c. since April, 1997, in association with services: corporate team building; logistical support for advertising videos produced in a wilderness setting;
 - d. since March, 1999, in association with wares: fleece jackets;

- e. since June, 1999, in association with wares: jackknives;
 - f. since August, 1999, in association with wares: t-shirts;
 - g. since December, 1999, in association with wares: toques;
 - h. since 2000 in association with services: providing accommodation, namely, lodges and inns;
 - i. since 2003 in association with wares: scarves;
 - j. since 2005 in association with wilderness expedition services: horseback riding.
6. By reason of the plaintiff's extensive sales, promotion, and advertising of his wares and services in association with the CALL OF THE WILD and CALL OF THE WILD and Design trade name and trade-marks, the public has come to recognize that the CALL OF THE WILD and CALL OF THE WILD and Design trade name and trade-marks denote the wares, services and business of the plaintiff.
7. By reason of the aforesaid, the plaintiff:
- a. is the owner at common law of all right, title and interest in and to the CALL OF THE WILD and CALL OF THE WILD and Design trade name and trade-marks;
 - b. the owner at common law of all goodwill associated with the use of CALL OF THE WILD and CALL OF THE WILD and Design trade name and trade-marks.

COMPLAINED OF ACTS

UNAUTHORIZED USE, TRADE LIBEL, CONFUSION and UNJUST ENRICHMENT

8. The defendants, each in their own capacity and together, without the authorization of the plaintiff, commenced using the Plaintiff's Trade-mark and Trade Name, and commenced using the Defendants' Confusingly Similar Expressions in association with the provision of wares and services in Canada, said services including but not limited to (hereinafter the following services are sometimes referred to as, "Defendants' Services"):
- a. outdoor tour guide and expedition services; ticket booking services; scuba diving services, photography and videography services;
 - b. passenger and cargo transportation services; hunting and fishing outfitting

services; accommodation services; resort services; providing educational services in the field of environment, wildlife protection and the outdoors;

c. wilderness tourism;

d. consulting with respect to services described in paragraphs a) through c)

thereby wrongly using the Plaintiff's Trade-marks and Trade name contrary to s.50(1) of the *Trade-marks Act* (hereinafter sometimes referred to as the "*Act*").

9. The defendants, each in their own capacity and together, have unlawfully commenced using the Plaintiff's Trade-mark and Trade Name, and have commenced using the Defendants' Confusingly Similar Expressions in association with the Defendants' Services, thereby directing public attention to the defendants' wares, services, or business in such a way as to cause or be likely to cause confusion in Canada between their wares, services, or business and the wares, services, or business of the plaintiff, contrary to section 7b) of the *Trade-marks Act*.

10. The defendants have made false and misleading statements tending to discredit the wares, services, or business of the plaintiff by registering the ownership of one, or more internet domain names in association with the Plaintiff's trade-mark and trade name, CALL OF THE WILD, including the internet domain, malecorps.com, and hosting, or authorizing the hosting at said domain of a website featuring pornographic photographs and videos, thereby giving the impression to members of the public that the plaintiff is in the business of selling pornography.

a. Said website, malecorps.com, relies upon a Meta-Description which uses hyper-text markup language code (hereinafter, HTML Code) to summarize the site contents as follows: "The hottest men in and out of uniform. Exclusive original pictures and films. Warrior, Athlete and Worker sections. Pay Per View PPV Videos."

b. Said website also relies upon Meta Keywords which use HTML Code to describe the site contents in the following terms: "Exclusive, original, nude, naked, photos, films, pics, videos".

The full extent of the defendants' above described activities is known to the defendants and the whole is pleaded by the plaintiff as contrary to section 7 a) of the *Act*.

11. By reason of their actions set forth herein, defendants have been enriched and the plaintiff has suffered a corresponding loss, there being no juristic reason for the enrichment.

WRONGFUL REGISTRATION

12. The plaintiff is a “person interested” within the meaning of s.57(1) of the *Act*.
13. The plaintiff pleads, and the fact is, that in accordance with s.17(1) of the *Act* he had not abandoned Plaintiff’s Trade-marks and Trade Name at the date of the advertisement of the application filed by Christopher Fragassi doing business as Call Of The Wild Expeditions (hereinafter, “Fragassi”) to obtain the Trade-mark Registration.
14. The plaintiff pleads pursuant to s.57(1) of the *Act* that the entry for the Trade-mark Registration as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner, namely, Fragassi, said Trade-mark Registration therefore being invalid.
15. The plaintiff pleads and the fact is that the Trade-mark Registration is invalid pursuant to s.18 of the *Trade-marks Act* because Fragassi was not the person entitled to secure the Trade-mark Registration by reason of the grounds set forth in:
 - a. s. 16(1)(a) of the *Act*, that is, that at the date Fragassi first used or made known the Alleged Trade-mark in association with:

outdoor tour guide and expedition services; ticket booking services; scuba diving services, photography and videography services,

it was confusing with the Plaintiff’s Trade-marks that had been previously used or made known in Canada by the plaintiff;
 - b. s.16(1)c) of the *Act*, that is, that at the date Fragassi first used or made known the Alleged Trade-mark in association with:

outdoor tour guide and expedition services; ticket booking services; scuba diving services, photography and videography services,

it was confusing with the trade name, CALL OF THE WILD, previously used in Canada by the plaintiff;

- c. s.16(3)(a) of the *Act*, that is, that at the date of filing the application to register the Alleged Trade-mark in association with:

passenger and cargo air transportation services; hunting and fishing outfitting services; accommodation services; resort services; providing educational services in the field of environment, wildlife protection and the outdoors

it was confusing with the Plaintiff's Trade-marks that had been previously used or made known in Canada by the plaintiff;

- d. s.16(3)c) of the *Act*, that is, that at the date of filing the application to register the Alleged Trade-mark in association with:

passenger and cargo air transportation services; hunting and fishing outfitting services; accommodation services; resort services; providing educational services in the field of environment, wildlife protection and the outdoors

it was confusing with the trade name, CALL OF THE WILD, previously used in Canada by the plaintiff;

16. The plaintiff pleads and the fact is that the Trade-mark Registration is invalid pursuant to s.18(1)(b) of the *Act* because the Alleged Trade-mark was not distinctive of Fragassi at the time proceedings set forth herein were commenced.

17. The plaintiff pleads and the fact is that the Trade-mark Registration is invalid on the grounds that Fragassi made material mis-representations in the application to obtain the Trade-mark Registration, namely, that he was satisfied that he was entitled to use the Alleged Trade-mark in Canada in association with:

- a. Outdoor tour guide and expedition services; ticket booking services; scuba diving services, photography and videography services;
- b. Passenger and cargo transportation services; hunting and fishing outfitting

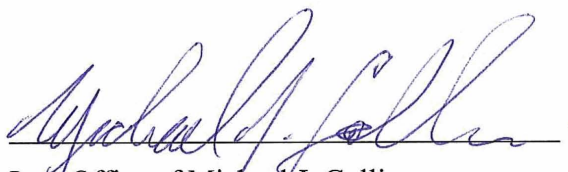
services; accommodation services; resort services; providing educational services in the field of environment, wildlife protection and the outdoors.

CONCLUSION

18. The plaintiff claims punitive and exemplary damages from the defendants by reason of their wilful violation of the plaintiff's proprietary rights and for the unlawful appropriation of the plaintiff's goodwill, which damages may be assessed by the Court in due course by way of reference.
19. The plaintiff also requests that, owing to the blatant violation of the plaintiff's rights, defendants be liable to pay costs on a solicitor - client basis.
20. The present proceeding is well founded in fact and law.

The Plaintiff proposes that this action be tried at Ottawa, Canada.

July 31, 2007



Law Office of Michael J. Collins
Michael J. Collins, Barrister & Solicitor
5929L Jeanne D'Arc Blvd., Suite 358
Ottawa, Ontario
K1C 7K2

Telephone: (613) 824-4114
Facsimile: (613) 830-1242

SOLICITOR FOR THE PLAINTIFF