

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-17-074743-124

DATE: June 3rd, 2014

PRESIDING: THE HONOURABLE MICHELINE PERRAULT, J. S.C.

UNITED AIRLINES INC.
and
CONTINENTAL AIRLINES INC.
and
ELAINE CLARK
and
JESSICA ROSSMAN
and
JEFF WITTIG
Plaintiffs

vs.

JEREMY COOPERSTOCK
Defendant

JUDGMENT ON DEFENDANT'S MOTION TO DISMISS THE ACTION AS BEING IMPROPER

I- Introduction

[1] On November 19, 2012, Plaintiffs United Air Lines ("**United**") and Continental Airlines ("**Continental**" or collectively "**the Airlines**"), as well as three of their employees : Elaine Clark, Jessica Rossman and Jeff Wittig ("**the Individual Plaintiffs**") instituted proceedings for the issuance of a permanent injunction against Defendant

Jeremy Cooperstock whereby they seek an order prohibiting Mr. Cooperstock from posting the names and contact information of any and all employees of the Airlines, including the Individual Plaintiffs, on UNTIED.com or any website ("**the Superior Court Action**").

[2] Mr. Cooperstock presents a Motion to dismiss the Superior Court Action as being improper, within the meaning of Articles 54.1 to 54.5 of the *Code of Civil Procedure* (the "**Motion to Dismiss**").

[3] It should be noted that Mr. Cooperstock first presented two Motions. One based on Article 165(4) C.C.P. and the other on Articles 54.1 to 54.5 C.C.P. On February 15, 2013, both Motions were heard by Justice Kirkland Casgrain who dismissed them. Mr. Cooperstock sought leave to appeal from the judgment dismissing his Motion under Articles 54.1 *et seq.* C.C.P., but not from the judgment dismissing his Motion under Article 165 (4) C.C.P. On September 26, 2013, the Court of Appeal granted leave to appeal, quashed Justice Casgrain's judgment and ordered a new Hearing of the Motion under Articles 54.1 *et seq.* C.C.P. in the Superior Court ("**the Court of Appeal Judgment**").

[4] In its judgment, the Court of Appeal held as follows:

« [19] En l'espèce, le juge commet une erreur de droit en appliquant à la demande provisionnelle la règle qui ne vaut qu'en matière d'irrecevabilité, soit de tenir les faits allégués en demande pour avérés. [...] »

[5] Therefore, the Motion to Dismiss is now before this Court for the second time.

II- Position of the parties

[6] Since April 1997, Mr. Cooperstock has been operating a website using the internet domain name *www.untied.com*. UNTIED.com is critical of United's treatment of passengers and employees. Mr. Cooperstock submits that his objective is to facilitate more efficient communication between passengers and those in the Airlines with decision-making authority to help resolve their problems.

[7] Mr. Cooperstock has maintained this website for 15 years without objection or interference from United. However, things changed after the merger between United and Continental in 2012, when the Airlines initiated two lawsuits against him: the Superior Court Action, as well as an action instituted before the Canadian Federal Court, whereby the Airlines are claiming infringement of their intellectual property rights and resulting consumer confusion ("**the Federal Court Action**").

[8] Mr. Cooperstock submits that the Superior Court Action is unfounded, frivolous and vexatious, as well as excessive and unreasonable, and that its only purpose is to interfere with his freedom of expression in a public debate. He alleges that the Superior Court Action is a "strategic lawsuit against a public participation", commonly known as a SLAPP action.

[9] Mr. Cooperstock also alleges that the Superior Court Action is improper because Plaintiffs have singled him out for his reposting of publicly available information and that there is no causal link between the large volume of correspondence sent to the Individual Plaintiffs and his UNTIED.com website.

[10] Plaintiffs reply that they are not trying to shut down Mr. Cooperstock's website or silence his criticism of the Airlines, but rather that they are trying to prevent UNTIED.com from misdirecting customers and also to protect the Individual Plaintiffs' rights to privacy, which are being infringed by being involuntarily listed on UNTIED.com.

[11] Plaintiffs allege that the UNTIED.com website contains a heading entitled "Contact", and that by clicking on such heading, users may follow a link entitled "Contact UAL". Users are then directed to a web page containing the names and direct contact information of Elaine Clark, Jessica Rossman and Jeff Wittig, whose respective titles with the Airlines are: Claims Analyst, Corporate Insurance; Senior Counsel, Americas; and Senior Counsel, Asia and Pacific.

III- Questions in issue

- A) Is Plaintiff's action improper within the meaning of Articles 54.1 *et seq.* C.C.P.?
- B) If so, what is the appropriate remedy?

IV- Analysis

[12] **A) Is Plaintiffs' action improper within the meaning of Article 54.1 C.C.P.?**

[13] Articles 54.1 to 54.5 of the *Code of Civil Procedure* read as follows:

54.1. A court may, at any time, on request or even on its own initiative after having heard the parties on the point, declare an action or other pleading improper and impose a sanction on the party concerned.

The procedural impropriety may consist in a claim or pleading that is clearly unfounded, frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another

person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate.

54.2. If a party summarily establishes that an action or pleading may be an improper use of procedure, the onus is on the initiator of the action or pleading to show that it is not excessive or unreasonable and is justified in law.

A motion to have an action in the first instance dismissed on the grounds of its improper nature is presented as a preliminary exception.

54.3. If the court notes an improper use of procedure, it may dismiss the action or other pleading, strike out a submission or require that it be amended, terminate or refuse to allow an examination, or annul a writ of summons served on a witness.

In such a case or where there appears to have been an improper use of procedure, the court may, if it considers it appropriate,

(1) subject the furtherance of the action or the pleading to certain conditions;

(2) require undertakings from the party concerned with regard to the orderly conduct of the proceeding;

(3) suspend the proceeding for the period it determines;

(4) recommend to the chief judge or chief justice that special case management be ordered; or

(5) order the initiator of the action or pleading to pay to the other party, under pain of dismissal of the action or pleading, a provision for the costs of the proceeding, if justified by the circumstances and if the court notes that without such assistance the party's financial situation would prevent it from effectively arguing its case.

54.5. If the improper use of procedure results from a party's quarrelsomeness, the court may, in addition, prohibit the party from instituting legal proceedings except with the authorization of and subject to the conditions determined by the chief judge or chief justice.

[14] Seized with a motion under Articles 54.1 *et seq.* C.C.P., the Court must follow the process of analysis described by Justice Nicholas Kasirer in *Acadia Subaru v. Michaud*¹ in order to determine whether procedural impropriety exists :

"[23] Mr. Michaud alleges in his motion that the appellants' action is improper in two different ways. These submissions may both be cast in the language of article 54.1, paragraph 2, which set forth grounds for finding a "procedural impropriety". First, he contends that the action in defamation is improper as it is "clearly unfounded", and thus deserves to be dismissed. Second, he argues that the action by the car dealers is a strategic lawsuit against public participation. The action in defamation seeks to silence Mr. Michaud rather than obtain compensation for the car dealers. It was undertaken "as an attempt to defeat the ends of justice" that restricts his right to freedom of expression in public debate. On this further basis, it should also be dismissed as improper.

[24] Article 54.1, paragraph 2 C.C.P. includes these distinct grounds, as well as the basis for finding the use of procedure to be "excessive" or "unreasonable" as cited by the motions judge in respect of the conclusions on punitive damages:

(...)

[25] By separating the grounds of "clearly unfounded" from some of the other measures of impropriety, the legislature has made plain that circumstances exist in which an action might have a basis in law or in fact yet still be subject to dismissal or some other sanction. These other grounds include conduct that is in bad faith, a use of procedure that is excessive or unreasonable or causes harm to another person, or an attempt to defeat the ends of justice. Mr. Michaud claims that the real objective of the 93 dealers is not to obtain reparation for damage to reputation but instead to prevent him from speaking out publicly on the radio. In other words, he argues that should the Court decide that the action in defamation of the car dealers is not clearly unfounded – that it shows "colour of right" or an "*apparence de droit*" – it may nevertheless be dismissed if it is an attempt to defeat the ends of justice that restricts his freedom of expression in public debate.

[26] Secondly, the rules for establishing impropriety provide an advantage to the party alleging the wrong, when certain pre-

¹ 2011 QCCA 1037.

conditions are met, by reversing the burden of proving an abuse of process. Placing emphasis on the requirement that he only needs "summarily" establish that the car dealers' action "may" be improper, Mr. Michaud argues that he succeeded in reversing the onus before the Court of Quebec. The car dealers should have been required to show that their action was not excessive or unreasonable and was justified in law. (...)

[27] Thirdly, article 54.3 C.C.P. sets forth distinct remedies available when a court finds an improper use of procedure (paragraph 1) or an appearance thereof (paragraph 2). The principal action may only be dismissed – the primary remedy sought here by Mr. Michaud – pursuant to paragraph 1. Alternatively, Mr. Michaud invokes paragraph 2 in order to obtain redress should it be decided that there is only an appearance of improper procedure. The dealers contend that the judge wrongly invoked paragraph 2 to reduce the punitive damages they claimed. (...)

(...)

[29] By allowing a party to establish impropriety "summarily" (article 54.2, paragraph 1), and by empowering the courts to sanction abuse or apparent abuse of process on that basis (article 54.3), the legislature has sought to provide judges with tools for acting expeditiously and inexpensively when faced with abuse or apparent abuse of process. Prior to the enactment of article 54.1 C.C.P., some criticism had been levied against courts that they were seen as too skittish to take bold action to counter abuse, including dismissing claims entirely, for fear of putting an end to an action that might have some basis in law. The reversal of the burden of proof and the powers to sanction apparent impropriety were enacted in part to answer the shortcomings of the former rules.

(...)

[42] Among other differences, there is a measure of blame associated with a finding that an action or proceeding is improper that is not necessary under article 165(4) C.C.P. If the French word "*abus*" signals this more resolutely than the term "impropriety", both linguistic texts of article 54.1, paragraph 2 C.C.P. make the underlying idea of a wrongful use of procedure plain in the description of what constitutes improper proceedings. The finding that a claim or pleading is "clearly unfounded" is presented alongside alternatives that it is "frivolous or dilatory". Other instances of impropriety in article 54.1 speak to conduct that is "vexatious or quarrelsome", in "bad faith" or to a use of procedure that is "excessive", "unreasonable" or prejudicial to the interests of another. Likewise, an "attempt to defeat the ends of justice" carries with it a connotation of wrongful conduct on the part of a litigant that is not necessarily present in respect of

preliminary exceptions brought outside the ken of article 54.1. Abuse under article 54.1 brings consequences that, as a general rule, would not flow from a ruling made under article 165(4). Indeed the remedies available in the event of a finding that a claim is improper or appears to be improper are wider, allowing a court to tailor a sanction to answer the specific character of the wrongful behaviour in question. In principle, the preliminary exception brought under article 165(4) C.C.P., where granted, allows only for a complete dismissal of the action and an ordinary order as to costs. (Emphasis added)

[...]

[65] The path for analyzing procedural impropriety is set out by the legislature in articles 54.1 C.C.P. and following: first, one must consider whether Mr. Michaud has summarily established what may be an abuse of process on the distinct basis of "an attempt to defeat the ends of justice"; second, if Mr. Michaud has acquitted that burden, the onus to disprove impropriety falls to the appellants under article 54.2, paragraph 1; and, third, if there is an abuse or an appearance of abuse the appropriate remedy must be identified (article 54.3, paragraphs 1 and 2).

[76] The relevance of wrongful motive and wrongful effect are both alluded to in the Code. The French text of article 54.1, paragraph 2 places a plain emphasis on the effect of the impugned use of procedure ("notamment si cela a pour effet de limiter la liberté d'expression d'autrui dans le contexte de débats publics"). While the English text does not allude directly to effects, it may be read to include that idea in so far as the expression "restricts freedom of expression" may be understood to refer to the action's effect on the victim of alleged impropriety. If the "effects-based" interpretation of article 54.1, paragraph 2 is plainer in the French text, so too is the purpose-based interpretation. The choice of the phrase "détournement des fins de la justice" is highly suggestive of behaviour that defeats the ends of justice not just in its effects but in its purpose. To be improper, the action must defeat the ends of justice by subverting them or undermining them. Where an action in defamation limits freedom of expression in its effects without subverting the ends of justice, it cannot be said to be a "détournement" in the full sense of the word and may well not be improper. Viewing the burden as a whole, the court must be satisfied that the car dealers' attempt to defeat the ends of justice reflects a measure of blame that, as we have seen, is characteristic of abuse of process generally. An attempt to defeat the ends of justice is a species of impropriety relating to a distortion of the judicial function. The Supreme Court has repeatedly identified the "integrity of the adjudicative process" as a core aspect of the doctrine of abuse of process, which extends to preventing a civil party from using the courts for an improper purpose. An attempt to defeat the ends of justice is similarly predicated on an indication

that the offending litigant's action is a bad faith attempt to deny the legitimate right of another person. In this sense, an attempt to defeat the ends of justice stands in violation of the principle that a litigant should only take action before the courts in good faith, as consecrated by articles 4.1 C.C.P."

[15] In the case of *Beaulieu v. Laflamme*², Justice Sansfaçon summarized the scope of Articles 54.1 *et seq.* C.C.P. as follows :

" [32] La Cour d'appel a récemment eu l'occasion de circonscrire la portée de ces articles dans trois jugements.

[33] Dans *Acadia Subaru*, la Cour appelle les tribunaux à faire preuve de prudence avant de conclure au rejet d'une poursuite ou d'un allégué sur la base de ces articles. Ce qui peut paraître abusif, écrit-elle, ou mal fondé au stade préliminaire des procédures pourra en effet paraître des plus pertinents à une étape plus avancée.

[34] Le juge devra se convaincre que la procédure est réellement abusive avant de la rejeter; s'il a un doute, il pourra toujours utiliser les pouvoirs alternatifs que lui donnent ces articles, le rejet constituant un remède ultime.

[35] Deuxièmement, écrit la Cour, une demande mal fondée en droit n'équivaut pas nécessairement à de l'abus au sens de ces articles. Le législateur a choisi d'ajouter les articles 54.1 et s. au code mais aussi d'y conserver l'article 165 (4), qui couvre toujours le cas du recours non fondé en droit, et qui n'a pas besoin d'être entaché d'abus pour être rejeté.

[36] La Cour d'appel souligne que le texte de l'article 54.1 *C.p.c.* juxtapose les termes et expressions « acte de procédure manifestement mal fondé », « frivole », « dilatoire », « mauvaise foi », « vexatoire », « excessive », etc., ce qui, selon elle, indique que pour pouvoir rejeter une procédure sur la base de cet article, le juge doit être en mesure d'écarter chez l'auteur de la procédure attaquée, un comportement répréhensible.

[37] Peu après, dans *Paquette c. Laurier*, la Cour, référant à ce dernier jugement, ajoutait que :

" Avant de déclarer un recours abusif, il est nécessaire d'y écarter un comportement blâmable. Le terme abus porte en lui-même l'idée d'un usage mauvais, excessif ou injuste ".

² 2011 QCCS 4282.

[38] Puis elle ajoute :

" Dans cette optique, l'utilisation des mots « acte de procédure manifestement mal fondé » en parallèle avec les mots frivole, dilatoire, vexatoire, quérulent, etc. emporte la nécessité d'y associer une mesure de blâme avant de déclarer un acte de procédure abusif. "

[39] Il ressort de ces décisions que:

1. Dans le cas d'une requête présentée sous 165(4) *C.p.c.*, un élargissement préconisé par certains jugements permettrait le rejet partiel de la procédure, si la demande visée par la requête en rejet peut être facilement isolée des autres demandes;

2. Pour être accueillie, la requête en rejet présentée sous 54.1 *C.p.c.*, qui allègue que la demande est manifestement mal fondée, nécessitera, en plus de la preuve de ce premier élément, la démonstration d'un comportement répréhensible; si la demande est manifestement mal fondée en droit, mais que les circonstances du dossier ne permettent pas de déceler un comportement blâmable de la partie, le rejet ne sera pas prononcé, bien qu'il puisse l'être sous l'article 165(4) *C.p.c.*

Par ailleurs, une requête en rejet pourra être accueillie même si la demande n'est pas manifestement mal fondée, puisque l'article 54.1 *C.p.c.* prévoit d'autres motifs d'intervention du tribunal que ce dernier. Par exemple, pourra être rejetée une demande qui n'est pas manifestement mal fondée mais qui constitue une utilisation de la procédure de manière excessive ou de manière à nuire à autrui. " (Emphasis added)

[16] As appears from these decisions, "impropriety" carries with it a connotation of "wrongful or "blameworthy" conduct of a litigant.

[17] Mr. Cooperstock alleges that Plaintiffs' claims are "*clearly unfounded, frivolous, and vexatious*";. Let us start with the allegation that the Superior Court Action is "clearly unfounded". As indicated above, Mr. Cooperstock has failed to show that the action was unfounded and should be dismissed pursuant to the criteria of Article 165 (4) C.C.P. Therefore, the action cannot be considered to be clearly unfounded in law under Article 54.1 C.C.P.:

"[58] (...) Because Mr. Michaud has failed to show that the suit was unfounded pursuant to the criteria of article 165(4) C.C.P., it is, perforce, not "clearly unfounded" in law under article 54.1.³"

[18] Let us now look at the arguments raised by Mr. Cooperstock :

- 1) His UNTIED.com website clearly discourages misuse of the work contact information of Corporate Plaintiffs' senior employees and the following warning is displayed :

Note that Untied.com strongly discourages readers from using the contact information provided below to harass or intimidate the management or other personnel at United Airlines. The addresses, emails, and telephone numbers are provided only as a means to facilitate more efficient communication between you and those in the airlines with the decision-making authority to help resolve your problem.

[19] As to why the Individual Plaintiffs were chosen among the thousands of other employees of the Airlines, Mr. Cooperstock testified that passengers who contact customer service receive no response. He believes that when a complaint is directed to the legal department, some action is taken. For example, Ms. Rossman and Mr. Wittig can "escalate" a complaint to someone higher up at United. Moreover, since they are lawyers, they can get involved if a lawsuit is contemplated by the customer. He adds that he has never encouraged people to be abusive.

[20] Mr. Cooperstock acknowledges that Ms. Rossman and Mr. Wittig are not directly involved in customer service and that United has asked him to remove their names from his UNTIED.com website. However, he has refused to do so because the Airlines did not provide an alternative. The Airlines, on the other hand, reply that they have provided other names to be posted on UNTIED.com, but that Mr. Cooperstock insisted on various conditions that were unreasonable.

[21] The testimony of Ms. Rossman and Mr. Wittig has shown that the warning posted on Mr. Cooperstock's website has not been sufficient to discourage customers from contacting them. They testified that even though they are employees of United, they do not act as direct contacts for receiving and handling consumer complaints. They indicated to the Court that since their names and contact information have been posted on UNTIED.com, they receive, on a regular basis, all kinds of complaints, both in the form of emails and telephone calls. They must then review each complaint in order to ensure it is redirected to the appropriate department for proper handling. This interferes with their work as corporate attorneys and the delay in forwarding the complaint to the proper department is frustrating for the customer.

³ *Acadia Subaru*, supra note 1, par. 58 and also par. 106(1).

[22] Moreover, in certain cases, the voicemail messages have been threatening and harassing in nature causing the Individual Plaintiffs distress and distraction. For example, Ms. Rossman testified that these messages caused her to fear for her safety and even to consider leaving her position with United.

[23] As to a "causal link" between the amount of correspondence and/or voicemail messages received, Ms. Rossman and Mr. Wittig testified that prior to Mr. Cooperstock posting their name and contact information on his website, they had never received any complaints from passengers. Mr. Wittig added that when he receives a call and asks how they obtained his name and contact information, the answer is UNTIED.com.

[24] In view of the foregoing, the Court finds that that Mr. Cooperstock did not provide evidence of a "blameworthy" conduct on the part of Plaintiffs in taking the present action.

- 2) UNTIED.com website clearly cautions visitors that it is not the website of United.

[25] This is not evidence of a "blameworthy" conduct on the part of Plaintiffs in taking the present action. Moreover, it does not address the issue that complaints and inquiries are still being misdirected.

- 3) United's own employee, Ms. Katie Kimbell, publicly encouraged passengers to write to the Director for passenger/customer relations or to the President of United, and publicly disseminated their names, job titles, work addresses and email addresses.

[26] Mr. Cooperstock submits that he simply aggregated Individual Plaintiffs contact information after Plaintiffs' own representative publicly encouraged passengers to contact senior employees of United.

[27] Firstly, this public message by United shows that it does not shy away from customer complaints. In fact, Mr. Cooperstock testified that for several years, he re-posted the names and contact information of employees provided by United on his UNTIED.com website and it was efficient. Secondly, to interpret Ms. Kimbel's message as meaning that passengers should contact any senior employees of United is disingenuous. Thirdly, this message demonstrates that Ms. Rossman and Mr. Wittig, as senior counsel for United, are clearly not the employees customer complaints should be directed to. Finally, it does not prove a "blameworthy conduct" on the part of Plaintiffs.

- 4) The names and contact information of the Individual Plaintiffs are publicly available on other websites and they have taken no steps to remove them.

[28] Mr. Cooperstock submits that the contact information of the Individual Plaintiffs may be found on other websites, such as the State Bar of Texas, "FindLaw", "Super

Lawyers”, “ScamBook”, “Netprospex” and “LinkedIn”. In other words, the Individual Plaintiffs cannot argue that privacy is an issue when their contact information is publicly available.

[29] Individual Plaintiffs reply that their contact information is not made available to the travelling public in general by either themselves or by the Airlines. Furthermore, they are not claiming that their contact information is confidential, but rather that it is being used to misdirect customer inquiries and complaints. It also makes them less productive in their jobs as they must take time to direct the customers to the proper service.

[30] Once more, it does not show a “blameworthy conduct” on the part of Plaintiffs in taking the present action.

[31] Is Plaintiffs’ action excessive and unreasonable and does it restrict Mr. Cooperstock’s freedom of expression in a public debate?

[32] Mr. Cooperstock submits that Plaintiffs are seeking a sweeping and broad injunction which would severely limit his freedom of expression. The Court does not agree. Firstly, the conclusions sought are limited in scope, as pointed out in the Court of Appeal Judgment :

“[21] D’autant plus que la demande a pour objet de faire cesser les attaques nominales concernant deux employés et non d’ordonner la fermeture du site. »

[33] Secondly, even if the Court was to grant all the conclusions of Plaintiffs’ action, Mr. Cooperstock would not be prevented from criticizing the Airlines or operating his website.

[34] In the case of *Prud’homme v. Médiasud inc.*⁴, Justice Daniel Payette stated the following with respect to SLAPP suits :

” [228] Ainsi, pour avoir gain de cause, les demandeurs doivent prouver :

- que la poursuite se situe dans le contexte d’un débat public;
- qu’elle a ou était susceptible d’avoir un effet indu et disproportionné sur leur liberté d’expression; et
- qu’elle est motivée par une volonté de détourner les fins de la justice.

⁴ 2013 QCCS 3836, par. 228 and 229.

[229] Ultimement ils doivent prouver que les demandereses ont eu un comportement blâmable qu'il convient de sanctionner."

[35] In *Acadia Subaru*, Justice Kasirer stated the following :

" [78] (...) Plainly, it cannot be said that every claim that has the effect of restricting freedom of expression in public debate is improper since that would render all actions in defamation *ipso facto* abusive. Only those that have an undue or disproportionate effect on freedom of expression, in the balancing of interests that article 54.1 calls upon to undertake, should be held to be improper. Where the primary burden is established using an effects-based measure of impropriety, this should not obscure the blameworthy character of the conduct that ultimately is the normative core of an "attempt to defeat the ends of justice"." (Emphasis added)

[36] The Court finds that Plaintiffs' action cannot be said to have an "undue" or "disproportionate effect" on Mr. Cooperstock's freedom of expression, nor is there evidence of a blameworthy conduct on the part of Plaintiffs in taking the present action. Thus, the Superior Court Action cannot be considered improper under Article 54.1 C.C.P.

[37] As to the Superior Court Action being excessive and unreasonable, Mr. Cooperstock knows the contact information of the Individual Plaintiffs is being misused and yet refuses to take it down despite numerous requests by the Airlines to that effect. The Court, once again, does not find this to be proof of a blameworthy conduct on the part of Plaintiffs. Furthermore, the Court was informed that attempts were made to resolve the issues on an amicable basis. However, each party accuses the other of being unreasonable.

[38] Mr. Cooperstock also alleges that Plaintiffs have deliberately initiated their lawsuit concerning the infringement of their trademarks and copyright in Federal Court instead of Superior Court in an attempt to force him to exhaust his resources and deter him from engaging in public debate. He testified that having to defend two actions in parallel before two different courts dealing with essentially identical facts is both costly and time consuming.

[39] Plaintiffs reply that they have the right to choose the jurisdiction which will hear their action with respect to intellectual property rights and that they chose the Federal Court of Canada because of its expertise. The Court is of the opinion that, although some facts may overlap, there is no duplication between the two proceedings and that choosing the Federal Court of Canada to hear a case dealing with intellectual property rights is not proof of a "blameworthy conduct".

[40] Mr. Cooperstock submits that Plaintiffs have failed to take any steps to mitigate the impact of his website and could have:

- a) removed their workplace contact information from various other websites where they continue to appear;
- b) put in place a telephone screening system or set up a call-forwarding system to relay calls to lower-level customer service representatives; and
- c) changed their addresses and not make the new ones public.

[41] Plaintiffs reply that they have done nothing wrong and that mitigating their damages, as suggested by Mr. Cooperstock, would have been an admission of guilt.

[42] The Court finds that the issue of mitigation of damages should be dealt with at a later stage.

V- Conclusion

[43] As mentioned by Justice Kasirer in *Acadia Subaru*⁵, "... the traditional cautiousness evinced by courts before dismissing claims completely, especially early in the proceedings, remains an appropriate approach, notwithstanding the renewed resolve to prevent abuse of process."

[44] Justice Kasirer also gave the following warning: "Courts must even guard against article 54.1 C.C.P. itself being invoked abusively by defendants who are inclined to cry wolf in the absence of any palpable threat of impropriety. After all, proper access to the courts is a value to be preserved for both sides of a dispute⁶."

[45] Mr. Cooperstock has not convinced the Court that the Superior Court Action is improper, nor has he demonstrated a blameworthy conduct on the part of Plaintiffs. Therefore, the Motion to Dismiss will be dismissed.

[46] In view of the Court's conclusion with respect to the first question in issue, it will not analyse the second question in issue dealing with the appropriate remedy.

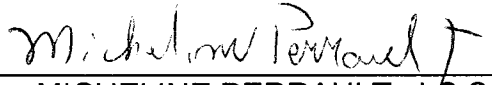
FOR THESE REASONS, THE COURT:

[47] **DISMISSES** Defendant's Motion to Dismiss the Action as Being Improper;

⁵ Supra, note 1, par. 30.

⁶ Ibid.

[48] **THE WHOLE** with costs.


MICHELINE PERRAULT, J.C.S.

Mtre. Mark Bantey
GOWLING LAFLEUR HENDERSON
Attorneys for Plaintiffs

Mr. Jeremy Cooperstock
Assisted by Mtre. Karim Renno

Dates of Hearing: April 28th and 29th, 2014