

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

RICHARD WARMAN

Plaintiff

- and -

THE NATIONAL POST COMPANY, JONATHAN KAY, EZRA LEVANT, KATHY
SHAIDLE, FIVEFEETOFFURY.COM, SMALLDEADANIMALS.COM,
CATHERINE MCMILLAN, MARK FOURNIER, FREEDOMINION.CA,
CONSTANCE WILKINS-FOURNIER

Defendants

**STATEMENT OF DEFENCE OF THE NATIONAL POST COMPANY
AND JONATHAN KAY**

1. Except as indicated herein, The National Post Company and Jonathan Kay (hereinafter the "National Post Defendants"), admit the allegations contained in paragraphs 3-5 and 55 of the Statement of Claim.
2. Except as indicated herein, the National Post Defendants deny the allegations contained in paragraphs 1, 47-54, 56, 57-60 and 62-64 of the Statement of Claim.
3. Except as indicated herein, the National Post Defendants state that they have no knowledge with regard to the allegations contained in paragraphs 2, 6-46 and 61 of the Statement of Claim.
4. The National Post Defendants state that a court of the Province of Ontario does not have the authority to grant the relief sought by the Plaintiff in subparagraph 1(b) of the Statement of Claim or, in the alternative, it is not appropriate that a court of the Province of Ontario grant such relief.
5. The National Post Defendants admit the statements contained in paragraph 3

of the Statement of Claim except they state that the Defendant, The National Post Company, is a partnership and not a corporation.

6. With respect to paragraph 4 of the Statement of Claim, the National Post Defendants admit the *National Post* publishes a blog as part of the online version of the newspaper at the URL www.network.nationalpost.com/np/blogs/fullcomment under the heading "Full Comment" (hereinafter referred to as "Full Comment"). The Full Comment portion of the online newspaper contains articles and comments of columnists, reporters and others associated with the *National Post* newspaper as well as other items.

7. With respect to paragraph 5 of the Statement of Claim, the National Post Defendants state that at all material times Jonathan Kay was employed by The National Post Company as a comments page editor and a columnist for the op-ed page of the newspaper. Jonathan Kay also contributed articles and commentary to Full Comment and on occasion would edit Full Comment.

Publication of The Matters Complained Of

8. The National Post Defendants state that on February 18, 2008 the *National Post* published an opinion piece written by Jonathan Kay and entitled *Jonathan Kay on Richard Warman and Canada's phony-racism industry* (hereinafter referred to as the "Comment Complained Of"). The National Post Defendants state that the Comment Complained Of was published for a short period of time on the Full Comment section of the online edition of the *National Post* but was not published in the print edition of the *National Post*.

9. The Comment Complained Of was not published on February 19th, 2008 as is alleged at paragraph 47 of the Statement of Claim. Further, the National Post Defendants state that the Comment Complained Of was published as part of the Full Comment section of the online edition of the *National Post* website and not on a section known "FreeComments" as alleged in paragraph 47 of the Statement of Claim.

10. The National Post Defendants admit that the Comment Complained Of contained the words referred to at paragraph 50 of the Statement of Claim but state that paragraph 50 of the Statement of Claim does not reproduce the Comment Complained Of in its entirety. The National Post Defendants state that they intend to rely on the Comment Complained Of in its entirety at the trial of this matter.

11. The National Post Defendants state that the words complained of taken in their full context and in their plain and ordinary meaning or by innuendo do not bear and are not capable of bearing the meanings alleged at paragraph 51 of the Statement of Claim or any defamatory meaning.

12. In the alternative, if the words complained of are defamatory, which is not admitted but is expressly denied, then the National Post Defendants state that the words complained of taken in their full context and in their plain and ordinary meaning were understood by a reasonable reader to mean the following:

(i) An allegation was made in a proceeding before the Canadian Human Rights Tribunal that the Plaintiff posted an offensive message on a website using an alias;

(ii) The author of the Comment Complained Of was of the view that anti-racist activists post fictitious messages on websites in order to bring attention and relevance to their views about right wing extremist groups; and

(iii) The author of the Comment Complained Of held the view that posting fictitious messages on websites or blogs by anti-racist activists is mischievous and raises questions regarding the extent in which allegedly racist material posted on the internet is authentic.

13. In the alternative, if the words complained of are defamatory, which is not admitted but is expressly denied, then to the extent that the words complained of were understood to have any of the meanings set out in paragraph 12 above then the National Post Defendants state that the words complained of are true or substantially true.

14. Further and in the alternative, if the words complained of at subparagraphs 50(a),(b),(d),(g),(h) and (i) of the Statement of Claim were understood to have the meanings set out in subparagraph 12(ii) or 12 (iii) above then the National Post Defendants state that to the extent that the words complained of are statements of fact they are true or substantially true and to the extent they consist of expressions of opinion they are fair comment made in good faith and without malice on matters of public interest, namely proceedings before a Canadian Human Rights Tribunal (the "CHRT"), the provisions of the Canada Human Rights Act relating to speech and the conduct of a former member of the Canadian Human Rights Commission (the "CHRC") and a frequent complainant to the CHRC. The National Post Defendants state that the opinions or comments were based upon facts or information contained in the Comment Complained Of or information well known in the community which were true or substantially true and without limiting the generality of the foregoing the National Post Defendants rely on the following facts in support of their defence of fair comment:

- (i) Prior to the publication of the Comment Complained Of, the Plaintiff had been employed by the CHRC;
- (ii) Prior to the publication of the Comment Complained Of, the Plaintiff had made several complaints to the CHRC regarding offensive or allegedly offensive material posted on the internet by racist or allegedly racist groups;
- (iii) Prior to the publication of the Comment Complained Of, the Plaintiff had posted messages on websites of racist or allegedly racist groups using an alias and pretending to hold views similar to or sympathetic with such groups;
- (iv) Prior to the publication of the Comment Complained Of, others associated with the CHRC had posted messages on websites of racist or allegedly racist groups using an alias and pretending to hold views similar to or sympathetic with such groups; and
- (v) Canada is generally tolerant of different races, religions, lifestyles and

other differences and the occurrence of racist speech by Canadians has diminished.

15. In the further alternative, the words complained of at subparagraphs 50(c),(e) and (f) were privileged as a fair and accurate report of a proceeding before the CHRT pursuant to s.3(1) of the *Libel and Slander Act*, R.S.O. 1990, c.L-12.

16. In the further alternative, the words complained of at subparagraphs 50(a)(b)(d)(g)(h) and (i) of the Statement of Claim were fair comment based on matters related to a proceeding before the CHRT which are the subject of privilege pursuant to s.3(1) of the *Libel and Slander Act*, *supra*.

17. With respect to paragraph 57 of the Statement of Claim, the National Post Defendants admit that the Comment Complained Of, or a portion thereof, was republished by or linked to websites hosted by others but deny the Comment Complained Of, or any portion thereof, was republished by print media.

18. Further and in the alternative, the National Post Defendants state that any republication of the Comment Complained Of or linking thereto by other internet or print media was not authorized by the National Post Defendants and state further that such republication or linking to the Comment Complained Of was not the natural and probable result of publishing the Comment Complained Of. Further, any republication by others of the Comment Complained Of, or a substantial portion thereof, constituted a breach of copyright held by the Defendant, the National Post Company or a related entity. Consequently, the National Post Defendants state that they are not responsible at law for any such republication or linking by others.

19. In the alternative, if the republication of the Comment Complained Of, or a portion thereof, was authorized or was the natural and probable result of publishing the Comment Complained Of, which is not admitted but is expressly denied, then the National Post Defendants state that such republication ceased to be authorized shortly after receipt of the Plaintiff's complaint when the National Post Defendants

contacted various websites that had posted the Comment Complained Of, or portions thereof, and demanded that the Comment Complained Of, or portions thereof, be removed from their websites. The National Post Defendants state that they are not responsible at law for any such unauthorized publication or continued republication of the Comment Complained Of, or a portion thereof, by others.

20. The National Post Defendants state that the words complained of were published as an incident of the freedom of expression guaranteed by Sections 1 and 2 of the *Charter of Rights and Freedoms*. To the extent that the defamation laws enforced in the Province of Ontario limit the right of the National Post Defendants to publish the words complained of, such laws are inconsistent with the constitution of Canada and are of no force or effect pursuant to subsection 52(1) of the *Charter of Rights and Freedoms*.

Alleged Damages

21. The National Post Defendants deny the Plaintiff has been injured or has suffered any of the losses or damages alleged in paragraphs 1, 59, 60 and 62 of the Statement of Claim, or any loss or damage, and puts the Plaintiff to the strict proof thereof.

22. In the alternative, if the Plaintiff has suffered any damage or loss, which is not admitted but is expressly denied, the National Post Defendants plead that the damages or loss claimed are excessive, exaggerated, remote, unrecognized at law, unmitigated by the Plaintiff, and unconnected with any alleged act or omission on its part, and puts the Plaintiff to the strict proof thereof.

23. In the alternative, if the Plaintiff has suffered any damage or loss, which is not admitted but is expressly denied, then the National Post Defendants state that on or about February 20, 2008 they published a full and fair retraction pursuant to subsection 5(2) of the *Libel and Slander Act, supra*. on the Full Comment section of the *National Post* online edition of the newspaper that contained the following words (hereinafter the "Retraction"):

RETRACTION

On Monday, the National Post posted on its FullComment.com Web blog a column entitled "Richard Warman and the phony-racism industry" that repeated allegations made by Bernard Klatt in a 2006 sworn affidavit against lawyer and Canadian human rights activist Richard Warman. Mr. Klatt has alleged that a racist posting on Freedomsite about Senator Anne Cools was made by Mr. Warman in 2003. The National Post has no evidence to support Mr. Klatt's allegation against Mr. Warman and it hereby retracts any suggestion that Mr. Warman manufactured any statement about Senator Cools. The National Post apologizes for any embarrassment this has caused Mr. Warman.

24. The National Post Defendants state that the Plaintiff, through his solicitors, agreed to the wording of the Retraction.

25. Further, the National Post Defendants state that upon the request of the Plaintiff's solicitors, it also published the Retraction on page A2 of the February 23, 2008 print edition of the *National Post*. The National Post Defendants agreed to the unusual further publication of the Retraction in the February 23, 2008 print edition of the *National Post* in good faith and in a sincere effort to address the Plaintiff's concerns notwithstanding the fact that the Comment Complained Of was not published in the print edition of the newspaper.

26. The National Post Defendants published the Retraction in good faith making it clear that the allegation regarding the Plaintiff that was reported on in the Comment Complained Of was in fact made but the *National Post* had no independent evidence to support such allegation.

27. Further and in the alternative, if the Plaintiff did suffer damage or loss, which is not admitted but is expressly denied, then the National Post Defendants state that the publication of the Retraction on February 20, 2008 on the Full Comment section of the online edition of the *National Post* and on page A2 of February 23, 2008 print edition of the *National Post* constituted a full apology pursuant to s. 9(1) of the *Libel*

and Slander Act, supra.

28. In the alternative, if the Plaintiff did suffer loss or damage, which is not admitted but is expressly denied, then the National Post Defendants state that such damage or loss was entirely mitigated by the following:

(i) The publication of the Retraction and apology on the Full Comment section of the online edition of the *National Post* on or about February 20, 2008;

(ii) The publication of the Retraction and apology on page A2 of the print edition of the *National Post* on or about February 23, 2008; and

(iii) After receipt of the Plaintiff's complaint, the National Post Defendants contacted various websites that had posted, linked to or referred to the Comment Complained Of, or portions thereof, and requested that such websites remove the Comment Complained Of or links thereto from their websites.

29. With respect to paragraphs 56 and 63 of the Statement of Claim, the National Post Defendants deny that they were reckless as to whether information contained in the Comment Complained Of was true or false. In particular, the National Post Defendants state that prior to the publication of the Comment Complained Of they took various steps to ensure the accuracy of information contained in the Comment Complained Of including but not limited to:

(i) A review of provisions of the *Canadian Human Rights Act*;

(ii) A review of decisions of the CHRT including decisions disposing of complaints made by the Plaintiff;

(iii) Attendance at a CHRT proceeding regarding a complaint initiated by the Plaintiff and referred to in the Comment Complained Of;

(iv) A review of an affidavit sworn by Bernard Klatt concerning the Plaintiff that was filed in a CHRT proceeding initiated by the Plaintiff and referred to in the

Comment Complained Of;

(v) A review of published articles about the Plaintiff; and

(vi) A review of published articles about the CHRC and the CHRT.

30. With respect to paragraphs 50 and 63 of the Statement of Claim, the National Post Defendants expressly deny that they acted maliciously, callously or in a high handed manner or that its conduct in publishing the Comment Complained Of warrants the imposition of punitive damages.

31. The National Post Defendants deny that they have received a proper notice of action as is required pursuant to subsection 5(1) of the *Libel and Slander Act, supra.*, and put the Plaintiff to the strict proof thereof.

32. The National Post Defendants rely on the provisions of the *Libel and Slander Act, supra.*, and without restricting the generality of the foregoing, with particular reference to section 3(1), 5(1), 5(2), 8, 9(1) and 22-24 thereof.

33. The National Post Defendants submit that the action should be dismissed against them with costs on a solicitor-client basis given the entirely unfounded claim by the Plaintiff for punitive damages.

May 8, 2008

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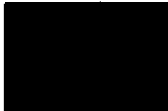
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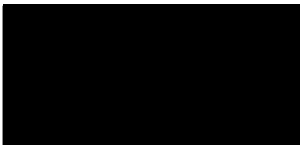
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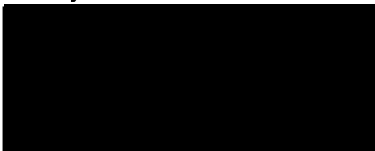
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Richard Warman
Plaintiff

The National Post Company et al
and
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Court File No: 08-CV-352197SR

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

STATEMENT OF DEFENCE

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