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March 2 2001

PURSUANT TO
CONFORMÉMENT A

RULE/LA RÉGLE 26.02 (

THE ORDER OF
L'ORDONNANCE DE
DATED / FAIT LE

THE HON. MR. Justice Cumming
February 5, 2001

Court File No. 96-CU-110595CP

REGISTRAR
SUPERIOR COURT OF JUSTICE

[Signature]

GREFFIER

COUR SUPÉRIEURE DE JUSTICE

SUPERIOR COURT OF JUSTICE

BETWEEN:

HEATHER ROBERTSON

Plaintiff

- and -

THE THOMSON CORPORATION,
THOMSON CANADA LIMITED, THOMSON AFFILIATES
INFORMATION ACCESS COMPANY and
BELL GLOBEMEDIA PUBLISHING INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AMENDED STATEMENT OF DEFENCE

1. The defendants The Thomson Corporation ("TTC"), Thomson Canada Limited ("TCL") and Information Access Company ("IAC") and Bell Globemedia Publishing Inc. ("BGPI") (the "defendants") admit the allegation in paragraph 2 of the amended statement of claim that the named plaintiff is a freelance writer, the allegation in paragraph 3 of the amended statement of claim that TTC is a corporation incorporated under the laws of Ontario, and the allegation in paragraph 4 of the amended statement of claim that TCL is a corporation incorporated under the laws of Ontario and a wholly-owned subsidiary of TTC. The defendants further admit that the Class definition is accurately recited in paragraph 7 of the amended statement of claim.

2. The defendants deny all further allegations contained in the amended statement of claim, except as expressly admitted below. The defendants further deny that the plaintiff, or any class member, is entitled to any of the relief claimed in paragraph 1 of the amended statement of claim.

3. The defendants have no knowledge in respect of the balance of the allegations contained in paragraph 2 of the amended statement of claim.

The Parties

4. The defendant TCL publishes a wide range of materials, including newspapers, magazines and other periodicals, including The Globe and Mail, which are made available in a variety of different media. TCL is the Canadian operating subsidiary of TTC.

5. The defendant IAC is a corporation (now named The Gale Group Inc.) incorporated under the laws of Delaware which provides reference products and services in a variety of different media. IAC is also a wholly-owned subsidiary of TTC.

6. The defendant TTC is a holding company and not an operating company. The defendants deny the allegations in paragraph 9A of the amended statement of claim that TTC expressly directed, ordered, authorized, aided or abetted TCL or IAC in the alleged copyright infringement, or was a party to, or indifferent to the likelihood of the alleged infringement which is, in any event, strictly denied.

6A. The defendant BGPI is a corporation incorporated under the laws of Canada. As of January 1, 2001, it acquired from Thomson Canada Limited, and now owns and operates, *The Globe and Mail* and *Globe Interactive*.

7. The defendant called "Thomson Affiliates" is not a legal entity, nor a proper party. The pleading in respect of this non-entity, in paragraph 6 of the amended statement of claim, is an inappropriate attempt to broaden the action where the plaintiff knows of no complaint.

8. The plaintiff Class, as defined in paragraph 7 of the amended statement of claim, includes persons who created works outside of an employment relationship ("Class

Freelancers" creating "Freelancer Works"), and persons who created works in the course of their employment ("Class Employees" creating "Employee Works"). The Works at issue (as defined in paragraph 7 of the amended statement of claim) therefore include Freelancer Works and Employee-Works.

9. The defendants deny the alleged infringement of the copyright and moral rights of the Class Freelancers, contrary to the allegations in paragraphs 9 and 10 of the amended statement of claim.

10. The defendants further deny the alleged infringement of the limited right available to Class Employees under section 13(3) of the *Copyright Act*, R.S.C. 1985, c. C-42, as amended, contrary to the allegations in paragraphs 8A and 10A of the amended statement of claim.

11. The claims made by the Class primarily relate to Works published in newspapers, magazines or other periodicals, whether or not the print edition of the newspapers, magazines or other periodicals is published by one of the defendants, or a non-party. In either event, newspapers, magazines or other periodicals are collective works under the *Copyright Act*, as discussed below.

Freelancer Claims

12. Publishers of newspapers, magazines and other collective works are the owners of the copyright in those collective works and as such have the statutory right to produce or reproduce their collective works, in whole or substantial part, in any material form, including freelancer materials. The defendants plead and rely upon sections 2 and 3 of the *Copyright Act*.

13. The statutory right to publish a collective work in any material form encompasses all of the Electronic Media complained of in this action, including microfiche, microfilm, computer database, CD-ROM, diskette, online service or other electronic system or device.

14. Publisher's rights extend not only to the right to produce or reproduce the works in whole or substantial part in any material form, but also to communicate the works to the public by telecommunication, and to authorise others to exercise these rights.

15. Further, the Class Freelancers admit, in paragraph 8 of the amended statement of claim, that they licensed rights in their Works to the publishers of newspapers, magazines, and other publications as defined in paragraph 7 of the amended statement of claim.

16. The defendants deny the allegations in paragraph 8 of the amended statement of claim that any Class Freelancer effectively placed any limits on the publishers' statutory rights in their collective works with respect to the use of a Work in Electronic Media. On the contrary, the publishers received sufficiently broad licenses from each freelancer to permit the defendants to use the Works as they did. Such licenses need not be in writing and are typically oral. These licenses are non exclusive and the scope of the license is often implied by the conduct of the parties to it. The Class Freelancers knew that the publications in which their Work were to be included were made available in Electronic Media. The Class Freelancers were themselves users of Electronic Media. Under the licenses, express or implied, each copyright owner, both the Class Freelancer and the publisher, had the right to produce or reproduce their Work or publication, respectively, in whole or substantial part, in any material form whatever, as copyright owners under the *Copyright Act*.

17. Publishers of the publications in which the Works of Class Freelancers appeared had all the requisite rights to make the Works available in Electronic Media. Thus, TCL and IAC had all the requisite rights to make those publications available, or authorize making them available, in whole or substantial part, including the Freelancer Works, in Electronic Media.

18. In any event, each Class Freelancer consented by his or her conduct to the use made of his or her Works. The defendants plead and rely upon s. 27 of the *Copyright Act*, which provides that consent is a defence to a claim for infringement.

Employee Claims

19. Copyright in Employee Works is owned not by the employee, but by the employer. The defendants plead and rely upon section 13(3) of the *Copyright Act*.
20. Further, the *Copyright Act* affords no rights to Class Employees where the Employee Work is not an article or other contribution to a newspaper, magazine or similar periodical.
21. Even where an Employee Work is an article or other contribution to a newspaper, magazine or similar periodical, the *Copyright Act* affords no right to Class Employees unless the Work is used otherwise than as part of a newspaper, magazine or similar periodical.
22. The defendants deny that any Employee Works have been used except as part of a newspaper, magazine or similar periodical. Therefore, no Class Employee has the right to exercise the limited right afforded by section 13(3) of the *Copyright Act*, contrary to the allegations in paragraph 8A of the amended statement of claim.
23. Section 13(3) of the *Copyright Act* does not require that the use be in the very newspaper, magazine or similar periodical in which such works were initially published, contrary to the allegation in paragraph 8A of the amended statement of claim.
24. In the alternative, any Class Employee who would otherwise have the benefit of the limited right afforded by section 13(3) of the *Copyright Act*, has agreed, as contemplated by that section, or has otherwise consented to the use of his or her Works in the manner now complained of in this Action. Those Class Employees therefore have no right under section 13(3).
25. Further, Class Employees do not include any unionized employee where the use of his or her work is governed by a collective agreement.
26. In any event, no Class Employee has sought to restrain the publication of an Employee Work otherwise than as part of a newspaper, magazine or similar periodical, nor have the defendants failed to comply with such a request.

27. No right to restrain is therefore available to any Class Employee, nor has there been a breach of any such right. The defendants deny that any Class Employee is entitled to any injunctive relief, contrary to the allegations in paragraph 10A of the amended statement of claim. Further, in no event is a Class Employee entitled to damages, which are available only to copyright owners, contrary to the allegations in paragraph 10A of the amended statement of claim. The defendants plead and rely upon section 34 of the *Copyright Act*.

No Rights Violated

28. The defendants strictly deny the allegations that they violated any rights of the Class, as alleged in paragraph 12 of the amended statement of claim. The defendants further deny the allegation in paragraph 11 of the amended statement of claim that they have been unjustly enriched as a result of the alleged infringement.

29. On the contrary, the defendants have proceeded in an appropriate exercise of their rights. The defendants strictly deny all allegations of infringement of copyright or moral rights of any member of the Class.

30. The defendants therefore deny that the Class members are entitled to any of the relief sought, including injunctive relief and damages.

Claims Barred by Delay

31. In the alternative, should any member of the Class have a potential claim, which is strictly denied, that claim is barred by his or her conduct. Each member of the Class, by his or her conduct, has acquiesced to the use of his or her Works in Electronic Media. The defendants relied upon this conduct to their detriment. The members of the Class are now, therefore, precluded from asserting any infringement. The defendants rely upon the doctrines of estoppel, waiver, acquiescence and laches.

32. In any event, all claims in respect of alleged infringement prior to September 10, 1993, are statute-barred. Each Class member knew, or could reasonably have been expected to know, of the uses made of each of his or her Works at the time such uses occurred. Any

proceedings for infringement are therefore required to be commenced within three years after the alleged infringing uses occurred. No remedy can be awarded for any alleged infringement in the period from April 24, 1979, through to September 10, 1993.

33. The defendants plead and rely upon the *Copyright Act*, R.S.C. 1985 c. C-42, as amended. The defendants further plead and rely upon the *Limitations Act*, R.S.O. 1990, c. L.15.

34. The defendants, therefore, ask that this action be dismissed, with costs.

June 18, 1999

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Plaintiff

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Defendants

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SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

STATEMENT OF DEFENCE

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