

FILED OCT 06 2009

Superior Court of Justice
Cour supérieure de justice

Defence to / Défense à la

Plaintiff's Claim
demande du demandeur

Defendant's Claim
demande du défendeur

Form / Formule 9A Ont. Reg. No. / Règl. de l'Ont. : 258/98

WHITBY

Small Claims Court / Cour des petites créances de

62979/09

Claim No. / N° de la demande

**601 Rossland Road East
Whitby, Ontario L1N 9G7**

Address / Adresse

(905) 430-5800

Phone number / Numéro de téléphone

Plaintiff No. 1 / Demandeur n° 1

Under 18 years of age.
Moins de 18 ans.

Additional plaintiff(s) listed on attached Form 1A.
Le ou les demandeurs additionnels sont mentionnés
sur la formule 1A ci-jointe.

OTAVNIK

Last name of individual or name of company, etc. / Nom de famille du particulier ou nom de la compagnie, etc.

JOSEPH

First given name / Premier prénom

Second given name / Deuxième prénom

Also known as / Également connu(e) sous le nom de

299 DOVER CRT, OSHAWA, ONTARIO

Address for service (street & number, unit, municipality, province) / Adresse aux fins de signification (numéro et rue, unité, municipalité, province)

L1G 6G7

(905) 728-2133

Postal code / Code postal

Phone no. / N° de téléphone

Fax no. / N° de télécopieur

Representative / Représentant(e)

LSUC # (if applicable) / N° du BHC (le cas échéant)

Address for service (street & number, unit, municipality, province) / Adresse aux fins de signification (numéro et rue, unité, municipalité, province)

Postal code / Code postal

Phone no. / N° de téléphone

Fax no. / N° de télécopieur

Defendant No. 1 / Défendeur n° 1

Under 18 years of age.
Moins de 18 ans.

Additional defendant(s) listed on attached Form 1A.
Le ou les défendeurs additionnels sont mentionnés
sur la formule 1A ci-jointe.

BAKER

Last name of individual or name of company, etc. / Nom de famille du particulier ou nom de la compagnie, etc.

RICHARD

H.

First given name / Premier prénom

Second given name / Deuxième prénom

Also known as / Également connu(e) sous le nom de

10 KING STREET EAST, SIXTH FLOOR. TORONTO, ONTARIO

Address for service (street & number, unit, municipality, province) / Adresse aux fins de signification (numéro et rue, unité, municipalité, province)

M5C 1C3

416 368 6344

416 368-3133

Postal code / Code postal

Phone no. / N° de téléphone

Fax no. / N° de télécopieur

Representative / Représentant(e)

LSUC # (if applicable) / N° du BHC (le cas échéant)

Address for service (street & number, unit, municipality, province) / Adresse aux fins de signification (numéro et rue, unité, municipalité, province)

Postal code / Code postal

Phone no. / N° de téléphone

Fax no. / N° de télécopieur

**Within seven (7) calendar days of changing your address for service, notify the court and all other parties in writing.
Dans les sept (7) jours civils qui suivent tout changement de votre adresse aux fins de signification, veuillez en
aviser par écrit le tribunal et les autres parties.**

DEFENCE / DÉFENSE

This Defence is being filed on behalf of: RICHARD H. BAKER

La présente défense est déposée au nom de : (Name of defendant(s) / Nom du/de la ou des défendeur(s)/défenderesse(s))

(Check as many as apply / Cochez la ou les cases qui s'appliquent.)

- I/We dispute the full claim made against me/us.
Je conteste/Nous contestons la totalité de la demande présentée contre moi/nous.
- I/We admit the allegations contained in paragraph(s) _____
Je reconnais/Nous reconnaissons les faits allégués au(x) paragraphe(s) (Paragraph number(s) / Numéro du ou des paragraphes)
- I/We deny the allegations contained in paragraph(s) THROUGHOUT
Je nie/Nous nions les faits allégués au(x) paragraphe(s) (Paragraph number(s) / Numéro du ou des paragraphes)
- I/We admit the full claim made against me/us and propose the following terms of payment:
Je reconnais/Nous reconnaissons être redevable(s) de la totalité de la demande présentée contre moi/nous et propose/proposons les modalités de paiement suivantes :
- \$ _____ per _____ commencing _____, 20 _____.
(Amount / Montant) \$ par (Week/month / Semaine/mois) à compter du
- I/We admit part of the claim made against me/us in the amount of \$ _____ and propose
Je reconnais/Nous reconnaissons être redevable(s) d'une partie de (Amount / Montant) \$ et propose/proposons la demande présentée contre moi/nous, soit
- the following terms of payment: \$ _____ per _____ commencing
les modalités de paiement suivantes : (Amount / Montant) \$ par (Week/month / Semaine/mois) à compter du
- _____, 20 _____.

DEFENCE / DÉFENSE

CAUTION TO PLAINTIFF(S):

If this Defence contains a proposal of terms of payment, you are deemed to have accepted the terms **unless** you file with the clerk and serve on the defendant(s) a Request to Clerk (Form 9B) for a terms of payment hearing **WITHIN TWENTY (20) CALENDAR DAYS** of service of this Defence [R. 9.03(3)].

AVERTISSEMENT AU(X) DEMANDEUR(S) :

Si la présente défense comprend une proposition à l'égard des modalités de paiement, vous êtes réputé(e)s les avoir acceptées, **sauf** si vous déposez auprès du greffier et signifiez au(x) défendeur(s) une demande au greffier (formule 9B) pour la tenue d'une audience relative aux modalités de paiement **DANS LES VINGT (20) JOURS CIVILS** de la signification de la présente défense [par. 9.03 (3)].

CAUTION TO DEFENDANT(S):

If your Defence contains a proposal of terms of payment and **YOU FAIL TO MAKE PAYMENT** in accordance with your proposal, **JUDGMENT FOR THE UNPAID BALANCE MAY BE OBTAINED AGAINST YOU** [R. 9.03(2)].

AVERTISSEMENT AU(X) DÉFENDEUR(S) :

Si votre défense comprend une proposition à l'égard des modalités de paiement et que **VOUS N'EFFECTUEZ PAS LES PAIEMENTS** conformément aux modalités que vous proposez, **UN JUGEMENT À L'ÉGARD DU SOLDE IMPAYÉ PEUT ÊTRE OBTENU CONTRE VOUS** [par. 9.03 (2)].

NOTE TO DEFENDANT(S):

YOU MUST FILE WITH THE COURT a copy of this Defence (Form 9A) for every plaintiff [R. 9.01(1)].

REMARQUE AU(X) DÉFENDEUR(S) :

VOUS DEVEZ DÉPOSER AUPRÈS DU TRIBUNAL une copie de la présente défense (formule 9A) pour chaque demandeur [par. 9.01 (1)].

**REASONS FOR DISPUTING THE CLAIM AND DETAILS
MOTIFS DE CONTESTATION DE LA DEMANDE ET PRÉCISIONS**

In separately numbered paragraphs, explain why you do not agree with the claim made against you.
Expliquez sous forme de paragraphes numérotés pourquoi vous contestez la demande présentée contre vous.

If you are relying on any documents or other material, you **MUST** attach copies to the Defence. If evidence is lost or unavailable, you **MUST** explain why it is not attached.

*Si vous vous appuyez sur des documents ou autres pièces, vous **DEVEZ** en annexer des copies à la défense. Si une preuve est perdue ou n'est pas disponible, vous **DEVEZ** expliquer pourquoi elle n'est pas annexée.*

Please refer to Schedule A hereto

(If more space is required, attach and number separate sheet(s). / *Si vous avez besoin de plus d'espace, numérotez et annexe une ou des feuilles supplémentaires.*)

Prepared on: October 5, 20 09
Fait le :

(Signature of defendant or representative /
Signature du défendeur/de la défenderesse ou du/de la représentant(e))

SCHEDULE A

1. Except as admitted herein, the Defendant, Richard H. Baker, denies each and every allegation in the Claim of the Plaintiff Joseph Otavnik (hereinafter "Otavnik") and puts him to the strict proof thereof.
2. The Defendant is a lawyer in the private practice of law in the City of Toronto and has known the late Norval Morrisseau since 1975. He was Morrisseau's lawyer from about 1975 until about 1982 and his association with the artist continued in subsequent years until his death in December 2007.
3. The Defendant has been one of several members of the Norval Morrisseau Heritage Society (hereinafter "NMHS") since its incorporation in October 2005. NMHS does not have a lawyer. Its members are all volunteers.
4. NMHS was created at the request of the late artist for the purpose of creating a catalogue raisonnée of his art, with a mission of researching, documenting and promoting the artistic achievement of Norval Morrisseau and protecting the integrity of his art.
5. NMHS works independently to achieve its goals. It is concerned, through its work in preparing a catalogue raisonnée, to protect the integrity of Morrisseau's art but does not engage in public debate or disclosure of its work. It has no commercial relationship with any art galleries or other commercial organizations. While NMHS regards Kinsman Robinson Galleries of Toronto as the dealer chosen and trusted by Morrisseau to represent his art since 1990, it is not affiliated in any manner with it nor dependent upon it in any way for its activities.
6. The various derogatory allegations about NMHS made by Otavnik in his Claim are not only completely false, but also absurd, scandalous and insulting to all concerned:

for example, the allegation (see page 15 of Otavnik Affidavit) that NMHS is “a creature of Mr. Donald Robinson. It is controlled by him and operates through him”.

7. Apart from one phone call from Otavnik some considerable time ago, the Defendant’s first personal contact with him arose out of an email request on June 24, 2009 from one Ritchie Sinclair who indicated that he was looking for a suitable location to house a painting for a short period to permit “closer inspection by experts”.
8. The painting in question (“the painting”) was apparently the subject of litigation against Mr. Sinclair by Otavnik in another Small Claims Court proceeding in Toronto, No. SC-09-00082782-0000 (“the Otavnik-Sinclair action”). There was no suggestion or request by Mr. Sinclair that this inspection be carried out by the Defendant, nor did the Defendant ever suggest he would do so.
9. The Defendant agreed to receive and keep the painting in his office for a short period to facilitate expert inspection at the instance of the parties to the Otavnik-Sinclair action. He made it clear that he would only do this with the consent of Otavnik and with the parties’ agreement that they would be fully responsible for insurance to protect against loss or theft of the painting while it remained in the Defendant’s office.
10. Until this Claim was served on him, the Defendant was unaware of the Motion Endorsement in the Otavnik-Sinclair action, produced at Tab 2 of the Plaintiff’s Claim herein, indicating, *inter alia*, that the inspection was “to be carried out by Richard Baker at his premises.....”.
11. On or about June 26, 2009 Otavnik brought the painting, a rolled canvas inside a tube container, to the Defendant’s office in Toronto and signed a confirmation agreeing to assume responsibility for loss or theft to the painting. He also gave the Defendant a book of exhibits in the Otavnik-Sinclair action and another book of documents headed by a purported declaration under the Competition Act and containing

substantially similar exhibits to those in this proceeding save for those referring to the Defendant. This was the first time the Defendant met Otavnik.

12. On July 3, 2009 Mr. Sinclair attended the Defendant's office, inspected the painting and had it photographed. The Defendant took no part in the inspection or photographing of the painting.
13. On July 8, 2009 Otavnik attended the Plaintiff's office and retrieved the painting.
14. On July 10, 2009 Otavnik circulated an email to members of the NMHS attaching a photo of a painting alleged to be the one inspected in the Defendant's office. The email also warned them to pay heed to alleged misrepresentations made to the Defendant by the Kinsman Robinson Galleries. To the knowledge and belief of the Defendant, neither he, nor other members of NMHS, have ever received misrepresentations of any kind from the Kinsman Robinson Galleries and have no reason to believe otherwise.
15. On July 13, 2009 Otavnik telephoned the Defendant and in the course of the short call he threatened to sue NMHS unless it disassociated itself from the Kinsman Robinson Galleries. The Defendant refused to engage in a discussion with him.
16. On August 5, 2009 Otavnik emailed the Defendant, as appears at Tab 3 of the Plaintiff's Claim herein, inquiring about an opinion on the painting from the Defendant or NMHS. On August 6, 2009 the Defendant, as also appears at Tab 3, by email to Otavnik, told him to refer his inquiries to Mr. Sinclair, or his lawyer, from whom the request to receive the painting had emanated. The same day Otavnik replied to the Defendant by email as follows:

"Mr. Baker,

Unless you want to be issued A Summons to Appear I suggest you stop being such an asshole. It is you who interjected yourself into this legal matter. It is/was you who agreed to inspect the painting. I did not contact you. I did not

ask you to do anything. I don't even know what you have done with the images of my painting. Actually Mr. Baker if you do not respond I will sue you. Sincerely, Joe Otavnik 1 905 728 2133"

17. True to his word, Otavnik has now sued the Defendant, as appears in this Claim.
18. The foregoing constitutes, to the best of his recollection and belief, the entire dealings of the Defendant with Otavnik. The Defendant is therefore not in any manner liable to Otavnik and has done nothing to justify being sued by him.
19. The Defendant therefore asks that Otavnik's claim herein be dismissed on the grounds that:
 - i. it discloses no reasonable or coherent cause of action;
 - ii. the sheer prolixity and abundance of unfounded and speculative allegations, made not only against the Defendant but also against other individuals in matters completely unconnected with the Defendant, will make it exceedingly difficult to have a fair trial of this Claim;
 - iii. the Claim is inflammatory, a waste of time, a nuisance and an abuse of the court's process.
20. The Defendant asks that Otavnik's claim be dismissed with costs, including reasonable disbursements and compensation for inconvenience and expense, all as provided for under Rule 19 of the Rules of the Small Claims Court, O. Reg. 78/06.
21. The Defendant further alleges that Otavnik has acted unreasonably in bringing this proceeding and asks this Honourable Court to order Otavnik to pay an amount as compensation to the Defendant who has, without any justification, been put to the time and expense of defending this spurious action.

22. The Defendant states that pursuant to Rule 6 of the Rules of the Small Claims Court O. Reg. 258/98, the proper jurisdiction for the conduct of this proceeding is the territorial division of Toronto, and not Whitby. To the extent that any cause of action is disclosed in the Claim, which is not admitted, it arose in Toronto where the Defendant resides and conducts his law practice. The Defendant intends to request this proceeding be transferred and tried in Toronto Small Claims Court.

Date: October 5, 2009

Richard H. Baker
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Toronto, Ontario
M5C 1C3

Tel. (416) 368-6344
Fax (416) 368-3133
Defendant