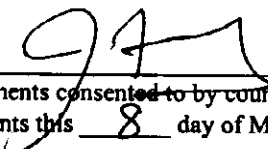


Amended pursuant to Rule 24(1)(a)  
Original Statement of Claim filed May 15, 1998.  
Amended Statement of Claim filed December 15, 1998.  
Further Amended pursuant to the Order of the Honourable Mr. Justice Macaulay the 7<sup>th</sup> day of December 1999.  
Second Further Amendment pursuant to Rule 24(1)(b)

  
Amendments consented to by counsel for the  
Defendants this 8 day of May, 2000.



Form 13 (Rule 20(1))

No. C981969  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**LASIK VISION CANADA INC.**

PLAINTIFF

AND:

**TLC WEST INC., TLC LASER CENTERS INC., ELIAS VAMVAKAS,  
JEFFERY MACHAT, ^ PAUL DAME, BART MCROBERTS, AND  
MICHAEL MELENCHUK**

DEFENDANTS

**SECOND FURTHER AMENDED STATEMENT OF CLAIM**

1. The plaintiff, Lasik Vision Canada Inc. ("Lasik"), is a federally incorporated company and has its registered office at #101 - 1281 West Georgia Street, Vancouver, B.C., V6E 3J7.

2. The defendant TLC West Inc. ("TLC West"), is a company incorporated under the laws of Ontario and has its head office in British Columbia at 1139 West Georgia Street in Vancouver, British Columbia.

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RAFTS  


3. The defendant TLC Laser Centers Inc. ("TLC Inc.") is a company incorporated pursuant to the laws of Ontario and has a head office at 5600 Explorer Drive, Suite 301, Mississauga, Ontario. TLC Inc. is a publicly traded company, with its shares listed on both the Toronto Stock Exchange and NASDAQ. TLC Inc. operates 55 laser eye centers in North America, eight of which are in Canada. Of its Canadian clinics, one is in Vancouver, three are in Toronto, Ontario, one is in London, Ontario, one is in Waterloo, Ontario, one is in Windsor, Ontario, and one is in Moncton, New Brunswick.

4. TLC West operates a laser refractive surgery clinic at 1139 West Georgia Street in Vancouver (the "TLC Vancouver Clinic") under licence agreement from its parent company, TLC Inc.

5. The defendant Elias Vamvakas ("Vamvakas"), whose address is 423 Weldrick Road East, Richmond Hill, Ontario, is the president, chief executive officer and chairman of the board of TLC Inc. and as such is the operating mind of TLC Inc. Vamvakas is a co-founder of TLC Inc.

6. The defendant Jeffery Machat ("Dr. Machat"), whose address is 212 Boake Trail, Richmond Hill, Ontario, is a director of TLC Inc. and acts as its national medical director. Dr. Machat is a co-founder of TLC Inc.

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7. The defendant Paul Dame ("Dame"), whose address is unknown, is an optometrist, and is a clinical director at the TLC Vancouver Clinic.

8. The defendant Bart McRoberts ("McRoberts"), whose address is unknown, is an optometrist, and is a clinical director at the TLC Vancouver Clinic.

9. The defendant, Michael Melenchuk ("Melenchuk"), is an optometrist and a director of TLC West. He resides at #1206 - 1311 Howe Street, Vancouver, B.C. V6Z 2P3. Melenchuk is the center director at the TLC Vancouver Clinic.

10. Lasik is in the business of performing laser eye surgery. On or about February 1998 it initiated a programme offering laser assisted in situ keratomileusis to correct myopia, hyperopia and astigmatism. At the material times Lasik had two clinics at which it performs laser eye surgery. One is located at 101 - 1281 West Georgia Street in Vancouver, British Columbia (the "Lasik Vancouver Clinic"). The other is at 5025 Orbitor Drive, Suite 300, Bldg. No. 2, Mississauga, Ontario (the "Lasik Mississauga Clinic"). Lasik has now opened thirteen additional clinics, in Burnaby, Calgary, Edmonton, Saskatoon, Winnipeg, Toronto, Niagara Falls, Windsor, London, Ottawa, Montreal, Quebec City, and Halifax.

11. Lasik is in competition with TLC West, TLC Inc. and its related subsidiaries.

12. Dr. Hugo Sutton is the founder of Lasik and is its medical director. At the material times Dr. Sutton was one of three surgeons performing laser eye surgery at the Lasik Vancouver Clinic and now performs surgery at the Lasik clinic in Burnaby, British Columbia.

13. Simon P. Holland ("Dr. Holland") is an ophthalmologist and laser eye surgeon, and is the chief surgeon and medical director of the TLC Vancouver Clinic. He sits on the National Medical Board of the TLC corporate group.

^

14. Dr. Sutton and Dr. Holland have known one another professionally for many years. Before June 1998, Dr. Sutton referred those of his patients who experienced complications which required the assistance of a corneal sub-specialist to Dr. Holland at the Eye Care Centre at Vancouver Hospital or St. Paul's Hospital.

15. In or about February, 1998 Lasik announced that it would perform laser eye surgery for less than had previously been charged by other laser eye surgery centres. Prior to February, 1998 there had been very little variation in the charges for such surgery by the various providers. By lowering its prices Lasik attracted a large volume of patients.

16. As a result of this price competition, in or around February, 1998 the defendants, and each of them, without justification began a campaign of disseminating defamatory and false statements about Lasik and Dr. Sutton calculated to damage Lasik's business and professional reputation and diminish Lasik's competitive viability in the laser eye surgery market and to enhance their own.

17. The elements of the campaign undertaken by the defendants, and each of them, which are known to the plaintiffs at this time, include:

(a) collecting information about  $\Delta$  Dr. Sutton's patients who experienced complications, including confidential medical information given to and obtained by Dr. Holland from Dr. Sutton's patients at the Eye Care Centre at Vancouver Hospital and St. Paul's Hospital;

(b) discussing the medical conditions of these patients with them in a manner designed to mislead them about their conditions, and/or encourage untrue and defamatory descriptions of their conditions and of the medical practices of Lasik and Dr. Sutton;

(c) encouraging these patients to describe these defamatory descriptions to reporters for wide publication and repetition;

(d) contacting these patients and encouraging them to contact the media, complain to the College of Physicians & Surgeons of British Columbia (the "College") and commence legal proceedings against Dr. Sutton and Lasik;

(e) encouraging the College to commence a review of Dr. Sutton's laser eye surgery practice at Lasik;

(f) making defamatory statements, which they knew to be false, to prospective patients about Dr. Sutton and Lasik in an attempt to discourage those patients from having surgery at Lasik;

(g) distributing materials about Dr. Sutton and Lasik with defamatory content which they knew to be false; and

(h) making statements about Dr. Sutton which they knew to be false.

Full particulars of the campaign of defamation are within the knowledge of the defendants.

Particulars, as known by the plaintiff at this time, are set out below.

18. In or about April, 1998 Doreen McMorran, a TLC West employee, contacted Walter Receconi, O.D. of Astoria, Oregon, to inquire as to a patient who had travelled to Vancouver to have surgery performed by Dr. Hugo Sutton at Lasik's premises.

19. Ms. McMorran falsely represented that she was a representative of a public relations firm retained by Lasik and was performing a follow-up study on a significant number of problem cases, and requested the telephone number for the patient. Lasik believes that similar stratagems have been employed by the defendants to distribute false statements for the purpose of damaging Lasik in the marketplace.

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#### **The Ralph Letter**

20. In or about April, 1998, Deborah Ralph, a former patient of Dr. Sutton's, submitted a letter, with the intention that it be published, to Nursing BC (the "Letter"). The Letter was subsequently published at page 9 of the May - June edition of Nursing BC and at page 6 of the July - August edition of Alberta RN.

21. Nursing BC is published by the Registered Nurses Association of British Columbia. Alberta RN is published by the Alberta Association of Registered Nurses.

22. The Letter, written and published of and concerning Lasik, and in particular the medical practices of Lasik, contained the following defamatory words which the defendants knew or ought to have known were false:

"In my case, possible complications were not discussed with me or noted in the preoperative consent form."

In their natural and ordinary meaning the defamatory words in the Letter meant and were understood to mean, by themselves and in the context of the Letter as a whole, that Lasik and Dr. Sutton breached their medical obligations to Ms. Ralph by failing to advise her of complications that might arise from laser eye surgery.

23. The Letter referred to and was understood to refer to Lasik and Dr. Sutton. The particulars are as follows:

- (a) the last paragraph of the Letter refers to Ms. Ralph's decision being "...driven by a cheap price." At the time of the Letter, Lasik was well known to readers of Nursing BC and Alberta RN as offering the lowest prices to nurses for laser eye surgery;
- (b) at the material time Dr. Sutton was the principal surgeon at Lasik.

24. Ms. Ralph's claim in the Letter quoted above is false. Prior to having surgery at Lasik Ms. Ralph signed a consent form acknowledging that she had been warned about possible complications both verbally and in writing. The form signed by Ms. Ralph stated:

"The procedures Photorefractive Keratectomy (PRK) and Laser Assisted In Situ Keratomileusis (LASIK), along with their advantages and disadvantages, potential risks, possible complications, and alternative treatments have been explained to me. I confirm that I have read and understand the preceding five (5) pages of the six- (6) page consent form."

25. Both Nursing B.C. magazine and Alberta R.N. have printed retractions.

26. The defendants, and each of them have distributed the Letter to optometrists, members of the medical profession, and to the general public as part of the campaign to discredit Lasik and Dr. Sutton. None of the defendants has distributed the retraction.

### **The CBC Broadcast**

27. On about July 6, 1998 the Canadian Broadcasting Corporation, broadcast on its television program "Broadcast 1" an interview with Ms. Ralph, in which she said of and concerning Lasik and Dr. Sutton, and in particular the medical practices of Lasik and Dr. Sutton, the following defamatory words which she knew or ought to have known were false:

"So I've been told by these three ophthalmologists, and I am going for a fourth opinion, that I won't be able to see out of this eye ever again...I'll be blind in one eye for the rest of my life." (the "CBC Broadcast")"

28. Ms. Ralph's claim in the CBC Broadcast quoted above is false. Ms. Ralph has an astigmatism that is correctable to 20/20; the astigmatism can be corrected by a retreatment with a



second lasik procedure. Two of the three people to whom Ms. Ralph refers as examining her are Dr. Holland and Melenchuk. The statements by Ms. Ralph in the CBC Broadcast are known to the defendants to be false.

29.            In April 2000 Dr. Holland apologized to Dr. Sutton and Lasik (the "Apology Letter") regarding his role in the CBC Broadcast of Ms. Ralph's statements. The remaining Defendants have not issued apologies.

30.            Notwithstanding their knowledge that the statements are false, the defendants , and each of them, in an effort to discredit Dr. Sutton and Lasik, have made multiple copies of the CBC Broadcast and distributed it to numerous optometrists, to members of the medical profession, and to the general public in British Columbia, Ontario and elsewhere. In particular, on about September 16, 1998 Dr. Machat and Dr. Dame, with knowledge of the false content, forwarded copies of the CBC Broadcast to optometrists in Ontario. This was done as part of the campaign to discredit Lasik and Dr. Sutton.

### **The CTV Broadcast**

31.            On or about September 29, 1998 CTV, published on its program "W5", an interview with Dave Perron, a former patient of Dr. Sutton's, in which Mr. Perron states of and concerning Dr. Sutton, and in particular the medical practices of Dr. Sutton, the following defamatory words which the defendants knew or ought to have known were false:

*"Dave Perron: Part way into the cut everything just stopped. Sutton and his nurse were in a state of confusion and you could tell he was very tense.*

*Interviewer:* According to Perron the cut had failed but rather than stop Dr. Sutton just a few minutes later proceeded with a second cut and that's one thing that should never be done...

*Dr. Holland:* I would have been devastated if he had been my patient and that happened to me.

*Interviewer:* Is that something that you would ever do, cut a flap twice?

*Dr. Holland:* I wouldn't cut a flap twice on the same day.

*Interviewer:* Would any good surgeon do that?

*Dr. Holland:* I cannot see a situation where it would be safe to proceed having a poor flap of any kind." (the "CTV Broadcast").

32. The statement that Dr. Sutton performed an initial lasik cut followed shortly thereafter by a second one is false; only one cut was performed. ^ The falsity of the statement was known, or ought to be known, to the defendants to be false, ^ as Mr. Perron was examined by the chief surgeon and medical director of the TLC Vancouver Clinic, Dr. Holland, who discussed Mr. Perron's case with Melenchuk.

33. In the Apology Letter, Dr. Holland apologized to Dr. Sutton and Lasik regarding his role in the CTV Broadcast concerning Mr. Perron. The remaining Defendants have not issued apologies.

34. Notwithstanding their knowledge that the statements are false, the defendants, in an effort to discredit Dr. Sutton and Lasik, have taken out a radio advertisement played on radio station CKNW making reference to the W5 program and made multiple copies of the CTV

Broadcast and passed it out to ^ optometrists, to members of the medical profession and to the general public in British Columbia, Ontario, and elsewhere.

### **The National Post Article**

35. On or about July 3, 1999 the National Post newspaper published in its Weekend Post II section, at page 21, a feature article on laser eye surgery (the "Post Article") that was based, in part, on interviews with Dr. Machat on his own behalf and on behalf of TLC Inc. In giving the interview it was the intention of Dr. Machat and TLC Inc. that statements made in the interview would be published in the National Post throughout Canada and elsewhere.

36. The Post Article included the following defamatory statement, attributed to Dr. Machat, of and concerning Lasik, and in particular the medical practices of Lasik, which Dr. Machat knew or ought to have known were false:

"The success of such companies as Mississauga, Ont.-based TLC, which had sales of \$260 million last year - a 22,194% revenue growth since 1993, making it the fastest-growing company in *Profit* magazine's 1999 list - are prompting folks with an eye for a buck to open up laser eye centres as if they were Starbucks. And it's that kind of activity, Dr. Machat protests, that's giving the industry a bad name.

Low-cost providers, he (Dr. Machat) laments, reuse blades, use out-of-date laser equipment and put dangerous limitations on pre- and post-operative care. And when you hear stories about people losing their flaps in waterskiing mishaps or losing their sight altogether as a result of this kind of surgical malarkey, it's almost certainly, Dr. Machat believes, at the hands of these fly-by-nighters."

37. In their natural and ordinary meaning the defamatory words in the Post Article meant and were understood to mean, by themselves and in the context of the Post Article as a whole, that Lasik provides sub-standard medical care and that the risk of an adverse outcome at Lasik is higher than at a TLC Inc. clinic.

38. The reference to "low-cost providers" in the Post Article referred to and was understood to refer to Lasik. The particulars are as follows:

- (a) Lasik is well known throughout Canada for offering laser eye surgery at a price significantly lower than other centres, in particular TLC's centres;
- (b) Dr. Machat and TLC Inc. have circulated and published criticisms of Lasik to the same purport and effect as those made in the Post Article and as set out elsewhere in this statement of claim.

39. Dr. Machat and TLC Inc. made the statements published in the Post Article maliciously, knowing they are false, intending that they would be published in the Post Article and disseminated to a wide audience throughout Canada and elsewhere, intending to discredit Lasik and as part of the ongoing campaign to discredit Lasik.

### **Defamation**

40. The defendants, and each of them and/ or their employees or agents, published the Letter, the CBC Broadcast, the CTV Broadcast, and/or the Post Article and words describing and repeating the false and defamatory contents of the Letter, the CBC Broadcast, the

CTV Broadcast and the *Post* Article (the "Campaign Materials") maliciously, knowing the contents to be false and defamatory, as particularized above.

41. The defendants, and each of them, intended and expressly or impliedly authorized others to republish the ^ Campaign Materials. It was the natural and probable result of the publication of the Campaign Materials that the defamatory words would be repeated by the persons to whom they were originally published.

42. Lasik believes that the Campaign Materials, or similar words, were also published to some other persons whom Lasik cannot at present identify, but it will rely upon the publication thereof to each and every person to whom it may discover the same has been published.

43. By reason of the publications of the Campaign Materials, and other similar words, by the defendants, and each of them Lasik has been injured in its character, credit and reputation and has suffered loss and damage.

#### **Injurious Falsehood**

44. The Campaign Materials are false as set out above.

45. TLC Inc. and TLC West are trade rivals of Lasik and distributed the Campaign Materials with the sole purpose of diminishing Lasik's competitive viability in the laser eye

surgery market so that TLC Inc. and TLC West may increase their own competitive viability in the market and reap pecuniary benefits as a result.

46. In the premises, the defendants, and each of them, stated or distributed or caused to be stated or distributed the Campaign Materials, knowing them to be false, or recklessly, not caring whether they were true or false and/or with no honest belief that they were true. In so doing, the defendants, were actuated by malice with the dominant motive of damaging Lasik and its business.

47. ^ Distributing the Campaign Materials was calculated to cause pecuniary damage to Lasik in its business. As a result, Lasik has been injured in its trade and has suffered loss and damage.

#### **Interference with Economic Relations**

48. The defendants, and each of them, wrongfully, and with intent to injure, interfered with potential contracts and business opportunities available to Lasik by ^ distributing the Campaign Materials. Particulars of which are set out above.

49. As a result, Lasik has been injured in its trade and has suffered loss and damage.

**False and Misleading Advertising under the *Competition Act***

50. The false information in the ^ Campaign Materials are being used by the defendants and each of them to intentionally mislead the public about the quality of service provided by Lasik.

51. ^ Distributing the Campaign Materials was for the sole purpose of discrediting Lasik in an effort to influence the decision of members of the public who are candidates for laser eye surgery to choose TLC Inc.'s clinics to the detriment of Lasik.

52. At all material times the defendants, and each of them knew ^ the Campaign Materials were false and misleading and that they would ultimately be restrained from circulating these materials but the defendants determined to proceed with the circulation of these materials in spite of that knowledge.

53. The conduct of the defendants constitutes misleading advertising and so is in violation of s.52 of the *Competition Act*, R.S. 1985, c. C-34.

***Trade Practice Act***

54. In the ordinary course of its business, TLC Inc. and TLC West solicit, offer and advertise and promote the provision of their laser eye surgery services to consumers.

55. Individual consumers pay TLC Inc. and TLC West to provide them with laser eye surgery services.

56. Consumers purchase laser eye surgery services primarily for personal, as opposed to business, purposes.

57. The defendants, and each of them have engaged in conduct, as set out above, which has the capability, tendency or effect of deceiving or misleading a person, contrary to section 3 of the *Trade Practice Act*, R.S.B.C. 1996, c. 457.

### **Conspiracy**

58. The defendants and each of them, as set out above, planned, agreed and conspired to discredit Dr. Sutton and Lasik by undertaking a campaign to spread false and defamatory statements about Dr. Sutton and Lasik in order to gain a pecuniary advantage for themselves.

59. The predominant purpose of the conspiracy was carried out by the unlawful means particularized above.

60. The defendants, and each of them, knew and intended that the actions referred to above would result in injury to Lasik.



61. The defendants, and each of them are vicariously liable for actions of their employees, agents and otherwise.

62. The defendants, and each of them intend to repeat and continue the wrongful acts complained of through their employees, agents and otherwise.

WHEREFORE the plaintiff claims as follows:

- (a) a temporary and permanent injunction restraining the defendants and each of them and their directors, employees, agents and otherwise, from further publication of the alleged, or any similar, defamatory statements;
- (b) general damages;
- (c) aggravated damages;
- (d) punitive damages;
- (e) special costs;

(f) such other and further relief as to this Honourable Court may seem just.

Place of Trial: Vancouver, British Columbia

Dated: May 15, 1998

  
Solicitors for the Plaintiff  
Lasik Vision Canada Inc.

Further Amendment Date: December 7, 1999

Second Further Amendment Date: May , 2000

The Solicitors for the Plaintiff Lasik Vision Canada Inc. are Fasken Martineau DuMoulin LLP, whose office address and address for delivery is 2100 - 1075 West Georgia Street, Vancouver, B.C. V6E 3G2 Telephone: 631-3131 Facsimile: 631-3232.  
(Reference: D. Geoffrey Cowper, Q.C. /LAS00054)