

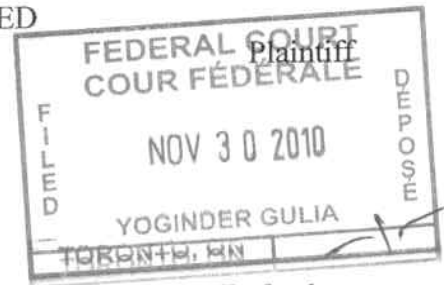
FEDERAL COURT

BETWEEN:

RESEARCH IN MOTION LIMITED

- and -

KIK INTERACTIVE INC.



STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a Statement of Defence in Form 171B prescribed by the *Federal Courts Rules*, serve it on the Plaintiff's solicitor or, where the Plaintiff does not have a solicitor, serve it on the Plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this Statement of Claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your Statement of Defence is sixty days.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

November 30, 2010

Issued by: **YOGINDER GULIA**
REGISTRY OFFICER
~~**AGENT DU GREFFE**~~
«Registry Officer»

Address of local office: 180 Queen Street West
Toronto, ON M5V 3L6

TO: Kik Interactive Inc.
295 Hagey Blvd, First Floor,
Waterloo, Ontario
N2L 6R5

CLAIM

1. The Plaintiff ("RIM") claims:
 - (a) interim, interlocutory and permanent injunctions restraining the Defendant and its directors, officers, agents, servants and employees and anyone acting under their instructions, from:
 - (i) making, using, producing, reproducing, distributing, advertising, promoting, offering for sale, selling, or providing the Kik Application (as defined herein) or otherwise infringing, or inducing users of the Kik Application to infringe, the RIM Patents (as defined herein);
 - (ii) using, displaying, reproducing or otherwise employing RIM Trade-marks (as defined herein), or any marks confusingly similar thereto; and
 - (iii) displaying, publishing, using, distributing, or causing the distribution of statements or promotional materials that include the False and Misleading Statements (as defined herein) to customers or potential customers, or statements that are similar in content or give a similar impression to the False and Misleading Statements;
 - (b) a declaration that:
 - (i) the claims of Canadian Letters Patent No. 2,353,161 (the "161 Patent"), Canadian Letters Patent No. 2,485,791 (the "791

Patent”) and Canadian Letters Patent No. 2,472,474 (the “474 Patent”), which are collectively referred to herein as the “RIM Patents”, are valid and subsisting;

- (ii) the Defendant has infringed, and induced wireless device users to infringe, the RIM Patents contrary to the *Patent Act*;
- (iii) the Defendant has used the RIM Registered Trade-marks in a manner likely to depreciate the value of the goodwill associated with them, contrary to section 22 of the *Trade-marks Act*;
- (iv) the Defendant has directed public attention to its wares, services and business in such a way as to cause or be likely to cause confusion in Canada between its wares, services and business and those of RIM, contrary to section 7(b) of the *Trade-marks Act*;
- (v) the Defendant has made false and/or misleading statements to the public about the Kik Application and RIM’s business, wares and services, which discredit said business, wares and services, contrary to sections 7(a) and (d) of the *Trade-marks Act*; and
- (vi) the Defendant has made false and/or misleading representations to the public about the Kik Application and RIM’s business, wares and services contrary to s. 52 of the *Competition Act* which relates to making a representation to the public that is false or misleading in any material respect;

- (c) damages, or in the alternative an accounting of the direct and indirect benefits and profits enjoyed by the Defendant as a result of its illegal acts, as RIM may elect after trial and discovery, and an order that the Defendant deliver up the amount of said benefits and profits to RIM;
- (d) aggravated, punitive and exemplary damages for the wilful and deliberate violation of RIM's rights;
- (e) costs on a full indemnity basis, plus all applicable taxes;
- (f) pre-judgment and post-judgment interest on the aforesaid amounts at a rate of two percent (2%) greater than the prevailing prime rate set by the Bank of Canada, calculated on a semi-annual, compounded basis, or such other rate as this Honourable Court considers reasonable pursuant to sections 36 and 37 of the *Federal Courts Act*, R.S.C. 1985, c F-7, as amended; and
- (g) such further and other relief as to this Honourable Court seems just.
- (h) The monetary relief being claimed in this action, exclusive of interest and costs, exceeds \$50,000. Accordingly, this action is not being proceeded with as a simplified action.

A. The Parties

2. RIM was incorporated in 1984 pursuant to the laws of Ontario. Its head office is located in Waterloo, Ontario. RIM is a leading designer, manufacturer and marketer of innovative wireless solutions for the worldwide mobile communications market, which includes a number of award winning products and services, including the

BlackBerry Wireless Platform which provides access to a wide range of applications on a variety of wireless devices around the world.

3. The Defendant is incorporated pursuant to the laws of Canada. It was incorporated on May 20, 2009 under the name Unsynced Inc. Its name was changed to its current name on March 5, 2010. It has a place of business at 295 Hagey Blvd., First Floor, Waterloo, Ontario. The Defendant is the successor to an unincorporated business operated by its CEO, Ted Livingston ("Livingston"), from about January 1, 2009 to May 20, 2009 under the name Unsynced.

B. The Defendant's Access to RIM Confidential Information

4. The directing mind and CEO of the Defendant is Livingston.

5. Livingston was employed by RIM on three occasions, as follows:

- (a) from April 30, 2007 to December 21, 2007 as a BlackBerry Systems Engineering Project Coordinator;
- (b) from January 7, 2008 to April 25, 2008, as a Technical Product Management Coordinator for BlackBerry Messenger; and
- (c) from September 9, 2008 to December 19, 2008 as a Technical Product Management Coordinator for BlackBerry Messenger.

6. At the outset of each period of employment with RIM, Livingston executed a "Confidentiality and Intellectual Property Agreement" ("Confidentiality Agreement"), as well as a "Code of Ethics" agreement ("Code of Ethics").

7. Under the various Confidentiality Agreements Livingston signed, he agreed that he would not disclose, use or reproduce any RIM confidential information, which includes trade secrets, secret information, know-how, research, customer information and marketing information, strategies and tactics. He also agreed that all worldwide rights in any intellectual property created by him in the course of his employment would automatically vest in and be the exclusive property of RIM.

8. Under the Code of Ethics Livingston also agreed that he would not use RIM confidential information to his own advantage or profit.

9. During his employment with RIM, Livingston worked as part of a product management team on product strategy for and strategic development of BlackBerry Messenger. In that capacity, Livingston had access to RIM proprietary information related to BlackBerry Messenger, including but not limited to technical information, development plans for BlackBerry Messenger, market research, internal reports, presentations, and other commercially sensitive or secret information ("RIM Confidential Information").

10. BlackBerry Messenger is a proprietary instant messaging solution that includes application, service and platform elements developed by RIM. The application is included on its BlackBerry smartphones. Among other things, it allows text, pictures and other files to be sent from one BlackBerry smartphone to another. It has also become known as "BBM".

11. By virtue of the express and implied terms of Livingston's employment with RIM, including the Confidentiality Agreements and the Code of Ethics, Livingston had certain obligations to RIM, including a duty:

- (a) not to disclose to, or allow access to the RIM Confidential Information by, any other person;
- (b) to use the RIM Confidential Information only while employed at RIM, for RIM's benefit and not for any other purpose;
- (c) not to reproduce the whole or any part of the RIM Confidential Information, nor to make any works derived therefrom;
- (d) not to take the RIM Confidential Information, any reproduction of any part of it, or any derivative works from RIM; and
- (e) a duty of good faith and loyalty.

12. After leaving RIM, Livingston quickly formed the Defendant which, by his own admission, is "based on a year of mobile psychology and purchase behaviour research conducted at RIM".

C. Defendant's Plan to Develop a Music Sharing Service for BlackBerry

13. As a member of RIM's BlackBerry Alliance Program, which the Defendant joined on November 2nd, 2009, the Defendant had access to further RIM Confidential Information, development assistance and business assistance.

14. Initially, to gain access to and integrate its applications with RIM's BlackBerry infrastructure, the Defendant represented to RIM that it was developing a music sharing service to integrate with the BlackBerry Messenger platform. Instead the

Defendant created a cross-platform instant-messaging application for use with various smartphone platforms (the “Kik Application”).

D. Kik Application Infringes RIM’s Intellectual Property and Fails to Comply with Privacy and Other Laws

15. In marketing the Kik Application, the Defendant has infringed on various intellectual property rights of RIM (as further described below). Moreover, the Defendant has inaccurately described the Kik Application as providing functionality equivalent to BlackBerry Messenger and as being faster and more reliable. In promoting the Kik Application, the Defendant deliberately attempted to trade upon the immense goodwill and reputation enjoyed by RIM in its various trade-marks and product names, including BlackBerry, BlackBerry Messenger and BBM.

16. Furthermore, in November 2010, it was brought to RIM’s attention that the Kik Application failed to comply with RIM’s Acceptable Use Policy and the terms under which RIM provides access to and use of its BlackBerry Push Service for reasons including the Defendant’s and the Kik Application’s failure to comply with:

- (a) applicable consumer and marketing laws and regulations; and
- (b) applicable privacy and data protection laws and regulations including by collecting, using, and disclosing personal information related to BlackBerry end users such as email addresses without obtaining necessary prior consents.

17. Among other things, the Defendant and the Kik Application, unlawfully and without providing necessary notices or obtaining necessary consents, transmitted BlackBerry end users’ personal information, including personal information from their

address books, to the Defendant's servers. The Defendant then stored that information on its servers and used the personal address book information to unlawfully transmit unsolicited messages (SPAM) to individuals, without obtaining the necessary consents of the end users. Kik unfairly benefitted from its decision to unlawfully access and use the end users' personal information as a means of driving the growth of its business. Further, RIM is not satisfied that the updated Kik Application described to RIM by the Defendant and which the Defendant threatened to implement on or about November 19, 2010 (with or without RIM's consent) would satisfy the legal requirements described herein and in the immediately preceding paragraph.

E. Infringement of the RIM Patents

18. RIM is the assignee and owner of the RIM Patents.

19. By virtue of the issuance of the '161 Patent, RIM was granted, for a period of 20 years from its filing date, the exclusive right, privilege and liberty of making and using and selling to others to be used, the invention claimed in claims 1 to 46 of the '161 Patent.

20. By virtue of the issuance of the '791 Patent, RIM was granted, for a period of 20 years from its filing date, the exclusive right, privilege and liberty of making and using and selling to others to be used, the invention claimed in claims 1 to 46 of the '791 Patent.

21. By virtue of the issuance of the '474 Patent, RIM was granted, for a period of 20 years from its filing date, the exclusive right, privilege and liberty of making and

using and selling to others to be used, the invention claimed in claims 1 to 17 of the '474 Patent.

22. The '161 Patent has been in full force and effect from its date of issue on January 25, 2005 up to and including the date hereof.

23. The '791 Patent has been in full force and effect from its date of issue on October 21, 2008 up to and including the date hereof.

24. The '474 Patent has been in full force and effect from its date of issue on November 6, 2007 up to and including the date hereof.

25. By virtue of s. 43 of the *Patent Act*, the RIM Patents are presumed valid and RIM relies on this presumption of validity.

26. The subject matter of the '161 Patent relates to technology for filtering and displaying electronic messages on a BlackBerry smartphone which includes a software interface module having certain attributes and functionality.

27. The '791 Patent is a divisional patent that issued from the same application as the '161 Patent. The '791 Patent relates generally to the subject matter of the '161 Patent.

28. The '474 Patent contains claims to a router for routing messages (including instant messages) between communication networks.

29. RIM was the first to make the inventions of the '161 and '791 Patents which allow the placement of an electronic message into its "context" by linking it to earlier stored messages.

30. RIM was the first to invent the type of routers and methods claimed in the '474 Patent.

31. Use of the Kik Application, by an end user, infringes each of the claims of the '161 Patent and the '791 Patent.

32. Use of the Kik Application, by an end user, infringes claims 1, 2, 4 to 7, 9, 10, 12 to 15, 16, and 17 of the '474 Patent.

33. There is no non-infringing use of the Kik Application.

34. The Defendant has been making, providing, and using the Kik Application to induce end users of the Kik Application to infringe the RIM Patents.

35. As a result of all of the above, the Defendant has infringed the RIM Patents. The precise number and dates of infringement of the RIM Patents by the Defendant are not specifically known to RIM, but are known to the Defendant.

36. The Defendant, at all relevant times, knew of the RIM Patents but knowingly infringed, and influenced and induced users of the Kik Application to infringe. But for the Defendant's acts of distributing the Kik Application with no non-infringing purpose and its acts of influencing and inducing said users to infringe, no infringement of the RIM Patents by them would have occurred.

F. Making False and Misleading Statements

37. Since at least the public release of the Kik Application, the Defendant has traded on the immense goodwill in the RIM Trade-marks (as defined herein) and the powerful reputation of BlackBerry Messenger. It has also made false and/or

misleading statements, representations, claims, allegations and suggestions about its business, wares and services, such as the following:

1. "Similar to BlackBerry Messenger"
2. "a BBM style app"
3. "We have developed Kik Messenger, a cross-platform messenger that is very similar to BBM."
4. "Kik takes all of the amazing things of BBM..."
5. "... we hope you'll give Kik a try - no other messenger is like it when it comes to speed and message receipts."
6. "Kik's service is even faster than BBM."
7. "Kik Messenger offers the closest thing to a real-time face-to-face conversation."
8. "Kik Messenger is super fast and more reliable than most other IM apps."
9. "We learned how to build and maintain a reliable back end; and how to work efficiently ..."
10. "But only Kik Messenger has a BlackBerry client your friends will actually use and love..."
11. "... when it comes to speed and receipts, there really is nothing that compares to Kik ..."
12. "... recent actions by BlackBerry maker RIM will delay Kik msg. delivery to your BlackBerry device by up to 1 hr. We hope RIM will restore normal service ASAP."
13. "...RIM is kicking BlackBerry users off Kik... Kik had already been excluded from BlackBerry App World, so no new Kik downloads have been possible for BlackBerry users. But now RIM has shut down "push" access; as a result, messages to BlackBerry users will be delayed by up to an hour..."
14. "...our nearly one million Kik users on BlackBerry devices..."
15. "We have worked cooperatively with RIM at every step... We have responded fully to any concerns they have raised. We know battery life and privacy could not be concerns, because we have completed an

update that sips battery power and provides additional privacy controls, and have offered it to RIM. Knowing this, we are confident there is no reason service should be denied to Kik users...”

(collectively, the “False and Misleading Statements”).

38. These False and Misleading Statements are, and were known by the Defendant to be, false and/or misleading because:

- (a) the claims, allegations and suggestions set out in the False and Misleading Statements are not true;
- (b) use of the Kik Application leads to violation of federal, provincial and international privacy and data protection laws;
- (c) the Kik Application does not comply with RIM’s Acceptable Use Policy; and
- (d) the Defendant knew its own actions as well as the Kik Application’s actions as described in paragraphs 16, 17, and 38(b) and (c) above prompted RIM to discontinue the BlackBerry Push Service for the Kik Application.

39. The Defendant has displayed, published, used and distributed the False and Misleading Statements in statements and promotional materials made available to the public.

40. The full nature and extent of the said statements and materials made available to the public by the Defendant are unknown to RIM but are known to the Defendant.

41. By reason of its above-mentioned activities, the Defendant has knowingly, or in the alternative recklessly, made representations to the public that are false and

misleading in material respects. The Defendant has thus violated section 52(1) of the *Competition Act* which relates to making a representation to the public that is false or misleading in any material respect.

G. Misuse of RIM's Trade-marks

42. RIM is the registered owner of the following trade-marks (the "RIM Registered Trade-marks") and the following registrations therefor (the "Registrations"). The Registrations were issued on the dates set out below and in association with the wares and services set out in the Registrations. Said wares and services include wireless devices on which the Kik Application runs, and the services necessary to download, run and use it.

<u>Trade-mark</u>	<u>Registration No.</u>	<u>Registration Date</u>
BBBB Design	660,208	March 6, 2006
BLACKBERRY & Design	659,946	March 1, 2006
BLACKBERRY	638,068	April 21, 2005
BLACKBERRY	554,207	November 21, 2001

43. By virtue of section 19 of the *Trade-marks Act*, RIM has had, since their respective dates of registration, the exclusive right to use the RIM Registered Trade-marks throughout Canada in respect of the aforementioned wares and services.

44. Since at least as early as the above-mentioned registration dates, RIM has continuously promoted, offered for sale and sold wares and services in Canada in

association with the RIM Registered Trade-marks. The RIM wares and services have been distributed in all provinces and territories of Canada.

45. A significant number of Canadians own wireless devices and have availed themselves of services that have been promoted and provided by RIM in association with the RIM Registered Trade-marks.

46. In each year since at least 2007, the total sales of goods and services in Canada by RIM in association with the RIM Registered Trade-marks has been in the hundreds of millions of dollars.

47. RIM is also the owner of the unregistered trade-marks:

- (a) BBM, which has become known among consumers as another name for BlackBerry Messenger since at least as early as 2005; and
- (b) the design mark depicted in Schedule A hereto, which it has used and displayed in Canada continuously since at least July 2008, and later iterations.

RIM has used and displayed the above-mentioned marks, *inter alia*, in association with BlackBerry Messenger, smartphones and computer software and wireless data messaging services, delivery of messaging by electronic transmission and telecommunication services in all provinces and territories of Canada. Millions of Canadians are using RIM's BlackBerry Messenger application and service. The RIM Registered Trade-marks and the above-mentioned unregistered trade-marks are referred to herein as the "RIM Trade-marks".

48. As a result of the long-term, broad-ranging and extensive promotion and use by RIM of the RIM Trade-marks, and of the great commercial success of its wares and services, the RIM Trade-marks have become well-known and distinctive of RIM in Canada. They have engendered a significant reputation and goodwill. The RIM Trade-marks have become famous in Canada.

49. The Defendant is using, displaying, reproducing and otherwise employing the RIM Trade-marks, or confusingly similar trade-marks, including the logo depicted in Schedule "B" hereto, in promoting, offering for sale, selling and providing its own wares and services, including the Kik Application.

50. The use, display, reproduction and employment by the Defendant of the RIM Registered Trade-marks are likely to have the effect of depreciating the value of the goodwill attaching to the RIM Registered Trade-marks, contrary to section 22 of the *Trade-marks Act*, including because the Defendants have associated said marks with the False and Misleading Statements.

51. By reason of all of its above-mentioned actions, the Defendant has:

- (a) made false and/or misleading statements tending to discredit the business, wares and services of RIM;
- (b) directed public attention to its wares, services and business in such a way as to cause or be likely to cause confusion in Canada between its wares, services and business and those of RIM; and
- (c) made use, in association with its wares and services, of a description that is false in a material respect and likely to mislead the public as to:

- (i) the character, quality and composition; and
- (ii) the mode of manufacture, production and performance;

of the Defendant's wares or services;

contrary to sections 7(a), (b) and (d) of the *Trade-marks Act*.

H. Conclusion

52. All of the acts of the Defendant described herein have been carried on absent any true spirit of alliance with RIM and without the consent or license of RIM. They were performed with full knowledge of, and with flagrant disregard for, the rights of RIM including Livingston's knowledge arising from his employment with RIM and access to RIM's Confidential Information. The Defendant threatens to continue its wrongful acts unless restrained by this Honourable Court.

53. As a result of the wrongful acts of the Defendant, as described herein, RIM has suffered and will continue to suffer serious and irreparable harm, as well as serious and substantial damages.

54. As a result of its wrongful acts, the Defendant has been unjustly enriched and has earned and enjoyed direct and indirect profits and benefits. These profits and benefits include, but are not limited to, business profits and growth in the value of the shares of the Defendant, which will continue to grow from the ongoing use and distribution of its applications. The Defendant would not have been able to earn or achieve such profits and growth without committing the wrongful acts described herein. For all these benefits, profits and growth, the Defendant is liable to account

fully to RIM.

55. The Defendant will continue to violate the rights of RIM unless restrained by this Honourable Court.

56. RIM pleads and relies upon the provisions of the following statutes:

- (a) *Competition Act*, R.S.C. 1985, c. C-34, as amended;
- (b) *Trade-marks Act*, R.S.C. 1985, c. T-13, as amended; and
- (c) *Patent Act*, R.S.C. 1995, c. P-4, as amended.

57. RIM proposes that this action be tried at Toronto.

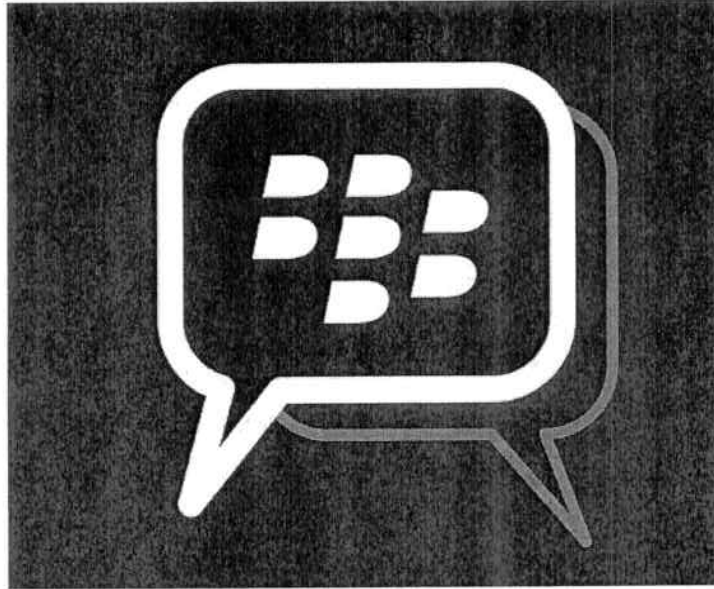
November 30, 2010


McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank
Tower
Toronto ON M5K 1E6

Andrew J. Reddon LSUC#: 30837K
Tel: (416) 601-7928
Fax: (416) 868-0673

Solicitors for Research In Motion
Limited

SCHEDULE A



SCHEDULE B



FEDERAL COURT

B E T W E E N :

RESEARCH IN MOTION LIMITED

Plaintiff

- and -

KIK INTERACTIVE INC.

Defendant

STATEMENT OF CLAIM

(Filed this 30th day of November, 2010)

McCarthy Tétrault LLP

Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Andrew J. Reddon LSUC#: 30837K

Tel: (416) 601-7928

Fax: (416) 868-0673

I HEREBY CERTIFY that the above document is a true copy of the
original issued out of / filed in the Court on the _____

day of NOV 30 2010 A.D. 20

Dated this _____ day of _____

NOV 30 2010

Solicitors for Research In Motion Limited


JOGINDER GULIA
REGISTRY OFFICER
AGENT DU GREFFE