GETTING THE DEAL THROUGH

Right of Publicity

in 21 jurisdictions worldwide

2014

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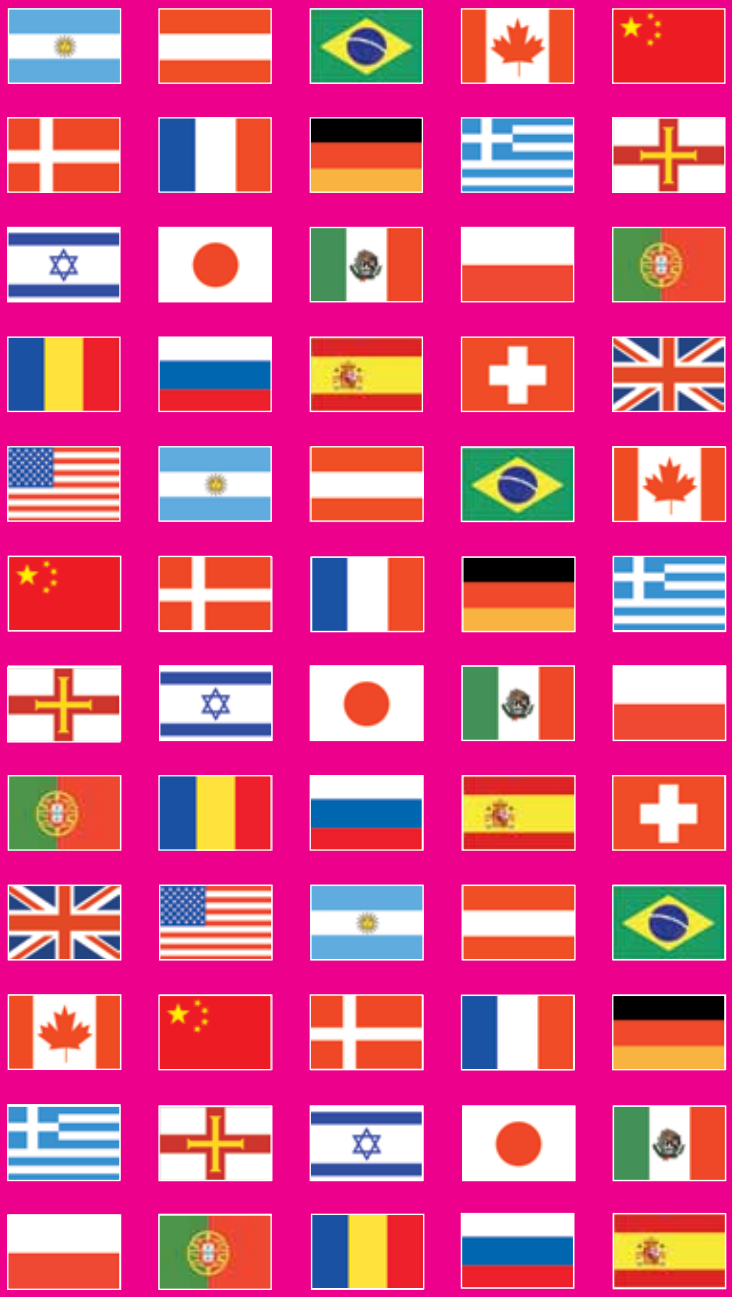

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Sources of law

1 Is the right of publicity recognised?

Publicity law in Canada is markedly different from its US counterpart. In the United States, 'personality rights' is the casual reference to the term 'right of publicity', defined simply as the right of an individual to control the commercial use of name, image, likeness and other unequivocal aspects of one's identity (eg, the distinct sound of someone's voice).

According to section 135 of the Canadian Encyclopedic Digest, the 'right of an individual to control the use of his or her persona and to commercially exploit his or her personality is protected by statute in British Columbia, Manitoba and Saskatchewan and by virtue of the common law in Ontario and Alberta'. The Privacy Act of Newfoundland and Labrador (Newfoundland) also provides some basis to recognise a potential right of publicity, as does section 5 of the Quebec Charter of Human Rights and Freedoms.

Canadian common law recognises the right of personality on a limited basis. In Canada, rights of publicity are protected by the common law tort of 'wrongful appropriation of personality', sometimes referred to as 'misappropriation of personality', being the unauthorised commercial exploitation of a person's name, image, voice or likeness. To be actionable, the use must clearly identify the person before any wrong will be attributed. Wrongful appropriation of personality is generally thought to have first been recognised in Canada as a cause of action in tort law in a 1971 landmark judgment of the Ontario High Court. In this case, the plaintiff, Robert 'Bobby' Krouse, a professional football player, who at the time was playing for the Hamilton Tiger-Cats Football Club, launched an action against Chrysler Canada Ltd, which had used his photograph in an advertising campaign for its cars without his consent.

Krouse was the only identifiable figure in the picture, and was therefore an essential element of the advertising campaign.

At trial, Krouse based his claim for relief on various established grounds, including unjust enrichment, passing off, invasion of privacy and compromising his contract with the football club, thereby subjecting him to potential litigation for breach of contract. The Court decided that this unauthorised use met the threshold of passing off but did not meet the legal test for defamation, copyright infringement or trademark infringement. The Court ruled in favour of the plaintiff, defining the unauthorised use as wrongful appropriation of the player's property right in his image, particularly as Krouse's image was viewed as a protectable commercial power supplemental to Krouse's athletic ability, which Krouse had capitalised on throughout his career as a professional athlete. The Court noted that Krouse's reputation and the value of his image were direct results of his work and efforts as an athlete and were his to exploit for further monetary gain.

The Court ruled that the plaintiff was therefore entitled to be compensated by the defendant for the wrongful appropriation of his property right in using his picture to sell cars.

The defendant appealed the decision, and the Court of Appeal found in favour of the defendant, holding that the plaintiff was only incidentally featured in the advertisement and the car was its primary feature. However, the Court of Appeal nonetheless recognised the existence of a tort broadly read to encompass how an individual controls his or her personality, confirming the tort of wrongful appropriation of personality as actionable in law and establishing the nature of publicity rights in Canada.

In the very recent case *Hay v Platinum Equities* (Alberta, 2012) the Alberta Court held that the tort of wrongful appropriation occurs even in circumstances of name and likeness only, without image. Very briefly, in *Hay*, the defendants required a loan from a bank to purchase a commercial property. To secure the loan, the defendants required a review engagement report from a chartered accountant (CA). Without the plaintiff's knowledge or consent, this report was provided to the bank complete with the plaintiff's name and professional designation as a CA on the plaintiff's misappropriated letterhead. The plaintiff's claim for damages rested upon his assertions that the defendant's forging of his name and professional designation upon his corporate letterhead amounted to an appropriation of personality, and the Court agreed. The Court concluded that a professional's name and reputation are entitled to be protected from unauthorised commercial use. The Court did not rule on whether a layperson or non-professional's name and reputation is entitled to the same protection; however, in *Aubry v Les Editions Vice Versa* (Supreme Court, 1998), (*Aubry*), discussed at greater length in question 6, the Supreme Court ruled that the unauthorised use of the identity of any person (whether famous or not) for the purpose of profit is protected under privacy rights.

2 What are the principal legal sources for the right of publicity?

Publicity rights fall under provincial jurisdiction, Canadian common law, or both, and rights and remedies vary from province to province accordingly. The provinces of Manitoba, British Columbia, Saskatchewan and Newfoundland have all

enacted legislation governing personality. The most explicit provincial legislation is the Privacy Act of British Columbia, which states that an unauthorised use of name or portrait, including caricature, of another 'for the purpose of advertising or promoting the sale of, or other trading in, property or services' is a tort, actionable without proof of damage. Under this statute, in determining whether a particular action or course of conduct is a violation of another's privacy one must take into consideration the nature, incidence and occasion of the act or conduct and the relationship between the parties. However, there is no infringement of a person's privacy through the use of a name or image unless the person in question is identified by name or description, or his or her presence is emphasised, whether by the composition of the picture or otherwise; or recognisable, and the defendant, by using the picture, intended to exploit the plaintiff's name or reputation. British Columbia's Act is explicit that any claim for wrongful appropriation is extinguished upon death.

Manitoba, Newfoundland and Saskatchewan treat appropriation of personality as an example of violation of privacy, and their legislation is less explicit than British Columbia's. Manitoba's Privacy Act recognises violation of privacy as 'a person who substantially, unreasonably, and without claim of right, violates the privacy of another person […]', citing as a specific example unauthorised use of name, likeness or voice for the purposes of advertising, sales or any other trading. Saskatchewan and Newfoundland echo Manitoba's legislation, and all three provincial acts state that any tortious use of a person's name, likeness or voice arises when the individual is identified or identifiable and the defendant intended to exploit the name or likeness or voice. The nature and degree of privacy to which a person is entitled is that which is reasonable in the circumstances, with due regard being given to the lawful interests of others.

In British Columbia, Saskatchewan and Newfoundland, a right of action for violation of privacy is extinguished by the death of the person whose privacy is alleged to have been violated, while Manitoba's legislation is silent on the issue of survival of a claim.

Yukon, Nunavut, Alberta, Ontario, Prince Edward Island, Nova Scotia and New Brunswick have not enacted privacy laws, other than incorporating protection of privacy into provincial freedom of information and protection of privacy legislation. Accordingly, these provinces and territories rely on Canadian common law.

A measured degree of protection of personality rights is found through the common law tort of wrongful appropriation of personality cited first in *Krouse v Chrysler Canada Ltd et al* (Ontario, 1971) (discussed in question 1), and later expanded upon in *Gould Estate v Stoddart Publishing* (Ontario, 1996) (*Gould*) (discussed in question 4), which explicitly references the American legal test of 'sale versus subject'. Under the 'sale versus subject' approach, if the defendant has used the plaintiff's likeness or name 'predominantly in connection with the sale of consumer merchandise or solely for the purpose of trade', then the tort of wrongful appropriation of personality would be established. This differs from the 'subject' approach, which focuses on whether the plaintiff is the subject of the defendant's work; in this latter approach, the court is able to consider whether the defendant's work is in the public interest and thus defensible in law. See question 22 for a discussion of defences existing to an infringement claim.

In the province of Quebec, where the Quebec Civil Code applies to matters arising within provincial jurisdiction, including property ownership (note that for historical reasons, the Quebec Civil Code is derived from France's Civil Code and is in contrast to the common law system, which is based on the British system and applies in all Canadian provinces and territories other than Quebec), Quebec courts have applied principles of civil liability to allow compensation for the prejudice arising from use of a person's image without his or her consent. In a Quebec case that went to the Supreme Court of Canada, the Supreme Court addressed how an individual's right to privacy could take precedence over artistic and journalistic freedom of expression. This right to privacy protects, inter alia, a 'narrow sphere of personal autonomy within which inherently private choices are made'. The Quebec Civil Code provides that every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his or her person, and the right to the respect of his or her name, reputation and privacy. These rights are inalienable. The Quebec Civil Code also recognises that use of a person's 'name, image, likeness or voice for a purpose other than the legitimate information of the public' is an invasion of privacy.

3 How is the right enforced? Which courts have jurisdiction?

In Canada, the right is enforced through civil litigation. If a person feels that he or she has been wronged, the individual may sue the alleged offender under tort law and the complainant must meet the civil law burden of proof, on a balance of probabilities that he or she suffered a 'wrong' as opposed to criminal matters in Canada, which presumes the innocence of the accused and requires the prosecution to prove guilt beyond a reasonable doubt. Unlike certain other common law jurisdictions, and at least three states in the United States (Arizona, Louisiana and Oklahoma), protection of publicity rights does not fall within any section of the Criminal Code of Canada.

All civil actions commence in the Superior Court of Justice, generally of the claimant's province; these provincial courts are tasked with almost all criminal, civil and family law matters. A Superior Court decision may be appealed to the Court of Appeal in the applicable province, and following that, certain cases may be appealed to the Supreme Court of Canada.

4 Is the right recognised per se, or by reference to other laws?

Arguably, publicity rights share a nexus with the individual right to privacy, particularly where provincial legislation references the tort of violation of privacy through the unauthorised use of name or likeness or voice for advertising and promoting sales or trade. Yet publicity rights differ from privacy rights because unlike privacy rights, publicity rights are individual property rights that can be alienable, assignable or descendible for commercial gain or otherwise. To succeed in an action for appropriation of personality at common law, a complainant must prove three things: that he or she is prominently displayed in the exploitation, be it through print advertising, television, radio or internet; that the exploitation clearly identifies the

complainant, capturing the complainant's quintessence; and that the exploitation was done for commercial purposes.

The tort of appropriation of personality is similar to but not synonymous with the tort of passing off. The law of passing off can be summarised in the simple proposition that no individual may pass off his or her goods as those of another. In the same vein, no person can imply another's endorsement of any given product or service through unauthorised use of part or all of the bundle of rights found in the property of a personality.

Athans v Canadian Adventure Camps Ltd (Ontario, 1977) (*Athans*) is an early example of this in Canada, and involved a waterskiing expert who sued a children's camp in Ontario after the camp published a distinctive photo of him in the camp's brochure. The photo published was one frequently used by the plaintiff himself for his own promotional purposes, and the Ontario High Court of Justice, in granting the plaintiff's action, cited the plaintiff's own use of the image to secure endorsements with companies such as Benson & Hedges. Moreover, the image appropriated was sufficiently well known to be associated with the plaintiff's characteristic personal style, and thus the defendant had clearly infringed on Athans' right to market himself. In this sense, wrongful appropriation of personality evokes trademark law and actions in trademark infringement.

A 1996 Ontario court case forced Canadian courts to address the intellectual property aspect of recognising a proprietary claim in an individual's personality, particularly in relation to Canada's Copyright Act. The Copyright Act applied to photographs of Canada's iconic concert pianist Glenn Gould, which had been published in a book written by the journalist Jock Carroll. Carroll, with Gould's permission, had taken photographs of the musician in the course of conducting interviews and engaging in numerous one-on-one discussions. As the photographer, and pursuant to the Copyright Act, Carroll very clearly owned copyright in the photographs, but he did not have authorisation from Gould's estate (the pianist had died prior to publication) to publish the materials. The estate, unable to allege copyright infringement, argued appropriation of personality. The defendant succeeded at trial, based in large part on what may be called the defence of public interest discussed in question 22. However, importantly, this case was the first instance in which issues in copyright law were adjudicated alongside the proprietary rights in personality.

Existence of right

5 Who has or is entitled to the right of publicity?

In Canada, only individuals possess the ability to bring a cause of action in civil court for the tort of wrongful appropriation of personality. Courts have specifically ruled that personality rights survive the death of individuals. Survivorship of personality rights was established in the 1996 civil action discussed in question 4. One of the preliminary issues in *Gould* was the issue of standing. Very clearly, Glenn Gould had personality rights and could have sued for appropriation of personality had he been alive, but since Gould had passed away 14 years prior to the commencement of the lawsuit, it was Gould's estate that brought the action. The court concluded that the estate had standing and confirmed that personality rights survive the rights holder and descend to a rights holder's heirs.

6 Do individuals need to commercialise their identity to have a protectable right of publicity?

Although the tort of wrongful appropriation of personality hinges on the unauthorised exploitation of an individual's name, likeness or voice generally for another's commercial gain, there is currently no requirement for an individual to have commercialised (or attempted to commercialise) these attributes in order to exercise the right or rights.

Common law, until recently, emphasised an individual's exclusive right to market his or her personality, and in one of Canada's most famous cases, *Athans*, the court found that the defendant could have chosen among thousands of photos depicting water skiers but instead chose to use a well-known photo of a world-renowned water skier, who himself had previously been using the photo for his own commercial exploitation. By the defendant's use of the photo, which was incidental to an advertising campaign and not even the primary object of the campaign (which was to solicit for campers), the court held that the plaintiff had lost control of his exclusive use of his promotional photograph. Thus, 'the commercial use of his [the plaintiff's] representational image by the defendants without his consent constituted an invasion and pro tanto an impairment of his exclusive right to market his personality and this […] constitutes an aspect of the tort of appropriation of personality'.

In *Aubry v Les Editions Vice Versa* (Supreme Court, 1998) (*Aubry*), a photographer took a picture of a young woman sitting alone on the front steps of a building in Montreal, Quebec. The picture was taken without the woman's consent, but pursuant to the provisions of the Copyright Act, the photographer owned the copyright in the photograph, and presumably therefore was entitled to license and exploit the photo as he saw fit. In this case, the photographer licensed (without remuneration) the photograph to a literary magazine to accompany a short story. Only 722 copies of the publication were sold, but the plaintiff sought damages based on alleged harm to her dignity, claiming to have been ridiculed by her classmates at school. The case went all the way to the Supreme Court of Canada, and the Court upheld a finding of liability against the photographer. However, in this case the actionable basis of liability was the violation of the woman's right to privacy as guaranteed in Quebec's Charter of Human Rights and Freedom, and not just a violation of the intangible property rights in personality. The Court concluded that the purpose of the protection of privacy was to 'guarantee a sphere of individual autonomy [... and] must include the ability to control the use made of one's image, since the right to one's image is based on the idea of individual autonomy, that is, on the control each person has over his or her identity'. Scholars such as Mitchell A Flagg (*Star Crazy: Keeping the Right of Publicity out of Canadian Law*, 1999) believe that the Supreme Court's majority judgment fell victim to a general confusion that has infused the tort of appropriation of personality by inappropriately mixing and matching concepts in privacy and property. Following the *Aubry* decision, fault can be established in Canada in the event that the identifiable image of a person is published without consent.

7 Can a foreign citizen have a protectable right of publicity?

Legislation such as the provincial Privacy Acts and Canada's Canadian Charter of Rights and Freedoms provides rights to

privacy and freedom of expression to 'persons' and 'everyone' respectively; the statutes do not refer explicitly to Canadian 'citizens'. Constitutional jurisprudence provides that such generic language in legislation means to embody individuals in Canada, citizens or non-citizens. As such, a foreign national has a protectable right to publicity in Canada and can access the Canadian courts to exercise that right.

8 What is protected under the right of publicity?

In Canada, rights of publicity are protected by the common law tort of wrongful appropriation of personality, being the unauthorised commercial exploitation of a person's name, image, voice or likeness. Publicity rights deal with the individual's right to control exploitation of his or her image. Since the Supreme Court's consideration of the nexus between publicity rights and privacy rights in *Aubry*, lower courts are bound by the Supreme Court's deference to the individual right of privacy, which appears to have created near strict liability for the unauthorised use of any person's identity – famous or not – for any commercial activity, whether or not such commercial activity generates a profit. Barring certain defences to infringement that must be analysed on a case-by-case basis, following *Aubry*, arguably no one in Canada can use images of friends, colleagues, neighbours, strangers or passers-by for any commercial exploitation without their consent, and *Hay* concludes that the wrong is in the use of any element of another person's personality without authorisation for the purpose of commercial gain.

9 Is registration required for protection of the right? If so, what is the procedure and what are the fees for registration?

There is no system in Canada for registering proprietary interests in one's personality. In contrast to intellectual property rights such as patents, trademarks, copyright and industrial design, in which authors or owners of the rights are able to register their interests, thereby creating a rebuttable presumption of ownership, there is no similar registry in place in respect of one's personality rights.

10 Does the existence, or the extent, of the right depend on where the individual lives or has lived?

The most explicit provincial legislation as it pertains to wrongful appropriation of personality is the Privacy Act of British Columbia, which states that an unauthorised use of name or portrait, including caricature, of another 'for the purpose of advertising or promoting the sale of, or other trading in, property or services' is a tort actionable without proof of damage.

Manitoba, Newfoundland and Saskatchewan treat appropriation of personality as an example of violation of privacy and are less explicit than British Columbia's legislation. Manitoba's Privacy Act recognises violation of privacy as 'a person who substantially, unreasonably, and without claim of right, violates the privacy of another person [...]', citing as a specific example unauthorised use of name, likeness or voice for the purposes of advertising, sales or any other trading. Saskatchewan and Newfoundland echo Manitoba's legislation, and the provincial acts of all three require that any tortious use of a person's name, likeness or voice arises because the individual is identified or identifiable, and the defendant intended to exploit the name, likeness or voice. The nature and degree of privacy to which a person is entitled is that which is reasonable in the circumstances, with due regard being given to the lawful interests of others.

In Saskatchewan and Newfoundland, a right of action for violation of privacy is extinguished by the death of the person whose privacy is alleged to have been violated, while Manitoba's legislation is silent on the issue of survival of a claim.

Yukon, Northwest Territories, Nunavut, Alberta, Ontario, Prince Edward Island, Nova Scotia and New Brunswick have not enacted privacy laws other than incorporating protection of privacy into provincial freedom of information and protection of privacy legislation. Accordingly, these regions rely on Canadian common law.

Ownership of right

11 Can the right be transferred? In what circumstances?

Under Canadian law, personality is generally considered a proprietary right rather than a personal right. Personal rights, like reputation in a defamation action, for example, are not alienable, assignable or descendible. Proprietary rights on the other hand are assignable, alienable and descendible on death.

As with other intangible property rights, the property owner is free to transfer the right or assign the interests to any third party by contract, by will or other testamentary instrument. With tort, as opposed to statutory actions, these rights appear descendible to the individual's estate, but the term of posthumous protection remains contentious, although it is easily argued that licensing personality rights of deceased persons (in particular, deceased celebrities) is big business. The *Gould* case, although not having to rule on the issue of just how long the personality rights of a deceased person might last, first established that the tort of misappropriation of personality should survive death and be enforceable by the heirs for a reasonable period. However, no determination on precise duration of the tort was made by the *Gould* court. Currently, since Gould passed away in 1982, the *Gould* decision allows Canadians to conclude that whatever the durational limit, if any, it is unlikely to be less than 14 years.

12 Can the right be licensed? In what circumstances?

As mentioned in question 8, individuals have the exclusive right to license their personality attributes to others, whether for commercial gain or not, and it is recommended that all licences and assignments be reduced to written contracts.

13 If the right is sold or licensed, who may sue for infringement?

Only the rights owner or licensee can sue for infringement.

14 How long does protection of the right last?

In Canada, under common law, the right of publicity can survive the death of the individual. With the exception of the statutes that specifically provide that wrongful appropriation of personality is extinguishable upon death, courts are generally in agreement that personality rights survive the death of an individual,

but it is currently unclear how long such rights survive. From the same facts surrounding the concert pianist, Glenn Gould, it is clear that Gould had personality rights and could himself have sued for infringement had he been alive. However, because the lawsuit was brought by the estate 14 years after his death, one of the key legal questions to be answered was whether the estate was entitled to sue for a violation of personality rights, or whether such an action could only have been brought by Gould himself. The trial judge concluded that the estate did have standing because personality rights survive the death of the rights holder and descend to heirs. While the court recognised that personality rights might be extinguished after some indeterminate period of time, no particular limitation period was established. The court concluded, rather, that any limitation period was likely to be more than 14 years, analogising the protection of personality rights to other intangible property such as patents and copyrights, which was longer than 14 years. It is worth noting that legal scholarship argues that personality rights are similar to copyright interests, which, according to the Copyright Act, subsist 'for the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year'. In any event, it is reasonable to conclude that whatever the limit, if any, it is unlikely to be less than 14 years.

15 Is the right protected after the individual's death? For how long? Must the right have been exercised while the individual was alive?

See questions 14 and 17. In certain provinces, the right is extinguished on death, while in common law the right is descendible on death for a period of at least 14 years. (See *Gould* in question 14). It is not necessary for the right to have been exercised while the individual was alive.

16 If post-mortem rights are recognised, who inherits the rights upon the individual's death? How is this determined?

As with other intangible property rights, the property owner is free to transfer the right, and assign the interests to any third party by contract, by will or other testamentary instrument. For individuals who die intestate, standard estate law governing intestacy dictates that the surviving spouse or, if there is no surviving spouse, then the surviving issue (children, then grandchildren) inherit the entire right, divided per stirpes in accordance with applicable estate law. For more information, see question 11.

17 Can the right be lost through the action or inaction of its owner?

In Canada, personality rights cannot be lost while an individual is alive, because no province or territory requires an individual's identity to be commercialised in order for the right to exist. Property rights in personality are separate and apart from the saleability of a personality or commerce resulting from a certain degree of public recognisability. A person can allege wrongdoing when his or her name, image or likeness has been publicly exploited without consent, regardless of whether profit has been derived by any party or harm incurred in libel. In certain provinces, the right is extinguished on death, while at common law the right is descendible on death for a period of at least 14 years. (See the *Gould* case in question 14).

While alive, individuals need not exercise or proclaim their personality rights on a regular basis, if at all. When rights are infringed, to allege harm, and to seek a remedy, individuals are limited only by statutory limitation periods within which they must file their claim of wrongful appropriation of personality, as against the alleged wrongdoer. These limitation periods are discussed further in question 24.

18 What steps can right owners take to ensure their right is fully protected?

While alive, rights owners are not required to take any steps to ensure protection of their rights other than reasonable vigilance with respect to infringement. There is no ability for a person to register proprietary interests declaring him or herself to be the owner of his or her personality. This is in contrast to intellectual property rights including, without limitation, patents, trademarks, copyright and industrial design, where authors or owners of the rights can register their interests creating prima facie ownership and a rebuttable presumption of ownership.

Infringement

19 What constitutes infringement of the right?

Publicity rights deal with an individual's right to control exploitation of his or her image. As set out in question 6, since the Supreme Court of Canada's decision in *Aubry*, lower courts are bound by the Court's deference to the individual right of privacy, which appeared to create near strict liability for the unauthorised use of any person's identity – famous or not – for any commercial activity (profit notwithstanding). Barring certain defences, which must be analysed on a case-by-case basis, and which are examined in question 22, Canadians are not free to use the image of another without the other person's consent.

20 Is an intent to violate the right necessary for a finding of infringement?

Disregarding current contradictions in Canadian jurisprudence on the notions of privacy and identity, the act of taking an aspect of the plaintiff's identity is sufficient to constitute the wrong in tort law. No element of intent is necessary. Following the Supreme Court's identification of the scope of the privacy 'right' in *Aubry*, it appears that all indicia of a person's identity are subject to the concept of privacy. Any use of a person's identity, famous or not, for commercial purpose will likely attract liability, unless one of the defences referred to below are available to the defendant.

21 Does secondary liability exist for the right? What actions incur such liability?

To date, no jurisprudence or legislation explicitly addresses the issue of secondary liability for the tort of wrongful appropriation of personality in Canada.

22 What defences exist to an infringement claim?

British Columbia's Privacy Act, discussed in question 2, includes explicit safeguards for the media in respect of allegations of violation of privacy. These safeguards are intended for newspapers, other publications or broadcasters, and state that in order to be rendered liable for wrongful appropriation of personality, the plaintiff must prove that his or her name or portrait was used specifically in connection with material relating to the readership, audience, circulation or other qualities of the newspaper, other publication or broadcaster. Further, the plaintiff must prove that his or her name or portrait was used specifically in connection with material relating to those goods or services.

Section 4(1)(e) of Saskatchewan's The Privacy Act also includes safeguards for the media. An act, conduct or publication is not a violation of privacy if it is undertaken by 'a person engaged in a news gathering: (i) for any newspaper or other paper containing public news; or (ii) for a broadcaster licensed by the Canadian Radio-television Commission to carry on a broadcasting transmitting undertaking'. For a successful defence, the defendant must be able to prove on a balance of probabilities that the act, conduct or publication was 'reasonable in the circumstances and was necessary for or incidental to ordinary new gathering activities'.

These safeguards are not found in Manitoba or Newfoundland's respective statutes. Currently, there is no case law indicating whether the courts in these provinces would recognise limitations similar to those found in British Columbia's Privacy Act or in Saskatchewan's Privacy Act.

The most common defence to an infringement claim is premised on the public interest values underlying section 2(b) of Canada's Charter of Rights and Freedoms, the 'fundamental freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication' and the Quebec Charter of Rights and Freedoms. Freedom of expression is held by Canada's highest court to represent inherent goodness in truth seeking; social and political decision-making and participation to be encouraged; and the diversity in forms of individual self-fulfilment and human flourishing to be cultivated for the sake of those to whom meaning is conveyed. When the activity can be broadly described as falling within the category of public interest, the legal protection of the individual's personality gives way to the larger societal good found in freedom of expression. This is illustrated best in Canada by the *Gould* case, referred to throughout this chapter, involving a published book of photographs of the iconic concert pianist, Glenn Gould. The book included photographs from an original cache of approximately 400 photographs taken with the permission of Gould in 1956 by the author and photographer Jock Carroll. The estate of Glenn Gould filed an action seeking damages claiming that the use of the photographs amounted to the tort of appropriation of personality. The Ontario High Court found that because of the public interest in knowing more about Gould, the book fell into the protected category, and no right of personality in *Gould* was therefore unlawfully appropriated by the defendant.

In a 1997 case involving the image of a famous deceased hockey player, Tim Horton, the court found that since the tort of unlawful appropriation of personality is based on the usurping of the person's right to control and market his or her own image, where that person has explicitly given over the right, as in freely assigning his right to name, image, and likeness by way of contract, there can be no interference with such a right. This defence of 'permission' was explicitly found in *Dowell et al v Mengen Institute et al* (Ontario, 1983) (*Dowell*), a case involving applicants who sought an interlocutory injunction to restrain the release of a film of a conference that was conducted on unemployment in Canada. The applicants at the time of the conference had voluntarily signed an authorisation to be filmed, such authorisation stated that the respondents were permitted to 'portray me, use my words, name, likeness, and story in both documentary and fictionalised films, tapes and written works arising from or suggested by the above Conference'. In the motion, the applicants sought to withdraw their authorisation after the sessions had been taped, editing undertaken and film locked and ready for release. Needless to say, the court recognised that the applicants had given their consent in explicit and considered terms, with the result that such authorisation was binding.

Remedies

23 What remedies are available to an owner of the right of publicity against an infringer? Are monetary damages available?

Damages can be awarded if an identifiable picture of a person is published without permission, it being of no consequence that the photo is not reprehensible or that the photo has not caused any injury to reputation, or both. In the seminal *Aubry* case referred to throughout this chapter, which involved publishing a photograph of a young woman without her consent, the Supreme Court of Canada found that the woman's right to protect her image was more important than the paper's right to publish the photo without her permission. The dissemination of the woman's image constituted a clear violation of her privacy. The Court also determined that a reasonable person, in the photographer's circumstances, would have been more diligent and would, at the very least, have tried to obtain the subject's consent. In *Aubry*, the photographer and publisher had done nothing to avoid infringing her right of privacy. It is easy, therefore, to draw a parallel to the obligations of due diligence of the news media in information-gathering to avoid liability.

In a recent Ontario Court of Appeal case, *Jones v Tsige* (Ontario, 2012) (*Jones*), which established a tort of 'intrusion upon seclusion', Sharpe JA notes, at paragraph 81, that the four provincial privacy acts 'require no proof of damage as an element of the cause of action'. The only statute that provides any guidance with respect to remedies is the Manitoba Privacy Act; section 4(2) states that all the circumstances of the case are to be considered, including:

> *(a) the nature, incidence and occasion of the act, conduct or publication constituting the violation of privacy of that person; (b) the effect of the violation of privacy on the health, welfare, social, business or financial position of that person or his family; (c) any relationship, whether domestic or otherwise, between the parties to the action; (d) any distress, annoyance or embarrassment suffered by that person or his family arising from the violation of privacy; and (e) the conduct of that person and the defendant, both before and after the commission of the violation of privacy, including any apology or offer of amends made by the defendant. The other provincial statutes leave this determination to judicial discretion.*

He adds that, 'absent proof of actual pecuniary loss, the awards are, for the most part, quite modest'.

According to section 495 of the *Canadian Encyclopedic Digest*, the 'measure of damages for wrongful appropriation of personality by commercial use of the plaintiff's image without consent is a lost user fee, that is, the amount that the plaintiff would have received had his or her permission been given'. Although the tort of wrongful appropriation of personality applies equally to the famous and not-so-famous, it is a certainty that famous and infamous personalities will command a substantially greater quantum in damages than non-recognisable individuals, as the commercialisation of the celebrity's personality is undisputed. When considering the tort of wrongful appropriation of personality under the broader genus of invasion of privacy, it is possible that even punitive damages could be awarded, in addition to compensatory damages. The benchmark case for punitive damages with respect to invasion of privacy is *Malcolm v Fleming* (British Columbia, 2000). Although the facts of this case, which involve a landlord spying on a tenant via hidden camera, are inconsistent with facts of existing case law concerning wrongful appropriation of personality, the principal factors considered could apply in certain future decisions when judges consider punitive damages for wrongful appropriation of personality. These factors include whether:

- the location of the violation was intimate;
- the relationship between the parties involved a high expectation of privacy;
- there was any premeditation;
- there would be additional humiliation of discovery at trial;
- there would be any potential for future embarrassment due to a permanent record of the violation; and
- there are other means of punishment (ie, criminal punishment).

So far, punitive damages under provincial privacy legislation have only been awarded in British Columbia. In Ontario, punitive damages have only been awarded once in a case that involved privacy issues, and the violations were exceptionally egregious. According to Sharpe JA in *Jones*, punitive damages should not be encouraged for tort claims, absent truly exceptional circumstances. No punitive damages have been awarded to date specifically with respect to wrongful appropriation of personality.

Interlocutory injunctions are commonly sought remedies, but are held to a strict tripartite legal test set out in *RJR MacDonald Inc v Canada (Attorney General)* (Supreme Court of Canada, 1994). In these motions, the applicant must prove the following: that there is a serious issue to be tried; irreparable damage; and that the balance of convenience to permit the injunction lies with the applicant. Balance of convenience is measured by the courts by weighing which party is likely to be more inconvenienced should the interlocutory injunction be granted.

The first part of the test, 'finding a serious issue to be tried', is typically not a difficult hurdle. To establish irreparable harm (the second part of the test), the claimant must cite substantial damage by showing, for example, irreparable injury to the applicants' property in their name and image (ie, irreparable harm to reputation). In *Dowell* (see question 22), the applicants sought an interlocutory injunction to restrain the release of the respondent's film. The court, however, found no evidence of irreparable harm. The applicants at the time of the conference had voluntarily signed an authorisation to be filmed, which also permitted the respondents to portray them, use their words, names, likenesses and stories in both documentary and fictionalised films, tapes and written works arising from or suggested by the conference. In the motion, the applicants sought to withdraw their authorisation after the sessions had been taped, editing had been undertaken, and film locked and ready for release.

The third part of the test for interlocutory injunctions and arguably the most subjective element requires the court to determine where the balance of convenience lies, or where the least amount of harm and inconvenience would fall as between the parties, in the event that the injunction is granted. In *Dowell*, the court found that the respondents, having expended considerable time and money in the course of the production of their film, and with a fixed date for the proposed release of the film, would be far more inconvenienced by the injunction than would the applicants. The court did not grant the injunction.

Canadian courts, acting on well-recognised principles of equity, have long denied injunctive relief, particularly of an interim nature, to litigants who seek to set aside what they have covenanted not to do. Here, the signed authorisation was intended to ensure that no participant in the film would later sue the producers for an alleged unauthorised use of their name, likeness, etc. As such, the application was dismissed.

In *Hay*, damages for the wrongful appropriation of personality were assessed at C$18,000. Damages were assessed based on compensation for both the plaintiff's time and the professional services rate he would have charged to the defendants.

24 Is there a time limit for seeking remedies?

Limitation periods are statutory in Canada and can differ within provincial and territorial limitation act legislation. Certain claims are governed by federal statutes with explicit limitations periods that supersede provincial limitations. Court proceedings in personality law, however, do not fall within any federal legislative exception and so remain governed by the applicable province. Most limitation acts stipulate a basic limitation period of two years from the date on which the claim was discovered. In an oversimplification, a claim is discovered on the earlier of:

- the day on which the claimant first knew that the injury, loss or damage caused by or contributed to by an act or omission had occurred; or
- the day on which a reasonable person first ought to have known the injury, loss or damage had occurred.

In addition, no proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place. The ultimate limitation period is predicated on date of injury, not date of discovery like the basic limitations period.

There are exceptions to the limitation periods. For example, the clock does not run at any time when the claimant is a minor incapable of commencing a proceeding and is not represented by a litigation guardian, when the person against whom the claim is made wilfully conceals from the claimant the fact that the injury, loss or damage has occurred or when the defendant wilfully misleads the claimant as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

Update and trends

In the past, the Canadian courts have been criticised for confusing the right of publicity with privacy-related rights. In Jones, arguably the most recent influential case in privacy-related tort law in Ontario, Sharpe JA notes and agrees, at paragraphs 23 and 24, with the findings of Allen M Linden and Bruce Feldthusen, in their work entitled Canadian Tort Law (9th ed; Toronto; LexisNexis, 2011), which observed that '[w]e seem to be drifting closer to the American model'.

In his decision in Jones, Sharpe JA reinforces this theory by drawing upon Professor William L Prosser's 1960 article, entitled Privacy (48 Cal LR 383; 1960). According to Sharpe JA, at paragraph 18, 'what had emerged from the hundreds of cases he [Professor Prosser] canvassed was not one tort, but four, tied together by a common theme and name, but comprising different elements and protecting different interests'. Sharpe JA then lists the four-tort catalogue delineated by Prosser:

- intrusion upon the plaintiff's seclusion or solitude, or into his or her private affairs;
- public disclosure of embarrassing private facts about the plaintiff;
- publicity that places the plaintiff in a false light in the public eye; and
- appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Sharpe JA states that most American jurisdictions 'now accept Prosser's classification and it has also been adopted by the Restatement (Second) of Torts (2010)'. In Jones, Sharpe JA sees the first classification as the applicable tort. In this American classification, there are clear delineations that pertain to the right of publicity as we understand it; namely, the fourth delineation deals explicitly with the appropriation of personality aspects for an advantage to the defendant. The idea that the right of publicity is tied to privacy rights is not new, but Prosser's formulation helps the courts to understand that the wrongful appropriation of personality is, on the one hand, an aspect of invasion of privacy, and on the other, its own tort.

The clock also stops on both the basic and ultimate limitation periods when the parties to a claim engage in alternative dispute resolution (ADR) designed to expedite civil lawsuits by encouraging settlement of issues outside the Canadian courts.

For some very specific issues, including proceedings to recover student loans and tax proceedings, no limitation period exists, but for claims in personality law, a person's claim could be extinguished because of the expiry of a limitation period.

25 Are attorneys' fees and costs available? In what circumstances?

The awarding of costs, inclusive of reasonable attorneys' fees, is available, but only at the discretion of the judge and pursuant to applicable legislation such as Ontario's Courts of Justice Act. Legislation governing costs may vary from jurisdiction to jurisdiction, and costs are awarded on a case-by-case basis.

26 Are punitive damages available? If so, under what conditions?

Punitive damages, when awarded, are an exception to the rule in tort law that a tortfeasor is to compensate a plaintiff through the awarding of damages for any loss experienced through an act or omission and not for the tortfeasor to be punished. Punitive damages, as the name indicates, are designed to punish. In Canada, the exact threshold of punitive damages varies from province to province and territory to territory. To date, no punitive damages have been awarded to a successful plaintiff following a finding of infringement on his or her personality rights. In fact, simple compensatory damages calculated to express an amount the plaintiff ought to have reasonably been able to command in the marketplace have been nominal in Canadian jurisprudence to date, including an award of just C$2,000 to the plaintiff in *Aubry*. See also question 23.

27 What significant judgments have recently been awarded for infringement of the right?

All relevant cases have been discussed throughout this chapter; perhaps the most controversial is the Supreme Court of Canada's decision in *Aubry*.

Litigation

28 In what forum are right of publicity infringement proceedings held?

Publicity infringement proceedings begin in the Provincial Superior Courts, then the Court of Appeal (if leave is granted) and finally the Supreme Court of Canada (if leave is granted).

29 Are disputed issues decided by a judge or a jury?

Disputed issues, if they proceed through Canada's court system, are decided solely by a judge. If issues in tort law for wrongful appropriation of personality proceed through ADR, outside the court system, they can be decided by third parties, including arbitrators and mediators.

30 To what extent are courts willing to consider, or bound by, the opinions of other national or foreign courts that have handed down decisions in similar cases?

In the field of publicity law, American jurisprudence and policy 'softly' influence views held in Canada. American law is, of course, not binding in Canada, although US legal principles, such as the 'sale versus subject' test, are often referred to in Canadian decisions. It is also common for Canadian courts to examine decisions made by the courts of other common law countries, and in particular the UK, to gain insight. Once again, these foreign court decisions are not binding in Canada.

International treaties are only binding in Canadian courts if the treaty has been ratified by Canada and incorporated into domestic law through Parliament. However, Canadian courts often reference applicable international treaties, conventions and case law when undertaking legal analysis and deciding issues at law.

31 Is preliminary relief available? If so, what preliminary measures are available and under what conditions?

Interlocutory injunctions are sought through preliminary motions. See question 23. In the event that preliminary relief is sought, it may be the case that the matter is heard by a master, not necessarily a judge.

32 What avenues of appeal are available in main proceedings or preliminary injunction proceedings? Under what conditions?

See questions 3 and 28.

33 What is the average cost and time frame for a first instance decision, for a preliminary injunction, and for appeal proceedings?

Timelines and cost to litigate a civil action in Canada are highly dependent upon a myriad of factors including, but not limited to, whether the claimant or plaintiff has retained legal counsel and, if so, what costs are associated with counsels' legal fees and disbursements; whether the issue goes to trial, or instead is resolved through mediation, arbitration or some other means of settlement outside of the court system; and whether a decision is appealed to a higher court with ongoing legal action required and time spent on court processes. No hard figures can be presented as to costs, but it is commonly understood that pursuing a cause of action in court is an extremely lengthy process in Canada. Access to justice issues, meaning how efficiently, expeditiously and inexpensively an average person can have their grievance adjudicated, is a well-researched, much-commented-upon subject in Canada, and many academics and lawyers feel that Canada's courts are not very accessible to the average person in Canada. Process times, process forms and costs render small suits unlikely to be heard.

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