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Protecting Your Personality Rights in Canada: A Matter of Property or Privacy?

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Abstract

This paper explores the protection of personality rights in Canada in two ways: first, by attempting to clarify the Canadian law on personality rights. The extent to which personality rights are protected across Canada is unclear, and the legal situation varies across the various Canadian jurisdictions. The second part of this paper focuses on explaining the theoretical basis for protecting personality rights. As will be seen by looking at the statutes, court judgments, and surrounding literature, there are mixed views about whether personality rights are rooted in principles of privacy, or whether they are of a proprietary nature. The theoretical foundation through which personality rights are protected will have a practical effect on some of the elements of their protection. Thus, this paper emphasized that in jurisdictions where personality rights have not been adequately addressed, the court or legislature will need to be clear on the theory to which they subscribe in order to determine the approach that will be taken in protecting these rights.

Cover Page Footnote

Amy Conroy is a Ph.D. student at the University of Ottawa, Faculty of Law. She would like to thank Professor Elizabeth Judge and Professor Teresa Scassa for providing helpful guidance on this paper.

PROTECTING YOUR PERSONALITY RIGHTS IN CANADA: A MATTER OF PROPERTY OR PRIVACY?

AMY M. CONROY*

INTRODUCTION

Protection for personality rights in Canada is a complex and uncertain matter with regards to if, and to what extent, personality rights are protected in Canada's various and distinct legal jurisdictions. Among the provinces where protection is known to exist, there are key differences in the level and method of protecting these individual rights.

British Columbia, Manitoba, Newfoundland, and Saskatchewan are four of the common law provinces in Canada that have enacted privacy statutes that provide a cause of action for the unauthorized appropriation of personality. These statutes may operate in addition to a common law right of action. In the remainder of common law Canada, protection is available only where there is a common law right of action for the appropriation of personality, which is the issue upon which the main uncertainty lies. In Canada's sole civil law jurisdiction of Quebec, statutory protection for an unauthorized appropriation of personality is available.

The tort of appropriation of personality protects against the unauthorized use of an individual's persona. The persona may include attributes such as a person's physical appearance (portrayed in a photograph or other visual representation), name, or voice. While an individual's persona has value, such value is not easily defined. Speaking in strictly commercial terms, the task of defining the worth of a given persona is relatively simple. Its usefulness has been defined as "the link in a consumer's mind between the celebrity and the product that he or she endorses,"¹ or similarly as "the persuasive influence on consumers that linking a celebrity (or a celebrity item) with a consumer product or service may engender."² However, it will become clear in this paper that the law has now realized that the commercial value inherent in this "good" is not the only feature worthy of protection. Indeed, the law has struggled to delineate the more theoretical elements of the individual persona, which come down to the individual right to privacy. To some, the unauthorized use of another person's persona is wrong because

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¹ Conrad Nest, "From 'ABBA' to Gould: A Closer Look at the Development of Personality Rights in Canada" (1999) 5 Appeal 12 [Nest].

² Robert G Howell, "Publicity Rights in the Common Law Provinces of Canada" (1997-1998) 18 Loy LA Ent L Rev 487 at 488 [Howell].

it infringes on a person's right to be let alone.³ The right to choose to *not* have one's persona publicized may also be framed as the right to anonymity.⁴ As this paper will show, any right of action developed to date necessarily acknowledges the fact that protection against unauthorized use of personality rights involves elements of privacy and property, quite often simultaneously.

Within this paper, the analysis of the protection of personality rights in Canada is divided into two parts. In Part I the aim will be to clarify the Canadian law on personality rights, including a brief history on traditional methods of protection. This will begin with a short review of the traditional methods of protecting personality rights, followed by an analysis of those Canadian jurisdictions that support an action for appropriation of personality. For those jurisdictions that offer legal protection for personality rights, the right of action will be described by reference to the following elements:

- a. The traits that can be appropriated;
- b. Whether the defendant must be identifiable;
- c. Whether the appropriation must be intentional;
- d. Whether there must be an element of gain on the part of the defendant;
- e. Whether the plaintiff must show that he suffered damage as a result of the appropriation;
- f. Whether personality rights are inheritable;
- g. Possible defences.

The purpose of Part II of this paper is to identify the theoretical foundation of personality rights and assess whether these affect the way that personality rights are protected. By viewing the right of action as being based more in notions of privacy over property or vice versa, the legislature and courts, supported by academic interpretation, have influenced the scope of protection in a way that has had real practical effects.

PART I – PROTECTING PERSONALITY RIGHTS IN CANADA

Traditional Methods of Protection

Prior to the legislative and common law developments that will be discussed below, an infringement of an individual's right to publicity was protected in Canadian

³ This interpretation was taken in the case of *Joseph v Daniels*, [1986] BCJ No 3231, 11 CPR (3d) 544 (SC) at 549, [*Joseph*]. See also David Vaver, "What's Mine is Not Yours: Commercial Appropriation of Personality Under the Privacy Acts of British Columbia, Manitoba and Saskatchewan" (1981) 15 UBC L Rev 241 at 257 [Vaver].

⁴ See *Gazette v Valiquette*, [1997] RJQ 30 at 36 (CA).

courts via other causes of action. Depending on the facts in a given case, a plaintiff might have (i) relied on a breach of an implied contract not to use a particular photograph, (ii) attempted to show an infringement of copyright or trademark, (iii) applied the law of defamation, or (iv) have taken action through the tort of passing off.⁵ As none of these causes of action were designed to protect personality rights, they provided very limited protection against an infringement.

For example, an action in defamation would only be of use to a plaintiff who could show that the unauthorized use of her personality had lowered her in the esteem of her acquaintances or of the public in general.⁶ Thus, an appropriation of personality that was in good taste and did not reflect badly on the plaintiff would not succeed via this route. Similarly, the utility of an action for passing off in this context was limited. For starters, the tort was designed to protect traders in their relations with consumers; therefore it only applied to those carrying on a business.⁷ Moreover, a plaintiff pursuing such a claim would have to show that the use of his personality confused his consumers into believing that the goods of the defendant were connected with those of the plaintiff.⁸

The situation in Canada stood in sharp contrast to certain American jurisdictions, where the legal discussion about providing specific protection for personality rights had been taking place for some time.⁹ The Canadian movement started in the late 1960s and early 1970s, resulting in the statutory and common law developments outlined below.

The Provincial Privacy Acts

British Columbia, Manitoba, Newfoundland, and Saskatchewan are four of Canada's common law jurisdictions that have enacted privacy-specific statutes dealing directly with personality rights.¹⁰

Within these four statutes there are two distinct approaches taken to the tort of appropriation of personality. In Manitoba, Newfoundland, and Saskatchewan, there is a general tort of invasion of privacy, with appropriation of personality constituting an explicitly stated example of the general tort.¹¹ A different approach is taken in British Columbia: although there is a general tort of invasion of privacy in British Columbia, appropriation of personality is itself a separate "special" tort, having its own set of

⁵ Vaver, *supra* note 3 at 243.

⁶ *Ibid* at 244.

⁷ *Ibid* at 245.

⁸ *Ibid*.

⁹ See *Haelan Laboratories Inc. v Topps Chewing Gum*, 202 F 2d 866 (1953).

¹⁰ British Columbia: *Privacy Act*, RSBC 1996, c 373 [BC *Privacy Act*]; Manitoba: *The Privacy Act*, CCSM c P125 [MB *Privacy Act*]; Newfoundland: *Privacy Act*, RSNL 1990, c P-22 [NFLD *Privacy Act*]; and Saskatchewan: *The Privacy Act*, RSS 1978, c P-24 [SK *Privacy Act*].

¹¹ MB *Privacy Act*, *ibid* at s 3(c); NFLD *Privacy Act*, *ibid* at s 4(c); SK *Privacy Act*, *ibid* at s 3(c).

requirements.¹² Therefore, a person wishing to take action to redress an appropriation of his personality in Manitoba, Newfoundland, or Saskatchewan, must assess whether the facts of his case conform to the requirements of the general tort of invasion of privacy. A person wishing to do the same in British Columbia must determine whether the facts of his case conform to the rules of the special tort. Herein, the right of action will be called the tort of appropriation of personality for all provinces, recognizing that in three of the above provinces it exists as one example of the general cause of action.

It is now possible to examine the tort of appropriation of personality more closely through the seven factors outlined above.

a. Traits that can be appropriated

The Manitoba, Newfoundland, and Saskatchewan statutes provide that an appropriation of personality can be achieved through the use of a person's name, likeness, or voice.¹³ The British Columbia Act only makes reference to the name or portrait (portrait being defined as either a likeness or a caricature).¹⁴ Thus, it appears that British Columbia has a more limited definition of "persona" than that the other three provinces. This could have real consequences for a person whose personality is appropriated through, for example, a voice recording alone.¹⁵

b. Whether the defendant must be identifiable

It is a statutory requirement in all four provinces that the plaintiff must be identified or identifiable by the use made of his persona.¹⁶ The issue was at the center of the British Columbia case of *Joseph v Daniels*,¹⁷ where a defendant's torso was the only trait of his that was depicted in a photograph. The plaintiff's claim under the British Columbia *Privacy Act* was dismissed due to the fact that he could not be identified as the person in the picture.

¹² BC *Privacy Act*, *supra* note 10 at s 3. The language of "general tort" and "special tort" is borrowed from Vaver, *supra* note 3 at 254.

¹³ MB *Privacy Act*, *supra* note 10 at s 3(c); NFLD *Privacy Act*, *supra* note 10 at s 4(c); SK *Privacy Act*, *supra* note 10 at s 3(c).

¹⁴ BC *Privacy Act*, *supra* note 10 at s 3(1).

¹⁵ For a case in which the appropriation of a person's voice was at issue, see *Sim v HJ Heinz Co Ltd*, [1959] 1 WLR 313 (CA). For a general discussion on the protection for the appropriation of a voice, see Vaver, *supra* note 3 at 277.

¹⁶ BC *Privacy Act*, *supra* note 10 at s 3(4); MB *Privacy Act*, *supra* note 10 at s 3(c); NFLD *Privacy Act*, *supra* note 10 at s 4(c); SK *Privacy Act*, *supra* note 10 at s 3(c).

¹⁷ *Joseph*, *supra* note 3.

c. Whether the appropriation must be intentional

In Manitoba, Newfoundland, and Saskatchewan, an action for the appropriation of personality can only succeed where the defendant intended to commit the wrong.¹⁸ In British Columbia there is no “intention” requirement, which significantly reduces the burden of proof on the plaintiff in that province compared to the first three jurisdictions.¹⁹

d. Whether there must be an element of gain on the part of the defendant

In Manitoba, Newfoundland, and Saskatchewan, the defendant’s use of the plaintiff’s persona must have resulted in a gain or advantage for the defendant.²⁰ However, it must be remembered that in these three provinces, the appropriation of personality is an example of the general tort of violation of privacy. In fact, the “advantage” or “gain” requirement is written into the example of appropriation of personality, and is not listed in the description of the general tort. Thus, it *may* be possible for a plaintiff to show that his privacy was infringed by pursuing his case under the general tort, where there is no requirement of “gain” or “advantage” for the defendant. Nevertheless, the fact that the element of “gain” or “advantage” has been inserted into the example in each province indicates that the legislature intended to protect personality rights only where they were used to the defendant’s advantage. In any case, the words “gain” and “advantage” can be construed widely to capture a wide variety of purposes for the use made by the defendant.

The British Columbia statute is more restrictive in this respect than the statutes of the other three provinces. In British Columbia, the use of the name or portrait of another must have been for the “purpose of advertising or promoting the sale of, or other trading in, property or services.”²¹ The statutory tort of appropriation of personality is therefore limited to acts that are motivated by commercial purposes. Again, however, it must be remembered that there is still a general tort of invasion of privacy by virtue of the British Columbia *Privacy Act*, and it *may* be possible for a defendant who is not liable under the special tort for lack of one appropriate purpose to be found liable under the general tort. The restrictions placed on purposes of the defendant in the British Columbia statute have the effect of giving the tort of

¹⁸ MB *Privacy Act*, *supra* note 10 at s 3(c); NFLD *Privacy Act*, *supra* note 10 at s 4(c); SK *Privacy Act*, *supra* note 10 at s 3(c).

¹⁹ For further explanation of the British Columbia position, see Vaver, *supra* note 3 at 282.

²⁰ Manitoba uses the word “gain”: MB *Privacy Act*, *supra* note 10, at s 3(c); Newfoundland uses the word “advantage”: NFLD *Privacy Act*, *supra* note 10 at s 4(c); Saskatchewan uses the word “gain”: SK *Privacy Act*, *supra* note 10 at s 3(c).

²¹ BC *Privacy Act*, *supra* note 10 at s 3(2).

appropriation of personality in that jurisdiction a much narrower scope than that of the other three provincial privacy statutes.²²

e. Whether the plaintiff must show that he suffered damage as a result of the appropriation

All four statutes provide that an appropriation of personality is actionable without proof of damages.²³ As will be seen, this is not the approach taken in other parts of Canada. Making the tort actionable *per se* widens the scope of the tort considerably.

f. Whether personality rights are inheritable

The *Privacy Acts* of British Columbia, Newfoundland, and Saskatchewan, all expressly provide that the right of action for appropriation of personality is extinguished upon the death of the person whose privacy was violated.²⁴ The Manitoba statute has no such provision, and it seems that an action for appropriation of personality can be brought by the deceased's estate, subject to a limitation period.

g. Statutory defences

There are a number of defences available to the defendant who has appropriated another individual's personality rights. The following constitute statutory defences in all four provinces: (i) that the plaintiff consented to the use of his persona;²⁵ (ii) that the use of the plaintiff's persona was incidental to the exercise of a lawful right of defence of person or property;²⁶ (iii) that the use was authorized or required under a provincial law or by a court, or any process of a court;²⁷ and (iv) that the act was that of a peace officer acting in the course of his or her duties.²⁸

Additional defences are available under the Manitoba statute. These are: (v) that the defendant, having acted reasonably, did not know and should not reasonably have known that the act, conduct, or publication constituting the violation would have violated the privacy of any person;²⁹ (vi) that there were reasonable grounds for the

²² See Vaver, *supra* note 3 at 294.

²³ BC *Privacy Act*, *supra* note 10 at s 3(2); MB *Privacy Act*, *supra* note 10 at s 2(2); NFLD *Privacy Act*, *supra* note 10 at s 3(1); SK *Privacy Act*, *supra* note 10 at s 2.

²⁴ BC *Privacy Act*, *ibid* at s 5; NFLD *Privacy Act*, *ibid* at s 11; SK *Privacy Act*, *ibid* at s 10.

²⁵ BC *Privacy Act*, *ibid* at s 2(a); MB *Privacy Act*, *supra* note 10 at s 5(a); NFLD *Privacy Act*, *ibid* at s 5(1)(a); SK *Privacy Act*, *ibid* at s 4(1)(a).

²⁶ BC *Privacy Act*, *ibid* at s 2(b); MB *Privacy Act*, *ibid* at s 5(c); NFLD *Privacy Act*, *ibid* at s 5(1)(b); SK *Privacy Act*, *ibid* at s 4(1)(b).

²⁷ BC *Privacy Act*, *ibid* at s 2(c); MB *Privacy Act*, *ibid* at s 5(d); NFLD *Privacy Act*, *ibid* at s 5(1)(c); SK *Privacy Act*, *ibid* at s 4(1)(c).

²⁸ BC *Privacy Act*, *ibid* at s 2(d)(i); MB *Privacy Act*, *ibid* at s 5(c); NFLD *Privacy Act*, *ibid* at s 5(1)(d)(i); SK *Privacy Act*, *ibid* at s 4(1)(d)(i).

²⁹ MB *Privacy Act*, *ibid* at s 5(b).

belief that the publication was in the public interest;³⁰ (vii) that the publication was privileged in accordance with the rules of law relating to defamation;³¹ and (viii) that the matter was fair comment on a matter of public interest.³²

The additional statutory defences (vi), (vii), and (viii) in Manitoba are addressed in a different way by British Columbia, Newfoundland, and Saskatchewan. In the latter three jurisdictions, the Manitoba defences (vi), (vii), and (viii) are not framed as defences. Instead, where these factors apply to a particular case, no violation of privacy will have occurred in the first place. Therefore, in British Columbia, Newfoundland, and Saskatchewan, it is not a violation of an individual's privacy to appropriate his or her personality rights for use in a publication, provided that the publication was: (a) a matter of public interest; (b) fair comment on a matter of public interest; or (c) privileged in accordance with the rules of law relating to defamation.³³ However, it is important to point out that in order for the public interest factor to negate the violation of privacy in British Columbia and Newfoundland, the matter must *be* in the public interest. In Saskatchewan, the threshold is lower: there must have been *reasonable grounds for belief* that the use of the persona was in the public interest. Note that the Saskatchewan approach of looking for reasonable grounds mirrors the approach taken to the defence of showing public interest in Manitoba (see above).³⁴

Additional Points on the Provincial Acts

Having explored the elements of the statutory causes of action for appropriation of personality, there are several additional points to make regarding the decision of the above four provinces to legislate on the current issue, before moving on to the analysis for the rest of Canada.

First, there is the question about whether the provincial legislation was implemented as an attempt to exclude the common law from developing a separate tort of invasion of privacy, one that would co-exist with the statutory right of action. Three of the four statutes deal with the issue directly: the Manitoba, Newfoundland, and Saskatchewan statutes provide that the statutory right of action for violation of privacy exists in addition to any other right of action otherwise available.³⁵ This leaves open the

³⁰ *Ibid* at s 5(f)(i).

³¹ *Ibid* at s 5(f)(ii).

³² *Ibid* at s 5(f)(iii).

³³ *BC Privacy Act*, *supra* note 10 at s 2(3); *NFLD Privacy Act*, *supra* note 10 at s 5(2); *SK Privacy Act*, *supra* note 10 at s 4(2).

³⁴ Note that this flexibility with respect to the “reasonableness” factor is found only in Manitoba and Saskatchewan. As will be shown below, the public interest “defence” exists in all provinces where the existence of the tort of appropriation of personality has been acknowledged. However, no other jurisdiction appears to apply a test of reasonableness in this regard.

³⁵ *MB Privacy Act*, *supra* note 10, s 6; *NFLD Privacy Act*, *supra* note 10, s 7(1); *SK Privacy Act*, *supra* note 10, s 8(1).

possibility that a plaintiff could pursue a right of action at common law, should the courts decide that one should exist. The *Privacy Act* of British Columbia has no such provision; however, the court in *Joseph* took the view that the statutory right of action was available in addition to the common law right of action.³⁶ The existence of a common law right of action would be significant if it had different requirements than the statutory right of action. For example, if there is no requirement of intent in the common law right of action in Manitoba, Newfoundland, or Saskatchewan, the claim would be much easier to satisfy than the statutory right of action in those provinces, where it is necessary to show intent.

Second, there is a debate over the utility of the provincial privacy statutes in protecting against violations of individual privacy. Critics of the legislative approach offer two main lines of argument. First, it is said that the broadly drafted statutes suffer from a lack of certainty and specificity which counteracts their ability to protect the privacy rights of the individual person.³⁷ Second, it is claimed that in reality, the provincial privacy acts have become “dead letters,” as few cases have fallen under their scope.³⁸

On the other hand, proponents of the statutory regime also espouse two main lines of arguments. First, it is said that the statutes were drafted broadly on purpose, so that they could incorporate new types of violations of privacy as they arise.³⁹ In particular, new information technologies are expected to bring about unforeseen privacy concerns, as are advances in biometrics, new methods of medical record keeping, and improvements in video surveillance technology.⁴⁰ A recent case serves as an example, where a young woman alleged that the company Virgin Mobile had appropriated her personality.⁴¹ The company had used a photograph of a young girl that it had obtained from Flickr, a photo-sharing website, in an advertisement for its products. Situations such as this provide support for the broad approach taken to the drafting of the privacy statutes. Unanticipated issues with appropriations of personality and general invasions of privacy will no doubt continue to arise.

Second, those in favour of retaining the provincial privacy statutes argue that, while it may be that some amendments are necessary, the provincial statutes do not need to be eradicated, and could instead be made more relevant by expanding the

³⁶ *Joseph*, supra note 3.

³⁷ *Consultation Paper: Renewing the Privacy Act* (Saskatoon: Law Reform Commission of Saskatchewan, 2009), online: Law Reform Commission <<http://www.lawreformcommission.sk.ca/Papers.htm>> [LRCS].

³⁸ *Ibid* at 2–3.

³⁹ *Ibid* at 4.

⁴⁰ *Ibid* at 3.

⁴¹ David Koenig et al, “Teen Finds Her Flickr Image on Bus Stop Ad”, *CBS News* (February 11, 2009), online: CBS News <<http://www.cbsnews.com/stories/2007/09/24/tech/main3290986.shtml>>.

notions of privacy that they contain.⁴² For example, the acts could be reformulated to address the heavy burden of proof upon the plaintiff, which requires her to show that the defendant's invasion of privacy was "willful."⁴³ This may have the effect of bringing additional cases under the scope of the acts, to combat the "dead letter" allegation.

The Common Law Tort of Appropriation of Personality

As the provinces of British Columbia, Manitoba, Newfoundland, and Saskatchewan enacted privacy legislation dealing with personality rights, a common law tort of appropriation of personality was developing elsewhere in Canada. The majority of the developments took place in the province of Ontario, where most of the cases on point arose.

The question of whether or not the common law offered protection for personality rights first arose in the 1973 case of *Krouse v Chrysler Canada Ltd*.⁴⁴ The plaintiff was a football player who sought to recover against Chrysler Canada Ltd who had used his image for the purpose of advertising without prior authorization. The advertisement showcased Chrysler's automobiles and provided the names, numbers, and general information of interest about the players of the National Football League. The advertisement made use of a photograph of Krouse in such a way that he was identifiable by the number on his jersey. At first instance, the trial judge held in favour of the plaintiff, finding that there had been passing off.⁴⁵

On appeal to the Ontario Court of Appeal, the appeal was allowed. Macgillivray JA articulated the respondent Krouse's position as a claim against the unauthorized use of his picture to promote the products of the appellant, the use of which falsely implied that the respondent had endorsed Chrysler's products.⁴⁶ The judge rejected Krouse's claim on the basis that professional athletes "by the clearest implication authorize and invite the communications media to photograph and write about their exploits."⁴⁷ In his opinion, the defendants had exploited the game of football, not the plaintiff. Furthermore, the court was not convinced on the facts of the case that a reasonable person would infer that the respondent had endorsed the products of the appellants.⁴⁸

The importance of the case for the present purpose lies in the fact that the court confirmed in *obiter* that the common law could accommodate a tort of appropriation of

⁴² LRCS, *supra* note 37 at 23.

⁴³ *Ibid* at 24.

⁴⁴ *Krouse v Chrysler Canada Ltd* (1974), 1 OR (2d) 225 [*Krouse*].

⁴⁵ *Ibid*.

⁴⁶ *Ibid* at para 11.

⁴⁷ *Ibid* at para 17.

⁴⁸ *Ibid* at para 34.

personality in suitable circumstances.⁴⁹ Thus, the door was opened for the development of a common law right of action for the unauthorized appropriation of personality.

Indeed, four years after *Krouse*, the Ontario High Court heard the case of *Athans v Canadian Adventure Camps Ltd.*⁵⁰ This case involved another professional athlete, a water-skier whose picture was used in association with the defendant's camps. The court concluded that as Athans was recognizable in the picture that was used, the defendants had infringed his right to market his personality.⁵¹ The court also stated that an action for appropriation of personality was separate and distinct from a cause of action in trademark or copyright.⁵²

Both *Krouse* and *Athans* are Ontario cases, and it is now well established that a common law tort of appropriation of personality exists in Ontario.⁵³ Having dealt with the position in British Columbia, Manitoba, Newfoundland and Saskatchewan above, this leaves the common law jurisdictions of Alberta, New Brunswick, Nova Scotia, Nunavut, Prince Edward Island, Northwest Territories, and Yukon. Most of these jurisdictions have not heard any case law directly on point, and it is still a matter of uncertainty whether there is a common law right of action for appropriation of personality in all of common law Canada. Though it has been almost forty years since *Krouse* was heard, the common law tort of appropriation of personality is still described as being in its infancy, even in the province of Ontario where the issue has received the most attention.⁵⁴

Nonetheless, it is not unreasonable to assume that a general tort will eventually be recognized in all common law provinces.⁵⁵ An important factor in justifying this

⁴⁹ *Ibid* at para 37.

⁵⁰ *Athans v Canadian Adventure Camps Ltd.*, [1977] 17 OR 2d 425 [*Athans*].

⁵¹ *Ibid* at para 28.

⁵² *Ibid.*

⁵³ While these cases established the common law right, they have been reconsidered and refined since the decisions themselves. It has since been argued that in *Krouse*, the tort of appropriation of personality was framed as a hybrid of passing off and the right of publicity, while *Athans* focused on a test of misappropriation (see Howell, *supra* note 2 at 493). This seems to hold true when one looks closely at each decision. The court in *Krouse* justified its decision on the fact that it was unlikely that a reasonable person would wrongly conclude that the appellant had endorsed the product, seemingly applying a test of confusion like that in an action of passing off (see *Krouse*, *supra* note 44 at para 43). In *Athans*, the plaintiff was found to be entitled to recover because the defendants had used what did not belong to them, that is, they misappropriated what belonged to Athans (see *Athans*, *supra* note 50 at para 28).

⁵⁴ Daniel M Anthony "Got Personality? How can you Protect it?" Smart & Biggar/Fetherstonhaugh (2009), online: Smart & Biggar <http://www.smart-biggar.ca/en/articles_detail.cfm?news_id=300> [Anthony]. See also Colin D Feltham "Common Law Tort of Invasion of Privacy" Barry, Spalding, Richard (Lawyers) (Saint John and Moncton, NB) at 4, online: ITSportsNet <<http://www.itsportnet.com/leagues/5272/documents/InvasionofPrivacyTheCommonLawTort.pdf>>.

⁵⁵ It has been argued that what is really happening in cases such as this is that the courts are giving a wider definition to torts such as nuisance, trespass, or defamation, when what they are really trying to protect is the general right to privacy. See the judgment of Carruthers CJPEI in *Dyne Holdings Ltd v Royal Insurance Co of Canada*, [1996] ILR I-3366, at para 55 [*Dyne*]. In *Dyne*, the plaintiff alleged that his privacy had been invaded through the unauthorized use of privileged personal information. The court

assumption is that in developing the common law, Canadian jurisdictions are compelled to adhere to the principles of the *Canadian Charter of Rights and Freedoms*, which protects privacy interests (making clear the importance of determining whether appropriations of personality are fundamentally an issue of privacy or property, discussed more fully below).⁵⁶ Furthermore, contemporary court opinions have offered support for the development of the tort. In the recent decision of *Somwar v McDonald's Restaurants of Canada Ltd*, Justice Stinson noted that

. . . traditional torts such as nuisance, trespass, and harassment may not provide adequate protection against infringement of an individual's privacy interests. Protection of those privacy interests by providing a common law remedy for their violation would be consistent with *Charter* values and an 'incremental revision' and logical extension of the existing jurisprudence."⁵⁷

At the very least, there is no evidence to suggest that the remaining Canadian provinces will not be willing to create a general right to privacy.⁵⁸

Drawing mostly from the case law in Ontario, it is possible to make some conclusions about the common law tort of appropriation of personality. Where no case on appropriation of personality is available to use as guidance on a particular point, the approach taken by the courts in cases involving the general tort of invasion of privacy will be considered persuasive. Any academic consensus is also considered.

a. The traits that can be appropriated

In *Athans*, Henry J confirmed that the plaintiff had "a proprietary right in the exclusive marketing for gain of his personality, image and name. . ."⁵⁹ It is important to

noted at paragraph 63: "It would seem to me the courts in Canada are not far from recognizing a common law right of privacy if they have not already done so. It is also clear that Canadian courts do not hesitate to protect privacy interests under some recognized tort." Thus, it would seem that in Prince Edward Island, the courts are determined to protect privacy generally, whether this is achieved by acknowledging a special tort of invasion of privacy or by widening the principles of existing torts. This tendency may eventually give rise to the recognition of a general tort of invasion of privacy, which could encompass a tort of appropriation of personality, as has been done elsewhere in Canada. See also *Motherwell v Motherwell*, [1976] 1 AR 47 at para 13, where the Alberta Court of Appeal noted that the common law has a "continuing ability to serve the changing and expanding needs of our present society." While the court did not declare that a general tort of invasion of privacy existed by virtue of the common law principles in Alberta, the invasion of privacy in that case was found to amount to a nuisance.

⁵⁶ See *Hunter v Southam*, [1984] 2 SCR 145.

⁵⁷ *Somwar v McDonald's Restaurants of Canada Ltd*, [2006] OJ No 64 at para 29 [*Somwar*].

⁵⁸ This was the view taken in the early stages of the development of the tort. See, for instance, comments in Allen M Linden *Canadian Tort Law*, 5th ed (Markham, Ontario: Butterworths, 1993) at pp 52–53. The suggestion that Canadian provinces will gradually recognize the right of action as the opportunity arises has been repeated more recently in *Somwar*, *ibid* at paras 8–12. See also discussion about the gradual and continuous development of the common law tort in Canada in Catherine W Ng, "Some Cultural Narrative Themes and Variations in the Common Law" (2009) 99 *Trademark Rep* 837 at 845.

note that in that case, the representation of the plaintiff was a line drawing, which shows that a “caricature” or “portrait” will, subject to the other requirements listed below, come within the scope of the tort. It will be recalled that such representations were explicitly included in the statute of British Columbia (see the section on traits for the provincial statutes, above). Whether the appropriation of a person’s voice will be actionable at common law remains to be seen.

b. Whether the plaintiff must be identifiable

It is highly unlikely that at common law, a plaintiff would ever be entitled to recover if she is not identifiable from the use made of her persona. The judge in *Athans* was careful to examine whether or not the plaintiff was identifiable from the line drawing that was used before deciding that he was entitled to recover.⁶⁰ Additionally, the British Columbia case of *Joseph v Daniels*, where it was decided that there is always a requirement that the plaintiff be identifiable, will be considered persuasive on the matter in the rest of Canada.

c. Whether the appropriation must be intentional

The recent decision of *Somwar*, discussed above, asserted that a claim for invasion of privacy is an intentional tort, which suggests that an action for appropriation of personality will have to be intentional for a plaintiff to recover at common law.⁶¹ The stance taken in *Somwar* on the issue of intent was approved in the recent Nova Scotia case of *MacDonnell v Halifax Herald Ltd*,⁶² involving an alleged invasion of the general right to privacy. In that case, an interim injunction was sought to prohibit the publication of a recording that had accidentally been left behind by the plaintiff politician. Refusing the injunction, the judge did not find that the act of recording had been done with the intention to invade the plaintiff’s privacy, and concluded that the defendant could not be described as an “intentional invader.”⁶³ Moreover, the literature supports the view that the courts have traditionally required an element of intent on the defendant’s behalf.⁶⁴

d. Whether there must be an element of gain on the part of the defendant

The case law suggests that the common law action for appropriation of personality requires that the defendant must have acted for the purpose of commercial

⁵⁹ *Athans*, *supra* note 50 at para 24.

⁶⁰ *Ibid* at para 16.

⁶¹ *Somwar*, *supra* note 57 at para 13.

⁶² *MacDonnell v Halifax Herald Ltd* (2009), 279 NSR (2d) 217 (SC).

⁶³ *Ibid* at para 17.

⁶⁴ See generally Howell, *supra* note 2 at 494. See also Alex Cameron and Mimi Palmer, “Invasion of Privacy as a Common Law Tort in Canada” (2009) 6:11 Can Priv L Rev 105 at 107 [Cameron & Palmer].

gain. In *Horton v Tim Donut*,⁶⁵ the Ontario Court of Justice rejected the argument that the plaintiff had appropriated the personality of the hockey player Tim Horton by hanging a memorial portrait of him in a chain of stores for the purpose of raising funds for a charitable foundation. The judge noted that the predominant purpose of the portrait was charitable and commemorative, not exploitative or commercial.⁶⁶ On that basis he refused to find that there was an illegal appropriation of personality.

In *Gould Estate v Stoddard Publishing Co* it was suggested that it was “open to the court to conclude, on a contextual basis, that the tort of appropriation of personality, is restricted to endorsement-type situations.”⁶⁷ It is not clear if this would be in addition to the “commercial purpose” requirement, or if an endorsement-type situation that is not for the purpose of commercial gain will suffice. This is an issue that requires clarification by the higher courts. However, at the moment, it appears that a common law action for appropriation of personality will only succeed where the defendant had a motive of commercial gain.⁶⁸

e. Whether the plaintiff must show that he suffered damage as a result of the appropriation

It is a matter of uncertainty whether the common law tort of appropriation of personality is actionable *per se* or whether damages must be shown. Some take the view that a plaintiff will not succeed where there is no damage.⁶⁹

It is also possible, however, that the courts will confirm that the appropriate process is in fact to assess whether there has been an unlawful appropriation of personality, followed by an assessment of damages. If this approach is correct, it would appear that damages are to be assessed by determining the amount of remuneration the plaintiff would likely have received if he had granted permission to the defendant to use his persona. Such an approach was taken in *Athans*.⁷⁰ For non-celebrities, this may often result in only nominal damages being awarded.

f. Whether personality rights are inheritable

There are two cases to date involving an attempt to claim a right of action on behalf of a deceased person. In *Gould Estate v Stoddard Publishing*, Lederman J found that the deceased’s right of action was inheritable.⁷¹ The judge drew a distinction between privacy rights, which are not descendible, and publicity rights, which were at

⁶⁵ *Horton v Tim Donut*, [1997] OJ No 390 [*Horton*].

⁶⁶ *Ibid* at para 23.

⁶⁷ *Gould Estate v Stoddard Publishing Co*, [1996] OJ No 3288 at para 16 [*Gould*].

⁶⁸ In support of this assumption, see the ruling in *Horton*, *supra* note 65. See also Anthony, *supra* note 54.

⁶⁹ Robert G Howell, “The Common Law Appropriation of Personality Tort” (1986) IPJ 149 at 153. See also Nest, *supra* note 1 at 16, and Krouse, *supra* note 44.

⁷⁰ *Athans*, *supra* note 50 at paras 29–31.

⁷¹ *Gould*, *supra* note 67 at para 23.

issue in the case.⁷² The case was eventually appealed and decided to be a matter of copyright, but the trial decision remains a preliminary authority for the view that personality rights are descendible at common law. *Horton v Tim Donut*, mentioned above, serves to reinforce this view. There, the plaintiff's case was also advanced on his behalf by his estate, and this was not considered to be a bar to the action.⁷³

g. Possible defences

A defendant will not be liable for an appropriation of personality at common law where: (i) he has consented to the use of his persona;⁷⁴ (ii) the use made of his personality rights was merely incidental to another purpose;⁷⁵ or (iii) the publication constituted a matter of public interest.⁷⁶ It is safe to assume that other common sense limitations apply as defences to an unauthorized appropriation of personality, such as where the publication was (iv) authorized by law; (v) an act of a peace officer in the course of her duties; (vi) privileged in accordance with the law relating to defamation; or (vii) a matter of fair comment.⁷⁷

The Quebec Position

In 1998, in the case of *Aubry v Éditions Vice-Versa*,⁷⁸ a Quebec woman brought an action in civil liability against a photographer who had used her picture in a magazine without her consent. The picture was of the young woman sitting on a set of steps, in public. The woman invoked her rights under both the Quebec *Charter of Human Rights and Freedoms* and the *Civil Code of Quebec* in order to establish that a wrong had been committed against her by the defendant photographer.⁷⁹ She relied upon her right to dignity, honour, and reputation, as well as her right to respect for her private life, as provided in the *Charter of Human Rights and Freedoms*.⁸⁰ From the *Civil Code of Quebec*, the plaintiff relied on the various provisions detailing what constitutes an invasion of privacy. Per the *Civil Code of Quebec*, an example of an invasion of privacy is to make use of a person's name, likeness, or voice for purposes other than the legitimate information of the public. (Note, as discussed above, the

⁷² *Ibid.*

⁷³ *Horton*, *supra* note 65 at para 5.

⁷⁴ *Dowell v Mengen Institute*, [1983] 72 CPR (2d) 238 (BC Sup Ct). Though this is a British Columbia case, it is clear that the right of action is intended to be for *unauthorized* appropriations of personality.

⁷⁵ *Horton*, *supra* note 65 at para 23.

⁷⁶ This was established from the beginning of the common law developments, in *Krouse*. For a more recent authority, see *Caltagirone v Scozzari-Cloutier*, [2007] OJ No 4003 (SCJ).

⁷⁷ See Cameron & Palmer, *supra* note 64, where the same view is taken.

⁷⁸ *Aubry v Éditions Vice-Versa*, [1998] 1 SCR 591 [*Aubry*].

⁷⁹ *Ibid.* See *Québec Charter of Human Rights and Freedoms*, RSQ c C-12 [*QC Charter*] and CCQ.

⁸⁰ *QC Charter*, *ibid.*, ss 4, 5.

“example” approach is the one taken in the statutes of Manitoba, Newfoundland, and Saskatchewan, but not the statute of British Columbia.⁸¹⁾

The trial judge found that under the provisions of both statutes, the unauthorized publication of a photograph of an individual constituted a wrong, and ordered the magazine to pay damages. The decision was affirmed in the Court of Appeal, and a further appeal to the Supreme Court of Canada was dismissed by a majority vote of five to two.⁸²

Being a seminal case in Quebec, and having been decided by the Supreme Court of Canada, *Aubry* will be considered representative of the Quebec law of appropriation of personality. Of course, the particular provisions of the *Civil Code of Quebec* will also be noted. The same factors that were considered for the provincial privacy legislation and for the common law will now be considered with respect to the position in Quebec.

a. The traits that can be appropriated

It is made clear in the *Civil Code of Quebec* that an appropriation of personality can be realized through the use of a person’s name, likeness, or voice.⁸³

b. Whether the plaintiff must be identifiable

The Court in *Aubry* indicated that the plaintiff must be recognizable in order for an appropriation of personality to be actionable.⁸⁴

c. Whether the appropriation must be intentional

The Court in *Aubry* did not comment on whether there was a requirement of intention on the part of the defendant, perhaps because in that case it was clear that the defendant had acted intentionally. However, in describing what constituted an illegal appropriation of personality, the court notably left out any mention of intent. It was said that there is “an infringement of the person’s right to his or her image, and therefore fault, as soon as the image is published without consent and enables the person to be identified.”⁸⁵

Additionally, the way that the relevant provisions of the *Civil Code of Quebec* were drafted suggests that there is no need for the courts to look for an element of intent. Article 36 of the *Civil Code of Quebec* provides examples of acts that may constitute violations of privacy. As discussed above, art 36(5), which was considered in *Aubry*, provides that it may be an invasion of privacy to use the name, image, likeness,

⁸¹ CCQ, *supra* note 79, art 36(5).

⁸² *Aubry*, *supra* note 78.

⁸³ CCQ, *supra* note 79, arts 35 and 36, and specifically art 36(5).

⁸⁴ *Aubry*, *supra* note 78 at para 53.

⁸⁵ *Ibid.*

or voice of a person for purposes other than the legitimate information of the public.⁸⁶ There is no mention of intent. Yet, in the same article, another example is provided, being the *intentional* interception or use of a person's private communications.⁸⁷ It would seem, then, that the provision on appropriation of personality was purposefully drafted without an element of intent.

d. Whether there must be an element of gain on the part of the defendant

The Court in *Aubry* stated that in matters of privacy, distinctions based on commercial purposes were irrelevant, and inconsistent with s 9.1 of the Quebec *Charter of Human Rights and Freedoms*.⁸⁸ Instead of focusing on the purpose of the appropriation, the court chose to focus on the balancing of rights as the only relevant issue.⁸⁹ As in the above section on intention, it is also notable that the court did not make any mention of gain when describing the wrong.

e. Whether the plaintiff must show that he suffered damage as a result of the appropriation

Both the majority and the minority in *Aubry* agreed that the plaintiff was required to show that she suffered damage through the appropriation of her personality rights. In fact, the minority would have allowed the appeal for the simple reason that, in their opinion, there was insufficient evidence of damage.⁹⁰ While agreeing that damages must be shown, the majority took the view that the evidence had proven that *Aubry* had indeed suffered damages from the unauthorized use of her photograph.⁹¹

It is important to note that the majority indicated that in determining whether the plaintiff had suffered damage as a result of the defendant's actions, the notion of damages would be widely construed. It was said that it would be "possible for the rights inherent in the protection of privacy to be infringed even though the published image is in no way reprehensible and has in no way injured the person's reputation."⁹² Thus, damages may include the anger of the plaintiff at having been exploited, or might flow from the fact that the plaintiff lost her right to choose whether to have her personality used by another.

f. Whether personality rights are inheritable

The inheritability of a right of action for appropriation of personality was not at issue in *Aubry*. Nor has the issue been directly addressed in subsequent Quebec

⁸⁶ CCQ, *supra* note 79, art 36(5).

⁸⁷ *Ibid*, art 36(2).

⁸⁸ *Aubry*, *supra* note 78 at para 61.

⁸⁹ *Ibid*.

⁹⁰ *Ibid* at para 37.

⁹¹ *Ibid* at para 35.

⁹² *Ibid* at para 54.

decisions on the general right to privacy. Nevertheless, it is possible to draw conclusions on this point from what was said by the Supreme Court of Canada in *Aubry*.

The court was very clear that it viewed the right to one's image as an element of the right to privacy in Quebec.⁹³ Further, the court stated that the right to privacy has an extrapatrimonial and a patrimonial aspect, consistent with the liberal interpretation that had been given to the right to privacy in the past.⁹⁴ Thus, the court recognized that there is a proprietary element to the right to privacy, which covers the right to one's personality. On that basis, it is possible to conclude that in appropriate circumstances, Quebec law would allow an action to be taken by the estate of a deceased person, provided that it could be proved that there was a patrimonial aspect at stake.

g. Possible defences

A defendant will not be liable for an appropriation of personality under Quebec law where: (i) the plaintiff expressly or impliedly consented to the appropriation of his personality;⁹⁵ (ii) the use of the individual's persona is incidental to another purpose;⁹⁶ (iii) the appropriation of personality is authorized by law;⁹⁷ or (iv) the publication is a matter of public interest.⁹⁸ It is also safe to assume that a publication that is privileged in accordance with the law of defamation, or is a matter of fair comment, will not be actionable.

PART II: PERSONALITY RIGHTS—A MATTER OF PRIVACY, PROPERTY, OR BOTH?

A major source of debate on the legal issue of appropriation of personality is whether the right of action flows from privacy rights or property rights.⁹⁹ The purpose of this section is not to count up the authorities that support either a privacy or property

⁹³ *Aubry*, *supra* note 78 at para 51.

⁹⁴ *Ibid* at para 51. See also *Godbout v Longueuil (City)*, [1997] 3 SCR 844.

⁹⁵ CCQ, *supra* note 79, art 35. See also *Aubry*, *supra* note 78 at para 60.

⁹⁶ *Aubry*, *ibid* at para 59.

⁹⁷ CCQ, *supra* note 79, art 35.

⁹⁸ The Court in *Aubry* engaged in a discussion about the factors that must be considered when balancing the public interest against the individual right to privacy. It was stated that factors that would weigh in favour of the public interest included the public's right to know about aspects of the private life of individuals engaged in public activity (such as politicians), the publication of a person involved in a newsworthy event (such as a demonstration), and the incidental inclusion of an individual in a photograph taken in a public place. Though the Court recognized the importance of freedom of artistic expression as a division of freedom of expression generally, the photographer's right to such freedom did not outweigh *Aubry's* right to privacy (*Aubry*, *supra* note 78 at paras 57–59, 65).

⁹⁹ While it is beyond the scope of this paper to cover the full extent of this debate, there is an analogous conversation about the proprietary nature in cultural identity for native people in North America. The debate in this arena brings on interesting questions about whether the ownership of the native cultural identity can properly fit within Western understandings of identity and property. See Rosemary Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy" (1993) 6:2 Can JL & Jur 249.

notion of the issue. Such an exercise would prove little, as it is clear that there is convincing evidence that both concepts apply to the issue of personality rights.¹⁰⁰ While it is true that some of the cases decided to date support one view over the other, this is usually because on the facts of the case, the notion of privacy or property was more involved, as the case may be.

The purpose of this section is rather to give consideration to the privacy aspect of personality rights, as well as to the separate notion of property rights, as both apply to personality rights, and to understand how the theoretical foundation makes a difference in the way that personality rights are protected.

Personality Rights as a Matter of Privacy

In considering the privacy aspect of personality rights, the first issue to point out is that the notion of privacy has been notoriously difficult to define.¹⁰¹ However, by looking at some of the more commonly accepted elements of privacy, it becomes clear that the concept of privacy has an undeniable place in the issue of personality rights.

For example, privacy has been said to connote “a right to be let alone.”¹⁰² One can easily see how this aspect of the right to privacy is offended in cases where an individual’s image is used without his or her consent. Indeed, the right to be let alone was at the root of Aubry’s claim against the defendant photographer, who surreptitiously took and used her image as she kept to herself.

The right to privacy has also been said to protect our right to control our bodies and decide what is done to them.¹⁰³ This would include, for example, the right to remain anonymous and to not be seen. This aspect of privacy rights has an obvious connection with personality rights, as the very thing that is being protected by personality rights is the right to choose what is done with one’s persona.

Personality as Property

Considering the nature of personality rights, it is undeniable that there are property interests at stake, by virtue of the fact that there is often a commercial value to

¹⁰⁰ On this point, see John DR Craig, “Invasion of Privacy and Charter Values: The Common-Law Tort Awakens” (1996–1997) 42 McGill LJ 355 at 369. Craig, having reviewed the recent case law, suggests that it would be reasonable to conclude that “a general tort of invasion of privacy, rooted in personal interests such as dignity and autonomy, as opposed to property rights, is now emerging in the common law of Ontario”. Cases like *Horton*, *supra* note 65, however, are illustrative of the fact that commercial property interests will certainly be of importance depending on the specific facts of cases to come.

¹⁰¹ It has been said that “the most striking thing about the right to privacy is that nobody seems to have any clear idea what it is.” (Judith Jarvis Thomson, “The Right to Privacy” (1975) *Phil & Pub Affairs* 295 at 295 [Jarvis Thomson]). Furthermore, Elizabeth Neill devoted an entire book to the discussion of how privacy should be defined and understood. See Elizabeth Neill, *Rites of Privacy and the Privacy Trade* (McGill: Queen’s University Press, 2001).

¹⁰² SD Warren and LD Brandeis, “The Right to Privacy” (1890) 4 *Harv L Rev* 193 at 193.

¹⁰³ Jeffrey H Reiman, “Privacy, Intimacy, and Personhood” (1976) 7:1 *Phil & Pub Affairs* 26 at 41.

an individual's persona. An individual's persona can make money, as in the case of an endorsement that persuades consumers to buy a certain product. The proprietary nature of personality rights becomes particularly clear when a celebrity personality is involved, as his or her personality may be worth a great deal in commercial terms.¹⁰⁴

Connecting Privacy and Property in the Concept of Personality

It has been said that our privacy rights, such as the “right not to be looked at” or the “right not to be listened to”, are analogous to the rights we have over our property, in that we have a right to control what others do to our bodies as we have a right to control what others do to our property.¹⁰⁵ Under this view, the privacy and property aspects of personality rights are inextricably intertwined. This seems to be the preferable view to take, as it seems illogical to argue that either privacy or property has little or nothing to do with personality rights.

That being said, it is important to take note of how the concepts of privacy and property work independently to affect the protection for personality rights. If, in a given case, it is clear that the plaintiff's proprietary or privacy rights have been infringed, the determination may affect the way that the court deals with the claim.

The Difference in Protecting Privacy and Protecting Property

To the extent that personality rights are protected as privacy rights, there may be added protection by virtue of the right to privacy inherent in the *Canadian Charter of Rights and Freedoms*. Judges are compelled to consider the right to privacy in making decisions. If personality rights are viewed as a matter of privacy, the courts will be careful to ensure that they receive adequate protection.

If, on the other hand, personality rights are protected as property rights, there are two notable consequences. First, they will be inheritable. To the extent that the right of action for appropriation of personality is proprietary, that right can be passed on through a plaintiff's estate. The second consequence of protecting personality rights as property is that (i) the right should be actionable *per se*, and (ii) the requirement that the plaintiff be identifiable should be omitted. The first consequence flows from the fact that a person's property can be appropriated whether he suffers damage or not. The second is a result of the principle that if a persona is property and has been appropriated, the unauthorized appropriation has occurred whether the general public realizes that it was appropriated or not.

¹⁰⁴ See, for example, *Athans*, *supra* note 50.

¹⁰⁵ Jarvis Thomson, *supra* note 101 at 304.

CONCLUDING REMARKS

Several definitive statements can be made about the legal protection for personality rights in Canada. It is clear that the right of action is available in British Columbia, Manitoba, Newfoundland, Ontario, Quebec, and Saskatchewan. There are some key differences in the elements of the right of action across those six jurisdictions, as outlined in this paper. Though there is clear authority on the right in Ontario, the extent to which personality rights will be protected by a common law right of action in the rest of Canada is an issue that requires clarification by either the provincial courts or the Supreme Court of Canada.

It is also clear that there is a dual foundation to personality rights. The right of action contains aspects of privacy rights as well as rights of a proprietary nature. It is important to ascertain to what extent the right is being protected as a privacy right, and to what extent it is being protected as a proprietary right, as this will have an effect on the scope of protection, the inheritability of the right of action, and the burden of proof on the plaintiff. With authority supporting both views, as well as a logical argument to support the notion that a claim for an unauthorized appropriation of personality might stem from either the right to privacy or from principles of property, it is not possible to draw clear lines in this debate at this point. The courts should take note of the consequences of making any statement that confirms the right of action as being founded in either privacy or property, and give due consideration to the issue before clarifying the foundations of the tort.