

Les Cahiers de droit



Droits de l'homme et libertés fondamentales - Droit de propriété

Volume 18, numéro 4, 1977

URI : <https://id.erudit.org/iderudit/042200ar>

DOI : <https://doi.org/10.7202/042200ar>

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Éditeur(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (imprimé)

1918-8218 (numérique)

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Citer cette note

(1977). Droits de l'homme et libertés fondamentales - Droit de propriété. *Les Cahiers de droit*, 18(4), 937–943. <https://doi.org/10.7202/042200ar>

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Jugements inédits*

Droits de l'homme et libertés fondamentales — Droit de propriété.

Droit à la vie privée; droit de disposer de son nom et de son image.

Droit de propriété; art. 406 à 408.

Deschamps v. Renault Canada,
Cour supérieure, Montréal,
05-810-140-71
24 février 1972
Juge Melvin L. Rothman.

The Motion for Interlocutory Injunction in the present case was heard at the same time and, by consent of the parties, was decided upon the same evidence as a similar Motion for Interlocutory Injunction made in the case of *Aimée Sylvestre (Dominique Michel) vs Automobiles Renault Canada Ltée.* bearing record No. 05-818141-71.

Both petitioners seek to enjoin respondent from distributing or exhibiting a poster bearing a photograph of petitioners with a Renault Automobile, or in any other manner identifying petitioners with respondent's products.

Petitioners are performing artists and, from the evidence made at the hearing, the Court is amply satisfied that they are well known and highly regarded.

Dominique Michel, a comedienne and singer has performed extensively in Quebec on the stage, television, radio and in the cinema and cabarets, and she has also performed in France.

In addition to her artistic work, she has also been engaged by several commercial firms, including Air Canada and Vichy Celestin, to appear in television commercials and posters. She enjoys a substantial annual income and an important part of this income is derived from this commercial publicity work.

Yvon Deschamps is a well known comedian having performed extensively on the stage and television and on recordings. While he has done some publicity work for remuneration, he has limited this, as a matter of principle, to one service company (a bank) because he does not wish to endorse or identify himself with commercial products generally. Indeed, he suggested in his evidence that he would find it difficult to condemn what he considers to be the excesses of commercialism in his art while at the same time obtaining personal benefits from the endorsement of commercial products.

Dominique Michel and Yvon Deschamps play the leading roles in a film known as "Tiens toi bien après les oreilles à Papa" produced in Quebec by Mojac Film Cinema and

* Les arrêts qui suivent, comme ceux déjà publiés aux pages 183 et 187 du présent volume 18, ont été sélectionnés et préparés dans le cadre d'un projet de recherche en droit des libertés subventionné par le Gouvernement du Québec et dirigé par Henri Brun.

Television Corporation which had its premiere in Montreal on December 25, 1971 and has enjoyed a considerable success since its opening.

Both petitioners were engaged by Mojac Film under separate written contracts, P-10 in the case of Dominique Michel, and P-11 in the case of Yvon Deschamps. The terms of these contracts are very different. In the case of Dominique Michel, under her contract P-10, she expressly reserved the right to approve all photographs used in publicity for the film as follows:

“Article 4.05 — Dominique Michel aura un droit de regard sur toutes les photos utilisées dans la publicité de film et aura un droit de veto sur toutes photos qui la représentent entièrement ou en partie, droit toutefois qu'elle s'engage à exercer raisonnablement.”

The Deschamps contract, Exhibit P-11, contains no such express reserve of any right to control publicity photos. Under article 13, Deschamps has undertaken to cooperate with the producer in the publicity for the film, to be present at the press conference and premiere of the film and to be available to the extent permitted by his professional activities for the promotion of the film, but without obligation on his part.

While the two contracts may be different in their terms, each one read in its entirety plainly has as its purpose the engagement of a performing artist to interpret a given role in a particular film. Certainly, there is no provision in either contract which contemplates that the artist has any obligation to endorse or identify himself with any commercial products and, in the opinion of this Court, a general undertaking to cooperate in promoting the film does not in any way imply such an obligation.

Renault's involvement in the present problem appears to have occurred quite innocently and unknowingly.

The screen play called for the character interpreted by Deschamps to own a small car. With this in view, in July 1971, Richard Hellman, a Vice-President of Mojac Film, approached Jean Legeais, Director of Marketing at Automobile Renault Canada Ltée and in mid July met with Legeais to discuss the matter. There followed an exchange of letters between Mojac Film and Renault, Exhibit I-13 en liasse (subsequently complemented by additional correspondence, Exhibits I-1 and I-2) under which Mojac Film was to receive by way of loan from Renault two Renault “12” automobiles for use in the film plus an additional Renault “12” to be given as a prize in a promotional lottery during the premiere of the film. In return, Mojac Film confirmed that Renault would receive color photo negatives of the two stars and the Renault “12” which Renault could exhibit in its sales outlets with a slogan to the effect of “Venez voir les trois vedettes du film “Tiens toi bien après les oreilles à Papa” avec Dominique Michel, Yvon Deschamps et la Renault 12.”

Renault was further to be given the right by Mojac to exploit these photographs in communications with its own dealer network and also in its own revue.

The heart of the problem is that in July 1971, when Mojac Film purported to grant the foregoing rights to Renault under Exhibit I-3, Mojac Film did not have any of such rights to grant. As mentioned above, they were not included in the contracts P-10 and P-11, and neither Richard Hellman nor anyone else took the trouble to consult Michel or Deschamps before entering into the agreements, I-3.

Let it be said at once that there is not the slightest evidence that Renault acted in anything other than good faith throughout the period of its involvement. Renault was approached by and was dealing with a senior officer of Mojac Film, the producer of the film, and had every reason to believe that Mojac Film was entitled to grant the promotional and

publicity rights in question. In the opinion of the undersigned, one could not reasonably have expected Renault to demand from Hellman written proof of Mojac Film's authority. Mr. Legeais testified that Renault rarely arranges this kind of promotional contract with the stars themselves and it is much more usual for the arrangements to be made with the film production company. Renault received no *mise en demeure*, letter or even warning telephone call and had no intimation of any problem connected with the poster until it received the Motion for Injunction in the present case. Indeed Deschamps admitted that when he first learned of the poster, I-1, he was not inclined to ask anyone for any explanations but preferred instead to take Injunction proceedings.

Subsequent to the exchange of letters between Mojac Film and Renault, Exhibit I-3, on September 26, 1971, following a session for the promotion of the film, Michel and Deschamps were asked to pose for some photographs with a Renault "12", and they allowed some eighteen photos to be taken of themselves with the automobile. Dominique Michel testified that there was no mention at all that the photos were to be used for posters or publicity. The subject, she stated, was never discussed. Miss Michel was uncontradicted in asserting that she was told that the photos were to be used in Renault's own offices as a souvenir of the film. She allowed herself to be photographed for this purpose as a matter of courtesy ("par gentillesse") because she was aware that Renault had loaned the automobiles for use in the film. Hellman, on the other hand, simply did not raise the matter. He assumed there would be no objection. Renault, for its part, having confirmed matters by letter (I-3) and having received the photos, had no reason to anticipate any problems.

One of the photos of the two stars was subsequently used in the poster, exhibit P-1. The poster contains the following text in addition to the photograph of the two stars and the automobile and a logo or emblem of the Renault Company: "Dominique Michel, Yvon Deschamps et la Renault "12", les trois vedettes du film *Tiens toi bien après les oreilles à Papa.*"

At Renault's request, 200 of the posters, P-1, were printed of which Renault kept about 38 and the remainder of 162 were forwarded to Mojac Film. While the posters do not appear to have had a very wide circulation, it is admitted that they were exhibited in Montreal, at least in the lobby of the Cinema V Theatre on Sherbrooke Street and in a Radio Shop on Gordon Avenue.

Mr. Guy Parent, a witness with some experience in the field of advertising as well as films and broadcasting expressed the opinion that in the advertising trade, the poster P-1, would be considered an identification of the two stars with Renault and would probably discourage Renault's competitors from offering Michel and Deschamps commercial work for a time. He suggested that he would consider them tied-up in this manner for about 18 months.

Petitioners claim the right to an Interlocutory Injunction essentially on the grounds a) that they are being identified with Renault Automobile against their wish and this will deprive them of any possibility of receiving engagements from competing automobile firms; b) that such free publicity for one commercial sponsor makes it impossible for them to justify the substantial fees they are receiving and hope to receive from others; c) that such free publicity violates the by-laws of the Union des Artistes and jeopardizes their standing as members of the Union and their ability to practice their profession; d) that they would never have associated themselves with posters of such poor quality.

Respondent argues in essence that petitioners have not established a serious and valid right of action, that the balance of inconvenience is in favor of respondent, that there is no abuse of any rights, and that there is no clear proof of any serious or irreparable injury.

While at this interlocutory stage the Court should seek to avoid any determination of the merits of the dispute (*Perusse vs Les Commissaires d'Ecoles de St-Léonard de Port Maurice, 1970 C.A. 324*), it must nevertheless examine the apparent rights of the parties to determine if, *prima facie*, a right exists to restrain the exhibition of the poster, and whether or not any serious or irreparable injury will result if it is not restrained by Interlocutory Injunction pending a hearing on the merits.

In order to determine the apparent rights of the parties, it is necessary to consider two principal questions. Firstly, was any consent or authorization given by the petitioners for the use of their names and photographs on the poster, P-1? Secondly, if no such consent or authorization was given, does Renault have the right to use their names and photographs without it?

On the first question: As mentioned above, no such authorization flows from the contracts, P-10 and P-11. Nor is there any other evidence of a consent by either petitioner to the use of the photograph in the poster. Beyond this, the only possibility that might be examined is that of a tacit consent or authorization in the light of petitioners' conduct. In this regard, while it may seem unusual and it does seem insouciant on petitioners' part to have allowed 18 photographs to be taken without a clear understanding of their purpose, the Court cannot conclude that this in itself constituted tacit consent that they be used in a commercial poster. In the absence of any proof to the contrary, the Court believes that Miss Michel's explanation should be accepted. This explanation was entirely consistent with Hellman's admission to the effect that there was no discussion at all of using the photos in a commercial poster.

On the second issue, some distinctions must be made. Certainly it cannot be contended that the mere publication of an individual's photograph or name is always and in itself a violation of his rights (*Field v. United Amusement Corp. 1971 S.C. 283, 285*). Clearly, there are instances, such as the reporting of news and the discussion of public issues and public figures, where the public interest may override private rights. But this is not one of those instances. Nor is the problem in the present case in any way similar to that in the *Field* case (*supra*) where the petitioner had been photographed briefly as part of a documentary film.

The question here is whether the names and photographs of petitioners can be used or exploited for commercial purposes without their consents. No question of public interest is involved and this issue must be decided purely on the basis of private rights.

The Court is satisfied, quite apart from any question of defamation or libel and quite independently of whether the poster is of good or poor quality, that the names and likenesses of petitioners involve proprietary rights which they are free to exploit commercially or to refrain from doing so, and equally free to decide the conditions under which such exploitation shall take place.

It is clear from the evidence that their names and likenesses have a real commercial value capable of being translated into money terms. Specific proof was made as to the remuneration paid to the petitioners for their publicity services by various distributors of commercial products and services. Moreover, in this day and age, it would be hard for any Court not to take judicial notice of how common it is for film stars and other public figures to lend their names and talents to commercial promotion. Such advertising and endorsement is an every day fact, and it was not at all unusual for Renault to be interested in obtaining some identification with the two stars. The very fact that Renault was willing to loan two automobiles and make a gift of a third automobile in itself bears witness to the current commercial value of such identification and endorsement.

Now, if the right of commercial exploitation of a film star's name and image is a proprietary right, a real right in property which is capable of yielding a financial return, then

it cannot be appropriated or used by anyone without the consent of its owner (art. 406 C.C. to 408 C.C.)

Mignault, Droit Civil Canadien, Vol. 2, p. 390.

“Le droit réel a pour corrélatif une obligation générale et négative, c'est-à-dire l'obligation imposée, non pas à tel ou tel individu, mais à toute personne autre que celle qui est investie du droit, de s'abstenir de tous actes qui pourraient en entraver l'exercice. Prenons par exemple le droit réel par excellence, le droit de propriété : si nous l'analysons, qu'y trouvons-nous? D'une part la faculté attribuée au propriétaire de retirer toute l'utilité de la chose sur laquelle son droit est établi, et d'autre part, l'obligation imposée à toute autre personne, sans distinction, de ne pas toucher aux produits de cette chose et de s'abstenir de tous actes qui pourraient entraver le propriétaire dans l'exercice de son droit.”

Again, at page 477, in defining the right of ownership, Migneault states:

“Ainsi, la propriété est la faculté accordée à une personne, à l'exclusion de toute autre, de retirer d'une chose toute l'utilité qu'elle peut donner et de faire sur elle tous les actes que la loi ne défend pas.”

Montpetit, Traité de Droit Civil du Québec, Vol. 3, p. 110.

“2 — Le droit de Propriété est Exclusif.

Le propriétaire d'une chose a seul le droit d'en jouir et d'en disposer. Il peut s'opposer à ce qu'une autre personne l'utilise, même s'il n'en éprouve aucun préjudice.”

When viewed in the context of a right in property or proprietary right, moreover, it matters little for present purposes whether the appropriation is innocent or otherwise; the proprietor of such an asset or right in either case is entitled to say “Stop, I don't want you to use my property.” In this respect, the property or asset in the present case, although it may be incorporeal, is no different than any other property or asset. It differs very little, for example, from the cause of a trade mark. The owner of a Trademark has the right of restrain its use by anyone else, even an innocent infringer. The good or bad faith of the infringer cannot affect the right of the owner to require that the infringement cease.

In Quebec, there appear to have been relatively few instances involving what has come to be known elsewhere under the general rubric of “Invasion of privacy” and none of which the undersigned is aware that have been decided otherwise than on the basis of libel or other special instances of delict under article 1053. For example, in the case of *Robbins vs Canadian Broadcasting Corp. 1958 C.S. 152*, damages were awarded under articles 1053 C.C. and 1054 C.C. because a broadcaster, following a letter of criticism, invited the viewing audience to telephone or write the plaintiff “to cheer him up” which resulted in many abusive and annoying letters and telephone calls.

In *Field vs United Amusement Corporation Limited, 1971 C.S. 283*, an Interlocutory Injunction was refused to restrain the showing of a documentary film which was alleged to injure the honor and reputation of the plaintiff.

Neither case is of much guidance in the present instance since there is no question here of any libel or injury to petitioners' reputation. Nor, in the opinion of the undersigned, is it necessary in the present instance to determine matters either on the basis of defamation or of the so called right to privacy.

The Canadian, English and American common law decisions on the “right to privacy” are of little help not only because the principles of law may be somewhat different but mainly because the law appears far from settled in these jurisdictions. In Canada, the status of the

“right to privacy” as such has been described by *Fox (Canadian Law of Copyright p. 603)* as follows:

“... But there is no such thing as a right of privacy and, therefore, apart from copyright, the publication of a person’s photograph without his consent is not actionable however much annoyance it may cause his personal feelings unless the photograph is published in such context or in such manner as to be defamatory of him. In the United States, apart from the question of libel, it has been held that the mere publication of a photograph of a person without his consent for advertising purposes is an unlawful invasion of his right of privacy for which an action for damages or an injunction will be without proof of special damage. Such a right has not been established in England or in Canada.”

It is open to question as to whether or not the foregoing description represents the law of this Province as regards the right to privacy. The undersigned has some considerable doubt that the right to privacy in Quebec is so narrowly circumscribed. It is unnecessary, for the purposes of the present case, however, to decide matters in the light of “personal feelings” or other subjective elements of privacy. The rights or assets involved here are quite concrete, objective and even measurable.

Counsel for Petitioners has referred the Court to *Frank Robert Krouse vs Chrysler Canada Ltd. et Al.*, a judgment (No. 784-69) of the Supreme Court of Ontario rendered by Mr. Justice Haines on November 1st, 1971, in a case very similar on its facts to the present one. Mr. Justice Haines specifically declined to decide matters on the “right to privacy” and, indeed, declined to make any findings as to whether such a right exists in Ontario since he was able to decide the issues on the basis of appropriation of a likeness for commercial purposes as well as on the basis of “passing-off”. The plaintiff was a professional football player whose photograph had been used without his consent by the defendant in an advertising promotion for automobiles. At page 31 of the judgment, Mr. Justice Haines states:

“Once it is established that Krouse is in the business of being used in advertisements, it becomes apparent that either line of cases will support an award.

Unlike Dr. Clark, Krouse, is “in the habit of manufacturing and selling” his image for advertisement purposes. Like *Maxwell*, supra, his photograph “gets currency as an indication of superior quality, or some other circumstances that render the article so stamped acceptable to the public”. He clearly satisfied the test of *Dockrell*, as the element missing in that case which precluded a cause of action is here present. In terms of Smith, L. J., Krouse is not claiming property in his name *per se*, rather he is showing “injury to him in his property”, his valuable commercial property right of being used in an advertisement. Thus, this is a case of “the defendant having done something more than use his name without his authority.” This surely satisfies the test of Williams of unauthorized user of his name to the injury of his rights of property. The general practice of using celebrities in promotional ads and in remunerating them for their participation is that “something more” required.

The passing off strand is even more clearly on point. What could be a more precise example of “an improper appropriation of the plaintiff’s reputation than appropriating that reputation in the commercial exploitation of one’s goods.” If it is accepted that there is a general business of giving endorsements and being involved in advertising promotion, and that at the very least professional athletes are part of that business, and that on the evidence adduced at trial Krouse is involved in that business, then the common ground necessary for passing off actions is established. In this context I don’t see any difference between A passing off B’s endorsement as being C’s and A either fabricating C’s endorsement or using C’s picture without permission. In either situation C suffers the very injury which passing off is intended to remedy.”

While Ontario and other common law authorities are of use only where the principles of law in both jurisdiction are similar, the principles set out in the Krouse case are of interest in the present case. Proprietary rights of this kind are no less protected under articles 406 and 408 C.C. than they are at common law. Moreover, the action for "passing-off" has long been recognized in Quebec, (*Nadeau, Tome 8, p. 191.*)

The Court concludes that petitioners do have an apparent right to prevent respondent from making use of their names, likenesses and photographs on the poster, P-1, or in any other manner identifying them with respondent's products.

Is this apparent right changed in any way by the fact that respondent was innocent and in good faith, or by petitioners' behavior in allowing the 18 photos to be taken without question, or in taking the present proceedings without prior discussion or *mise en demeure* ? Respondent may very well have been placed in an unfortunate position originally by Mojac Film and its present position seems a sympathetic one. But since respondent has contested the Motion for Injunction, its good faith cannot really be a factor in deciding matters.

As *Lord du Parc* stated in *Marengo vs Daily Sketch & Sunday Graphic, 1943, 65 RFC 242 at page 253*:

"... the honest man who finds that through more ignorance or inadvertance he has done innocently that which if done with wrongful intent would have given a right of action for damages, will be anxious, when the facts are made clear to him, to take such steps as will prevent any misunderstanding in the future. If a Court of equity is convinced that there has been some innocent misrepresentation, and an honest defendant not being himself so convinced, has refused to take proper steps of his own motion, the Court acting upon the defendant's conscience will compel him by Injunction to act as an honest man ought to act when he has learned all the facts and considered them impartially. . ."

As to the question of serious or irreparable injury, it seems clear that unless the Interlocutory Injunction is granted at this stage, it would be impossible later to restore the parties to their respective original conditions, or to undo any further identification with respondent's products, and it might be exceedingly difficult for petitioners to evaluate their damages in money terms. (*Les Structures Lamelle Ltée vs Structures de Bois Lamelle du Québec Inc. 1965 R.P. 216.*)

The Interlocutory Injunction will therefore be granted as follows, upon each of the petitioners furnishing security of \$250.00;

The Court hereby orders and enjoins the respondent Automobiles Renault Canada Ltée, its representatives, agents and employees—

a) to cease printing, reprinting, circulating, exhibiting, or causing to be exhibited, reproducing or causing to be reproduced, in any manner whatsoever, the poster Exhibit P-1, or any other poster or document containing the name or photo of either the petitioner, or in any way identifying the petitioner with the respondent or its products;

b) To refrain from identifying or causing to be identified in any way or by any means the name or image of petitioner with respondent or its products;

c) Such order of Interlocutory Injunction to remain in force until final judgment on the merits of the present case;

Petitioner is hereby ordered to furnish security of \$250.00; The whole with costs.