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## **A Closer Look at the Canadian Copyright Act: Can Corporations Hold Moral Rights?**

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### **Abstract**

*Traditional wisdom holds that moral rights are personal rights and therefore cannot be held by a corporation. This submission challenges both views. It aims to show that in Canada, moral rights are not entirely personal in nature, and that corporations can indeed hold moral rights.*

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## 1. Introduction

As noted by the Supreme Court in *Théberge v Galerie d'Art du Petit Champlain Inc.*,<sup>1</sup> copyright law in Canada is entirely a creature of statute, whereby “the rights and remedies it provides are exhaustive.”<sup>2</sup> An important element of Canada’s *Copyright Act*,<sup>3</sup> and indeed of many other jurisdictions (particularly those in continental Europe), is the provisions relating to moral rights. Moral rights are essentially non-economic rights intended to protect the author from any distortion, mutilation or other modification of her work(s) that is prejudicial to her honour or reputation. For example, s. 28.2(1) of the *Copyright Act* states:

*The author’s right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author, (a) distorted, mutilated or otherwise modified; or (b) used in association with a product, service, cause or institution.*

Mere changes to the physical structure, or steps taken to preserve a work (in good faith) are not, by themselves, considered distortions, mutilations or modifications.<sup>4</sup> With respect to the author’s right, s. 14.1(1) of Canada’s *Copyright Act* states that:

*The author of a work has...the right to the integrity of the work and... the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.*

Subsection 14.2 of the Act provides that moral rights may be assigned in whole or in part, and s. 14.3 states that mere assignment of copyright does not constitute a waiver of moral rights.

Traditional wisdom holds that moral rights belong to the author of a particular literary, dramatic, musical or artistic work, the rationale being that some aspect of an author’s personality continues to reside within the work. Thus, it is commonly claimed that moral rights are personal rights that cannot be held by a corporation.<sup>5</sup> As the majority of the Supreme Court noted in *Théberge*:

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<sup>1</sup> *Théberge v Galerie d'Art du Petit Champlain Inc.*, [2002] 2 SCR 336, [2002] SCC 34.

<sup>2</sup> *Ibid.*, at para. 4, also citing *Compo Co. v Blue Crest Music Inc.*, [1980] 1 SCR 357, *R v Stewart*, [1988] 1 SCR 963, *Bishop v Stevens*, [1990] 2 SCR 467. This statement was also reiterated in *CCH Canadian Ltd. v Law Society of Upper Canada*, [2004] 1 SCR 339, at para. 8, *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, [2004] SCC 45, at para. 82, and *Euro-Excellence Inc. v Kraft Canada Inc.*, [2007] SCC 37, at para. 3.

<sup>3</sup> RSC, C-42, available at <http://www.cb-cda.gc.ca/info/act-e.html#rid-33225>.

<sup>4</sup> See s. 28.2 (3) of the *Copyright Act*, which states: “For the purposes of this section, (a) a change in the location of a work, the physical means by which a work is exposed or the physical structure containing a work, or (b) steps taken in good faith to restore or preserve the work, shall not, by that act alone, constitute a distortion, mutilation or other modification of the work.”

<sup>5</sup> See *Théberge*, note 1, and *Snow v The Eaton Centre Ltd.* (1982), 70 CPR (2d) 105 (Ont HC). For a general discussion of moral rights, see R Howell, L Vincent & M Manson, *Intellectual Property Law*:

*Moral rights, by contrast, descend from the civil law tradition. They adopt a more elevated and less dollars and cents view of the relationship between an artist and his or her work. They treat the artist's œuvre as an extension of his or her personality, possessing a dignity which is deserving of protection.*<sup>6</sup>

Even the dissenting opinion of Justice Gonthier implicitly accepted that moral rights were strictly personal in nature:

*Moral rights, inspired by the continental civil law concept of droit d'auteur, are concerned primarily with protecting the integrity and paternity of the work...which is then regarded as an extension of the author's personality. These are extra-patrimonial rights...In other words, the subject-matter of copyright, unlike moral rights, is a right in the work and not a personal right.*<sup>7</sup>

However, I suggest that the combined effect of the provisions in the *Copyright Act* relating to photographs and to succession of moral rights upon an author's death, leaves this traditional wisdom open to challenge.

## **2. Analysis**

In addition to the relatively boundless definition of a photograph as a “photolithograph and any work expressed by any process analogous to photography,”<sup>8</sup> the Canadian *Copyright Act* deems the owner of the negative (or photographic plate), or the initial photograph itself (where there is no negative or plate) to be the author. Subsection 10(2) of the Act states:

*The person who*

*(a) was the owner of the initial negative or other plate at the time when that negative or other plate was made, or*

*(b) was the owner of the initial photograph at the time when that photograph was made, where there was no negative or other plate,*

*is deemed to be the author of the photograph and, where that owner is a body corporate, the body corporate is deemed for the purposes of this Act to be ordinarily resident in a treaty country if it has established a place of business therein.*

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*Cases and Materials* (1999), D Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (1997), and, for a fuller account, see M Goudreau, “Le droit moral de l’auteur au Canada” (1994) 25 *Revue Generale de Droit* 403, and E Adeney, “Moral Rights: A Brief Excursion Into Canadian History” (2001) 15 *Intellectual Property Journal* [Canada] 205.

<sup>6</sup> See *Théberge*, note 1, at para. 15.

<sup>7</sup> See *Théberge*, note 1, at para. 120 and 122.

<sup>8</sup> See s. 2.

Since there is nothing in the *Copyright Act* which expressly requires moral rights' holders to be natural persons, and since the Act deems corporations to be authors, it would seem that the s. 14.1 provisions on moral rights ought to apply to corporations which 'author' photographs.

One might argue that the succession provisions relating to moral rights, found at ss. 14.2 (2) and 14.2 (3) of the Act, speak to the "death of its author" and the "death of any person who holds moral rights" as evidence that the moral rights provisions in the Act were intended to refer to natural persons, as opposed to legal ones.<sup>9</sup> However "death" simply means to bring something to an end.<sup>10</sup> When applied to corporate bodies, it comfortably accords with notions of corporate liquidation (whether voluntary or compulsory).

Indeed, if we examine the succession provisions dealing with moral rights more closely, it becomes apparent that moral rights are not entirely personal in nature. Subsection 14.2(2) of the *Copyright Act* expressly provides that, upon the death of an author, his or her moral rights pass to his/her estate.<sup>11</sup> If moral rights were intended to be solely personal rights, then it is difficult to understand how such a purely personal right may be bequeathed.<sup>12</sup> Furthermore, s. 14.2(2)(b) of the *Copyright Act* provides that where no specific bequest has been made, the moral rights pass to the person to whom the copyright is bequeathed.<sup>13</sup> Again, this is clear evidence that moral rights, as provided for within Canada, are not intended to be entirely personal in nature.<sup>14</sup> Under the *Copyright Act*, Parliament appears to have expressly carved out an element of moral rights that transcends traditional "flesh and blood" authors, whether through succession or corporate authors of photographic works.

The Supreme Court of Canada has repeatedly endorsed the modern approach to statutory approach, that the "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the

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<sup>9</sup> Article 6(2) of the Berne Convention for the Protection of Literary and Artistic Works (1886) also states as follows: "The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained."

<sup>10</sup> Compact Oxford English Dictionary of Current English, 3rd ed. (1995).

<sup>11</sup> There is no requirement that the "person" to whom the moral rights are bequeathed be a natural person; they could well be bequeathed to a body corporate.

<sup>12</sup> It is even more problematic to consider how those bequeathed moral rights would be enforced. How would the Executor of an estate truly know when such moral rights are being infringed?

<sup>13</sup> Again, there is no requirement that this "person" be a natural person. Considering that this provision deals with situations where the so-called economic interests in the copyright have been sold, it may well be a corporation that hold the economic rights, and hence receives the moral rights through succession and operation of this provision.

<sup>14</sup> Subsection 14.2(3) of the Act adds another wrinkle by allowing the moral rights which have been transferred through succession to be further transferred through succession in the event that the recipient dies.

object of the Act, and the intention of Parliament.”<sup>15</sup> If the *Copyright Act* deems that corporations are authors in respect of photographs, and there are no exclusions against corporations holding moral rights either under s. 14.2 or s. 28.2, then the “harmonious scheme” appears to provide for moral rights, albeit in very limited circumstances (eg: over photographs) to be held by corporations. Also, the ability to bequeath or have one’s moral rights effectively transferred to another person (legal or natural) upon the author’s death, adds further “harmony” to the view that Parliament did not intend moral rights to be entirely personal in nature. To hold otherwise, would be to suggest that Parliament was not aware of the moral rights implications of labelling corporate bodies as “authors,” or that the provisions of s. 14.2 (2) did not expressly erode the concept of moral rights being either purely personal or not held by corporations.

Accepting the view that a corporation can indeed hold moral rights does have some interesting implications for adjudicating moral rights infringements. For instance, the ss. 28.1 and 28.2 provisions (on moral rights infringement) would have to be adjudicated with a view towards conduct that is prejudicial to the honour or reputation of the corporation. But this is not an insurmountable hurdle. Presumably, conduct that affects the reputation of the corporation would be something decided upon by its “controlling mind” (i.e. the board of directors, majority shareholder(s), and/or the delegates of those groups). This would be no different from a corporation deciding to launch a trade mark infringement action, or an action in passing off. Such a novel cause of action should be pursued by corporations despite the dominance and pervasiveness of the “traditional wisdom” (as I have labelled it).

### **3. Conclusion**

Given the elements of the *Copyright Act* outlined above, it does appear as though the Canadian Parliament intended corporations to be “authors” (in limited circumstances) capable of holding moral rights, and that moral rights therefore need not be purely personal in nature. For proponents of the “traditional” view of moral rights, this may be uncomfortable and unfamiliar territory, but this appears to be the subtle legislative scheme set out in Canada’s *Copyright Act*. As such, the author urges Canadian corporations to consider carefully the implications of this; even if the claims advanced here are contentious, a vigilant solicitor would do well to consider this challenge to the traditional wisdom. This article is also a “call to arms” (of sorts) for Canadian corporation’s to rearrange their intellectual property management and litigation strategy, and for estate planners and solicitors to consider the apparent flexibility and longevity afforded to certain moral rights by the Canadian Parliament.

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<sup>15</sup> See *Bell ExpressVu Limited Partnership v R*, [2002] 2 SCR 559, quoting E Driedger, *Construction of Statutes*, 2nd ed. (1983). See also *Stuart Investments Ltd. v The Queen*, [1984] 1 SCR 536, at 578, *Québec (Communauté urbaine) v Corp. Notre-Dame de Bon-Secours*, [1994] 3 SCR 3, at 17, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para. 21; *R v Gladue*, [1999] 1 SCR 688, at para. 25, *R v Araujo*, [2000] 2 SCR 992, para. 26, *R v Sharpe*, [2001] 1 SCR 45, at para. 33, and *Chieu v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 84, at para. 27.