

**RIGHT OF PRIVACY VERSUS FREEDOM OF EXPRESSION: *AUBRY v. EDITION VICE-  
VERSA INC.***

by  
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On April 9, 1998, the Supreme Court of Canada delivered a judgment in the case of *Aubry -vs- Edition Vice-Versa Inc.*, which case could be characterized as a test case.

Essentially, the Court had to deal with the balancing of the right to privacy and freedom of expression under the Quebec Charter of Human Rights and Freedoms, RCQ, c.C-2 (hereafter: the “Quebec Charter”). Additionally, the Court had to determine whether the trial judge erred in deciding that the Plaintiff had suffered a prejudice, which is an essential element of civil responsibility under Quebec law. Such prejudice may be extrapatrimonial and /or patrimonial.

The Court unanimously found that the balancing of rights favoured the Plaintiff’s right to privacy, but two dissenting judges (Lamer C.J. and Major J.) found that the Plaintiff did not establish sufficient evidence of prejudice resulting from the fault of the Defendants to trigger their civil responsibility.

The majority of the Court found, with respect to extrapatrimonial damages, no error in the trial judge’s finding that moral prejudice had been sustained by the Plaintiff. With respect to patrimonial damages, the majority of the Court was of the view that the commercial or promotional exploitation of an image, whether of the well-known person or a private individual, can cause the victim material prejudice which entitles the victim to claim an amount in exchange for use of his or her image. The patrimonial aspect of the damages was not discussed at trial nor on appeal. No evidence of patrimonial damages having been made and no cross-appeal having been filed, the Court did not vary the amount of

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\$2,000.00 awarded by the trial judge for extra-patrimonial prejudice.

The facts of the case have been summarized as follows:

The respondent, Pascale Claude Aubry, brought an action in civil responsibility against the appellants, Gilbert Duclos and Les Éditions Vice-Versa Inc., for taking and publishing a photograph showing the respondent sitting on a step in front of building on Ste-Catherine Street in Montreal. Both sides accept that the photograph was taken in a public place and published without the respondent's consent. According to the evidence, it was the Appellant Gilbert Duclos who took the respondent's photograph. The photograph was published by the Appellant Les Éditions Vice-Versa Inc. in June issue of *Vice Versa*, a magazine dedicated to the arts, and 722 copies of the issue in question were sold. The photograph was drawn to the Respondent's attention by a friend who had purchased a copy of the magazine. The Respondent, who was 17 at the time, brought this action for damages in the amount of \$10,000.00, half as compensatory damages and the other half as exemplary damages.

The analysis of the Supreme Court was limited to the sole issue of the publication of a photograph taken without permission. The Quebec Charter states the following:

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

4. Every person has a right to respect for his private life.

9.1 In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Quebec.

The Supreme Court considered that the case at bar raises a problem of civil law and such an action is subject to the civil law principles of recovery. As a result, the traditional elements of liability, namely, damage and causal connexion, most established.

In the Court's view, the right to one's image, which has an extra-patrimonial and patrimonial aspect, is an element of the right to privacy under Section 5 of the Quebec Charter. If the purpose of the right to privacy guaranteed by Section 5 of the Quebec Charter is to protect a sphere of individual autonomy, that right must include the ability to control the use made of one's image. Since the right to one's image is included in the right to respect for one's private life, every

person possesses a protected right to his or her image. 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.

The right to respect for one's private life comes into conflict here with another right protected by the Quebec Charter, in Section 3, namely the right to freedom of expression which includes freedom of artistic expression.

The right to respect for one's private life, like freedom of expression, must be interpreted in accordance with the provisions of Section 9.1 of the Quebec Charter. For this purpose, it is necessary to balance these two rights.

The Court did not consider it appropriate to adopt the notion of "socially useful" for the purposes of legal analysis as it was done by the Court of Appeal. This notion seems to have been borrowed by American law.

The Court considered that only one question arises, namely the balancing of the rights at issue. Whether the public's right to information can justify dissemination of a photograph taken without any authorization.

In the Court's view the artistic expression of the photograph which was alleged to have served to illustrate contemporary urban life, cannot justify the infringement of the right to privacy it entails. It has not been shown that the public's interest in seeing this photograph is predominant.

When the value is at issue and the case must be balanced, it is important to bear in mind, that our law is characterized by recognition of interrelated rights whose purpose is to strengthen the democratic ideal. Individual freedom is at the heart of that ideal. The Court concluded that the Plaintiff's right to protection of her image is more important than the Defendant's right to publish the photograph of the Plaintiff without first obtaining her permission.

The question of damages was the cause of dissent among the judges of the Supreme Court, the minority found that damages have not been proven while the majority felt that they had, to a sufficient extent. All the judges however agreed that damages have to be proven by the Plaintiff before the Defendant's civil liability could be engaged.

This case deals only with the claim for damages resulting from the activities of the Defendant. Nothing is said about any injunctive order which could have been sought under Section 49 of the Quebec Charter to obtain the cessation of the interference of the Plaintiff's right or freedom recognized by the Quebec Charter.

Had such a request been made, could an injunction order issue only if damages have been established to the satisfaction of the Court? The judgment of the Supreme Court seems to indicate that such a pre-requisite would be necessary since the approach taken by the Court is the civil liability approach which encompasses the traditional elements of liability, namely fault, damage and causal connection.

While we do say that the decision of the Supreme Court seems to indicate the need for such a pre-requisite, there may still be room for some argument. As such, Section 49 of the Quebec Charter does not make the establishment of moral or material prejudice a pre-requisite to obtain an order for the cessation of an interference. In fact, Section 49 is quite clear: any unlawful interference with any right or freedom recognized by the Quebec Charter entitles the victim to obtain the cessation of such interference.

For moral or material prejudice to be a pre-requisite to obtain an injunctive order, Section 49 would have to be interpreted as saying: any unlawful interference with any right or freedom recognized by this Charter which causes moral or material prejudice entitles the victim to obtain the cessation of such interference and compensation for the said prejudice.

Section 40 of the Quebec Charter simply does not say that. It is therefore possible to think that a Plaintiff could obtain an injunctive order under Section 49 even if he or she cannot establish moral or material prejudice as long as the other requirements of the Quebec Charter are met, including those of Section 49.1.

In fact, this decision of the majority of the Supreme Court (even though it seems to make proof of moral or material prejudice a pre-requisite to the issuance of any injunctive order) has set the prejudice threshold so low that it is for all practical purposes almost inexistent. It is submitted that this is the ultimate result to which the minority judges did not want to come to.

It is now open to discussion whether this decision will have any application or effect outside the Province of Quebec. We believe it will, if it were only from the point of view of having established that our law is characterized by recognition of interrelated rights, whose purposes is to strengthen the democratic ideal and that individual freedom is at the heart of that ideal. This deal is certainly not limited to Quebec but applies to the whole of Canada.

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