



LIMITATION PERIOD FOR CIVIL REMEDIES SOME COMMENTS ON SECTION 41 OF THE CANADIAN *COPYRIGHT ACT*

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LIMITATION PERIOD FOR CIVIL REMEDIES

41.(1) Subject to subsection (2), a court may not award a remedy in relation to an infringement unless

- (a) in the case where the plaintiff knew, or could reasonably have been expected to know, of the infringement at the time it occurred, the proceedings for**

PRESCRIPTION

41.(1) Sous réserve du paragraphe (2), le tribunal saisi d'un recours en violation ne peut accorder de réparations que si :

- (a) le demandeur engage des procédures dans les trois ans qui suivent le moment où la violation a eu lieu, s'il avait connaissance de la violation au moment où elle**

infringement are commenced within three years after the infringement occurred; or

- (b) in the case where the plaintiff did not know, and could not reasonably have been expected to know, of the infringement at the time it occurred, the proceedings for infringement are commenced within three years after the time when the plaintiff first knew, or could reasonably have been expected to know of the infringement.

a eu lieu ou s'il est raisonnable de s'attendre à ce qu'il en ait eu connaissance à ce moment;

- (b) le demandeur engage des procédures dans les trois ans qui suivent le moment où il a pris connaissance de la violation ou le moment où il est raisonnable de s'attendre à ce qu'il en ait pris connaissance, s'il n'en avait pas connaissance au moment où elle a eu lieu ou s'il n'est pas raisonnable de s'attendre à ce qu'il en ait eu connaissance à ce moment.

RESTRICTION

(2) The court shall apply the limitation period set out in paragraph (1)(a) or (b) only in respect of a party who pleads a limitation period.

RESTRICTION

(2) Le tribunal ne fait jouer la prescription visée aux alinéas (1)a) ou b) qu'à l'égard de la partie qui l'a invoquée.

R.S.C. 1985 (4th Supp.), c. 10, s. 9; S.C. 1997, c. 24, s. 22

§1.0 Related Sections

Section 2—Definitions: “infringing”, “plaintiff”; section 3—Copyright in works; section 15—Copyright in performer’s performance; section 18—Copyright in sound recordings; section 21—Copyright in communication signals; section 27—Infringement generally; section 27.1—Importation of books; section 32.4— Certain rights and interests protected [compensation for acts done before recognition of copyright of performers]; section 32.5—Certain rights and interests protected [compensation for acts done before recognition of copyright of performers and broadcasters]; section 33—Certain rights and interests protected [compensation for acts done before recognition of copyright or moral rights]; section 34—Copyright [civil remedies]; section 35— Liability for infringement; section 38—Recovery of possession of copies, plates; section 38.1—Statutory damages; section 39.1—Wide injunction; section 77— Circumstances in which licence may be issued by the Board [unlocatable owners]; section 89—No copyright, etc., except by statute.

§2.0 Related Regulations

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Period for Royalty Entitlements for Non-members of Collecting Bodies — Regulations Establishing, SOR/97-164.

§3.0 Prior Legislation

§3.1 Corresponding Section in Prior Legislation

Section 23 from 1924.01.01 to 1928.01.31; section 24 from 1928.02.01 to 1988.12.11; section 41 from 1988.12.12 to present.

§3.2 Legislative History

§3.2.1 S.C. 1921, c. 24, s. 23.

PRESCRIPTION OF ACTION

23. An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

PRESCRIPTION

23. L'action en violation du droit d'auteur ne pourra plus être intentée après l'expiration d'un délai de trois ans à compter de cette violation.

§3.2.2 R.S.C. 1927, c. 32, s. 24.

PRESCRIPTION OF ACTION

24. An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

PRESCRIPTION

24. L'action en violation du droit d'auteur ne pourra plus être intentée après l'expiration d'un délai de trois ans à compter de cette violation.

§3.2.3 R.S.C. 1952, c. 55, s. 24.

PRESCRIPTION OF ACTION

24. An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

PRESCRIPTION

24. Une action pour violation du droit d'auteur ne peut plus être intentée après l'expiration d'un délai de trois ans à compter de cette violation.

§3.2.4 R.S.C. 1970, c. C-30, s. 24.

PRESCRIPTION OF ACTION

24. An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

PRESCRIPTION

24. Une action pour violation du droit d'auteur ne peut plus être intentée après l'expiration d'un délai de trois ans à compter de cette violation.

§3.2.5 S.C. 1988, c. 15, s. 9.

TIME LIMIT FOR ACTIONS

24. An action in respect of infringement shall not be commenced after the expiration of three years next after the infringement.

PRESCRIPTION

24. Les actions pour violation se prescrivent par trois ans à compter de la violation.

§3.2.6 R.S.C. 1985, c. C-42, s. 41.

LIMITATION PERIOD

41. An action in respect of infringement of copyright shall not be commenced after the expiration of three years immediately following the infringement.

PRESCRIPTION

41. Les actions pour violation du droit d'auteur se prescrivent par trois ans à compter de la violation.

§3.3 Transitional

S.C. 1997, c. 24, s. 22(2).

Subsection [41](1) applies in respect of (a) proceedings commenced but not concluded before this section comes into force [*i.e.* 1997.01.01]; and

(b) proceedings commenced after this section comes into force [*i.e.* 1997.09.01].

Le paragraphe [42](1) s'applique aux procédures engagées après la date d'entrée en vigueur du présent article [*i.e.* 1997.09.01] de même qu'aux procédures en cours à cette date.

§4.0 Purpose

Section 41 provides for a general statutory limitation of three years for civil remedies arising from the infringement of a provision of the *Copyright Act*.

§5.0 Commentary

§5.1 History

This section first appeared in the *Copyright Act, 1921* where it faithfully reproduced section 10 of the *United Kingdom copyright Act, 1911*. It established a three-year prescription period for commencing an action in copyright infringement, in place of the shorter limitation period of two years which had applied under earlier Canadian copyright statutes. See for instance: S.C. 1832, c. 53, s. 11; S.C. 1841, c. 61, s. 12; S.C. 1859, c. 81, s. 13; S.C. 1868, c. 54, s. 18; S.C. 1875, c. 88, s. 27; R.S.C. 1886, c. 62, s. 34; and R.S.C. 1906, c. 70, s. 44.

The word “copyright” was removed from the text of section 41 in the *Copyright Amendment Act* (S.C. 1988, c. 15, s. 9; R.S.C. 1985, (4th Supp.), c. 10, s. 9). The use of the all-encompassing word “infringement” instead of the term “copyright infringement” or “infringement of copyright” may have been intended to prevent the courts from concluding that the limitation period of three years set forth in section 41 does not apply to an action for infringement of moral rights pursuant to subsection 34 (1.1). Interestingly, in certain foreign jurisdictions, notably France, an action based on the infringement of moral rights is imprescriptible.

The 1997 amendment to the *Copyright Act* (S.C. 1997, c. 24, s. 22) puts an end to the controversy as to whether fraud or concealment should be given consideration in the computation of the three year limitation period: it now should. See CARRIÈRE (Laurent), *Prescription et propriété intellectuelle — La prescription extinctive comme fin de non-recevoir en matière de propriété intellectuelle* (1993), 10 Canadian Intellectual Property Review 357, at p. 380 and VAVER (David), *Limitations in Intellectual Property “The Time Is Out of Joint”* (1994), 73 Canadian Bar Review 451, at pp. 462-463.

§5.2 General

§5.2.1 Civil remedies

Sections 34 to 41 of the *Copyright Act* fall under the heading “Civil Remedies”. Section 41 is the coda of this part of the *Copyright Act* and applies to all civil remedies available to a copyright owner (or whoever has a copyright interest) in respect of copyright

infringement of a work; a performer's performance, a sound recording or a communication signal, to the complete exclusion of any provincial statute governing limitation periods (see section 89: "No copyright unless under this Act").

§5.2.2 Criminal remedies

The "Criminal Remedies" set forth in sections 42 and 43 of the *Copyright Act* are not subject to the three-year limitation period of section 41: see *R. v. Harris* (1990), 34 C.P.R. (3d) 392 (Nfld. Prov. Ct.).

Criminal proceedings taken by indictment as provided for under paragraphs 42(1)(g) and 42(2)(d) of the *Copyright Act* are imprescriptible: see SALHANY (Roger E.), *Canadian Criminal Procedure*, 5th ed. (Agincourt, Canada Law Book, 1989), at pp. 18-19 and 314-315; MORTON (James C.), *Limitation of Civil Actions* (Toronto, Carswell, 1988), at pp. 59-62.

Proceedings taken by summary conviction in respect of subsections 43(1) and 43(2) of the *Copyright Act* are subject to the general limitation applicable to summary offences, which, pursuant to subsection 786(2) of the *Criminal Code* is six months. However, proceedings taken by summary conviction under paragraphs 42(1)(f) and 43(2)(c) of the *Copyright Act*, are subject to the limitation specifically set forth by subsection 42(4), namely two years.

§5.2.3 Licences under section 77

The section 41 limitation period does not apply to an action launched by a copyright owner to collect royalty payments set by the Copyright Board in the owner's absence. The latter case however would be subject to the five-year limitation provided for in subsection 77(3) of the *Copyright Act*.

§5.2.4 Licences

In the cases of royalties owed pursuant to a licence or other agreement, the time limitation for instituting an action for the collection of royalties or other amounts due under the agreement will be governed by the general civil law of the province.

§5.3 Triggering of the Limitation Period

§5.3.1 General application

The plain meaning of section 41 dictates that each distinct act of infringement will set in motion its own limitation period of three years. Proceedings taken outside the three-year period are barred. However, if the proceedings so taken cover distinct acts of

infringement falling both inside and outside the limitation period, the action will be receivable with respect to acts having occurred less than three years before the action was commenced and be considered stale in respect of the earlier acts.

The filing of proper legal proceedings in the competent court will have the effect of interrupting the prescription: see *Canada (A.G.) Delaurier*, (1979), 93 D.L.R. (3d) 434 (Man. Q.B.), and articles 2224 and 2225 of the *Civil Code of Lower Canada* and articles 2892 and 2895 of the *Civil Code of Quebec*. This is so even if the pleadings must be amended subsequently: see *Larochelle v. R.* (1974), 2 N.R. 494 (F.C.A.); *Leesona Corp. v. Consolidated Textiles Mills Ltd.* (1977), [1978] 2 S.C.R. 2.

Furthermore, every act which interrupts prescription against one of several debtors would interrupt it with respect to all: see *Martel v. Hôtel-Dieu St-Vallier*, [1969] S.C.R. 745; *De Jong P.Z. v. Falcon Maritime Management S.A. (Panama)* (1988), [1989] 2 F.C. 63 (F.C.T.D.).

§5.3.2 Continuing offence

A continuing offence is one which is committed over a span of time. As found in BLACK (Henry Campbell) et al., *Black's Law Dictionary*, 6th ed. (St. Paul, West, 1990), at pp. 321-322:

As to period of statute of limitation, the last act of the offense controls for commencement of the period. A "continuing offense", such that only the last act thereof within the period of the statute of limitations need be alleged in the indictment or information, is one which may consist of separate acts or a course of conduct but which arises from that singleness of thought, purpose or action which may be deemed a single impulse;

Reference could also be made to the American decision of *Taylor v. Merrick*, 219 U.S.P.Q. 2d 420, Posner J. (7th Cir. 1983).

[7] The next question is whether Taylor can complain about infringing sales that occurred more than three years before he sued. He invokes the supposed rule that only the last infringing act need be within the statutory period. Oddly, considering how often the issue must arise, we have found little mention of such a rule in the cases. Two district court cases uphold the rule (none reject it), see *Baxter v. Curtis Industries, Inc.*, 201 F. Supp. 100, 133 USPQ 78 (N.D. Ohio 1962); *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1018, 56 USPQ 8, 12 (S.D.Cal. 1942), but *Cain* is not very explicit. However, there is no doubt of the rule's validity if it is regarded not as something peculiar to copyright law but as the application to that law of the general principle that the statute of limitation does not begin to run on a continuing wrong till the wrong is over and done with (this seems to be the

approach in Cain). See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 295 (2d Cir. 1979); *Railing v. United Mine Workers of America*, 429 F.2d 780, 783 (4th Cir. 1970).

The principle strikes a balance between the plaintiff's interest in being spared having to bring successive suits, and the two distinct interests, *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975), that statutes of limitations serve. One is evidentiary — to reduce the error rate in legal proceedings by barring litigation over claims relating to the distant past. The other is repose — to give people the assurance that after a fixed time they can go about their business without fear of having their liberty or property taken through the legal process. Apart from the harmful effect of uncertainty on planning, it is more painful to lose what you have come to think of as your own than it is gratifying to get back something you wrote off many years ago and have grown accustomed to doing without. See Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 477 (1897); cf. Hirshleifer, *Price Theory and Applications* 61 (1976). When the final act of an unlawful course of conduct occurs within the statutory period, these purposes are adequately served, in balance with the plaintiff's interest in not having to bring successive suits, by requiring the plaintiff to sue within the statutory period but letting him reach back and get damages for the entire duration of the alleged violation. Some of the evidence, at least, will be fresh. And the defendant's uncertainty as to whether he will be sued at all will be confined to the statutory period. His uncertainty about the extent of this liability may be greater, but that is often true in litigation. [at pp. 423-424]

See also SALHANY (Roger E.), *Canadian Criminal Procedure*, 5th ed. (Toronto, Canada Law Book, 1989), at p. 316; *R. v. Bell*, [1983] 2 S.C.R. 471, McIntyre J., at p. 488.

Therefore, “[w]here the offence is a continuing one, and continues up to within less than the statutory limitation period before institution of proceedings, it is material if it was first committed at a time anterior to the period”: see *R. v. Belgal Holdings Ltd.* (1966), [1967] 3 C.C.C. 34, Stewart J., at p. 36 (Ont. H.C.).

However, if the infringement is on-going but consists of a series of discrete acts, a separate limitation period will apply to each such act. It remains open to the person whose copyright has been infringed by a continuous act of infringement to file a timely claim within three years of the completion of the act.

§5.3.3 Laches

The simple fact that a copyright owner tolerates the infringement of his copyright will not

abridge the limitation period. However, unreasonable delay in pursuing the legal remedies provided for by the *Copyright Act* may amount to laches and, under normal circumstances, should deprive the plaintiff from seeking equitable remedies, including interim and interlocutory injunctions against the infringer: SHARPE (Robert J.), *Injunctions and Specific Performance*, 2nd ed. (Toronto, Canada Law Book, 1992), at nos. 1.990- 1.1020; WILLIAMS (Jeremy S.), *Limitation of Actions in Canada*, 2nd ed. (Toronto, Butterworths, 1980), at pp. 29-39. As put by Collier J. in *Sandvik, A.B. v. Windsor Machine Co.* (1986), 8 C.P.R. (3d) 433 (F.C.T.D.), at 443: “A patentee is not required to sue at the first drop of the hat”. This maxim should also apply to a copyright owner.

§5.3.4 Conversion

Ever since the decision rendered by the Supreme Court of Canada in *Underwriters' Survey Bureau Ltd. v. Massie & Renwick Ltd.*, [1937] S.C.R. 265, it has been settled law that a claim for conversion under section 38 of the *Copyright Act* is subject to the same three-year limitation period which generally applies to infringement. See also *Sutherland Publishing Co. v. Caxton Publishing Co.*, (1938), [1939] A.C. 178 (H.L.) for the same conclusion under the United Kingdom *Copyright Act, 1911* with respect to conversion provisions.

§5.3.5 Breach of trust or confidence

Section 89 of the *Copyright Act* states that entitlement to copyright is governed exclusively by the terms of the Act “or any other statutory enactment for the time being in force.” Accordingly, the remedies available for infringement of copyright and the limitation period for seeking relief from infringement are also subject to the provisions of the Act.

Yet, section 89 concludes by stating that nothing in the section abrogates “any right or jurisdiction to restrain a breach of trust or confidence.” Any such claim would therefore be subject not to the limitation period set forth in section 41 but to the laws of the province in which the breach of trust or confidence occurred: see VAVER (David), *Civil Liability for Taking or Using Trade Secrets in Canada* (1980-81), 5 Canadian Business Law Journal 253; BOURGEOIS (Marie), *La protection juridique de l'information confidentielle économique: étude de droit québécois et français* (1988), 1 Cahiers de propriété intellectuelle 1.

§5.3.6 Fraud or concealment

Paragraph 41(1)(b) of the *Copyright Act* (as introduced by S.C. 1997, c. 24, s. 22(1)), provides that where the plaintiff

- i) did not know and
- ii) could not reasonably have been expected to know

of the infringement at the time it occurred, the limitation period will start to run from the date the plaintiff

- i) first knew or
- ii) could have been reasonably expected to know of the infringement.

For instance, where there has been fraudulent concealment of the existence of a cause of action, the limitation period will begin to run only where the plaintiff discovers the fraud with reasonable diligence: see *Underwriters' Survey Bureau Ltd. v. Massie & Renwick Ltd.* (1939), [1940] S.C. R. 218 (S.C.C.) Duff J., at p. 244; *Guérin v. R.* (1984), [1984] 2 S.C.R. 335 (S.C.C.) Dickson J., at p. 390; *Kruger v. R.* (1985), 17 D.L.R. (4th) 591 (F.C.A.) Heald J., at p. 624.

It is open to the court to apply the test of knowledge of concealed infringement on an objective basis, and thereby conclude that, had the copyright owner now appearing before it as plaintiff exercised reasonable diligence, he would have discovered the unauthorized concealment or fraudulent use of the work in which he owns the copyright: see MORTON (James C.), *Limitation of Civil Actions* (Toronto, Carswell, 1988), at pp. 101-103; WILLIAMS (Jeremy S.), *Limitation of Actions in Canada*, 2nd ed. (Toronto, Butterworths, 1980), at pp. 210-213.

In conducting this assessment, the court may, of course, take into account the inherent difficulty that would be encountered by a diligent copyright owner as in, for example, the infringement of architectural drawings whose unauthorized reproduction could not readily be discovered until the building described therein were constructed.

No special consideration is given, however, to foreign copyright owners who may not be as likely to discover acts of infringement whether concealed or not. The foreign copyright owner is required to be as vigilant in the enforcement of his copyright interests as a copyright owner who resides in Canada.

§5.4 Pleadings

Whether statutes of limitations were procedural in nature or substantive was long debated but finally held substantive: see *Tolofson v. Jensen*, [1994] 2 S.C.R. 1022 (S.C.C.) La Forest J., at pp. 1070-1073 and CASTEL (Jean-G.), *Canadian Conflict of Laws*, 3rd ed. (Toronto, Butterworths, 1994) 1st Supplement at p. 20; compare with *Sommers v. R.*, [1959] S.C.R. 678, Fauteux J., at p. 688; CÔTÉ (Pierre-André), *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville, Blais, 1992), at pp. 158-166 and 174-187. As a procedural measure whereby a substantive right is rendered

nugatory, the party who intends to rely upon a limitation period must specifically plead it, with the material facts which give rise to the limitation period: see *Consolboard Inc. v. MacMilan Bloedel (Saskatchewan) Ltd.* (1982), 63 C.P.R. (2d) 1, Cattanach J., at pp. 26-28 (F.C.T.D.-Reference); *Sandvik, A.B. v. Windsor Machine Co.* (1986), 8 C.P.R. (3d) 433 (F.C.T.D.), Collier J., at p. 443. However, since these cases dealt with patent infringement for which there is no specific provision as to limitations in the *Patent Act* (R.S.C. 1985, c. P-4), recourse had to be made to section 39 of the *Federal Court Act* (R.S.C. 1985, c. F-7, as amended S.C. 1990, c. 8, s. 10).

Inasmuch as the prescription set forth in section 41 be construed as absolutely extinguishing the cause of action so that no action could be maintained after the delay for the prescription expired, a proper approach would have to be that the court could, of its own motion, supply the defence resulting from prescription: *Corpex (1977) Inc. v. Canada*, [1982] 2 S.C.R. 643 (S.C.C.) Beetz J., at p. 661. However, the legislator preferred to accord the *Copyright Act* with the prevailing practice and subsection 41(2), as introduced by S.C. 1997, c. 24, s. 22, now specifically provides that the court shall apply the limitation period only in respect of a party who pleads it.

§5.5 Negative and Not Positive Prescription

The limitation period set forth in section 41 is a means by which civil liability for copyright infringement can be discharged by lapse of time. In this regard, section 41 creates an extinctive or negative prescription which is a bar to an action, removing the right of action from infringement otherwise granted under the *Copyright Act*.

The prescription under section 41 is not a means for an infringer to acquire rights. The mere fact that the infringement occurred more than three years prior to the action does not entitle the infringer to continue his infringement. Injunctive remedies will then lie as well as those other remedies which section 34 provides for.

Furthermore, in view of the negative nature of copyright, it might well be that some acts of infringement are prescribed but not others. For instance, a work might have been reproduced (contrary to subsection 3(1) introductory of the *Copyright Act*) more than three years before the commencement of the action but communicated to the public (contrary to paragraph 3(1)(f) of the *Copyright Act*) or distributed (contrary to paragraph 27(2)(b) of the *Copyright Act*) thereafter. In such a case, the copyright owner will still be entitled to institute infringement proceedings with respect to the infringement under paragraphs 3(1)(f) and 27(2)(b) of the *Copyright Act* but not under subsection 3(1) introductory of the *Copyright Act*.

§5.6 Construction

§5.6.1 Interpretation

In cases of ambiguity, section 41, as a provision restricting the right to take action, should be interpreted restrictively: see CÔTÉ (Pierre-André), *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville, Blais, 1992), at p. 392; DRIEDGER (Elmer A.), *Construction of Statutes*, 2nd ed. (Toronto, Butterworths, 1983), at p. 185. In support of a strict construction to be given to limitation statutes, reference should be made to *Berardinelli v. Ontario Housing Corp.* (1978), [1979] 1 S.C.R. 275, Estey J., at p. 280:

[A limitations statute] being a restrictive provision wherein the rights of action of the citizen are necessarily circumscribed by its terms, attracts a strict interpretation and any ambiguity found upon the application of the proper principles of statutory interpretation should be resolved in favour of the person whose right of action is being truncated.

§5.6.2 Computation of time

Save for paragraph 41(1)(b), the limitation period set forth by section 41 runs from the date that the cause of action arises under the *Copyright Act*. In order to set out the time within which the action must be commenced, reference should be made to the “computation of time” provisions of the *Interpretation Act* (R.S.C. 1985, c. I-21, ss. 26-30) as well as to the definition of “year” in subsection 37(1) of the said Act.

§6.0 Case Law

§6.1 Canada

§6.1.1 Copyright Issues

1. *Underwriters’ Survey Bureau Limited v. Massie & Renwick Ltd.* (1937), [1938] Ex. C.R. 103, MacLean J. (Ex. Ct.).

One other point remains for decision and that is whether or not, in respect of the claims of infringement and conversion, the period of limitation applicable to such actions is a bar to relief here, the plaintiffs contending that the defendant fraudulently, and by fraudulent concealment, infringed and converted the works in question, and that, in such a state of facts, the period of limitation cannot be set up as a bar.

...

In the case of *Bulli Coal Mining Company v. Osborne* [[1899] A.C. 351] it was held that the Statute of Limitations was no answer to a claim in respect of a concealed and fraudulent trespass in the working of a coal mine, so long as the party defrauded remained in ignorance without any fault or laches of his own. The fraudulent act there was the taking furtively, underground coal from a neighbour’s pit. In delivering the

judgment of the Judicial Committee of the Privy Council, Lord James of Hereford said:

Now it is always been a principle of equity that no length of time is a bar to relief in the case of fraud, in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the statute in the case of concealed fraud, so long as the party defrauded remains in ignorance without any fault of his own. The contention on behalf of the appellants that the statute is a bar unless the wrong-doer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity. [pp. 126-128]

2. *Underwriters' Survey Bureau Limited v. Massie & Renwick Ltd.*, (1937) S.C.R. 265, Judson J.

It would appear to be unnecessary to express any opinion on the question whether section 24 [now section 41] of the *Copyright Act*, which is a reproduction of section 10 of the English Act, would, apart from the considerations about to be mentioned, affect a claim under section 21 [now section 38] of the Canadian Act, which is section 7 of the English Act.

The words "in respect of infringement of copyright", although by no means an apt description of a claim made under section 21, are capable of a construction by which the phrase would extend to a claim under such section if the infringing copy with which the claim is concerned is a copy of the making and importing of which constituted infringement in the pertinent sense.

The Canadian statute must be assumed to contemplate proceedings in the Exchequer Court of Canada for the purpose of enforcing the rights created by section 21 as well as proceedings in provincial courts. This circumstance suggests various considerations which would appear to be of no inconsiderable weight. First of all, it would seem to be improbable that Parliament contemplated a uniform period of limitation throughout Canada in respect of actions admittedly falling within section 24 and differing periods of limitations as regards claims asserted in the provincial courts under section 21. Then, there is a great practical difficulty if section 24 has no application to claims under section 21. It is at least plausibly debatable whether such proceedings under the statute would be within the field of operation of provincial statutes of limitation; and as regards one of the provinces, especially having regard to the terms of the French version, it is at least arguable whether the period of prescription would not be thirty years.

We think we are entitled to assume that the Parliament was not entirely oblivious to these considerations and, as the language of section 24 cannot be said to be capable of only one necessarily exclusive meaning precluding its application to claims under section 21 of the character mentioned, there would appear to be reasonable ground for holding that such application was within the probable intention of Parliament.

Other authorities on this point, and to which I was referred, are *Lynn v. Bamber* [(1930) L.R. 2 K.B.D. 72], *Betjemann v. Betjemann* [(1895) L.R. 2 Ch. D. 474], and *Oelkers v. Ellis* [(1914) L.R. 2 K.B.D. 139]. Salmond on the Law of Torts [9th Ed., pp. 180, 181], discussing the rule of concealed fraud states:

When the defendant has been guilty of fraud or other wilful wrong doing, the period of limitations does not begin to run until the existence of a cause of action has become known to the plaintiff. This is commonly spoken of as the rule of concealed fraud, but the term *fraud* is here used in its widest sense as meaning any act of wilful and conscious wrong doing — for example — a wilful underground trespass and abstraction of minerals. The term *concealed*, moreover does not imply any active suppression of the facts by the defendant, but means merely that the wrong is unknown to the person injured at the time of its commission. ... The rule of concealed fraud does not apply when the plaintiff could by exercise of care and diligence have discovered the fraud. In other words, the statute runs not from the time when the cause of action was discovered by the plaintiff, but from any earlier time at which it ought to have been discovered.

Upon a consideration of the evidence, and the course of conduct of the defendant's officers and servants, I cannot avoid the conclusion that the defendant wilfully and wrongfully concealed from the plaintiffs its procurement of original works of the plaintiffs, the plaintiffs' property, from persons unauthorized to part with them, and similarly concealed the fact that it had caused copies of the same to be made for its own use, and in furtherance of that it caused or countenanced the removal of the name or names of the owners of the copyright from the said copies. If secrecy and concealment were deemed necessary in the steps leading to the production of the infringing copies, it is improbable that the defendant would cease to conceal from the plaintiffs the conversion of the infringing copies to its own use; and it is a fair inference that every possible means was taken to conceal this conversion in order to prevent the plaintiffs obtaining evidence of the infringement. I do not think there has been laches, or lack of reasonable diligence, on the part of the plaintiffs, to discover the

infringement and conversion, and it was not their fault that they remained in ignorance of the same. The evidence points strongly to the conclusion that the officers and managers of the defendant company believed the plaintiffs had copyright in the works in question, and that would be a sufficient motive for concealing their wilful wrong doing. I can hardly believe that the officers of the defendant company would not be conscious of their wrong doing, and they would not openly adopt the attitude that they were entitled as of right to enjoy the fruits of the extensive and expensive labours of the plaintiffs, and this would furnish a motive for concealing their wrong doing. [at pp. 269-270]

3. *Underwriters' Survey Bureau Limited v. Massie & Renwick Ltd.*, [1940] S.C.R. 218, Duff J.

There remains the question of the Statute of Limitations. The point which has concerned me most as to this feature of the appeal is whether, in view of the fact that the rights the respondents seek to enforce are the creature of the statute, you can go beyond the statute for the purpose of ascertaining the statutory limitation.

I have come to the conclusion, however, that the principle applied in *Bull Coal Mining Co. v. Osborne* [1899] A.C. 351 cannot be limited to underground trespasses, that it covers this case and that there was ample evidence in support of the conclusion of the learned trial judge that there had been fraudulent concealment within the meaning of the rule; with the consequence that the limitation period began to run only on the discovery of the fraud, or at the time when, with reasonable diligence, it would have been discovered. [at p. 244]

4. *Warner Brothers-Seven Arts Inc. v. CESM-TV Ltd.* (1971), 65 C.P.R. 215, Cattanach J. (Ex. Ct.).

It seems clear to me that the prescription in s. 24 of the *Copyright Act* is against the right of the plaintiffs to be awarded damages but that the right to an injunction is not affected thereby. [at p. 228]
(...)

Section 24 [now section 41] of the *Copyright Act* does not apply where the infringement of the copyright has been concealed.
(...)

Salmond on the Law of Torts, discussing the rule of concealed fraud states:

“When the defendant has been guilty of fraud or other wilful wrong doing, the period of limitations does not begin to run until the

existence of a cause of action has become known to the plaintiff. This is commonly spoken of as the rule of concealed fraud, but the term of *fraud* is here used in its widest sense as meaning any act of wilful and conscious wrong doing — for example — a wilful underground trespass and abstraction of minerals. The term *concealed*, moreover does not imply any active suppression of the facts by the defendant, but means merely that the wrong is unknown to the person injured at the time of its commission. ... The rule of concealed fraud does not apply when the plaintiff could by the exercise of care and diligence have discovered the fraud. In other words, the statute runs not from the time when the cause of action was discovered by the plaintiff, but from any earlier time at which it ought to have been discovered.”

On the evidence I cannot avoid the conclusion that the defendant “concealed” its conduct from the plaintiffs in the sense of the above quotation from Salmond in that while the defendant did not actively suppress any facts the wrong was unknown to the plaintiffs. The defendant did make full disclosure of its plan to the Department of Transport in its application for its initial licence and during the negotiations therefore and to stations CBWT and CJAY requested to do so by the Department of Transport. [at pp. 244-245]

5. *Formules Municipales Ltée v. Pineault* (1975) 19 C.P.R. (2d) 139, Walsh J. (F.C.T.D.).

The fact that defendants have been competing with plaintiff for many years in the publication and sale of similar forms seems to have been tolerated by plaintiff so that even if these earlier forms were copied from plaintiff’s and given the same or similar numbers it would appear to be too late for plaintiff to invoke copyright protection in connection with them.

(...)

I do not find, however, that even if plaintiff has adopted a course of conduct over the years whereby it has tolerated the copying, printing and sale of forms devised by it (if, indeed, such is the case) by defendants without complaint it is thereby precluded from bringing proceedings in infringement of copyright with respect to more recently devised forms which it has copyrighted provided it has then, with reasonable diligence, brought action to enjoin defendants who have allegedly copied and are publishing and selling same from so doing. [at pp. 142-143]

6. *Kerr v. R.* (1982), 66 C.P.R. (2d) 165, Grant J. (F.C.T.D.).

After March 18, 1976, the defendant did not use the cartoon character "Metrix" in any of its commercials. Section 24 [now section 41] of the *Copyright Act* provides as follows:

24. An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

This action was commenced on February 21, 1980. Therefore, the plaintiff could only succeed in respect of infringement (if any) that took place subsequent to February 21, 1977. Subsequent to that date, the Metric Commission did grant permission to other corporations to create artwork incorporating the cartoon character "Metrix" therein in relation to the metric system only. [at p. 169]

7. *Universal City Studios Inc. v. Zellers Inc.* (1983), [1984] 1 F.C. 49, Walsh J. (F.C.T.D.).

While defendant contends that plaintiffs waited nearly six months from October 1982 until March 1983 before bringing proceedings it was necessary for plaintiffs to fulfil certain legal requirements first by way of the formal assignments of the copyrights in November, and the registration of E.T. sculpture in December 1982. As soon as the alleged infringing sales were discovered letters to desist were written both to Defendant Zellers Inc. and to International Games of Canada Limited in October, and International Games responded positively, undertaking to withdraw any merchandising of the dolls. It was only in November that plaintiffs became aware of the sale by defendant of the keychains. I do not consider therefore that the delay in instituting proceedings constitutes acquiescence.

(...)

The fact that other infringing sales are taking place is not a defence available to defendant nor is there any evidence before the Court in the present proceedings to indicate that steps have not also been taken by plaintiffs against the other vendors of such allegedly infringing merchandise as soon as these sales are ascertained. They may well be so common that it is difficult for plaintiffs to keep up with all such sales. In the case of small infringers it may well not be worth their while to institute proceedings against them. I do not believe however that on the evidence before me it can be said that plaintiffs have tolerated or condoned any such infringement. [at pp. 61-62]

8. *Randall Homes Ltd. v. Harwood Homes Ltd.* (1987), 17 C.P.R. (3d) 372, Ferg J. (Man. Q.B.).

All of the evidence in the case, some admissions by the defendant's president on discovery, including the absence of any evidence to the contrary, point to the character and design of this home as being unique and original. There are only 23 homes of this particular design in Winnipeg, all erected from Harzan's particular creative design, or if you will, artistic work. It was argued a house is a house, that there can be no originality in a house, but here there was definitely originality. Evidence indicated this house was different, was designed with flair, many distinctive features were used and its elevations, its three dimensions, produced a particularly pleasing curb appeal, that is "the look". Distinctive, if not unique angles in roofing and over-all structural form for a split-level home, are evident in Plan 1605. So much so, in fact, that the distinctiveness and originality of the design could be recognized (and was by the basement contractor) as soon as the basement of the copied home was poured. The unauthorized use of the plan was discovered just after the basement was poured. It has been said that where a designer produces good design, good proportion, and good use of material, that this is the true artistry of architecture. That this dwelling design carried with it in fact an originality, I cannot question. And that, I think, with respect, is the test. [at p. 377]

9. *R. v. Shimming* (1991), 35 C.P.R. (3d) 397, Allen J. (Sask. Prov. Ct.). A. *The limitation period*

It is clear to me that the infringement of a copyright not only gives rise to a civil action for injunction and damages, but also to punitive penalties which may be levied by courts of summary jurisdiction. Authorities support the proposition that a criminal prosecution for summary penalties does not debar the copyright owner from his remedy by way of injunction in a civil action brought for the infringement of the copyright.

The *Copyright Act* addresses the civil remedies in ss. 34 to 41 and the summary remedies in ss. 42 and 43.

The only limitation period specified in the *Copyright Act* is found in s. 41.

Learned Crown counsel has urged upon me the interpretation of the word "action" as found in s. 41 to include a proceeding in a court of justice by which one party prosecutes another for the punishment of a public offence, as found in Black's Law Dictionary, Revised 4th ed. (1968), p. 49.

With respect, I think it is obvious from a reading of ss. 34 to 43 that s.

41 applies only to actions for civil remedies and does not apply to the provisions of the Act which impose summary penalties, namely, ss. 42 and 43.

Since the Act does not contain a specific time-limit within which summary conviction proceedings must be instituted, the general time limitation of six months provided in s. 786(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, applies, since these proceedings come within the definition of "proceedings" within s. 785 of the *Code*.

In the subject case, the information contains 53 counts. The first 25 counts are alleged to have occurred between October 1, 1986, and January 10, 1990. The 26th count is alleged to have occurred between December 11, 1989 and January 12, 1990. The next 10 counts are alleged to have occurred between April 1, 1989 and January 10, 1990. The last 17 counts are alleged to have occurred between July 11, 1988 and January 10, 1990.

The information detailing the 53 counts was sworn on July 4, 1990. The six-month limitation period running back in time from that date brings us to January 4, 1990. In my opinion, this provides a time frame of six days (January 4, 1990 to January 10, 1990) within which the infringements alleged must have occurred in order to sustain the charge. The sole exception to this is count No. 26, where the time frame is eight days (January 4, 1990 to January 12, 1990). [at pp. 398-399]

10. *Constructions nouvelle dimension Inc. c. Alarie* (1992), J.E. 92-938, Goodwin J. (Que. Sup. Ct.).

L'avocat de la demanderesse soutient que, dans les circonstances, le recours ne peut être prescrit par le seul écoulement du temps. En effet, sa cliente était dans l'impossibilité d'intenter des procédures: Elle ignorait jusqu'en octobre 1989 que son droit d'auteur avait été enfreint. La situation implique que la prescription ne court qu'à compter de la connaissance de la violation.

Il y a lieu de noter que la demanderesse a fait diligence et n'a aucunement renoncé à protéger ses droits, tel qu'en font foi d'autres poursuites qu'elle a intentées. [at p. 4 of the full report]

...

Le Tribunal déclare que le recours est prescrit.

L'action de la demanderesse a été déposée au greffe de la Cour

supérieure le 30 mars 1990, soit quelque 42 mois après que la violation alléguée eut été incontestablement apparente, que l'on retienne septembre 1986 ou octobre 1986.

Le Tribunal ne met pas en doute les propos de M. Beaulieu à l'effet qu'il n'ait pu constater la violation alléguée avant octobre 1989. Mais, en l'absence de fraude ou de dissimulation frauduleuse de la part de la défenderesse, il faut s'en tenir à l'article 41 précité qui fixe la prescription à trois ans à compter de la violation.

Le texte de cette disposition est sans équivoque et doit être appliqué rigoureusement. Si le législateur avait voulu qu'il en soit autrement, il aurait dû le dire. Cependant, même à l'occasion de l'adoption de la Loi modifiant la Loi sur le droit d'auteur (en vigueur depuis 1988), il n'a pas jugé à propos de modifier cet aspect de l'article 41 (3). Il n'est donc pas loisible d'y ajouter quelque autre notion ou considération, malgré l'exposé bien étoffé du procureur de la demanderesse. [at p. 5 of the full report]

11. *Pagliari v. Pantis* (1994), J. E. 94-1041, Benoît J. (Que. Sup. Ct.).

L'article 41 de la loi stipule que les actions pour violation des droits d'auteur se prescrivent par trois ans à compter de la violation. Le demandeur a témoigné qu'il s'est enquis avant 1980 des ventes de ces albums mais que le défendeur Denis Pantis a prétendu que les ventes n'étaient pas suffisantes pour donner droit à des royalties et des redevances. Le demandeur prétend qu'il n'a eu connaissance des violations de ses droits qu'à son retour d'Europe à la fin de l'année 1987, soit au début de l'année 1988. À ce propos, le demandeur s'est trouvé au Québec jusqu'en 1980 et il lui aurait été facile de constater que les défendeurs reproduisaient ou permettaient à d'autres de reproduire les œuvres musicales des albums DP- 1, DP-2 et DP-3 et d'obtenir une ordonnance d'injonction et une reddition de compte. La loi ne peut venir en aide à qui se ferme les yeux. Les demandeurs ne peuvent en conséquence exercer des réclamations pour les vingt années passées avant d'instituer la présente action.

Cependant, le demandeur Michel Pagliaro s'étant établi en France de 1980 à 1987 inclusivement, a pu attacher foi aux prétentions antérieures des défendeurs. Il n'était pas en mesure de constater par lui-même. Il a affirmé que c'est à son retour au Québec qu'il a découvert que les défendeurs reproduisaient alors ses œuvres et les avaient reproduites en album ou prétendu avoir accordé l'autorisation à des tiers de les produire en albums (pièces DP-4 à DP-1 1 plus deux autres albums et quatre cassettes). Le demandeur Michel Pagliaro n'a pu découvrir que, pendant son absence du pays, les défendeurs

étaient les producteurs immédiats ou par intermédiaire des reproductions illégales. Les défendeurs n'ont jamais agi ouvertement. Aussi le demandeur est-il, dans les circonstances révélées par la preuve, en droit de réclamer pour violation de ses droits pour les dix années antérieures à l'institution de l'action. Il est reconnu que la prescription n'est pas un obstacle dans un tel cas. [at pp. 16-17]

12. *Prud'homme v. Enseignes Normall Russell* (1993), J.E. 93-840, (Downs J. (Que. Sup. Ct.).

En effet, les droits d'auteur ne font pas partie de la propriété mobilière ou immobilière au sens de l'article 585(2) de la *Loi sur les cités et villes*. Ils sont de la compétence exclusive du gouvernement fédéral en vertu de l'alinéa 91(23) de la *Loi constitutionnelle de 1867*. Ils ne peuvent donc être restreints ou supprimés par une loi provinciale.

Nous sommes en présence d'un texte fédéral clair. L'article 41 de la *Loi sur le droit d'auteur*, S.R.C. 1970, c. C-30, prévoit que le droit d'action civile à l'encontre d'un contrevenant aux droits d'un auteur se prescrit par trois ans. Or, si l'application de l'alinéa 585(2) de la *Loi sur les cités et villes* devait ici être retenue, de l'aveu même du procureur de la défenderesse-requérante, le non-respect du délai prévu signifierait que le droit d'action à l'encontre de la municipalité n'aurait jamais pris naissance. [at p. 4]

13. *Tele-Direct (Publications) Inc. v. American Business Information, Inc.* (1996), 113 F.T.R. 123, McGillis J. (F.C.T.D.-Merits).

I cannot accept the argument of counsel for the defendant that the action is barred, in whole or in part, by the three year limitation period in s. 41 of the *Copyright Act*, R.S.C. 1985, c. C-42, as amended ("*Act*"). The action in this matter was instituted by a Statement of Claim filed on June 10, 1994, and the allegations of copyright infringement were raised in an Amended Statement of Claim filed on October 27, 1994. Although ABI began its operations in Canada in 1990, the evidence adduced at trial establishes that Tele-Direct was unaware of the activities of ABI, which form the basis of the allegations of copyright infringement, until some point in 1994. Even if I were to assume that the ABI pamphlets subsequently found in the files of Tele-Direct during the course of preparing this litigation were sufficient to impute Tele-Direct with the requisite degree of knowledge, these pamphlets bear dates ranging from July 1992 to 1995. In the circumstances, that would be insufficient to engage the limitation period in s. 41 of the *Act*. The action is therefore not barred, in whole or in part, by the limitation period in s. 41 of the *Act*. [at p. 136]

14. *Milliken & Co. v. Interface Flooring Systems (Canada) Inc.* 75 CPR (3d) 481 (FCTD-Summary Judgment; 1996-12-02) Tremblay-Lamer J.

I am of the opinion that the defendant was right in asserting that the s. 41 limitation period has no application with respect to injunctive relief.

[...]

The rationale for that rule lies, in my opinion, with the equitable nature of injunctive relief. In claims for injunction or other equitable relief, statutes limiting the time during which actions may be brought should generally be considered inapplicable. [See, by analogy, I.C.F. Spry, *The Principles of Equitable Remedies*, The Law Book Company Ltd., 4th ed., Australia, 1990, at pp. 241 and 242.]

Notwithstanding this, the s. 41 limitation period still prevents a plaintiff from claiming non-injunctive relief if more than three years have lapsed since the alleged infringement date. Certain common law exceptions may, however, prevent a defendant from relying upon a statutory limitation period. Such is the case with the promissory estoppel and waiver doctrines. For promissory estoppel, the plaintiff must establish that the defendant, by words or conduct, made a promise which was intended to affect their legal relationship and to be acted upon. Further, the plaintiff must establish that he actually relied on such representation. For waiver, the plaintiff must establish that the defendant acted in a manner whereby they waived reliance upon a known right or defect. [at p.489.]

15. *Pagliari v. Pantis* (1997), J.E. 97-1940, Nuss J. (Que. C.A.).

Pour ce qui est des royautés à titre d'interprète, la base du recours étant de nature délictuelle, la prescription est de deux ans en vertu de l'article 2261 (2) du C.c.B.I.-C. [...]

Par leur appel incident, les intimés allèguent que les appelants ne peuvent bénéficier de la prescription car il y a eu continuité dans les actes qu'ils caractérisent frauduleux. Or, il est erroné de prétendre à la continuité de la contrefaçon puisque les intervalles entre les reproductions sont de six ans (1976-1982) et de sept ans (1982-1989).

D'autre part, lorsqu'il s'agit d'une action délictuelle fondée sur la fraude, les mêmes délais que pour les autres actions délictuelles trouvent application. Notre Cour, sous la plume du juge Montgomery, dans l'arrêt *Lilian Diamond c. Serge Bikadoroff*, (1976) C.A. 695, s'est prononcée en ces mots sur la période de prescriptions relative à la

fraude:

“I know of no rule that prescription does not run in favour of one who has committed a fraud, and counsel for Appellant could submit no authority for such a rule.”

(mes soulignements)
(p. 696)
[at pp. 34-14]

La Cour supérieure a déclaré Pagliaro propriétaire des bandes maîtresses et/ou phonogrammes produits en contrefaçon de ses droits d'auteur. Bien que je sois d'avis que toutes les œuvres en litige ont été reproduites en contrefaçon des droits de Pagliaro, il subsiste la question du délai de prescription applicable à la revendication de la propriété des biens contrefaits.

Le seul article de la Loi relatif à la prescription est l'article 41 précité qui la fixe à trois ans.

La Cour suprême, dans l'affaire *Massie & Renwick, Ltd. c. Underwriters' Survey Bureau Ltd.*, [1937] R.C.S. 265, 270, énonce que ce délai de prescription s'applique à tous les redressements prévus à titre de recours civils incluant le recours prévu à l'art. 38 relatif à la propriété des œuvres contrefaites.

Je suis donc d'avis que Pagliaro doit être déclaré propriétaire des œuvres pour lesquelles son droit de revendiquer la propriété n'est pas prescrit, c'est-à-dire l'album K-Tel (DP-10) de 1985 ainsi que les 4 cassettes 15035, 15057, 15078 et 21003 qui ont été produites en 1989. La saisie des autres œuvres devrait par conséquent être annulée. [at p. 19]

16. *McCutcheon v. Haufschild* (1998), 146 F.T.R. 28, Hargrave Prothonotary (F.C.T.D.-Pleadings) [On plaintiff's motion to amend the statement of claim].

Paragraph 83 pleads a postponement of limitation under s. 41(1)(b) of the *Copyright Act*, the Plaintiff alleging she was not aware of any infringement which occurred more than three years before filing the statement of claim. The issue will therefore be whether the Plaintiff, by exercising reasonable diligence, might have discovered the infringement at an earlier time: see for example *Warner Bros.-Seven Arts inc. v. CESM – TV* (1971), 65 C.P.R. 215 at 246. Under the circumstances this is an appropriate amendment.

17. *Robinson v. Films Cinar Inc.* (1998), R.E.J.B. 98-9618, Rayle J. (Que. Sup. Ct.-Option).

Si le Tribunal devait fractionner l'action aujourd'hui, plus de deux ans après sa signification, il ne ferait que retarder «la marche normale du procès» sans par ailleurs remédier à quelque préjudice que ce soit. Au contraire, le Tribunal craint que pareil jugement n'ait pour résultat d'enclencher entre les parties une série d'incidents procéduriers additionnels. L'article 41 de la Loi sur le droit d'auteur prévoit en effet que les actions pour violation se prescrivent par trois ans à compter de la violation. Il a été décidé [*Massie & Renwick Ltd. c. Underwriters' Survey* (1937) R.C.S. 265, arrêt cité et suivi dans *Pantis c. Pagliaro*, J.E. 97-1940 (C.A.)] que ce délai s'applique à tous les redressements prévus par la loi. Les défendeurs ayant attendu précisément trois ans et un mois depuis la survenance des événements pour exiger que les demandeurs optent entre leurs divers recours, on peut s'attendre à ce qu'un jugement qui leur serait favorable donne lieu à des incidents additionnels par lesquels on opposerait aux demandeurs l'extinction du recours disjoint. Or, ces débats seraient futiles puisque le jugement qui ordonnerait le fractionnement de l'action, n'a pas pour effet d'éteindre les droits des parties comme le soulignait la Cour d'appel dans l'arrêt *Cogeco Design & Construction Ltée c. Commission de la construction du Québec* [J.E. 89-330 (C.A.)]. [at p. 8]

18. *R. v. Bonamy* (2000), 6 C.P.R. (4th) 1, Rowles J. (B.C.C.A.).

[13] The appellant argues that the offences charged in counts 1 and 2, both of which were alleged to have taken place between 1 May 1991 and 1 November 1993, are barred because of the time limitation contained in s. 41 of the Copyright Act. Section 41 provides that "an action shall not be commenced after the expiration of three years immediately following the infringement". The appellant points out that he was not charged with the offences in counts 1 and 2 until 12 January 1996.

[14] An examination of the provisions in ss. 34 to 41 of the Copyright Act leads me to the conclusion that those sections are concerned with civil remedies for infringement of copyright whereas ss. 42 and 43 of the Act clearly create offences for which fines or imprisonment may be imposed. The limitation period referred to in s. 41 would apply to actions for civil remedies but not to the sections which create offences. [at paras. 13, 14]

19. *Bergeron v. Sogidès Ltée*, [2000] J.Q. 3058, Robert J. (Que. C.A.).

En l'espèce, les intimés doivent rendre compte aux auteurs chaque année. La prescription des paiements dus aux auteurs court à compter

de chaque échéance. [at para. 33]

§6.1.2 Limitation Cases

1. *Martel v. Hôtel-Dieu St-Vallier*, [1969] S.C.R. 745, Pigeon J.

[Translation] But in view of the fact that the hospital must be held liable, it would seem clear to me that the limitation period, which was interrupted by service of the writ on the hospital, was also interrupted in so far as the action the anaesthetist is concerned.... According to a well-established line of jurisprudence, there is joint and several liability among all those responsible for the same offence or quasi-offence. [at p. 753]

2. *Consolboard Inc. v. MacMillan Bloedel (Saskatchewan) Ltd.* (1982), 63 C.P.R. (2d) 1, Cattanach J. (F.C.T.D.).

Certainly the application to plead a statute of limitations has a most material bearing upon the question of liability.

At common law a statute of limitations does not bar an obligation or debt but it does bar the right of action to enforce that obligation or debt.

Under the civil law prescription is an extinction of those rights.

As I see the difference under the common law it is a procedural point of law and must be raised by an express pleading. Rule 409 provides that if a defendant has a special ground of defence which makes the claim of a plaintiff not maintainable that defence must be pleaded otherwise it is not available.

Under the civil law in prescriptions of short durations the debt or obligation is absolutely extinguished and no action can be maintained.

In that instance the Court of its own motion will supply the defence. At substantive law there is no defence. That holds true only where it is apparent the claim is extinguished. Different considerations would prevail in the cases of a continuing infringement of a patent right. In that event under the civil law a prescription would affect only the part of the damages prescribed.

The same would hold true under the common law if a statute of limitations had been pleaded. The plaintiff could only obtain relief in damages for the period not prescribed. For damages incurred beyond that period its action is barred. But that is predicated upon the statute being pleaded.

It may be that counsel for the defendant considered that because limitation periods have been fixed by legislation that such provides a guide to the true measure of damages because the delay by the plaintiff in asserting its rights in a Court of competent jurisdiction would make damages for a greater period unreasonable. I think such a ground for minimizing damages in this instance is untenable.

A Court of equity has always refused its aid to stale demands where a party has slept on its right and acquiesced for a great length of time.

That is the maxim, *Vigilantibus et non dormientibus jura subserviunt*.

Lord Blackburn in *Erlanger et al. v. New Sombrero Phosphate Co. et al.* (1878), 3 A.C. 1218, quoted at p. 1279 the exposition of this doctrine by Sir Barnes Peacock in *Lindsay Petroleum Co. v. Hurd et al.* (1874), 5 L.R.P.C. 221.

Sir Barnes Peacock said at pp. 239-40:

... The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be *practically unjust* to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, thought perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

But Sir Barnes Peacock specifically pointed out that the delay, to serve as a defence of laches, must not be such amounting to a bar by any statute of limitations.

The doctrine of laches is also a defence and as such it too must be pleaded and it was not pleaded in the defendant's statement of defence.

While a statute of limitations is a defence to a question of liability it also has a most material bearing on the question of damages in a continuing infringement. It prescribes, if pleaded, the period for which damages for infringement will exist. If not pleaded the damages are for the period during which infringement took place subject to no limitation. [at pp. 27-28]

3. *Guérin v. R.*, [1984] 2 S.C.R. 335, Dickson J.

It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, as “conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other”, is sufficient. I agree with the trial judge that the conduct of the Indian Affairs Branch toward the Band amounted to equitable fraud. Although the Branch officials did not act dishonestly or for improper motives in concealing the terms of the lease from the Band, in my view their conduct was nevertheless unconscionable, having regard to the fiduciary relationship between the Branch and the Band. The limitations period did not therefore start to run until March 1970. The action was thus timely when filed on December 22, 1975 [at p. 390]

4. *Kruger v. R.* (1985), 17 D.L.R. (4th) 591, Heald J. (F.C.A.).

Subsection 38(1) [now section 39] of the *Federal Court Act* provides that:

38(1) ... the laws relating to ... the limitation of actions in force in any province ... apply to any proceedings in the Court in respect of any cause of action arising in such province ...

Subsection 38(2) provides that:

38(2) ... the laws relating to ... the limitations of actions referred to in subsection (1) apply to any proceedings brought by or against the Crown.

Accordingly, it is necessary to consider the law of British Columbia respecting limitation of actions, at the relevant times. The applicable *Statute of Limitations* in 1941 and 1946, when these causes of action

arose, was R.S.B.C. 1936, c. 159. Under that statute, the limitation period for actions relating to real property was stated to be 20 years. However s. 38 of that Act provides:

38. In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered ...

Unlike *Guerin et al. v. The Queen et al.* (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, the causes of action in the instant case could have been discovered if the appellants had exercised reasonable diligence at the same time the causes of action arose. Putting the appellants' case at its very highest, the effective dates under this section would be, in the case of Parcel "A", January of 1941, and in the case of Parcel "B", February of 1946. In both cases then, the limitation period would have expired long before this action was commenced, if the British Columbia *Statute of Limitations* of 1936 is applied. [at p. 624]

5. *Sandvik, A.B. v. Windsor Machine Co.* (1986), 8 C.P.R. (3d) 433, Collier J. (F.C.T.D.).

Limitation (prescription) periods

The defendants argued that any alleged infringement by Windsor was in British Columbia, and the time for bringing suit was determined by applicable legislation of that province. It was contended the time for suit was two years after the cause of action arose. It was said any damages, or accounting of profits, must, accordingly, only go back to two years before this action was commenced (June 30, 1975).

A similar contention was advanced on behalf of Stihl, based on art. 2261 of the *Civil Code of Quebec*, for a two-year prescription.

These arguments, in my view, fail because the so-called defences have not been properly pleaded. In para. 20 of Windsor's defence, and para. 19 of that of Stihl, this is said: "In the alternative defendant ... will rely upon Section 38(1) of the Federal Court Act." Section 38(1) of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), is as follows:

(38(1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings in

the Court in respect of any cause of action arising in such province, and a proceeding in the Court in respect of a cause of action arising otherwise than in a province shall be taken within and not after six years after the cause of action arose.

Rule 409 of the *Federal Court Rules* has some application.

Rule 409. A party shall plead specifically any matter (e.g., performance, release, a statute of limitation, prescription, fraud or any fact showing illegality)

- (a) that he alleges makes a claim or defence of the opposite party not maintainable,
- (b) that, if not specifically pleaded, might take the opposite party by surprise; or
- (c) that raises issues of fact not arising out of the preceding pleading.

The defendants' plea in this case is one of law. There is no precise statement of material facts (Rule 409(1) which can then be said to bring into play the limitation or prescription provisions of particular provinces. The pleas, as framed, are completely devoid of information as to what is really alleged. The proper method, to my mind, would be to set out the material facts giving rise to the invocation of the two-year prescription periods relied on. The plea should then go on to specify the specific provincial limitation sections, or articles, and the effect they have on the time from which alleged damages, or accounting of profits can be assessed or calculated.

The pleas in this case leave the plaintiff completely in the dark. [at p. 443]

6. *De Jong P.Z. v. Falcon Maritime Management S.A. (Panama)* (1988), [1989] 2 F.C. 63, Dubé J. (F.C.T.D.).

Cases recognizing the interruption of prescription against joint and several debtors of an obligation arising from a quasi-offence are numerous in Quebec law. [*Gélinas-Deschênes c. Dampousse*, [1967] C.S. 709; *Berthiaume c. Richer et Lefebvre et Ville de Longueuil*, [1975] C.A. 638; *Banque Canadienne Nationale c. Gin gras*, [1973] C.A. 868; and see also Martineau, Pierre, *La Prescription*, P.U.M. 1977, at p. 346.] It has therefore been clearly established that interruption against all joint and several debtors, including tortfeasors, is effected when one of them is sued in due time. [at p. 68]

7. *Kibale v. R.*, (1990), [1991] 1 F.C. D-46, Pratte J. (F.C.A.).

Une requête faite en vertu de la Règle 419(1)a doit être jugée sur la seule vue des pièces de procédure sans qu'aucune preuve soit admissible. C'est la Règle 419(2) qui le dit. [Voir à ce sujet ce que disait le juge Hugessen dans *Sembawang Reefer Lines (Bahamas) Ltd. v. The Ship "Line Erre", et al.* — décision non rapportée du 15 mai 1990, dossier no A-330-89.] D'autre part, un "Statute of Limitations" suivant la "common law" n'éteint pas le droit d'action mais donne seulement au défendeur un moyen de défense d'ordre procédural qu'il peut ne pas invoquer et qu'il doit, s'il veut s'en prévaloir, plaider en défense (voir Règle 409). C'est dire qu'un demandeur n'est pas tenu, lorsqu'il rédige sa déclaration, d'alléguer tous les faits qui démontrent que son action est prise en temps utile. En effet, un demandeur n'est pas obligé de prévoir tous les moyens que son adversaire pourra lui opposer. Il peut attendre la production de la défense et, dans le cas où le défendeur invoque que l'action est tardive, plaider en réponse les faits qui, à son avis, révèlent qu'elle ne l'est pas. Il s'ensuit que, comme le juge Collier le décidait dans *Hanna et al. v. The Queen* (1986), 9 F.T.R. 124, un défendeur doit plaider un "Statute of Limitations" dans sa défense; il ne lui est pas permis de le faire dans une requête en radiation sous l'empire de la Règle 419, car, on ne peut, pour les motifs que j'ai dits, affirmer qu'une action est tardive pour le seul motif que la déclaration ne fait pas voir qu'elle ne l'est pas. [at p. 2 of the full report]

8. *Tolofson v. Jensen*, [1994] 2 S.C.R. 1022, La Forest J. (S.C.C.).

Canadian courts have also begun to shatter the mystique of the second reason which rests on the notion that statutes of limitation are directed to the remedy and not the right. [at p. 1070]

§6.2 United Kingdom

1. *Bullis Coal Mining Company v. Osborne*, [1899] A.C. 351, Hereford J. (J.C. P.C.).

Now it has always been a principle of equity that no length of time is a bar to relief in the case of fraud, in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the statute in the case of concealed fraud, so long as the party defrauded remains in ignorance without any fault of his own. [at p. 363]

2. *Nicol v. Barranger* (1921), [1917-23] MacG. Cop. Cas. 219, Peterson J. (Ch. D.) (later reversed on other grounds by the Court of Appeal).

Dealing with a defence under sec. 10 of the Copyright Act, 1911, that the infringement, if any, occurred more than three years before the

commencement of the action, Mr. Justice Peterson said: "It was urged that if Mrs. Soutten reproduced Mr. Faulkner's drawing it was a reproduction which was made more than three years before the issue of the writ. But the catalogues of 1916 and 1917 were published less than three years before the issue of the writ. According to the defendant's contention this fact is immaterial. This is really a contention that the section means that an action for infringement cannot be commenced more than three years after the first infringement of the copyright by the defendant. But this is not, in my view, the true construction of the section. Every unauthorized reproduction is an infringement of copyright. The section assumes that it is proposed to take proceedings in respect of some particular infringement and provides that an action shall not lie in respect of that infringement, unless it has occurred within the three years which immediately precede the issue of the writ. The words 'the infringement' point to the reproduction or infringement of which complaint is made. Moreover, the section does not, in my opinion, apply to an action for an injunction restraining infringements in the future, in which past infringements are evidence of the threat to infringe in the future (see *Hogg v. Scott*, L.R. 18 Eq. 444, a decision on sec. 26 of the Act of 1842). Apart, then, from the fact that sec. 10 has not been pleaded, I am of opinion that this argument on the part of the defendant fails." [at pp. 228- 229]

3. *Sutherland Publishing Co. v. Caxton Publishing Co.* (1937), [1938] Ch. 174, MacKinnon J. (C.A.). (Dissenting opinion later adopted by the House of Lords).

The plaintiffs in this case are bringing an action for infringement of copyright. They claim damages for that infringement under s. 6, sub-s. 1. They claim also damages for conversion under s. 7. It is argued that it is only in so far as the remedy claimed is under s. 6, sub-s. 1, that there is an action in respect of the infringement of copyright within the provision of s. 10. But in so far as in this action the remedy claimed is under s. 7, this is not "an action in respect of infringement of 'copyright'" within s. 10, and as regards the part of the claim for that remedy the limitation of three years in s. 10 does not apply.

I cannot accept this contention. I think that the limitation of three years in s. 10 does apply to the remedy claimed under s. 7. With the reasons given by Crossman J. for coming to that conclusion I am not sure that I quite agree. He seems to have said that in this case the plaintiffs were undoubtedly bringing an action in respect of infringement of copyright. For they were claiming damages under s. 6, sub-s. 1, as well as under s. 7. There is only one action, though two sorts of relief are claimed in it. And as the one action is clearly in part "an action in respect of infringement of 'copyright'" under s. 10 that action cannot be commenced after the expiration of three years.

With one aspect of this reasoning I do agree. It seems to me that the damages for breach of copyright and damages for conversion are complementary the one of the other, and together make good the totality of the loss inflicted on the owner of an infringed copyright. Speaking broadly, damages for infringement are what a plaintiff has lost by the diversion of his customers to the defendant's publication, while damages for conversion are what the defendant has gained by selling the plaintiff's property. If for breach of his copyright the owner of it has two remedies which together compensate him for the totality of the loss inflicted on him, it seems to me most improbable that the Legislature can have had any reason to fix, or can have intended to fix, one period of limitation (three years) for the damages for breach of copyright and a longer period (six years) for the damages for conversion.

The equivalent of these two-fold remedies was created by the first Copyright Act of 1709 (s. 1), by forfeiture of pirated copies, and a penalty of one penny for every sheet. Sect. 10 provides a limitation of three months for both remedies. So in the Act of 1842, s. 15 provided the remedy of damages for breach of copyright, and s. 23 that for detention or conversion, while by s. 26 the period of limitation for both was twelve months. In view of this historical background it would be the more surprising that in 1911 the Legislature should have intended that the period of limitation should apply to only one of the two sorts of relief. [at pp. 197-198]

4. *Sutherland Publishing Co. v. Caxton Publishing Co.*, (1938), [1939] A.C. 178, Lord Russell of Killowen (H.L.).

A further consideration is this, that if s. 10 does not apply to proceedings under or by virtue of s. 7, the period of limitation applicable to those proceedings will vary according to the country in which the proceedings are instituted. Under the Act of 1842 a uniform period of one year was fixed by s. 26; but on the respondents' argument the period would be six years in England and forty years in Scotland, with the result that a plaintiff barred in England after six years could, upon founding jurisdiction in Scotland, claim in respect of all copies converted anywhere within forty years.

My Lords, I am conscious that on any view there are difficulties of construction under the Act, but with me what was called the positional argument weighs most strongly. The only answer to it seemed to be the alleged impossibility in certain cases under s. 7 of fixing a starting-point for the three years. For the reasons which I have endeavoured to explain this alleged impossibility does not exist. Accordingly the

positional argument brings its full weight to bear, and I would hold that as a matter of construction s. 10 applies to proceedings under s. 7. [at p. 188]

5. *Banks v. CBS Songs Ltd.*, [1992] 17 F.S.R. 278, Soctt J. (C.A.).

The question whether or not the manufacture, distribution and sale of a particular record can properly be regarded as all part of a continuing cause of action cannot, in my opinion, at the present stage of the litigation be given a clear answer. I have already referred to dicta from *Hole v. Chard*. I should also refer to *National Coal Board v. Gallery* [1958] 1 W.L.R. 16 in which *Hole v. Chard* was considered. Pearce L.J. (as he then was), giving the judgment of the court, said this at page 26:

“It must, we think, be a question of degree as to whether separate acts are so knit up together, so close in time and quality, as to be properly described in the words ‘a continuing cause of action’.

The general proposition that persistence in tortious conduct of particular kinds such as trespass or nuisance constitutes a continuing cause of action must be regarded as established. It must also be accepted that in contract also, breaches of obligation of various kinds may amount to continuing breaches. But that must depend on the nature of the particular obligation broken.”

At page 27 he said this:

“A continuing cause of action is not in our view constituted by repealed breaches of recurring obligations nor by intermittent breaches of a continuing obligation. There must be a quality of continuance both in the breach and in the obligation.”

As Pearce L.J. said, the question whether there is or is not a continuing cause of action is a question of degree. That being so, it is a question, in my opinion, best left to be answered at trial where all the relevant facts can be given in evidence. [at p. 295]

§6.3 United States

1. *Roley v. New World Pictures Ltd.* (1994), 30 U.S. P. Q. (2d) 1654, Tang J. (9th Circuit).

This interpretation [of section 507(b)] is consistent with the prevailing view that the statute bars any claim for damages that accrued more than three years before commencement of suit.

(...)

In a case of continuing copyright infringements, an action may be brought for all acts that accrued within the three years preceding the filing of the suit. [at p. 1656]

§6.4 Varia

1. *Fax Directories (Pty.) Ltd. v. SA Fax Listings CC* (1989), [1990] 2 S.A. 164, Hugo J. (Surban and Coast Local Division).

This argument is clearly untenable. Applicant has explained why it did not come to Court and indeed sought to protect its rights along different, if perhaps ill-judged, lines. Mere delay or even acquiescence does not reflect a waiver. It is perfectly permissible to ignore what is conceived to be a pin prick until the pricks become so frequent and so damaging that action becomes essential. (Questions of prescription do not arise here.). [at p. 176]

§7.0 List of Cases

§7.1 Canada

§7.1.1 Copyright

1. *Beauchemin v. Cadieux* (1899), 10 B.R. 255 at 259 (Que. Sup. Ct.); rev'd (1900), 10 Que. K.B. 255 (Que. C.A.); aff'd (1901), 31 S.C.R. 370 (Que. Sup. Ct.-Damages).
2. *Underwriters' Survey Bureau Ltd. v. Massie and Renwick Ltd.*, [1936] Ex. C.R. 47 (Ex. Ct.-Interlocutory); [1937] Ex. C.R. 15 (Ex. Ct.); rev'd [1937] S.C.R. 265 (S.C.C. Quash); [1938] Ex. C.R. 103 (Ex. Ct.); rev'd in part [1940] S.C.R. 218 (S.C.C.); special leave to appeal refused [1940] S.C.R. ix (J.C.P.C.-Canada); (1941), 1 C.P.R. 207 (Ex. Ct.-Referee); var'd (1941), 1 C.P.R. 224 (Ex. Ct.-Reference).
3. *Cartwright & Sons Ltd. v. Carswell Co.* (1957), 29 C.P.R. 5 (Ont. H.C.- Pleadings); (1958) 29 C.P.R. 101 (Ont. H.C.-Interlocutory).
4. *Warner Brothers-Seven Arts Inc. v. CESM-TV Inc.* (1969), 58 C.P.R. 97 (Ex. Ct.-Pleadings); (1971), 65 C.P.R. 215 (Ex. Ct.).
5. *Compo Co. v. Blue Crest Music Inc.* (1974), 17 C. P.R. (2d) 149 (F.C.T. D.); rev'd (1976), 30 C.P.R. (2d) 14 (C.A.); aff'd (1979), 45 C.P.R. (2d) 1.
6. *Turgeon v. Noles* (unreported), Que. Prov. Ct., Doc. No. 500-02-001911-73,

- Verschelden J., October 21, 1974.
7. *Films R.P. c. Filmex Ltd.*, [1975] C.S. 964 (Que. Sup. Ct.).
 8. *Kerr v. R.* (1982), 66 C.P.R. (2d) 165 (F.C.T.D.).
 9. *Universal City Studios Inc. v. Zellers Inc.* (1983), 73 C.P.R. (2d) 1 (F.C.T.D.).
 10. *Dictionnaires Robert Canada SCC v. Librairie du Nomade Inc.* (1987), 16 C.P.R. (3d) 319 (F.C.T.D.); aff'd (1990), 37 F.T.R. 240 (note) (F.C.A.).
 11. *R. v. Harris* (1990), 34 C.P.R. (3d) 392 (Nfld. Prov. Ct.).
 12. *R. v. Shimming* (1991), 35 C.P.R. (3d) 397 (Sask. Prov. Ct.).
 13. *Constructions Nouvelle Dimension Inc. c. Alarie* (1992), J.E. 92-938 (Que. Sup. Ct.); in appeal (Que. C.A.).
 14. *Bemben & Kuzych Architects v. Greenhaven-Carnegy Developments Ltd.* (1992), 45 C.P.R. (3d) 488 (B.C.S.C.).
 15. *U & R Tax Services Ltd. v. H & R Block Canada, Inc.* (1993), 47 C.P.R. (3d) 430 (F.C.T.D.-Pleadings); affirmed (1993), 42 C.P.R. (3d) 522 (F.C.A.).
 16. *Pagliari v. Pantis* (1994), J.E. 94-1041 (Que. Sup. Ct.); rev'd in part (1997), J.E. 97-1940 (Que. C.A.).
 17. *BMG Music Canada Inc. v. Vogiatzakis (February 20, 1996)*, Doc. T-2585- 95, Hargrave J.A. (F.C.T.D.-Pleadings).
 18. *Prud'homme v. Enseignes Norman Russell* (1993), J.E. 93-840 (Que. Sup. Ct.); (1996), J.E. 96-1 741 (Que. Sup. Ct.-Merits).
 19. *Tele-Direct (Publications) Inc. v. American Business Information, Inc.* (1996), 74 C.P.R. (3d) 72 (F.C.T.D.); aff'd (1997), 76 C.P.R. (3d) 296; leave to appeal to the Supreme Court of Canada refused.
 20. *Milliken & Co. v. Interface Flooring Systems (Canada) Inc.* (1996), [1997] 1 FC D-47, 75 CPR (3d) 481, 123 FTR 269, [1996] CarswellNat 2011, [1996] FCJ 1571, [1996-12-02] [http://www.cmf.gc.ca/cgi-bin/sino/disp.pl/fc/ 1 997/fic/v1 / 1 997fca2520.html](http://www.cmf.gc.ca/cgi-bin/sino/disp.pl/fc/1997/fic/v1/1997fca2520.html), in French at [http://www.cmf.gc.ca/cgi-bin/sino/disp.pl/cf/ 1 997/fic/v1 / 1 997cfa2520.html](http://www.cmf.gc.ca/cgi-bin/sino/disp.pl/cf/1997/fic/v1/1997cfa2520.html) (summary) (FCTD- Summary Judgment)
 21. *Weiss v. Prentice Hall Canada Inc.* (1995), 66 C.P.R. (3d) 417 (Ont. Gen. Div. Small Claims Court).

22. *Prud'homme v. Enseignes Russell Inc.* (1993), J.E. 93-840 (Que. Sup. Ct.-Pleadings); (1996), J.E. 96-1 741 (Que. Sup. Ct.).
23. *Dalbernet v. Centre éducatif et culturel inc.* (1996), J.E. 97-282 (Que. Sup. Ct.).
24. *McCutcheon v. Haufschild* (1998), 146 F.T.R. 28 (F.C.T.D.-Pleadings).
25. *Lapierre-Desmarais v. Edimag inc.* (1998), R.E.J.B. 98-5104 (Que. Ct.-Civ. Div.).
26. *Robinson v. Films Cinar Inc.* (1998), R.E.J.B. 98-9618 (Que. Sup. Ct.-Option).
27. *R. v. Bonamy* (2000), 6 C.P.R. (4th) 1 (B.C.C.A.); application for leave to appeal to the Supreme Court of Canada dismissed [2000] S.C.C.A. 345.
28. *Cadow v. Savory* (2000), 8 C.P.R. (4th) 219 (Nfld. S.C.-T.D.).
29. *Bergeron v. Sogidès Ltée*, [1998] A.Q. 2384 (Que. Sup. Ct.); rev'd (2000), R.E.J.B. 2000-20192 (Que. C.A.).

§7.1.2 Limitations Issues

1. *Consolboard Inc. v. MacMillan Bloedel (Saskatchewan) Ltd.* (1978), 39 C.P.R. (2d) 191 (F.C.T.D.); rev'd (1979), 41 C.P.R. (2d) 94 (F.C.A.); rev'd (1981), 56 C.P.R. (2d) 145; (1981), 62 C.P.R. (2d) 38 (F.C.T.D.-Referee); (1982), 63 C.P.R. (2d) 1 (F.C.T.D.-Reference); (1983), 74 C.P.R. (2d) 199, 50 N.R. 161 (F.C.A.-Reference); leave to appeal refused [1983] 2 S.C.R. vi.
2. *Guérin v. R.*, [1982] 2 F.C. 385 (F.C.T.D.); (1981), D.L.R. (3d) 170 (F.C.T.D.-Suppl.); rev'd (1982), [1983] 2 F.C. 656 (F.C.A.); rev'd [1984] 2 S.C.R. 335 (S.C.C.).
3. *Kruger v. R.* (1981), 125 D.L.R. (3d) 513 (F.C.T.D.); aff'd (1985), [1986] 1 F.C. 3 (F.C.A.); leave to appeal refused [1985] 2 S.C.R. viii.
4. *Sandvik, A.B. v. Windsor Machine Co.* (1986), 8 C.P.R. (3d) 433, 7 C.I.P.R. 232, 2 F.T.R. 81 (F.C.T.D.).
5. *De Jong P.Z. v. Falcon Maritime Management S.A. (Panama)* (1988), 21 F.T.R. 187 (F.C.T.D.-Prot.); aff'd (1988), 24 F.T.R. 156 (F.C.T.D.).
6. *Kibale v. R.* (1988), 26 F.T.R. 307 (F.C.T.D.); rev'd [1991] 1 F.C. D-46 (F.C.A.).

§7.1.3 Patent

1. *Leesona Corp. v. Consolidated Textiles Mills Ltd.* (1975), 20 C.P.R. (2d) 255 (F.C.A.); rev'd (1977), 35 C.P.R. (2d) 254 (S.C.C.).

§7.1.4 Varia

1. *Gingras v. Québec (Cité de)* (1947), [1948] B.R. 171 (Que. C.A.).
2. *Sommers v. R.* (1959), 124 C.C.C. 52 (B.C.C.A.); aff'd [1959] S.C.R. 678.
3. *R. v. Belgal Holdings Ltd.*, (1966), [1967] 3 C.C.C. 34 (Ont. H.C.).
4. *Larochelle v. R.*, [1972] F.C. 1137 (F.C.T.D.); aff'd [1974] 2 F.C. 107 (F.C.A.).
5. *Corpex (1977) Inc. v. Canada*, [1982] 2 S.C.R. 643; [1982] 2 S.C.R. 674 (S.C.C.-Rehearing).
6. *R. v. Bell* (1982), 66 C.C.C. (2d) 317 (Que. C.A.); aff'd [1983] 2 S.C.R. 471.
7. *Berardinelli v. Ontario Housing Corp.* (1976), 13 O.R. (2d) 354 (Ont. H.C.); aff'd (1977), 15 O.R. (2d) 217 (Ont. C.A.); rev'd (1978), [1979] 1 S.C.R. 275.
8. *Canada (A.G.) v. Delaurier* (1979), 93 D.L.R. (3d) 434 (Man. Q.B.).
9. *Tolofson v. Jensen*, (1989), 40 B.C.L.R. (2d) 90 (B.C.S.C.); aff'd (1992), 65 B.C.L.R. (2d) 114 (B.C.C.A.); rev'd [1994] 2 S.C.R. 1022 (S.C.C.).

§7.2 United Kingdom

§7.2.1 Copyright

1. *Nicol v. Barranger*, (1920), [1917-23] MacG. Cop. Cas. 219 (Ch. D.); rev'd [1917-23] MacG. Cop. Cas. 230 (C.A.).
2. *Sutherland Publishing Co. v. Caxton Publishing Co.*, [1936] 1 All E.R. 177 (Ch. D.); rev'd (1936), [1937] 1 All E.R. 338 (C.A.); rev'd (1938), [1937] Ch. 294 (Ch. D.); [1937] 4 All E.R. 405 (C.A.); aff'd [1938] 4 All E.R. 389 (H.L.).
3. *Czezowski v. G. W. Parr & King* (1960), 73 D.A. 55 (Ch. D.).
4. *Banks v. CBS Songs Ltd.* (1990), [1992] 17 F.S.R. 278 (Ch. D.); rev'd [1992] 17 F.S.R. 278-286 (C.A.).

§7.2.2 Varia

1. *Hogg v. Scott* (1874), L.R. 18 Eq. 444 (Ch.).
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