

COMPETITIVE ADVANTAGE: LEGAL STRATEGIES FOR SUCCESS IN CANADA'S SPORTS INDUSTRY

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MODERATED BY: CLAIRE CARVER-DIAS



LEGAL DISCLAIMER

- **The presentation today is not intended as legal advice.**
- **Because this is a high level overview, it is impossible to cover all relevant details, and your available rights and remedies will depend on the unique facts of each situation, your applicable contract or subcontract, or the nature of your project.**
- **For specific advice, please contact your qualified legal counsel before making any decisions or taking any action. This is of particular importance as every province and territory has its own legal regime.**
- **As you know, the situation is extremely fluid and is changing on a daily basis. As things evolve, your best course of action could also evolve. Please follow up to date and reliable sources for your information.**

UNDERSTANDING PERSONALITY RIGHTS



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TOPICS WE WILL COVER

- 1. What are personality rights?**
- 2. Why do we want to protect them?**
- 3. What do personality rights protect?**
- 4. How does the law protect personality rights?**

1. WHAT ARE PERSONALITY RIGHTS?

- A personality right is a proprietary right in the exclusive marketing for gain of your personality, image and name
- Nomenclature: personality rights can also be referred to as image rights, publicity rights, rights against misappropriation, etc.



If they think your dreams are crazy,
show them what crazy dreams can do.

 Just do it.

2. WHY DO WE WANT TO PROTECT THEM?

- **The Value of Personality Rights**
 - Preserve exclusivity of personality, image and name
 - Protect the public goodwill of personality
 - Prevent reputational harm
 - Protect opportunities to earn endorsement fees



3. WHAT DO PERSONALITY RIGHTS PROTECT?



- **Attributes that identify a person to the public**
 - Name
 - Voice
 - Expressions
 - Likeness
- **Any other element(s) that easily identifies an individual**
 - Ex. a Chicago Bulls jersey with the number 23 identifies Michael Jordan

4. HOW DOES THE LAW PROTECT PERSONALITY RIGHTS?

Difficult to define one source as each state, province, and country has their own personality rights laws. Your rights will be subject to multiple legal jurisdictions unless you stay local.

- **Common Law**

- *Krouse v Chrysler Canada Ltd.*
- *Gould Estate v Stoddart Publishing Co.*

- **Civil Law**

- Quebec Charter of Human Rights

- **Legislation**

- Privacy Legislation in 5 provinces
- PIPEDA

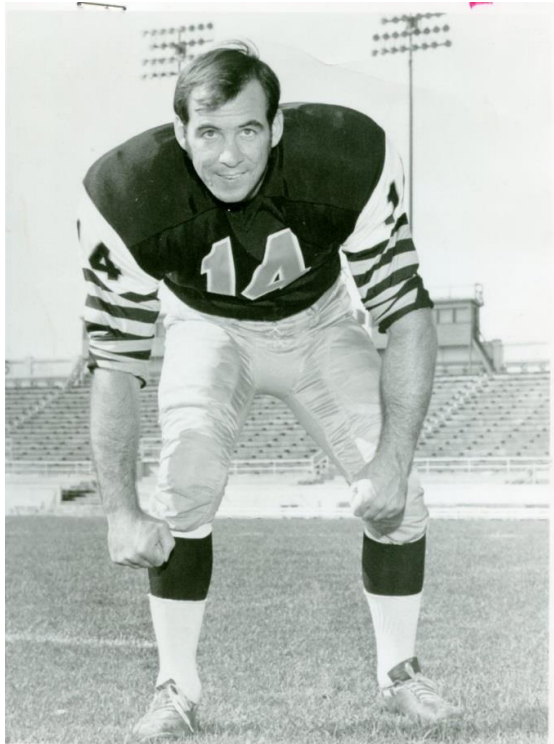


4.1 CAUSES OF ACTION



- **Tort of Misappropriation of Personality**
- **Breach of Contract**
- **Breach of Privacy**
- **Defamation**
- **Unjust Enrichment**
- **Common Law Trademark/ Passing Off**

4.2 MISAPPROPRIATION OF PERSONALITY



- A tort or an intellectual property right?
- The invasion of a person’s “exclusive right” to market his or her personality (*Athans v Canadian Adventure Camps Ltd.*)
- Expressly recognized in *Krouse v Chrysler Canada Ltd.*

4.3 ELEMENTS OF A SUCCESSFUL CLAIM (ONTARIO)



- **To prove misappropriation of personality, plaintiff must prove:**
 - Element of Plaintiff’s personality is used (e.g., face, voice, etc.)
 - Element of personality used specifically identifies the Plaintiff
 - “Sales” vs. “Subject”

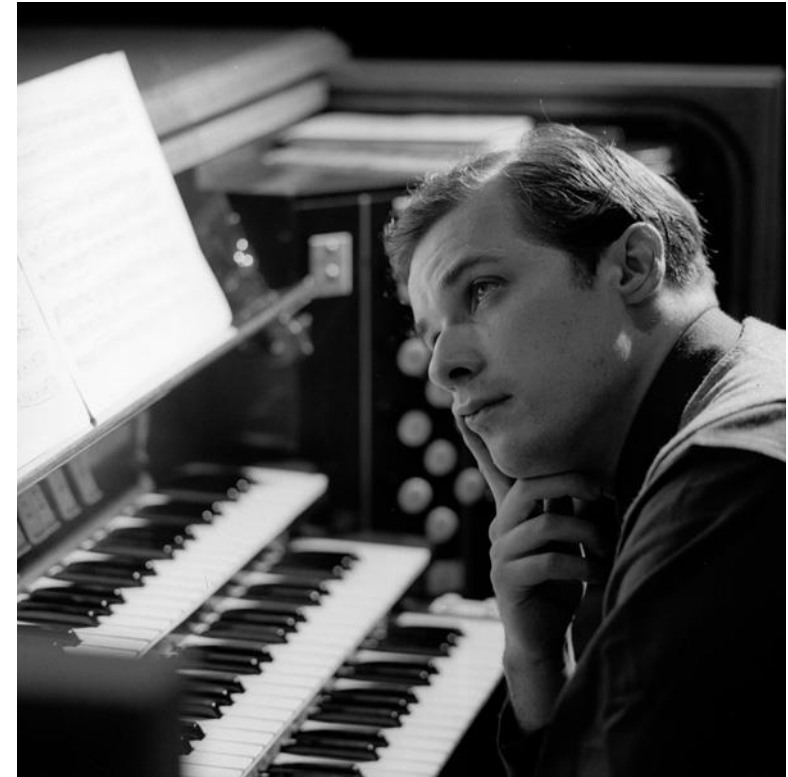
4.4 REMEDIES AFTER ESTABLISHING TORT OF MISAPPROPRIATION OF PERSONALITY

- Damages
 - Conflicting jurisprudence when assessing damages.
 - Damages have been assessed in the past as:
 - compensation for what you would have received had you authorized the use;
 - a disgorgement of profits; and
 - loss of publicity opportunities
- Injunction
 - Stop the infringing use



4.5 DO RIGHTS SURVIVE DEATH?

- **Rights may go to the estate**
 - Unclear how long those rights survive



SPONSORSHIP & BRANDING ISSUES FACING AMATEUR ATHLETES



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LET'S DISCUSS...

- 1. Sponsorship generally**
- 2. Rise of Morality Clauses**
- 3. Exclusivity in sponsorship deals**
- 4. COVID-19 Contingencies for Sponsorships**
- 5. Co-Branding: what is it, what to consider?**
- 6. Times are Changing – a “democratization of power”?**

1. SPONSORSHIP: WHAT TO CONSIDER

- **Tokyo: *Rule 40***
- **Types of sponsorships, funding**
 - Conflicts and obligations as a National Team member
- **Key considerations when securing a sponsorship or endorsement deal:**
 - What do corporate partners want?
 - Term, Compensation, Scope, Termination, etc.

2. MORALITY CLAUSES

- What is a morality clause?
- The times (and risks?) have changed
- Reciprocal Morality Clauses

...I have spoken at length with Kevin privately about the matter, but as someone who takes my responsibility as a role model very seriously, it is important to me that he, and UA, take public action to clearly communicate and reflect our common values in order for us to effectively continue to work towards our shared goal of trying to motivate ALL people to be their best selves.

-Misty Copeland



3. EXCLUSIVITY IN A SPONSORSHIP DEAL

- Major component of a sponsorship / endorsement contract
 - *Designation of a product category exclusivity – a way for sponsors to exclude competitors within a product/service category*
 - *Consider: National team obligations?*
 - *Major threat = ambush marketing*



4. COVID-19 CONTINGENCIES

1. How are sponsors protecting their interests during COVID-19 cancellations or postponements?
2. Mitigate loss and preserve 'partnership'
 1. Loss of value?
 2. What is sponsor's *activation*? More than just an event? How to add value...
 3. Renegotiation instead of termination? Focus on *value*, link performance to payment – not 'term'



5. CO-BRANDING WITH ATHLETES

- Collaboration of two or more brands with significant customer recognition
- Strategy = customer experience
- Successful examples:



6. TIMES ARE CHANGING?

AMATEUR ATHLETE MONETIZATION

- **NCAA: changing tides? College athletes soon able to benefit from the use of their name, image and likeness**
 - Colleges/Universities prohibited from paying athletes directly
 - Permitted to identify yourself by sport and institution, but no use of protected logos
 - But must avoid conflicts, pre-existing institutional arrangements
- **Rule 40: “We’re seeing a democratization of power” – Erica Wiebe** (to [CBC.ca/sports](https://www.cbc.ca/sports), Jan. 7, 2020)



RULE 40 & THE COC GUIDELINES

Tokyo 2020 ~~Tokyo 2021~~



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RULE 40 GUIDELINES

- **Guidelines outline how the Canadian Olympic Committee (“COC”) will implement Rule 40**
- **Requires Team Canada Athletes and their sponsors to know the restrictions that apply during the Rule 40 period (the “Rule 40 Period”)**
 - **Olympic Competition: July 23 – August 8, 2021***
 - **The Rule 40 Period: July 13 – August 10, 2021***

THE NOTIFICATION REQUIREMENT

- **Athletes and their sponsors must notify the COC of their advertising campaigns that will run during the Rule 40 Period**
- **Administered through COC's online platform**
- **Submission must include an advertising plan along with all other pertinent information**
- **Must be submitted by May 14, 2021**



WHO MAKES THE CUT?

- Advertising campaigns will be accepted if they comply with 2 key principles



CAMPAIGN PROFILE

1. Campaign profile must not be centered on the Rule 40 Period

- In market on or before April 13, 2021
- No ramp up during the Rule 40 Period



ADVERTISING MUST BE GENERIC

2. Advertising CANNOT:

- Create an association with the Games
- Reference an athlete's performance in the games
- Use Olympic IP or content

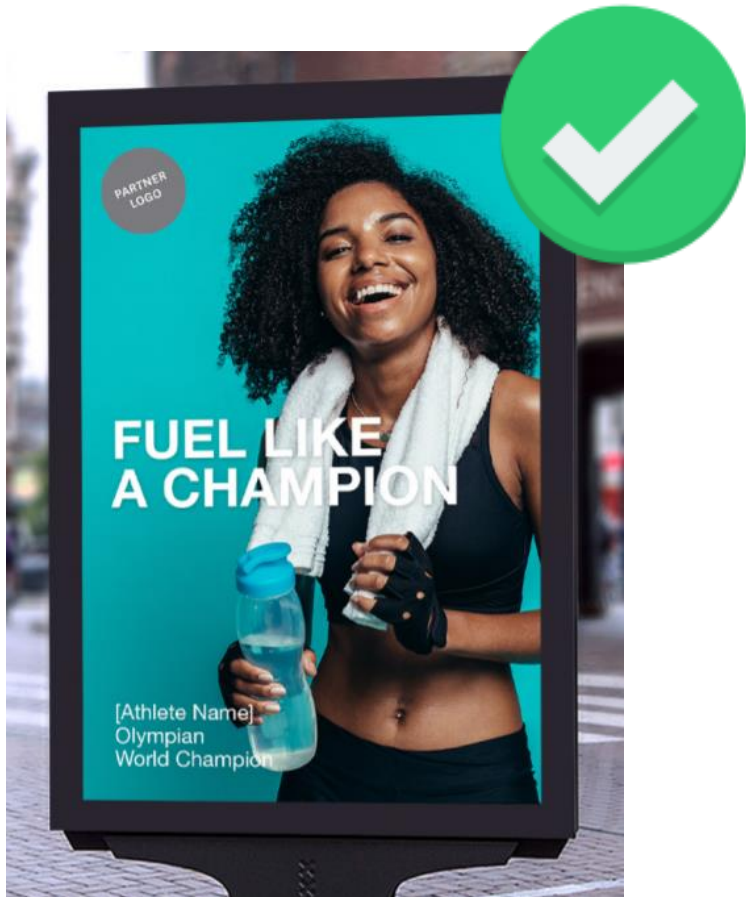


**Team Canada
Olympics
Tokyo 2020
Summer Games**

**#teamcanada
#olympics
#tokyo2020
#summergames**



GENERIC ADVERTISING- SPONSOR




ADDITIONAL TYPES OF ADVERTISING



X-Sponsor Follow

Congratulations [@AthleteName](#) on your medal!
We're all so proud! [#gold](#)



1:14 PM · 26 July 2020

86 Retweet 110 Likes


1 1 11

Add another Tweet

Congrats!

Thanks!

Athlete Name Follow



4,321 views

Thanks [@Sponsor](#) for all your support! [#gold](#)

View all 123 comments

1 DAYS AGO



SAVE THE DATE

April 13, 2021



Advertising must be in the market

May 14, 2021



Notification Requirement

July 13, 2021

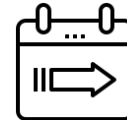


No Ramp Up During Rule 40 Period!

August 10, 2021



In the market for 90 days



READ THE FINE PRINT: WAIVERS AND INDEMNIFICATION CLAUSES



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WAIVERS & INDEMNITIES—WHAT ARE THEY?

Purpose

- **Waiver:**
 - Party A releases Party B from any claims Party A might have against Party B in a defined set of circumstances, i.e. they prevent Party A from suing Party B
 - i.e.: prevents Party A from suing Party B (for some things, in some circumstances)
 - Frequently used in contracts involving sports where injuries are anticipated
 - A sign with a warning at a venue (e.g. ski hills, arenas) constitutes a contract with a waiver, in the right circumstances

WAIVERS & INDEMNITIES—WHAT ARE THEY?

Purpose

- **Indemnity:**
 - Party A agrees to compensate Party B if Party B suffers a defined type of loss in a defined set of circumstances
 - Allows the parties to allocate / customize their risk
 - Athletes / participants often required to indemnify the sports organization hosting / arranging the sport
 - Often used by venue owners

WAIVERS

Scope of Waiver

- Broad enough to protect sports organizations from lawsuits by athletes in many circumstances, including the organization's own negligence
- Courts are reluctant to exclude liability for negligence:

[62] But in the circumstances of this case, this submission begs the question of what it was that had to be brought to Mr. Apps' attention. At para 31 of her reasons, the judge rightly recognized a **waiver of an occupier's own negligence as "among the most onerous of clauses", and that "The more onerous the exclusion clause the more explicit the notice must be"**. It does not follow that because there may have been adequate notice that something in the contract limited one's rights, **enough had been done to bring to the consumer's attention the fact that the contract included a clause so onerous as to exclude liability for the service provider's own negligence.**

WAIVERS

Scope of Waiver

- Don't have to use the word “negligence” but it must clearly refer to negligence, or the athlete *can* sue the organization for *its* negligence

[109] Even if I am wrong on my interpretation of the provisions of the waiver, I would still not give effect to the waiver. The law is clear that a party relying on a waiver has the onus of proving the validity of the document and **any ambiguity is resolved against the party who is attempting to rely on it.** In this case, the waiver is broad and vague and parts of it do not make sense. If a party is seeking to rely on a waiver to defend a claim based in **negligence, the wording must be specific as to what risks and dangers in the activity would be covered.***

- To a waiver only provides a defence for “only those matters which were specifically in the contemplation of the parties at the time the release was given”*

WAIVERS

Must be brought to the releasor's attention

- Releasee must take reasonable steps to bring the waiver to the releasor's attention
- Court will consider:
 - Format, length of waiver
 - Sufficiency of time to read and understand it
 - Whether releasor read the waiver or not
 - Competency of the signing party
- Waiver must be brought to releasor's attention before they agree to participate in the sport / activity



WAIVERS

Must be brought to the releasor's attention

- Waiver must be brought to releasor's attention **before** they agree to participate in the sport / activity:

Once the issue is framed so that the adequacy of the notice determines whether the clause was imported into the agreement, then the timing of the notice becomes crucial. Essentially, **a term cannot be included in an agreement unless it was contemplated at the time that the agreement was concluded, or was added thereto by a proper variation or modification.** As stated in Cheshire, Fifoot and Furmston: The Law of Contract, 11th ed. by M.P. Furmston (London: Butterworths, 1986), at p. 152:

The time when the notice is alleged to have been given is of great importance. No excluding or limiting term will avail the party seeking its protection unless it has been **brought adequately to the attention of the other party before the contract is made. A belated notice is valueless.**



WAIVERS

Tips for enforceable waivers

- Use specific language (e.g. “waiver of liability,” “release of liability,” “assumption of risk”)
- Make the exculpatory language conspicuous (bold / underline / caps / italics / colour / larger font)
- Use language easy to understand by intended releasor
- Make format readable (headings / subheadings / separate paragraphs)



WAIVERS

Applicability to minors:

- Waivers are unenforceable against children
- Have parents / guardians sign an “assumption of risk” form instead



WAIVERS

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INDEMNITIES

- Waiver says Party A can't sue Party B
- Indemnity requires Party A to cover Party B's legal costs if Party B is sued by someone else in the course of activities carried out / participated in by Party A
- Can vary in scope:
 1. **Limited:** Party A and Party B are each responsible for only indemnifying for claims arising from their own negligence (e.g. if Party A is negligent and Party B is also sued, Party A indemnifies Party A)
 2. **Intermediate:** Party A is responsible for 100% of liability for its sole or partial negligence (i.e. Party A indemnifies Party A if Party A is at least partly to blame, but so is Party B)
 3. **Broad:** Party A is liable *even if* Party B is *solely* negligent and Party A is blameless

INDEMNITIES

Sample clauses

“the applicant will indemnify and save harmless the City against all loss, costs, claims, damages, actions, suits of any nature and kind whatsoever which may arise as a result of the use of the facility”

- Plaintiff injured using bungee playground at a Rib Fest operated by a boys’ and girls’ club on property rented from the city
- Court found the following was enforceable because it was unambiguous, and the injury was causally connected to the activities being carried out by the club:

INDEMNITIES

Sample clauses (not endorsed):

City of Hamilton & Hamilton Ti-Cats Stadium License Agreement

9.2.1 Licensee's Agreement to Indemnify. LICENSEE SHALL, EXCEPT AS PROVIDED IN SECTION 9.2.2 OR AS OTHERWISE EXPRESSLY PROVIDED IN THIS STADIUM LICENSE, DEFEND, PROTECT, INDEMNIFY AND HOLD HARMLESS OWNER, AND ITS ELECTED OFFICIALS, AFFILIATES, AND **OWNER'S AND AFFILIATE'S OFFICERS, DIRECTORS, EMPLOYEES, INDEPENDENT CONTRACTORS AND AGENTS, FROM AND AGAINST ANY AND ALL LIABILITIES, DAMAGES, SUITS, CLAIMS AND JUDGMENTS OF ANY NATURE (INCLUDING REASONABLE LEGAL FEES, COSTS AND EXPENSES), ARISING FROM OR IN CONNECTION WITH ANY INJURY TO OR DEATH OF A THIRD PERSON OR ANY DAMAGE TO PROPERTY OF A THIRD PERSON (INCLUDING LOSS OF USE) RESULTING FROM, ARISING OUT OF OR IN CONNECTION WITH (i) LICENSEE'S USE OR OCCUPANCY OF THE LICENSED PREMISES, OR (ii) THE NEGLIGENCE OR WILLFUL MISCONDUCT OF LICENSEE OR LICENSEE'S CONTRACTORS, EMPLOYEES, OFFICERS, DIRECTORS, AGENTS, INVITEES OR SPACE LICENSEES, OR (iii) THE NEGLIGENCE OR WILLFUL MISCONDUCT OF CONCESSIONAIRES FOR FOOTBALL HOME GAMES, LICENSEE EVENTS OR LICENSEE NON-EVENTS OR WITHIN LICENSEE'S FACILITIES (BUT NOT OTHERWISE), OR (B) LIABILITIES OF ANY NATURE RESULTING FROM, ARISING OUT OF OR IN CONNECTION WITH ANY FINANCIAL RESPONSIBILITY OF LICENSEE UNDER THE PROVISIONS OF SECTION 8.2**

INDEMNITIES

Sample clauses (not endorsed):

Curling Canada standard agreement for member clubs:

7. In consideration of the Organization allowing me to participate, I agree: a) That the sole responsibility for my safety remains with me; b) To ASSUME all risks arising out of, associated with or related to my participation; c) That I am not relying on any oral or written statements made by the Organization or its agents, whether in a brochure or advertisement or in individual conversations, to agree to participate in the Activities; d) To WAIVE any and all claims that I may have now or in the future against the Organization; e) To freely ACCEPT AND FULLY ASSUME all such risks and possibility of personal injury, death, property damage, expense and related loss, including loss of income, resulting from my participation in the Activities; f) **To FOREVER RELEASE and INDEMNIFY the Organization from any and all liability for any and all claims, demands, actions, damages (including direct, indirect, special and/or consequential), losses, actions, judgments, and costs (including legal fees) (collectively, the “Claims”) which I have or may have in the future, that might arise out of, result from, or relate to my participation in the Activities, even though such Claims may have been caused by any manner whatsoever, including but not limited to, the negligence, gross negligence, negligent rescue, omissions, carelessness, breach of contract and/or breach of any statutory duty of care of the Organization;** g) **To FOREVER RELEASE AND INDEMNIFY the Organization from any action related to my becoming exposed to or infected by COVID-19 as a result of, or from, any action, omission or negligence of myself or others, including but not limited to the Organization;** h) That the Organization is not responsible or liable for any damage to my vehicle, property, or equipment that may occur as a result of the Activities; i) That negligence includes failure on the part of the Organization to take reasonable steps to safeguard or protect me from the risks, dangers and hazards associated with the Activities; and j) This release, waiver and indemnity is intended to be as broad and inclusive as is permitted by law of the Province of Ontario and if any portion thereof is held invalid, the balance shall, notwithstanding, continue in full legal force and effect

QUESTIONS?



GOWLING WLG