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Moral Rights: A Brief Excursion Into Canadian History

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In 1931, Canada was the first of the copyright countries to adopt a moral rights provision, closely modeled on Article 6bis of the Berne Convention, into its legislation. But this was not the first step that Canada had taken towards the legislative protection of moral rights. Not only had certain provisions protective of the non-economic interests of authors been included in the federal Criminal Code and in the legislation of Quebec prior to 1920, but during the 1920s a sustained effort had been made to give these interests more explicit and systematic protection under the Copyright Act. The present article focuses on a series of bills put to the Canadian Parliament from 1924 onwards. Not only would they have provided increased protection for the non-economic interests of authors but they would have given a legislative definition to the term "moral right". These bills, framed in the absence of any influence from Article 6bis, provide a glimpse of what "moral rights" might have been. They support the view that Canada was moving towards the express legislative protection of these rights significantly earlier than is commonly thought.

En 1931, le Canada fut le premier des pays de tradition de « copyright » britannique à adopter dans sa législation une disposition relative aux « droits moraux » largement inspirée de l'article 6bis de la Convention de Berne. Mais il ne s'agissait pas là du premier pas franchi par le Canada en vue d'en arriver à une législation protectrice des droits moraux. Non seulement des dispositions protégeant les intérêts non économiques des auteurs avaient-elles été incluses dans le Code criminel canadien et dans la législation québécoise avant 1920, mais des efforts soutenus avaient aussi été déployés dans les années 20 pour conférer à ces intérêts une protection plus explicite et plus systématique en vertu de la Loi sur le droit d'auteur. Le présent article met l'accent sur une série de projets de loi présentés devant le Parlement canadien à partir de 1924. Non seulement ces projets de loi auraient-ils assuré une protection améliorée des intérêts non économiques des auteurs, mais ils

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1. INTRODUCTION

Canada can claim credit for being the first of the copyright countries\(^1\) to introduce moral rights provisions into its domestic legislation. It did so in 1931 as a preliminary to ratifying the 1928 Act of the Berne Convention. Until 1928, the Convention had been concerned with the economic rights of the author and those deriving title from the author. Riding a wave of pro-author sentiment, however, Italy, with the support of a number of other continental European countries,\(^2\) managed in 1928 to elicit the agreement of the less enthusiastic nations\(^3\) of the Berne Union to what seemed a crucial extension of the scope of authorial protection. The result was Article 6bis which gave codified recognition to certain rights remaining with the author after any alienation of the economic rights. The rights recognized were the right of the author to claim correct attribution of the work and the right, under certain circumstances, to protect its integrity.

(1) Indépendamment des droits patrimoniaux d’auteur, et même après la cession desdits droits, l’auteur conserve le droit de revendiquer la paternité de l’œuvre, ainsi que le droit de s’opposer à toute déformation, mutilation ou autre modification de ladite œuvre, qui serait préjudiciable à son honneur ou à sa réputation.

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\(^1\) Namely the countries which have formulated their copyright legislation according to British models, these models centering on the notion of copyright ownership. They include Australia, New Zealand, the United States and Canada. These countries are to be contrasted with countries which have taken the notion of authors’ rights as the basis for their legislation.

\(^2\) France, Poland, Romania, Czechoslovakia, Belgium. In pursuing the issue of moral rights at the Rome Revision Conference, Italy was responding to various forces, among them the fact that the Association littéraire et artistique internationale (ALAI) and other organizations had been pressing for 30 years for increased moral rights protection. Italy had also recently granted domestic authors quite extensive and systematic moral rights protection, as had several other countries. See notes 22-24 below. See also, generally, Michaëlidès-Nouaros, G., *Le droit moral de l’auteur*, Librairie Arthur Rousseau, Paris, 1935, 27-31 and Ricketson, S., *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Centre for Commercial Law Studies and Kluwer, London, 1987, [8.96], 459ff.

\(^3\) For example the UK and Australia.
Canada’s response in 1931 was the introduction into its copyright legislation of s. 12(5) which largely adopted the terms of the Berne provision. The enactment of this section was greeted with pleasure by the office of the Berne Union which saw in it a satisfactory, albeit narrowly formulated, recognition of moral rights in Canada.

Elle [the new law] est principalement destinée à mettre la législation canadienne en harmonie avec l’Acte de Rome que le Canada applique à partir du 1er août 1931. Et nous reconnaissons volontiers que les textes relatifs au droit moral (art. 5) . . . sont entièrement satisfaissants.5

Right from the start, however, the provision had its critics. Mechanisms for enforcement of the provision were, under Berne, left to domestic arrangements in the Union countries. In Canada, while the core entitlements were adopted, the issue of enforcement was only partially addressed.6 The outcome was that for 50 years after its introduction s. 12(5) was criticized in Canada as inadequate, poorly drafted and unclear.7 It was said that with s. 12(5) the legislature had not genuinely embraced the moral rights of authors.8 When new moral rights provisions were

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5 Le Droit d'Auteur (hereafter DA) 1932, 5. It was also stated at 113 that “L’article 5 de la nouvelle loi canadienne réserve maintenant au droit moral une place dans la loi sur le droit d’auteur.” There seems little doubt that the European writers saw this as the introduction of real moral rights into Canada though they considered the formula adopted “un peu étroite”. The approbation of the Berne Union may have been based on an overestimation of the provision’s capacity for enforcement.

6 Through the substitution of “restrain” for “object”, allowing injunctive relief to be sought for breach of the right of integrity. See comments of Mr. Cahan, HC Deb, June 8, 1931, 2400.

7 Fox noted of the right of attribution component that it was “conceived in vagueness, poorly drafted, sententious in utterance, and useless in practical application.” The term of protection was unclear and there appeared to be no useful remedy for breach of the right. Fox, H.G., “Some points of interest in the law of copyright” (1945-46), 6 UTLJ 100 at 126. See also Gendreau, Y., “Moral Rights”, in Henderson, G.F. (ed) Copyright and Confidential Information Law of Canada, Carswell, Ontario, 1994, 161 at 168.

8 McDonald, in his background study to the Report on Intellectual and Industrial Property, noted that “the theory of moral rights, as such, has not been adopted in Canada” though “much of its content has found expression in Canadian
introduced with the 1988 amendments, they were seen as a considerable step forward in the protection of the moral rights of authors.

It is not the purpose of this article to discuss the shortcomings of s. 12(5) or the virtues of its successors, but to look further back at the legislative beginnings of moral rights in Canada. While the existence of s. 12(5) in the statutes might have given the impression of a country observing the externalities rather than the spirit of moral rights, it should not be forgotten that before 1931 persistent efforts had been made at introducing a reasonably full and effective regime of protection analogous to moral rights. These are to be found partly in actual legislation but largely in a series of bills put to the Canadian Parliament between 1924 and 1930. Looked at in the light of these attempts, s. 12(5) was in many ways a step backwards.

What is particularly interesting about the developments in Canada before 1931 is that they occurred in large part prior to the 1928 Rome Revision Conference of the Berne Convention. Therefore, until Bill 37 was introduced by the Federal government in 1930, they were in no way a response to a need for compliance with the dictates of the Convention. Here was a copyright country attempting to protect the non-economic interests of authors along its own lines and outside of the theoretical or policy framework adopted by the Convention. Relatively few countries in the world, least of all countries strongly influenced by the British legal tradition, have been in this position.

2. LEGISLATION FOR MORAL RIGHTS BEFORE 1928

The Rome Conference of the Berne Convention, and Article 6bis in particular, were enormously influential in disseminating the idea of moral rights throughout the world and ensuring their inclusion in numerous pieces of legislation. However, the 6bis formulation also had the effect of limiting, for many countries, visions of how protection might be afforded against certain treatments of a work or against certain types of

9 Through Bill C-60, S.C. 1988, c.15.
of detriment to the author. Berne standardized the idea of moral rights.\textsuperscript{11} Prior to the Rome Conference, on the other hand, we see a period of fluidity, when the nature of the interests concerned was disputed and the means of protecting them not yet fully resolved. What we now choose to call in English “moral rights” could have taken a number of different forms. These forms depended, and still depend, on an assessment of the type of interest being protected. They also depended on what types of remedies or modes of enforcement were judged appropriate to the interest.

There has, for example, long been a tension between the notions of authorial and cultural interests. While the dominant doctrinal position in Europe was that protection of the author was at issue, and while this position was endorsed by the Berne Convention,\textsuperscript{12} that protection has often been conflated with the protection of important cultural artefacts or, more broadly, protection of the works themselves.\textsuperscript{13} The conflation might arise naturally in circumstances where a high level of creativity is expected to exist before the production of the work gives rise to protection, and undoubtedly also arises from the fact that those lobbying most strongly for the rights of authors are often those whose own productions belong to the category of valued cultural artefact.\textsuperscript{14} To draw attention to well known cultural objects is also one of the most persuasive ways in which authors can elicit support for their cause from the public and politicians.

\begin{itemize}
\item \textsuperscript{11} See, for example, the current Italian and Spanish moral rights provisions which are in very much the same terms as Article 6bis. See also the way in which the copyright countries have without exception adopted the notion of prejudice to honour or reputation.
\item \textsuperscript{12} “...la Convention entend protéger les auteurs et non les œuvres...” [emphasis in original] Actes de la 2me conférence internationale pour la protection des œuvres littéraires et artistiques réunie à Berne du 7 au 18 septembre 1885 (hereafter Berne Actes 1885), 40.
\item \textsuperscript{13} This conflation of ideas was particularly evident later, at the 1948 Brussels revision conference of the Berne Convention (see note 98), and has also been prominent in copyright countries. In relation to Canada, Vaver, in discussing s. 12(7), notes “the interest of the public in ensuring that its culture, as represented through its arts, literature and music, remains authentic and intact as far as possible”. See Vaver, D., “Authors’ Moral Rights in Canada”, (1983) 14 IIC 329, 351 and note 107.
\item \textsuperscript{14} We have seen this recently in the arguments by Steven Spielberg in the US in favour of the adherence of that country to the Berne Convention. See Hearings before the Subcommittee on the Judiciary, Senate, 100th Congress, 2nd session on S1301 and S1971 at 505ff.
\end{itemize}
Another area of tension has related to exactly what type of protection is at issue. Are we talking about rights in the nature of human or natural rights which inhere in the person of the author and can be exercised by him or her — these rights being recognized but not created by the statute?\textsuperscript{15} Are we talking about rights which do not arise naturally, being created solely by statute for the purposes of the state, but which nevertheless still inhere in the author or the author’s successors in title?\textsuperscript{16} Are we talking about rights which are bound up with the economic aspects of authorial protection as part of the same whole?\textsuperscript{17} Or are we talking about rights which have an existence of their own, side by side with what might be called “copyright”?\textsuperscript{18} Finally, are we perhaps concerned with a form of protection which is not available to the author as legal subject at all, but which rather arises solely from the statutory prohibition of certain activities? The practical ends achieved by these different notions of what is protected might be very similar, and so might the policy reasons for promoting them. But the pathways to achieving these ends might be substantially different.

(a) Legislation in Continental Europe

Rights which might be denominated moral rights were generally late in achieving legislative protection. In the last years of the 19th century, certain laws began to give protection in the nature of moral rights, though they did so in a relatively piecemeal and unsystematized way. Very early examples of these were found outside of Europe.\textsuperscript{19} Some protection was also offered in the German statutes of the first decade of the 20th cen-

\textsuperscript{15} This would, for example, have been the view of Kohler (see note 32) and Gierke in late 19th century Germany, and is reflected in current German commentaries: “The statutes only mean, in relation to authors’ rights, the recognition and the more detailed formulation of a right, whose existence is anchored in general concepts of law.” Ulmer, E., Urheber- und Verlagsrecht, 3. Auflage, Springer-Verlag, Berlin, Heidelberg, New York, 1980, 105, n 8.

\textsuperscript{16} See the copyright statutes of the UK and Australia. Copyright has no existence, even in relation to unpublished works, except as provided for in the legislation. Moral rights are similarly granted by statute.

\textsuperscript{17} The monist theory as accepted in Germany and Austria.

\textsuperscript{18} The dualist theory, most often associated with France, but also propounded by Kohler in Germany and giving form to the early Polish legislation among others.

\textsuperscript{19} See for example the Japanese law of 1899 (DA 1899, 141ff), the Brazilian law of 1898 (DA 1898, 101ff).
tury but was not consolidated into a coherent moral rights regime. France would not legislate for the *droit moral* until 1957. Nevertheless, prior to and during the time that Canada was considering legislating for the non-economic rights of authors, several European countries did put systematic statutory regimes in place. Romania, for example, passed a law of this kind in 1923, Italy in 1925 and Poland in 1926. All operated by granting or recognizing rights which were available to authors themselves to exercise.

In Romania, for example, where the totality of authors’ rights were gathered under the rubric of literary and artistic property, authors were recognized as having a non-transmissible right of control over their work, even after the economic rights in it had been assigned and it had been published. This right, which was called in the French translation of the law the “*droit moral de contrôle*”, included the right to “s’adresser à la justice, lorsque l’éditeur ou le réproducteur modifient l’oeuvre cédée, la dénaturent, la publient ou la reproduisent contrairement aux conditions du contrat ou d’une manière préjudiciable à la réputation de l’auteur.” After the death of the author neither the heirs nor the publishers were permitted to alter the work without the alteration being brought to the notice of the public. The right of control that the author had enjoyed could now be exercised only by the Romanian Academy, and this right remained with the Academy in perpetuity.

In Italy, a country which did not use the property concept in its legislation, the author was declared in the new law of 1925 to have the right to take action to prevent the authorship of the work being misat-

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20 The LUG (*Literary Copyright Act*) of 1901 and the KUG (*Artistic Copyright Act*) of 1907.
21 Law no. 57-298 of 11 March 1957.
22 Law on literary and artistic property of 28 June 1923 (DA 1924, 25ff).
23 Decree no. 1950, Dispositions on the rights of the author of 7 November 1925 (DA 1926 2ff).
24 Law relating to the rights of the author of 29 March 1926 (DA 1926, 133ff).
25 Op. cit., note 22, art. 3. The right was so absolute that it “ne peut faire l’objet d’aucune transaction.”
tributed or the work being modified or mutilated in a way which would cause serious and unjust prejudice to the author's moral interests. This right was independent of the economic rights — the economic rights themselves, however, including the exclusive right to modify the work and the right to publish it anonymously or under a pseudonym and to withdraw it from circulation. The moral right would exist in perpetuity, to be exercised by the author and his or her family and heirs and, ultimately, by the state if the succession failed or if the successors failed properly to exercise the right.

In Poland, in 1926, the economic and moral rights of authors were organized differently. A set of personal rights was seen as separate from the "droit d'auteur" ("copyright") though provided for in the same piece of legislation. This indicated that a form of dualism had been adopted, following the teachings of Kohler in Germany. The rights could exist even in the total absence of economic rights. The "personal rights" of the author would be injured if:

Quelqu'un s'arroge la paternité d'une œuvre et s'approprie le nom ou le pseudonyme de l'auteur; quand il ne cite dans son ouvrage ni l'auteur, ni la source à laquelle il a puisé le texte ou des extraits, ce qui est susceptible d'induire un erreur en ce qui concerne l'origine de l'œuvre; quand il indique faussement le nom de l'auteur ou la source; quand il publie une œuvre non destinée par l'auteur à être publiée; quand il introduit dans la publication des changements en y opérant des additions ou des suppressions qui en altèrent le sens ou nuisent à sa tenue et à sa valeur; quand il édite l'ouvrage sous une forme qui ne lui est manifestement pas appropriée;

32 Kohler (1849-1919), one of the most influential of European jurists in this area, is mostly associated with the development of the Immaterialgüterrecht, a term that he used for the economic rights of the author which he considered to be analogous to property. He regarded the Individualrecht or right of personality pertaining to an author as separate from the Immaterialgüterrecht and based on different principles, though often brought into operation by the same facts. In this he differed from his contemporary, Otto von Gierke, who saw both the economic and personal rights of the author as part of an overarching Persönlichkeitsrecht or right of personality. See generally Gierke, O. von, Deutsches Privatrecht, Leipzig 1895, reprinted by Verlag von Duncker & Humblot, Muenchen and Leipzig, 1936, Kohler, J. Das Autorrecht (hereafter Autorrecht), Fischer Verlag, Jena, 1880, and Kohler, J. Das Urheberrecht an Schriftenwerken und Verlagsrecht (hereafter Urheberrecht), Stuttgart, 1907, reprinted by Scientia Verlag, Aalen, 1980.
quand il introduit des changements dans l’œuvre originale; quand il ap-
pose sur l’original d’une œuvre d’art le nom de l’auteur malgré sa volonté
ou en fait connaître l’auteur de toute autre façon malgré sa volonté; quand
il emploie la critique pour rabaisser la valeur de l’œuvre en faussent
sciemment les faits, etc.34

These rights could be asserted by the descendants of the author after the
author’s death.35

What is notable about these early European provisions is how much
bolder they were than Article 6bis. While having much in common, most
notably the recognition of the private rights of authors and their capacity
for enforcement, they unabashedly expressed the differing doctrinal
positions of their countries. In 1928, when the task was to find a for-
mulation of the moral rights that was agreeable to all members of the
Berne Union, many aspects of these doctrinal positions had to be sup-
pressed.

(b) Legislation in England

The picture in England was very different. Under the 1911 Copyright
Act, the non-economic interests of authors were not protected in their
own right. However England was not unmindful of the personal interests
of authors36 and these had some protection in the Fine Arts Copyright
Act of 1862 under the marginal heading “Penalties on fraudulent Pro-
ductions and Sales”. This Act, which remained in force until 1956,37
provided for a penalty in certain cases of misleading conduct.38 Most
pertinently it provided that

... no person shall fraudulently sign or otherwise affix, or fraudulently
cause to be signed or otherwise affixed, to or upon any Painting, Drawing,

36 See the words of Lord Mansfield in Millar v. Taylor (1769), 98 E.R. 201, 4
Burr. 2303 (Eng. K.B.) at 252-253 [E.R.]. The equitable action for breach of
confidence was also one of the primary ways in which certain of the non-
economic interests of authors of unpublished works were protected.
37 In the UK. The statute did not apply in Canada: Henry Graves & Co. v. Gorrie
38 It was described by Channell J. in: Carlton Illustrators v. Coleman & Co.,
against what is commonly known as a passing off of the goods of one person
as the goods of another.”
or Photograph, or the Negative thereof, any Name, Initials, or Monogram;
...

... where the author or maker of any painting, drawing, or photograph
shall have sold or otherwise parted with the possession of such work,
if any alteration shall afterwards be made therein by any other person, by
addition or otherwise, no person shall be at liberty during the life of the
author or maker of such work, without his consent, to make or knowingly
to sell or publish, or offer for sale, such work or any copies of such work
so altered as aforesaid, or of any part thereof, as or for the unaltered work
of such author or maker.39

Upon an offence being proven, the offender was to pay to the aggrieved
party "a sum not exceeding £10, or not exceeding double the full price
at which all such copies or altered works shall have been sold or offered
for sale", and the offending works were to be forfeited to the person
whose name had been misused.40

This provision was, however, rather unlike the moral rights pro-
visions which were to develop in continental Europe. It did not, for
example, operate by giving or recognizing full private law rights subs-
sisting in the hands of the author41 but rather by penalizing certain types

39 25 & 26 Vict., c. 68, s. 7. Concern for artists whose work was being mutilated
appears to have been the driving force behind the Act: "Mr. Charles Landseer
stated a most glaring case in his evidence before a committee appointed by the
Society of Arts. It appears that he painted a picture called the "Eve of the Battle
of Edgehill", in which he introduced two dogs, which had been touched up by
his brother Sir Edwin, and, as he himself admitted, greatly improved. The
picture was sold to a dealer, who cut out the figures of the dogs and sold them
as the work of Sir Edwin Landseer, and he then filled up the hole in the original
picture with two dogs painted by an inferior artist, and sold the whole picture
as the work of Mr. Charles Landseer." Commentary by Copinger (Copinger
W. A., The Law of Copyright in Works of Literature and Art, Stevens and
Haynes, London, 1870, 198) on the history of the provision. The story is also
told in Parliamentary Debates, HL Deb vol. 166 col 199 22 May 1862, per
the Lord Chancellor. In the same speech the Lord Chancellor used the rhetoric
of "frauds committed on artists of integrity" and the argument that "artists
might naturally manifest some sensitiveness on the score of their reputation at
being so treated" to justify the provision.

40 25 & 26 Vict., c. 68, s. 7.

41 At an early stage there seemed to be doubt about whether the author would be
the aggrieved person taking action. Copinger, in his 1870 text, makes a clear
distinction between this aggrieved person and the artist, the aggrieved person
being evidently the person misled by the impugned activity: "It would seem
that if the double price of the copies be less that £10, yet that amount may still
be recovered, and that if the double value exceed £10, then any sum up to such
double price may be recovered by the person aggrieved, as an inducement to
of undesired activity. Thus, while an author could take action for the pecuniary penalty in a civil court, the form of redress for the offence was limited to this statutory sum.\textsuperscript{42} On the other hand, at least by the first decade of the 20th century, it was established that, in the case of this type of enactment in favour of a person, it was also possible for an aggrieved party to take action for an injunction to prevent further breach.\textsuperscript{43} So the provision embraced elements of private law. Furthermore, the effect of the activity on the artist was central to the operation of the provision. The offence could only be committed during the lifetime of the artist, it could only be committed in the absence of the artist’s consent, and alterations would only come within the Act if they were likely to be sufficiently detrimental to the artist:

To come within the enactment an alteration must be a material alteration having regard to the object with which the enactment was passed; and that which would be material in that sense would be an alteration \textit{which might affect the credit and reputation of the artist}\textsuperscript{44}

This UK provision was an extremely early one. It predated systematic moral rights thinking, even in Europe, and it could, therefore, not be expected that the mechanisms for protection would be the same as those

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\textit{him to proceed, he having to give up the spurious work to the true artist or his representatives, and receive from the person who has defrauded him the price he has paid and as much more.”} Copinger, W. A., \textit{The Law of Copyright in Works of Literature and Art}, Stevens and Haynes, London, 1870, 198. Copinger’s comments would seem to be more applicable to the other forms of misattribution covered by the section.
\end{flushright}

\textsuperscript{42} In spite of the monetary nature of the penalty and the fact that it was to be paid, not to the state, but to a private person, it had been held that this was not a mere debt owing to the aggrieved person. It was a criminal penalty with the legal consequences of such: \textit{Graves, Ex parte}, 19 LT (NS) 241.

\textsuperscript{43} See the comments of Channell J. in \textit{Carlton Illustrators v. Coleman & Co.}, [1911] 1 K.B. 771 [Eng. K.B.] at 782: “I think that this case comes within the rule that, where there is a statutory enactment in favour of a person, and there is a penalty for the breach of the statutory enactment which goes to the person aggrieved, in such a case the penalty is the only remedy for the breach. That principle, however, only applies to remedies for the breach which has been committed, and an injunction is not a remedy for the past breach but is a means for preventing further breaches. In \textit{Cooper v. Whittingham} [1880] 15 Ch D. 501 it was decided by Jessel MR. that where a statute creates a new offence and imposes a penalty for it the ancillary remedy by injunction may still be claimed.”

\textsuperscript{44} \textit{Carlton Illustrators v. Coleman & Co.}, [1911] 1 K.B. 771 [Eng. K.B.] at 780 per Channell J. [emphasis added]
later to be put forward in Berne Convention debates. Nevertheless the longevity of this statute guaranteed it a continuing influence on the handling of the interests of authors, both in the UK and the countries of the Empire.

3. CANADA

Canada began the expansion of its legislation into the “moral rights” area in the second decade of the 20th century. This expansion was incidental to the development of measures to protect authors’ economic interests, and had more in common with England’s very early form of protection than with the systems of rights that were starting to be established in the continental European countries. Because of the difficulties faced by authors in Canada at the time, this country looked first of all to the criminal law to bring about the desired outcomes.

(a) Protection of Unionist Authors

The issue of what type of legislative protection was most desirable for authors had arisen in relation to foreign authors of dramatic works. Authors from France, Belgium and Switzerland, all members of the Berne Union, were having difficulty enforcing the economic rights that were guaranteed to them under the Convention. The infringements of which they were complaining occurred through the unauthorized representation of their works in Canada, often under the name of a different author or under a new title.45 These alterations had various consequences for the author. Apart from making apprehension of the infringement difficult for the foreign author, the removal of the author’s name from a work (and often its substitution with a false name) would have been detrimental in two further ways. On the one hand, it prejudiced the author’s capacity to establish a reputation for himself and, on the other, it inhibited litigation, since the true author wishing to take action to

45 See the speech of M. Rodolphe Lemieux (Rouville), HC Deb, 15 February, 1915, 196-203 moving the resolution “That, in the opinion of this House, stricter measures should be taken for the carrying out of the Berne convention relative to copyright.” See also the comment of M. Louvigny de Montigny in 1925: “Previous to that time [1906] most of the newspapers and theatres were exploiting literary and musical works without giving the names of the authors or paying them any royalties ....” 15-16 Geo. V, Appendix No. 1, Proceedings of the Special Committee appointed to consider and report upon Bill No. 2, an Act to amend and make operative certain provisions of the Copyright Act, 1921, Ottawa, 1925 (hereafter Special Committee 1925), 154.
enforce his rights would then have the task of proving authorship. For these and other reasons, actions in the Canadian civil courts were perceived to be slow, expensive and complex for foreign litigants,\textsuperscript{46} and success brought little reward since the defendant was likely to be insolvent.\textsuperscript{47} The case of Joubert v. Géracino\textsuperscript{48} illustrated some of the issues and outcomes of the day.\textsuperscript{49}

Joubert, a French author, had come before the Canadian courts seeking national treatment under the Berne Convention. Relying on the UK Dramatic Copyright Act of 1833, which was still in force in Canada, he had made complaint of three types of offence (délit) for which he sought statutory damages.\textsuperscript{50} The first was the unauthorized representation of a number of works, the second was the suppression of the name of the author and the third was the suppression of the works’ titles. (The Act did not provide for the second and third types of offence and ultimately the three were treated together as the offence of unauthorized

\textsuperscript{46} For a detailed discussion of the problems facing the foreign author see the comments of M. Lemieux, op. cit. note 45. See also DA, Etudes générales, “Le Canada et la protection des auteurs unionistes”, 1916, 40-44.

\textsuperscript{47} Ibid. at 41-42.

\textsuperscript{48} Judgment in the Superior Court was delivered by Monet J. on 21 November 1914. On appeal the case went to the Court of King’s Bench (1917) 26 Que. B. R. 97.

\textsuperscript{49} The case was, apparently, intended as a test case and had found its way into the courts through the efforts of M. Louvigny de Montigny or those associated with him. (He had earlier performed a similar role regarding the landmark case of Hubert v. Mary (Joubert v. Méré).) For de Montigny’s account of his role in these two cases see Special Committee 1925, op. cit. note 45, 154. M. de Montigny had been an activist for authors’ rights since, by his own account, about 1900 and held a number of positions. He was, among other things, an author, councillor of the Canadian Authors’ Association, Canadian Correspondent to the Bureau of the International Copyright Union (Switzerland), La société des gens de lettres (France), Le syndicat de la propriété artistique (France), the Music Publishers’ Association (England) and Canadian correspondent of Le Droit d’Auteur, official organ of the Bureau of the International Union for the protection of literary and artistic works.

\textsuperscript{50} The law provided for either a statutory minimum remedy of 40/- per representation or “the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater”. These were civil remedies to be awarded in case of conviction, not fines: “La demande n’est pas pour le paiement d’une amende; c’est simplement un recours d’ordre civil pour des dommages liquidés par la loi à un minimum de 40 schellings, et dont le maximum peut varier suivant la preuve.” King’s Bench decision, op. cit. note 48 at 108 Action under this law was taken by the author, his representative or successor in title.
representation.) Joubert had, however, been unable to persuade the court of his standing to take action in his own name, given that he was a member of a French collecting society, and in 1914, the Superior Court in Quebec had dismissed\textsuperscript{51} his claims.

In the light of cases of this kind, and particularly the failure of complainants to recover from insolvent defendants, civil action seemed hardly worthwhile. This being the case, there was no effective check on infringing activity. Under these circumstances a possible solution appeared to be the imposition of fines or imprisonment of the person responsible for the unauthorized representation.

\[\text{[L]e plus important est d'ouvrir aux auteurs étrangers des voies de recours sommaires en imposant une sanction pénale ou correctionnelle comme peine de la violation des droits de la propriété intellectuelle.}^{52}\]

\textbf{(b) Amendment of the Criminal Code – s. 508B}

Therefore, in April 1915, the \textit{Criminal Code} was amended by the passing of legislation\textsuperscript{53} providing penal sanctions for those responsible for the offending dramatic representations.\textsuperscript{54} There was nothing new about this turning to the criminal law. The French penal code contained a clause providing, under circumstances of unauthorized representation, for a fine (to be paid to the state) as well as the confiscation of receipts (to be paid to the complainant).\textsuperscript{55} British legislation also made provision for summary offences.\textsuperscript{56} What was new about this Canadian bill was, first, that it protected the interests of dramatic authors in correct attribution and the integrity of the work, in other words the core interests to be protected by Article 6bis of the \textit{Berne Convention} in 1928. Secondly, the Bill provided for fines and the imprisonment of those who violated

\begin{itemize}
  \item \textsuperscript{51} See note 48 above.
  \item \textsuperscript{52} DA 1916, 43: comment by M. Lemieux in Parliament. See also HC 15 February, 1915, 200 (English translation).
  \item \textsuperscript{53} \textit{The Criminal Code Amendment Act, 1915}, S.C. 1915, c. 12 (5 Geo. V. c. 12).
  \item \textsuperscript{54} Such legislation (but dealing only with issues of representation of the works) had been passed in 1909 by the House of Commons but rejected by the Senate. In 1913 the need for it had been raised again by the Royal Society. In January 1915 M. Louvigny de Montigny produced a memorandum outlining the plight of foreign authors, on which the speech of M. Lemieux in the House of Commons had been based (see note 45). These criminal sanctions were the end result of many years of effort. See DA, Etudes générales, “Le Canada et la protection des auteurs unionistes”, 1916, 40 at 43.
  \item \textsuperscript{55} \textit{Code Pénal} of 1810, Art. 428-429.
  \item \textsuperscript{56} \textit{Copyright Act} 1911, s. 11.
\end{itemize}
these interests. The provision embodying these new legislative directions was as follows:

508B. Any person who makes or causes to be made any change in or suppression of the title, or the name of the author, of any dramatic or operatic work or musical composition in which copyright subsists in Canada, or who makes or causes to be made any change in such work or composition itself without the written consent of the author or of his legal representative, in order that the same may be performed in whole or in part in public for private profit, shall be guilty of an offence, and shall be liable on summary conviction to a fine not exceeding five hundred dollars, or, in the case of a second or subsequent offence, either to such fine or to imprisonment for a term not exceeding four months, or to both.

This was an author-centred provision in the sense that written authorial consent would vitiate the offence. It might even loosely be called the first “moral rights” provision in Canadian legislation, though the definition is problematic given that it did not appear to endow the authors with any more than the right to set in train a criminal action. Nevertheless it was seen in Berne Convention circles as an attempt to smooth the way for “la reconnaissance franche du droit d’exécution et de représentation et du droit à l’intégrité des oeuvres”.

Subsequently, the provision was incorporated without change in the new Copyright Act of 1921 as s. 25(2), later to become s. 26(2), and later still s 43(2). It is still in operation.

57 It did so after first of all covering the authors’ economic interests in 508A: “Any person who, without the written consent of the owner of the copyright or of his legal representative, knowingly performs or causes to be performed in public and for private profit the whole or any part, constituting an infringement, of any dramatic or operatic work or musical composition in which copyright subsists in Canada, shall be guilty of an offence, and shall be liable on summary conviction to a fine not exceeding two hundred and fifty dollars, or, in the case of a second or subsequent offence, either to such fine or to imprisonment for a term not exceeding two months, or to both.”

58 An act to amend the Criminal Code, 5 Geo. V, c. 12, s. 508B assented to 15 April 1915. See also DA 1916, 14. The provisions were tested in a private prosecution before the police court of Montreal, Helbrunner v. Drouet, reported in DA 1917, 58 and in (1916) 49 Que. S.C 65.

59 This type of provision would not seem to be classifiable as “a statutory enactment in favour of a person” which might have made action for injunctive relief possible. See Channell J. in Carlton Illustrators v. Coleman & Co., [1911] 1 K.B. 771 [Eng. K.B.] at 782 and note 43 above.

It should also be noted here that Quebec passed an equivalent, though not identical, set of provisions in 1919.\textsuperscript{61} These too dealt with theatrical performances and remained in force until 1988.\textsuperscript{62}

(c) Subsequent Developments

There were two notable sequels to the passing of s. 508B – one discouraging to those who would promote the non-economic interests of authors, the other more promising.

The first was a private prosecution brought as early as 1915 in reliance on the Berne Convention coupled with the new provisions in the Criminal Code of Canada. In this case of Heilbromer v. Daoust a representative of a French author sought to enforce the provisions against a Canadian offender who had, among other things, suppressed the name of the author. The case was proven but the fine was minimal and, upon appeal, the accused was acquitted.\textsuperscript{63}

The second major sequel was the appeal decision in the Joubert case. When the case came before the Court of King’s Bench in 1917,\textsuperscript{64}

\begin{itemize}
  \item \textsuperscript{61} Chapter 47 of the Statutes of Quebec, 1919, 9 Geo. V. (The Theatrical Performance Act), s. 3712a: “It is forbidden for any person, company, corporation, partnership, club or association of persons whatsoever, to publish, exhibit, distribute, or cause to be published, exhibited or distributed any advertisement, newspaper notice, poster, prospectus, circular or programme referring to such performance, in whole or in part, of any work or of various works, literary, dramatic, lyric, or musical, without stating therein, accurately and completely, the name of such person, and without stating therein the title and the author of such work or works.” Infringement would lead, on conviction and “over and above all other legal recourses”, to a maximum fine of $100 and costs, or in default of payment, to imprisonment for a maximum of 1 month. The fine was for the benefit of the state. Suit was to be instituted by “any person of lawful age”: ss 3712b and 3712d. (I am most grateful to Professor Yolande Gendreau for the English text of these provisions and details of their history.) See DA 1926, 95 for a brief discussion of the section, comments on it by M. Louvigny de Montigny indicating that it was indeed seen as pertaining to moral rights protection, and an account of an action taken under it.
  \item \textsuperscript{62} They were eventually repealed by An Act to repeal certain statutory provisions, S.Q. 1988, c. 27 (repealing the then Theatrical Performances Act, R.S.Q. 1977, c. R-25).
  \item \textsuperscript{63} For a report of the case see DA 1917, 58. For an account of the ultimate acquittal of the accused see DA 1916, “Le Canada et la protection des auteurs unionistes”, 40 at 43. The outcome before the Police Court did not prejudice the possibility of civil remedies. In the case of the Quebec provision the outcome of a 1926 action was a fine of $5 and costs: see DA 1926, 95.
  \item \textsuperscript{64} Joubert v. Géracino, op. cit. note 48.
\end{itemize}
the majority overturned the decision of the lower court and recognized
the complainant’s standing. While the action was of necessity based on
the provisions of the 1833 legislation and hence on proven interference
with the property of the author, the significance of the suppression of
the work’s title and of the name of the author was discussed. These
actions were treated by the majority of the court as being relevant to the
quantum of damages.65 Most interestingly, the judgment of the majority
(per Carroll J.) contained a statement of what were considered to be the
rights of the author:

Un auteur a droit au crédit de son travail, au respect de ses textes, et aussi
au bénéfice matériel qui peut lui résulter du prestige de son nom ou de la
vogue de ses œuvres.66

The comment would suggest a concept of natural rights, based on the
labour of producing the work, accruing to the author by virtue of the
authorship. The right, as imagined here, required respect for the work
itself and the author’s connection with it, the benefits flowing from this
respect being perceived, at least partially, as economic. The words in-
dicate a unitary notion of authors’ rights, the infringement being capable
of impacting on the author’s commercial well-being just as infringement
of the economic rights could impact on the author’s non-commercial
well-being. While the 1833 legislation did not provide the possibility
for these “rights” to be asserted on their own, they were seen as being
sufficiently significant to play a role in decision making. A couple of
early steps had thus been taken along the road to moral rights. But the
court’s comments were inconclusive and, while interesting and prom-
ising, s. 508B (like its counterpart in Quebec) was designed to address
particular mischiefs and did not give any systematic protection. What
the provision did do, though, was provide a pattern which could be
followed when, during the 1920s, a need was felt to amend the 1921 Act
in a way that offered all authors a more structured and reliable regime
of protection.

65 “... nous faisons bloc des dommages provenant des trois délits des défendeurs,
quoique, techniquement, il n’y ait condamnation que pour le défaut
d’autorisation des 84 représentations illicites.... nous aurions été disposés à
accorder un montant appréciable de dommages, réels et punitifs, mais surtout
punitifs, pour la suppression des noms d’auteurs et les changements de titres
de certaines pièces. Ces méthodes sont plus que desloyales, elles constituent
des fraudes intolérables.” King’s Bench decision, op. cit. note 48 at 110 per
Carroll J.
66 Joubert v. Géracimo, op. cit. note 48, 111.
4. THE BILLS OF 1924-1930

During the 1920s the Canadian Authors’ Association, dissatisfied with the new Canadian Copyright Act of 1921, gave its copyright committee the task of preparing a report to suggest amendments to the current legislation. One member of that copyright committee was M. Louvigny de Montigny, a longstanding activist for authors’ rights, and a figure whose influence was seen in most of the developments in authorial protection during the first third of the century. The recommendations of this report were subsequently included in a bill which was introduced to the Canadian House of Commons in 1924 as Bill 28, a private member’s bill “to amend and make operative certain provisions of The Copyright Act, 1921”. Its sponsor was Mr. Edgar Chevrier, MP for Ottawa. In February 1925, the bill, now Bill 2 of that year, was again introduced to the House by Mr. Chevrier and referred to a Special Committee. The Committee amended and reported the Bill, but too late for it to be considered before the close of the session. 

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67 See note 49.
68 The following, from a Resolution on Copyright adopted by the Canadian Authors Association at its annual meeting in Quebec, May 20 1924 explains the provenance of the Bill: “Whereas several Canadian and unionist authors, playwrights, composers, artists and publishers, have requested Mr. Edgar Chevrier, Barrister and M.P. for Ottawa to introduce into Parliament a bill containing various stipulations with the object of amending the present Act by prescribing proper recourses and penalties not heretofore enacted, with a view to effectively restraining any counterfeiting or unlawful reproduction of their works and to afford them full protection of their rights; and Whereas on the first day of April, 1924, Mr. Edgar Chevrier, M.P., has introduced into the House of Commons, a bill entitled Bill 28. . . On motion of Mr. T. W. Alliston, seconded by Judge F.W. Howay, it is resolved: That the Canadian Authors’ Association, at their general meeting held in the City of Quebec on Monday, May 19, 1924, approve of the aforesaid Bill 28 . . . by which bill Parliament is requested to adopt most of the amendments drawn up in the memoranda dated 1921, and 1922 of the copyright committee of the Canadian Authors’ Association, said bill setting forth special recourses in special cases not provided for in the law now in force . . . ”. See Special Committee 1925, 7. On the drafting of the bill, see the account of M. Louvigny de Montigny at 150. Mr. Chevrier was later to become a Justice of the Appeal Court of Ontario.
69 For the text of the Special Committee Hearings see: 15-16 Geo. V, Appendix No 1, Proceedings of the Special Committee appointed to consider and report upon Bill No. 2, an Act to amend and make operative certain provisions of the Copyright Act, 1921, February-June Session, 1925.
70 Explanatory Notes to Bill 3 of 1926.
general purpose and the sense of grievance giving rise to it were outlined in the Explanatory Notes accompanying later versions of the Bill:

Since 1921, the matter has been laid before Parliament on behalf of the Canadian Authors’ Association seeking legislation to implement the protection of the rights of authors, playwrights, composers, artists and publishers, which is not granted by the Copyright Act now in force, though the said Act was supposedly designed for that purpose. No opportunity was, during the preparation of the said Act, awarded to them of submitting their rights for consideration.71

In fact, the Bill was overwhelmingly concerned with matters of economic concern,72 a fact reflected in the 1925 committee hearings which heard no evidence whatever on the question of moral rights. Nevertheless, from its inception, the Bill did contain provisions protecting the non-economic interests of authors,73 and during the course of the Committee hearings was amended to define the “moral right” of authors.74

(a) Attribution of Authorship and the Integrity of the Work

The provision in the Bill most clearly designed to protect what might be called the moral rights of authors was a redrafted s. 25. Section 25(2) had, from 1921, contained the limited “moral rights” protection that had been afforded dramatic, operatic and musical works by, originally, the Criminal Code.75 In the current proposal this section had been adopted, but reworded and extended to further classes of works so as to form a fairly comprehensive moral rights provision. Most importantly, literary and artistic works were now included within the protection.

Any person who makes or causes to be made any change in or suppression of the title, or name of the author, of any literary, artistic, musical, operatic or dramatic work in which copyright subsists in Canada, or who makes or causes to be made any change in such work itself without the written consent of the author or of his legal representative, with a view of having same in whole or in part reprinted, reproduced or performed in public,

71 Id.
72 Namely licensing clauses.
73 Bill 28 of 1924, cl. 10 (proposed s. 23A(4)) which was stated in the Explanatory Notes to “give the Court power to protect the author against such practices as plagiarism, alteration of title, suppression or alteration of author’s name, etc”, cl. 12 (proposed s. 25(2)), and cl. 13 (proposed s. 25C) which was in much the same terms as the earlier s. 3712a of Chapter 47 of the Statutes of Quebec. See note 61 above.
74 See Special Committee 1925, xvii.
75 See note 58 above.
shall be guilty of an offence and shall be liable on summary conviction to a fine of not less than twenty-five dollars and not exceeding five hundred dollars and to the payment of costs, and in default of payment of such fine and costs, shall be liable to imprisonment for a term not exceeding two months. In the case of a second or subsequent offence, he shall be liable either to such fine or to imprisonment for a term not exceeding four months, or to both.76

The person charged bore the onus of proving written consent.77

In most respects it is difficult to see this as anything but a provision of protection for the moral rights of authors, since both the name of the author and the integrity of the work, including its title, were safeguarded by it to varying degrees. But s. 25, and before it s. 508B of the Criminal Code, had never unambiguously expressed moral rights thinking, and this problem carried over to the new section. Like its predecessors, the proposed section appears only to have penalized certain activities. While authorial consent was again pivotal, the provision did not in terms give or recognize rights which were available for exercise by authors; the author was limited to acting as complainant in the prosecution for the statutory penalty. It is, therefore, questionable whether the provision would have satisfied what were to become the dictates of the 1928 Rome revision of the Berne Convention. It is also questionable whether it would have conformed with dominant notions of moral rights in Europe at the time.

(i) European Theory

By the time this Bill was introduced into the Canadian Parliament, Europe had been struggling for more than 50 years with the problem of how authorial protection was to be fitted into the current legal system. There were many conflicting theories, but two distinct lines of thought were, on the one hand, that authorial protection derived solely from state prohibition of certain activities and, on the other, that it derived from rights inhering in the individual, whether those rights were in property or personality.

Kohler, writing in 1880, likened this first, prohibitory, protection of authors to the protection of animals against cruelty:

The opposition to our doctrine of copyright [the Autorrecht] operates on two fronts. The catchcry is that the so-called “right of the author” is only the reflex of certain statutory offences, the automatic outcome for authors

76 Bill as amended in 1925, proposed s. 25(2).
77 Bill as amended in 1925, proposed s. 8125(3).
of certain public regulations and arrangements, somewhat as laws for the
prevention of cruelty to animals rebound to the animals' benefit even
though the laws arise not from the rights of the animals but from an attempt
to suppress a public nuisance and the moral crudity of humans. ..."78

For his part, he argued the existence of a natural right of authors, the
oyster as he called it, which was itself capable of enjoyment, which
dwelt within the protective shell of statute but which was not simply a
necessary consequence of prohibition.79 Similar ideas were propounded
by other jurists80 and accepted as the guiding principle of legislation
across Europe.81 Even in those countries within the English tradition,
where general law copyright was either not recognized or only recog-
nized to a limited extent, the statutes operated primarily by giving ex-
clusive rights, not simply by imposing penalties. This was as much the
case with the Canadian Copyright Act of 1921, modelled as it was on
the UK Act of 1911, as any other legislation. The Berne Convention,
too, endorsed this thinking, referring to the "enjoyment and exercise" of
the rights granted.82 This concept of active dominion over the use of the

78 Autorrecht, op. cit. note 32, at 4. (This and all further translations from the
German in this article are the author's own.) He was echoed by Gierke, op. cit.
note 32, at 756: "The opinion deriving from the time of the old statutes which
prohibited unauthorised reproduction is not yet quite silent, the opinion that
the Urheberrecht is not a right at all, but only a reflection of the prohibitions.
This Gierke described as a "declaration of bankruptcy by private law jurispru-
dence".

79 Autorrecht, op. cit. note 32, at 4.
80 In 1895 Gierke, writing about personality rights as a genus (which included
all authors' rights), stated: "Personality rights are private rights. ... The state
protects them extensively through the criminal law and in doing so affords
them in many ways its administrative protection. But fundamentally they are
also protected by way of suit, since they, as absolute private rights, afford a
person an entitlement as against the whole world to recognition and to the
cessation of infringing activities and, in case of breach, to restitution or com-
pensation, such entitlement being enforceable by way of civil action. Where
state protection fails, the right to self help comes into fullest operation": Op.
cit. note 32, at 705-706. Gierke was, of course, stating the position as he saw
it in Germany. Whether the civil courts would recognize particular rights of
authors would depend upon the legal system of the country in question.

81 As noted by Gierke, op. cit. note 32, at 753, "In recent times extensive legisla-
tive developments in all civilised countries have expanded the Urheberrecht.
In the process, the concept of a right which flows directly out of the creative
act has achieved increasing dominance. The right gave a dominion (Herrschaft)

82 See, e.g., art. 4 of the Berlin text of the Berne Convention: "La jouissance et
l'exercice de ces droits ne sont subordonnés à aucune formalité. ...". (emphasis
work extended to Article 6bis whereby a system was set up that would allow authors to “claim” (revendiquer), to “object” (s’opposer), and generally to “exercise” their “rights”. If the Union members did not already recognise such rights at common law or under legal doctrine, then they undertook to create such rights by statute for the benefit at least of authors from other member nations.

There could therefore have been quite strong theoretical objections to what was being suggested for Canada. On the surface, this protection through the criminal law in the absence of any private law recourse looked like an endorsement of a very old, privilege-based, way of thinking about authors’ entitlements; it was based on an exercise of state power rather than a recognition of authorial power.83 To be sure, other countries used the mechanism of summary offences in, or in relation to, their copyright law, and had done so for a long time.84 But this was in addition to a recognition of authors’ private law rights. In the new legislation of the 1920s, Romania, Italy and Poland had all provided expressly, and within the clause establishing the moral or personal rights, for the assertion of these rights at civil law.85 The fact that this Canadian criminal action would be initiated by the author or author’s representative (the 1924 version of the Bill provided the complainant with “some compensation for the trouble and risk involved in bringing a successful complaint”86) may have been seen by some as sufficient to bring the provision within Berne guidelines.87 Nevertheless, Ladas, writing in 1938, rejected the notion that criminal penalties alone could satisfy the requirements of the Convention:

... from the whole import of the Convention, it is to be concluded that a provision for a criminal penalty only would not be sufficient compliance

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83 Though paradoxically it was seen in Canada as modern, a toughening up of the stance towards infringement.
84 See e.g. the UK Copyright Act of 1911, s. 11 and the French Code Pénal of 1810, art. 428-429.
85 Romania, art. 3: “...ils sont en droit de s’adresser à la justice. ... Ils peuvent même demander des dommages intérêts.” (DA 1924, 25ff). Poland, art. 58: “L’auteur ... peut ... réclamer ... la cessation des actes préjudiciables et la réparation de leurs effets.” (DA 1926, 133ff). Italy, art. 16: “L’auteur a, en tout temps, le droit d’intenter une action...” (DA 1926 2ff).
86 Bill 28 of 1924, Explanatory Note 24 referring to proposed new s. 25. These criminal provisions were seen as functioning through private initiative.
87 Indeed in 1915, in the Helbronner case, when a private prosecution was mounted in Canada in reliance both on the Convention and the Criminal Code, the Police Court in Montreal did not disclaim jurisdiction.
with the Convention. Inasmuch as this purports to protect the material and
moral interests of the authors in their works, infringements of their rights
should, in each country, entail a liability for damages, and an order of the
court prohibiting further infringement.\textsuperscript{88}

At the very least, this type of protection, existing in isolation, would
have been a significant departure from the notions of moral rights as
they had developed in Europe.

(ii) \textit{Earlier Judicial Comment in Canada}

It seems unlikely, however, that the proposed departure expressed a
considered approach to the theoretical status of moral rights. The whole
movement in Canada towards protection through criminal sanctions was

\begin{footnotesize}
1, Macmillan, New York, 1938, 606. Vaver, on the other hand, posits the idea
of “a state’s power [under the Convention] to deal with a perceived inequity
by means other than granting an individual a legal cause of action against a
wrongdoer.” Vaver, D., “Copyright in Foreign Works: Canada’s International
delegates were prepared to see, for example, rights of action in equity as
complying with Convention demands, it seems unlikely that they would have
endorsed forms of protection which fell outside a system of private rights
altogether. Even though the Convention did not commit itself to any of the
many theoretical approaches to authors’ rights, there was no doubt that what
were at issue were private law rights: “la Commission n’a nullement voulu se
prononcer pour l’une ou pour l’autre des théories en cours relativement à la
nature juridique des droits qui appartiennent aux auteurs sur leurs œuvres
littéraires et artistiques.” [emphasis added] \textit{Berne Actes 1885}, 40. (This is why
the Convention was so welcome to figures such as Kohler, who saw in it a
confirmation that authorial protection was not just a privilege emanating from
the state: \textit{Urheberrecht}, op. cit. note 32, at 99) Furthermore, at the Brussels
conference and in relation to the proposal that the convention should provide
for the protection of cultural artefacts after the death of the author, the private
law nature of what was at issue was reiterated: “bien des esprits argumentent
ainsi: le principe de la survivance du droit moral après l’extinction du droit
pécuniaire ne se rattaché pas au droit privé et ne doit pas, par conséquent,
trouver place dans une convention qui . . . vise uniquement un droit privé (le
droit de propriété littéraire et artistique).” [emphasis added] \textit{Documents de la
conférence de Bruxelles 5-26 juin 1948}, Bureau de l’Union Internationale pour
la protection des œuvres littéraires et artistiques, Berne, 1951, (hereafter \textit{Brus-
sels Actes 1948}) 185-6. This view prevailed. On the other hand Ladas’ assertion
that provision for damages would be required is perhaps an overstatement.
There seems no reason in principle why the availability of injunctive relief
would not be sufficient to establish a right as existing in private law and
enforceable by the rightsholder.
\end{footnotesize}
a response to a loss of faith in the practicality of civil law actions.\textsuperscript{89} Indeed the jump straight into penal protection was perhaps evidence more that authors’ rights, including non-economic rights, were being taken for granted than that they were being neglected.

As early as 1911, in the Supreme Court of Canada, a degree of judicial recognition had been given to the notion of literary property as a source of rights existing in general law. Such a notion was capable of influencing the interpretation of contracts. In the case of \textit{Morang v. LeSueur},\textsuperscript{90} Sir Charles Fitzpatrick C.J.C. made the following observations in relation to a publishing contract:

But it will not be contended that the publisher . . . might publish the manuscript, having paid the author his price, with such emendations or additions as might perchance suit his political or religious views and give them to the world as those of one of the foremost publicists of our day. Nor could the author be denied by the publisher the right to make corrections, in dates or otherwise, if such corrections were found to be necessary for historical accuracy; nor could the manuscript be published in the name of another. After the author has parted with his pecuniary interest in the manuscript, he retains a species of personal or moral right in the product of his brain. Lyon Caen, note to Sirey, 1881.1.25.

What I have said is sufficient to shew that what is called literary property has a character and attributes of its own and that such a contract as we are now called upon to consider must be interpreted and the rights of the parties determined with regard to the special nature of the thing which is the subject of the contract.

Though the remarks were not echoed by the other two members of the Court, they show the strong influence in Canada of a European notion of authors’ rights.

The concept of literary property existing independently of legislation was also endorsed in 1922, in a case brought in Quebec under s. 508A of the \textit{Criminal Code}. It was said there by Cusson J. that ss. 508A and 508B

\textsuperscript{89} See the above discussion concerning the insertion of “authors’ rights” provisions in the \textit{Criminal Code} at note 52 and associated text. The framers of these legislative proposals were at this time promoting criminal sanctions for copyright infringements with exceptional enthusiasm. See the testimony of Mr. Blake Robertson: “I think when Mr. Chevrier’s Bill 2 is adopted ... there will be more penalty clauses in the legislation in Canada than exist in any other two countries combined.” \textit{Special Committee} 1925, 108.

\textsuperscript{90} \textit{Le Sueur v. Morang & Co.}, 45 S.C.R. 95, 1911 CarswellOnt 734 (S.C.C.). The case was on appeal from the Court of Appeal of Ontario.
confinement tous deux le principe de l’inviolabilité de la propriété intellectuelle...91

The judge evidently had no trouble here seeing the interest of the author in the preservation of the work’s integrity, its title and the authorial designation as being part of a general right to intellectual property in a work. The form of protection and its location in the Criminal Code does not appear to have been considered relevant. We have also seen that in Joubert v. Géracimo the court recognized an apparently natural right of authors to a level of respect and fair play in relation to the work’s correct designation.92

Now, and very significantly, there was clear evidence in the Bill itself that a concept of private, subjective, “moral” rights was in existence and close to receiving statutory recognition.

(b) Assignment of Property Rights and the “Moral Right of the Author”

The proposed s. 25D supports the view that Canada was moving rapidly towards a legislatively endorsed European type of moral rights recognition. This section93 addressed the situation where a person had been charged with an offence under the Act and had raised the defence that he was working from an already offending copy of the work. It also addressed the question of whether a previous assignment of the work could be raised as a defence. In doing so it introduced, in terms, the concept of a moral right:

Any person, corporation or association charged under this Act with having reproduced, performed or executed a work contrary to the provisions of this Act, shall not be allowed to set up as a means of defence that the work was so reproduced, performed or executed from copies of such work bearing an altered title or from copies failing to disclose the name of the author of the original work; and any assignment of a work shall not entitle the assignee to suppress or change the name of the author of the said work nor in any way whatsoever change the nature of the work, nor in any other way affect the moral right of the author therein.

(2) For the purpose of this section “moral right” means the author’s personal privilege of enjoying the prestige or influence which he may

92 See the comments of the court per Carroll J. above at note 66 and associated text.
93 Present in the Bill from 1925 onwards.
derive or which may accrue to him from his production, notwithstanding any assignment of his property rights. [emphasis added]

In clarifying the fact that assignment of the work (presumably the economic rights in the work) would not of itself permit a free use of the work to the detriment of the personal interests of the author, the provision foreshadowed the first words of Article 6bis. In mentioning the moral right of authors, however, the provision went further than the Berne Convention was able to go three years later.

But what was the “moral right” as mentioned here? Its definition in the bill is not notably similar to any of the formulations later to be offered at Berne Convention debates⁹⁴ (Canada offered no definition of its own in Rome) and does not appear to derive from any other piece of national legislation. Nevertheless the moral right as defined here was consistent with European thinking. It was stated to be a positive right to enjoy, a personal privilege — certainly not merely a need of protection. Further, it seems that any detriment arising from a disregard of it would have been measured by objective criteria. The privilege was that of enjoying the social accompaniments of success, the prestige or influence deriving from the work; it was not therefore the author’s subjective sense of violation which was primarily at issue here. (The wording of the provision seems to have owed much to Carroll J.’s reference to the “prestige de son nom” and “la vogue de ses oeuvres”,⁹⁵ though the linking of prestige and pecuniary benefit had been dropped). In this respect the provision was again largely in step with European notions at the time. It would not be strongly argued at Rome in 1928 that the protection offered should cover more than honour or reputation.⁹⁶ That argument would not be forcefully promoted until 20 years later in Brussels.⁹⁷

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⁹⁴ Indeed at the Berne Convention conferences there was no real attention given to defining the term and it was not used in the text of Article 6bis (though it was used in Article 11bis). The delegates concentrated on formulating particular prerogatives which would be guaranteed to the author.


⁹⁶ The notion of the right protecting the author’s personal bond with the work implied this, but it was not a contentious issue in relation to the drafting of 6bis.

⁹⁷ “La définition du droit moral donnée par l’article 6bis actuel est trop étroite, en ce sens qu’elle interdit uniquement les modifications de l’œuvre qui sont de nature à porter préjudice à l’honneur ou à la réputation de l’auteur. Bien des lois et décisions judiciaires, ainsi que la plupart des représentants de la doctrine, vont plus loin et considèrent que d’autres modifications encore peuvent être interdites. . . .” Brussels Actes 1948, 184.
Canada seemed to be on the brink here of a full statutory recognition of moral rights in the European mould, but the fact remained that the framers of the Bill were still holding back, probably for the best of reasons, from giving or recognizing rights which were enforceable through courts exercising civil jurisdiction. The protection of the state, prompted into operation by the author/complainant, must still have seemed both cheaper and more reliable in outcome than the vagaries of civil action, and a considerably better disincentive to offenders.

(c) The Work as National Property: the Title, the Altered Work and the Author’s Name

Alterations to the work and failure to attribute it correctly were likely to have consequences beyond the period of copyright protection. The question of what would happen to a work in the public domain was of considerable interest across a number of countries in this early period, and Canada was no exception. Various consequences of a lapsing of legal protection were considered. If the author or author’s successor were to lose the economic rights, did that mean that the work would simply become free for all to exploit as they wished? What was to happen to the author’s non-economic interests in the work, for example the attachment of the author’s name to it? Were they to cease with the cessation of the economic interests, or were they to persist for a longer time? If protection for a longer time was seen as desirable, how was it to be achieved? And was it only the author’s interests which were at issue here?

Writing in 1935, Michaëlidès-Nouaras noted that, where protection of the work was desired beyond the period of copyright, this could be achieved in two ways: either the droit moral of the author could be deemed perpetual or a new theoretical foundation of protection could be established, independent of the deceased author’s moral right. He

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98 A number of countries made special arrangements for the protection of cultural works during this decade, among them most notably Czechoslovakia and also Romania and Italy. See art. 16 of the Czech law of 1926 (DA 1927 29ff), art. 6 of the Romanian law (DA 1924 25ff) and art. 24 of the Italian law of 1925 (DA 1926 2ff). There was exceptionally strong support for this type of protection later, at the Brussels revision conference of the Berne Convention, notably from Belgium (which proposed a new paragraph 3 for Article 6bis to this effect), Denmark, Finland, Norway, Sweden, Poland, Austria, Hungary and Czechoslovakia. See Brussels Actes 1948, 190–194.
commented that, while the latter approach was the more logical, it was also the more difficult to achieve.\textsuperscript{99}

We have seen that the earlier Romanian and Italian legislation took the former path, providing for a continuation of the moral right after the death of the author and its exercise in the hands of various other parties. The Canadian Bills, on the other hand, revealed a dual focus which, while maintaining the notion of the author-work connection, allowed for the development of an alternative theory of protection. Thus the Bills ensured that the author would continue to be named in relation to the work, even after the work had entered the public domain. Any alteration to the work was to be advertised as such, and therefore not attributed to the author. But in addition to this the Bills established the concept of national or public property and the now dominant interests of the public in the work’s exploitation.\textsuperscript{100}

After the expiration of the term of copyright as aforesaid, the works on which copyright ceases to subsist shall be deemed public property, and any person shall thereafter be entitled to reproduce, execute or perform such works without any special authorization, subject however to the condition that the title of the work and the name of the author be accurately reproduced. Provided that, if any change, alteration or adaptation is made for the reproduction, the execution or performance of a work which has become public property, such change, alteration or adaptation, as well as the name of the original author, be indicated on the reproduction of the said work, and, in the case of an execution or performance of such work, that the name of the original author, with such change, alteration or adaptation, be indicated in the notices advertising such execution or performance of said work and in the programmes thereof.\textsuperscript{101}

This was again a penal provision, leading to a fine of not less than ten dollars and costs and, in default of payment, to imprisonment for a maximum of one month.

The reference to public property was reinforced in the Explanatory Note to the Bill which stated that “Public domain is a national property which is to be used, but not abused, and must be safeguarded as such.” This notion of the public domain being a form of property, and to be safeguarded in exclusionary ways, is unusual. The public domain is generally conceived of as that area beyond our normal conception of


\textsuperscript{100} This was present in the Bill as early as 1924 and remained in it throughout its history.

\textsuperscript{101} Bill as amended in 1925, proposed s. 10A.
property. The section might, however, not seem so surprising in the light of early legislative endorsement in France of the term “propriété publique” for works whose copyright protection had lapsed.\(^{102}\) In any case, the clause provided a potentially useful alternative to the rather strained notion of perpetual moral rights protection.

Whether this “national property” was presumed to exist already or was to be called into existence by the legislation, the provision was bringing the protection of the interests in question expressly under the property umbrella. This would have had a number of effects. For one thing it was a potent means of establishing or confirming a persuasive basis for the sanctions — persuasive because property rights had long been accepted as among the most sacrosanct of rights\(^ {103}\) (and perhaps doubly persuasive in countries where the concept of personality rights had relatively little purchase.) The concept of national property also broadened the base of interests protected beyond those of the individual to the community at large in a way that could be usefully harnessed by those interested in the preservation of the author’s work. Furthermore, the reference to property was capable of justifying the permanence of the protection being accorded, through the implied analogy of this property with tangible property. This permanence was then complemented procedurally by the availability of criminal sanctions exercisable by the state. The vexed question of who would exercise the “rights” after the death of the author was thereby disposed of.

5. SUBSEQUENT HISTORY AND THE GOVERNMENT BILL OF 1931

The Chevrier Bill, as amended by the special committee in 1925, continued throughout the decade to be introduced periodically to Parliament. When Chevrier, a Liberal, temporarily lost his seat of Ottawa in the 1925 general election, Mr. Leon Ladner, a Conservative who had been a member of the 1925 special committee,\(^ {104}\) took over the Bill’s pro-

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102 See Décret concernant les droits des propriétaires d’ouvrages posthumes of 22 March 1805. “Vu les lois sur les propriétés littéraires; considérant qu’elles déclarent propriétés publiques les ouvrages des auteurs morts depuis plus de dix ans.”

103 This had been commented on by Gierke in 1895: “... there is a national economy which regards property as so sacred that a right which is not property is also not considered sacred”: op. cit. note 32, at 756.

104 Leon Johnson Ladner, member for South Vancouver. (I am indebted to the office of Hon. Marjory LeBreton for historical details of this period.)
motion. In 1926, the Ladner Bill, a reprint of the Chevrier Bill, was introduced to Parliament but not proceeded with due to the priority now being given to government measures. In 1927, the same text was again presented to the House by Mr. Ladner and again was not proceeded with. During 1928 the Rome conference of the Berne Convention considered the issue of moral rights, which put pause to Canadian developments on this front. When, two years later, no domestic legislation had eventuated, Mr. Ladner introduced the legislation to the House for a final time.  

However, by this stage the Liberal government was close to introducing its own piece of legislation and the Ladner Bill was withdrawn in favour of the government Bill.

With the government Bill of 1930, Canada had produced a legislative proposal specifically in response to the 1928 revision conference of the Berne Convention. And the government had finally become involved in what had until then been an initiative of the Canadian Authors’ Association. The Bill was intended “to give effect to Article 6bis of the Berne Convention” but in its wording it owed far more to the legislative movement of the previous decade than to the Convention text itself.

This Bill was short and narrowly focused, consisting of only two clauses, and was mostly given over to the introduction of a moral right. Any concept of national property or protection of the work in the public domain had been jettisoned. The clause which would have effected protection of the moral right reads as follows:

(3) Any person who, during the life of the author, prints, publishes, or otherwise reproduces the whole or any part of a literary, musical, dramatic or artistic work, and makes or causes to be made any changes in, or suppression of the title or the name of the author, or distorts, mutilates, or modifies the work in a manner detrimental to the moral right of the author, or who publishes, or causes to be published, advertisements or programmes referring to the performance or execution of any such work

105 At the time of introducing the Bill in 1930, Mr. Ladner commented as follows: “From time to time the proposed amendments were deferred, and latterly the delay was due to the conference at Rome dealing with the Berne Convention. It was understood that the government would introduce legislation relative to the convention at Rome, and also dealing with the questions involved in the committee’s report. No such legislation has so far been introduced. As this Bill embodies the recommendations of the special committee and as there is practically nothing in the Bill that is controversial, with the exception of one clause, it is not anticipated that there will be any serious objection in the house by those who understand the proposed amendments.” HC Deb, 244.

106 Explanatory Notes 1.
without stating accurately therein the original title of such work and the name of the author thereof, shall be guilty of an offence, and liable on summary conviction, over and above all other recourses to a fine not exceeding fifty dollars and costs, and in default of payment of such fine and costs to imprisonment for a term not exceeding one month.

(4) For the purpose of this section “moral right” means the personal privilege the author possesses to benefit from the prestige or the influence he may enjoy from his work independently of his right of ownership or any assignment thereof.\footnote{107}

It was essentially a combination of the two main amendments proposed in the earlier bills, and appeared also to be indebted to the legislation of Quebec.\footnote{108} However, it differed in several respects from its federal predecessors: the notions of distortion, mutilation and modification had been imported from Article 6bis; the consent of the author to the impugned action was no longer a relevant consideration; and the moral right was said to be “possessed” by the author, suggesting its existence in natural law rather than merely by virtue of statute. Furthermore, liability to a fine or imprisonment upon summary conviction was stated to be “over and above all other recourses” — a wording that was to be found in the Quebec statute and that, while cryptic, suggests the possibility of civil action.\footnote{109}

The Liberal government Bill, however, was the short lived product of a party about to lose office. It was described by the Prime Minister\footnote{110} as “a cumbersome piece of legislation and . . . contentious in many respects”,\footnote{111} and was withdrawn the day before the prorogation and dissolution of the Parliament on 30 May 1930. The following year the new Conservative government introduced the dramatically different, substantially less Canadian and less enforceable, s. 12(7).\footnote{112}
6. HOW THE BILLS OF THE 1920s WERE SEEN IN CANADA

The history of these attempts to amend the Canadian legislation perhaps attests to what had been asserted by the Polish administration at the Rome Revision Conference — that international protection of moral rights was needed to spur national legislatures into action.\(^{113}\) Only after 1928 did the government of Canada become involved in the attempt to introduce moral rights. But the situation was perceived in a more positive light by those who had been instrumental in the promotion of the Bills.

In 1931, Mr. Chevrier, speaking of the 1926 Bill, claimed that in that year “for the first time in any legislature of the world the moral right of the author was recognized”.\(^{114}\) He continued in reference to the wording of the Bill:

There is not a vast difference between that definition [of the moral right] and the definition which was accepted in Rome; but the seed was not sown in vain; and I want to say on the floor of this house that it is to Canada’s credit that this moral right has been introduced into a measure of international legislation.\(^{115}\)

Mr. Chevrier was supported in these assertions by M. Louvigny de Montigny\(^{116}\) who was a witness before the Special Select Committee of the House of Commons on the 1931 Bill\(^{117}\) and who had previously been a witness at the 1925 committee hearings. He had been summoned to appear before the 1931 Committee to give advice as to the meaning of the Berne Convention. His words there were:

The safeguarding of moral right is the main feature of the revised Convention of Rome. To the praise of the Canadian Parliament, may I recall here that this enactment was first proposed by the House of Commons’ Special Committee on Copyright, in 1925, and was later adopted, in 1928, by some fifty nations at the Rome International Conference. ... The “moral right” came from this House in 1925, and was afterwards adopted.\(^{118}\)

\(^{113}\) “L’existence formelle d’une telle disposition pourrait devenir un point de départ et donner une impulsion nouvelle à des développements ultérieurs.” Rome Actes 1928, 116.

\(^{114}\) June 8, 1931, 2401.

\(^{115}\) Id.

\(^{116}\) See note 49 above.

\(^{117}\) 21-22 Geo. V, Appendix No. 1, Proceedings of the Select Special Committee of the House of Commons on Bill No 4: An Act to amend the Copyright Act, May 15, 1931 to June 2, 1931 (hereafter Special Committee 1931).

\(^{118}\) Special Committee 1931, 160-1.
The Romanians and Italians in particular, who introduced domestic moral rights legislation in 1923 and 1925 respectively, might have been rather surprised by this claim to precedence on behalf of Canada.

7. THE 1931 DEBATES

There seems little doubt that the prior presence of moral rights on the legislative agenda in Canada eased the passage of what was to be s. 12(7) through Parliament. Both the government and the opposition had by now produced bills on this subject and there seems to have been little dissent on the principle of introducing the rights.

Nevertheless the debates in 1931 indicated that a number of members of Parliament parted regretfully with the idea of protection through the creation of summary offences. Section 12(7) did not seem to them to offer an equal level of protection and indeed did not appear to fulfil the requirements of Article 6bis. There was no proper provision made in the Canadian legislation for “the means of redress for safeguarding these rights” as had been contemplated by Article 6bis(2) of Berne. Somewhat unfavourable comparison was made with Bill No. 37 of the previous year with its maximum fine of $50 plus costs (plus the possibility of imprisonment which was, however, not mentioned). But the government was unrepentant. This provision was needed so that the 1928 revision of the Berne Convention could be ratified. It, therefore, had to be sufficiently innocuous to make a rapid transit through Parlia-

119 See above notes 22 and 23.
120 The main opposition spokesman, Mr. Rinfret, while he had his reservations about the bill, commented: “I think the bill is most excellent in that it meets all conditions and comes strictly within the convention as to its principles whilst it makes an effort to adjust conditions created in Canada by adherence to the Rome convention. . . . although I have sat on a number of committees on copyright, I have never before been on one where there has been such an excellent spirit of cooperation on the part of members of the three parties in the house. . . . So far as I am concerned I do not hesitate to commend the bill to my hon. Friends on this side of the house.” HC Deb June 8 1931, 2395.
121 Mr. Chevrier: “Moral right is a new creation, and just as when we create statutory penal crimes we always by proper legislation, enacted at the same time, create the adequate remedy, we should do so in this case.” HC Deb June 8, 1931, 2401.
122 Having mentioned Bill 37, Mr. Rinfret went on: “. . . no effort has been made in the present bill to change the penal conditions of the Copyright Act . . . the act would probably bear a certain degree of amendment in that connection. . . . It would be an appropriate task for a future session to deal with the penal conditions of the Copyright Act.” HC Deb, June 8, 1931, 2401.
The government was not interested in producing a law that was likely to cause discomfort to a large number of people, and so the provision was promoted as “educative” and left largely incapable of exercise either by authors or by the state.\textsuperscript{123}

Another suggestion, which picked up on the earlier idea of abuse of national property, was put by M. Louvigny de Montigny to the House Committee in 1931. Like the Czech government a few years earlier and many others in coming years,\textsuperscript{124} he was concerned at the mistreatment of cultural icons and saw the introduction of moral rights as an opportunity to link the cause of authors with the cause of the community. He now proposed that the moral right should be extended to the public domain, in order to make respected, without exacting a cent from the public or from the users, the works of the Old Masters, which are today mutilated and distorted to a scandalous extent.\textsuperscript{125}

He was making two suggestions: that the droit moral be perpetual (which would have brought Canada into line with a number of the European nations), and that it be retrospective. The proposal was greeted with scepticism on the basis of its retrospectivity, members of the Committee not feeling that the legislature had the power to enact such a clause. Any question of prospective perpetual protection was not addressed, and there again the matter was left.

8. CONCLUSION

Upon the passing of s. 12(7) a significant period of development was over. Canada had fixed its moral rights provision in the mould of Article 6bis and in doing so had, in many respects, come into line with the Berne Union membership.\textsuperscript{126} Although it was stated at the 1931 Senate hearings that an opportunity to reconsider s. 12(7) would come during the following session,\textsuperscript{127} it was actually more than 50 years before moral rights were revisited in any sustained way. By this time the efforts of the 1920s seemed almost to have been forgotten. Nevertheless they are important as a stage along the way to the current moral rights regime. In looking

\textsuperscript{123} HC Deb June 8, 1931, 2402 per Mr. Cahan.
\textsuperscript{124} See note 98.
\textsuperscript{125} Special Committee 1931, 161.
\textsuperscript{126} Its other “moral rights” provision, the current s. 43(2), remained in the legislation unchanged.
\textsuperscript{127} Senate Deb, June 11, 1931, 222 per Messrs. Beique and Willoughby.
back now on the development of authors' rights in Canada, it is worth remembering that this country was one of the first to give serious consideration to legislating for the moral rights of authors and that the provisions it proposed were as independently conceived as any of the other international provisions of the time. These provisions are an illuminating example of what, at one point, "moral rights" could have been.