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NON-OFFICIAL TRANSLATION

COURT OF QUEBEC

« Small Claims Division »

CANADA
PROVINCE OF QUEBEC
DISTRICT OF QUEBEC
QUEBEC CITY
« Civil court »

N^{os} : 200-32-034788-041
200-32-034787-043

DATE : March 31st 2009

HONORABLE CHARLES G. GRENIER, J.C.Q, PRESIDING (JG1934)

A

[...], city A (Quebec) [...]

Plaintiff

vs.

SUN MEDIA CORPORATION

612 Saint-Jacques street, 17th floor, Montreal (Quebec) H3C 4M8,

Defense

et

B

[...], city A (Québec) [...]

Plaintiff

vs.

SUN MEDIA CORPORATION

612 Saint-Jacques street, 17th floor, Montreal (Québec) H3C 4M8,

Defense

JUDGEMENT

INTRODUCTION

[1] Considering the two separate entreaties, the plaintiffs, Mr A and Mrs B, each claim from the defence, Sun Media Corporation, editors of the Journal de Montreal and the Journal de Quebec, punitive damages – in the amount of \$5,000 in the case of Mr A and of \$4,000 in the case of Mrs B – as well as punitive damages – in the amount of \$2,000 in the case of MR A and of \$3,000 in the case of Mrs B -, following the breach of their rights to private life, which according to the plaintiffs, was a result of the non-consensual publication, October 12th 2003, in the periodicals in question, of their photos accompanied by their names and descriptive texts pertaining to them.

[2] The plaintiffs are also criticising the methods – clandestine and thus faulty according to them – used by Sun Media Corporation to achieve their goals, which were to publish a series of spectacular reports which has culminated with the previously mentioned article October 12th 2003, which consisted of a collage entitled the « family of the guru, containing among other things photographs, theirs, their name and descriptive texts pertaining to them. This series of reports has been followed by the publication of a book entitled « Raël : Le journal d'une infiltrée » (Rael : The diary of an infiltrated) relating how the reports were done.

[3] The investigative methods described consist of a clandestine infiltration, using false identities and references, the Raelian Movement, by a journalist and a photograph from the Journal de Montreal in order to share in the life of this community during nine months and thus glean some information, some of which were gained while under contractual obligation interdicting them from taking photographs and the diffusion of documentation.

[4] The plaintiffs maintain that it is both due to extra contractual and contractual faults towards them that must activate Sun Media Corporation's civil responsibility toward them and their obligation to repair the prejudice caused by this breach of their right to the respect of their private life, specifically due to the non-authorized use of their name, image and diffusion of personal information regarding them.

[5] Sun Media Corporation has produced in each of these two entreaties a contestation in which it makes the following points :

- « 1. The defence published photos for the legitimately inform the public;
2. The consent of the plaintiff was not required because it was in the interest of the public that the photos were published;
3. The defence's published photos were not taken in a private location contrary to what suggests the plaintiff and the defence did not invade the private life of the plaintiff;

4. The plaintiff has suffered no damages;
5. The defense was within its rights to publish the published photographs;
6. The action of the plaintiff is not well founded in fact and in law.
»

COMMON ENQUIRY AND AUDIT

[6] With the consent of the parties, the two entreaties were subject to a common enquiry and audit.

ADMISSIONS

[7] Sun Media Corporation admits at the beginning of the hearing and during the hearing the following facts :

- The plaintiff's obligations towards articles 1, 2 and 3 of the *Loi sur la presse*, L.R.Q. c. P-19, have been respected;
- The Raelian Movement has been infiltrated by a journalist and a photograph from the Journal de Montreal, both in the employ of Sun Media Corporation, Mrs Brigitte McCann, under the name of Brigitte Poirier, and Mrs Chantal Poirier, under the borrowed name Chantal Fortin, through the use of clandestine methods, where false identities were involved and cellular phones provided by Sun Media Corporation, postal boxes as well as references provided by Sun Media Corporation for employers that were aware of the project;
- Mrs McCann and Mrs Poirier did not respect the obligations they were contracted to follow regarding the diffusion of information and the taking of photographs when they signed the inscription form for the American seminars organized by the [corporation A], an organisation affiliated with the Raelian Movement.
- All acts taken by Sun Media Corporation and its employees were taken with full knowledge of their consequence;
- Sun Media Corporation recognizes that they may have caused prejudice by publishing the reports, but according to them, even if there was prejudice, the right for the public to receive the information was more important.

QUESTIONS ON THE DISPUTE

[8] The case opposing the two parties raise the following questions :

- Did Sun media Corporation commit an extra contractual fault towards the plaintiffs by infiltrating the Raelian Movement of which they are members, through the use of its employees, under false representation?
- Did the infiltrated employees commit a fault, contractual or not, towards [corporation A] and extra contractual towards the plaintiffs, by deliberately not respecting their contractual obligation relative to the act of taking photographs and of diffusing information gathered during the American seminars?
- Even if there were extra contractual and contractual faults committed, were they justified with regard to the right of the public for information and the press' freedom of expression?
- Did the plaintiffs, [corporation A] or the Raelian Movement have copyright on the photographs diffused in the incriminating reports – published October 12th 2003 -, taken directly from the information sheet distributed within the American seminars – the awakening seminar and the training seminar – held on the grounds of [corporation A] from July 12th to July 26th 2003?
- Did Sun Media Corporation infringe on the plaintiff's right to respect and private life by diffusing in the Journal de Montreal and the Journal du Quebec, October 12th 2003, photographs accompanied with their names and a descriptive text concerning them?
- Did the right of the public to receive the information and the right to free expression of the press justify this breach of the right to respect of the plaintiff's private lives?
- If the civil responsibility of the Sun Media Corporation is activated with regard to the plaintiffs, were they subject to prejudice with regard to the diffusion of the report in question?
- If there was prejudice, what is the amount of the damages, and punitive damages that should be attributed to each plaintiff?

THE FACTS

[9] From the documents and testimonies submitted by the parties, taking into account the admissions enumerated above, the Tribunal retains the following facts.

[10] Mr A and Mrs B are both members of the Raelian Movement. Mr A is an entrepreneur in construction, directing [Company A] which has its headquarters in city B. Mrs B is a member of the Order of Psychologists of Quebec since 1996 and practices in a private office with clients suffering from depression and who have previously made suicide attempts.

[11] Mr A is a level « 4 » on the increasing scale of responsibility going from 1 to 6 within the Raelian Movement, which gives him the status of guide. He is responsible for the organization in Eastern Quebec. He is also one of the directors of corporation A who possesses the grounds where several activities of the Raelian Movement occur, including the American seminars.

[12] Mrs B is an « angel » of the leader of the Raelian Movement, Rael. She organizes on an annual basis the awakening seminars and training seminars of the Raelian Movement called « American seminars » which occur on the grounds of [corporation A] in the Eastern Township region.

[13] The Raelian Movement is now significantly well known in Quebec due to the media coverage it has had for the last 30 years, premises of the Movement which in themselves attract attention, and has created several actions susceptible to attract controversy during its time by the leaders or members of the Movement and finally, due to the public image of the leader of the Raelian Movement, Mr Claude Vorilhon, better known under the name Rael.

[14] Remember simply that Rael, born in France, believes he is the result of the union between an Eloha, a member of an extra-terrestrial family, the Elohim, and a woman from Earth, and that after having received the good message from these which manifested themselves to him early in his adult life, he gave himself the mission to prepare the Elohim's return on Earth and to create favourable conditions for humans of the Earth for them to give us eternal life.

[15] The Raelian Movement has members all over the planet and its Quebec branch is active and dynamic, especially since the Raelian Movement here has permanent installations, and that Rael visits often since he speaks French.

[16] For more information on the basics of the Raelian Movement and Rael's history, the undersigned sends readers to exposes that seem quite complete on the history and organisation of the Raelian Movement from some judges of the Court of Quebec and from the Superior Court where judgements have been rendered, contained in *Chabot c. Corporation Sun Media*¹, *Église raëlienne c. Grattor*² et *Chabot c. Corporation Sun Media*³.

[17] Sun Media Corporation is a member of the Quebecor Group, a company also very well known. Sun Media Corporation edits both the Journal de Montreal

¹ J.E. 2008-140 (C.Q.).

² 2006 QCCS 3560, J.E. 2006-1519 (C.S.).

³ J.E. 2006-1139 (appel rejeté, 2006 QCCA 1385).

and the Journal de Quebec, who are read, combining their respective readership, approximately 1 300 000 individuals per day.

[18] Representing it at the hearing was the chief editor general of the Journal de Montreal, Mr Serge Labrosse who, at the time these case events unfolded, was the assistant to the director of information of the paper.

[19] Mrs Poirier and McCann were invited at the hearing by subpoena transmitted to Sun Media Corporation. Mrs Poirier accompanied Mr Labrosse but did not testify.

[20] In a letter dated November 17th 2008, transmitted to the clerk of the small claims court Division of the Court of Quebec, Mrs Julie Goulet, the director of judicial affairs for Sun Media Corporation, Master Bernard Pageau, informed her that « Brigitte McCann is no longer an employee of Sun Media Corporation and it is impossible for us to reach her. »

[21] Mr Labrosse testified that during the Holiday season of 2002-2003, when the Clonaid affair was full on – a person close to Rael, Mrs Brigitte Boisselier who was directing Clonaid, a company specialized in genetic research founded by her, shockingly announced to the world that in her laboratory she was able to clone babies -, the decision was taken at the Journal de Montreal, in front of what the managers thought was a hoax from the Raelian Movement, to go to the bottom of the story in order to inform the public about the truth regarding the Movement.

[22] In the eyes of the newsroom editors at the Journal, the Clonaid affair was the last straw relative to the saga of the Raelian Movement after some years, characterized by a zigzagging scientist taking the journalistic world by surprise, a circus orchestrated by the latter with much sensationalism, a good dose of manipulation and a cult of secrets, all of which under the guise of great openness for the Medias.

[23] To illustrate this climate of reciprocal defiance and constant manipulation of the Medias by the Raelian Movement, Sun Media Corporation deposited to the Court a press review – approximately a hundred articles from here and there – pertaining to the Raelian Movement and its most spectacular actions from 1999 to 2003 by certain visible members or by Rael himself.

[24] Notable among these articles : advertisement boards from the Raelian Movement placed near the Jacques-Cartier bridge in Montreal mentioning the return of extra-terrestrials on Earth with the mention « Are we ready? », an affirmation from a public relations officer from the Movement asking for the peace between Israel and the Arab countries was a gift from the extra-terrestrials made to Israel, attacks against the Order of Psychologist of Quebec, public invitations by Rael to give his life for the Elohim, the distribution of documentation and condoms at the entrance of teaching establishments, spectacular declarations by

Brigitte Boisselier on cloning babies and the capacity to regrow the arms of a young victim of the war in Irak, Raelians going naked for GMOs.

[25] According to Mr Labrosse, in the name of public right to information, they had to go behind the scenes and take extraordinary means to get further information and thus infiltrate the Raelian Movement through the use of journalists, Mrs Brigitte McCann and a photograph, Mrs Chantal Poirier, both working at the Journal de Montreal, which is what was done with their consent.

[26] Mr A and Mrs B had Mrs C testify, a person who acted as press attaché and public relations officer for the Raelian Movement from 1992 to 2006.

[27] Mrs C testified that as press attaché and public relations officer for the Movement and as is common practice in most organisations that deal with the Medias, all requests from the Medias needed to go through her. She affirms that the Movement is very preoccupied with the protection of the private life of its members, especially when it comes to the taking of video and photographs.

[28] According to her, numerous Medias – many coming from other countries – regularly attend the American seminars and ask for this in the proper manner. Once accepted, it is clear to them that there are rules to follow concerning the private life of the participants; they are clearly warned to be careful.

[29] The plaintiffs have presented a copy of the forms Medias need to fill out from the Raelian Movement, forms that need to be signed by all media representatives attending any event organised by the Raelian Movement. The following is the text in question (P-6):

RAELIAN MOVEMENT

MEDIA ACCREDITATION

Name of the event :

.....

Date :

Name of the media :

.....

Name of the journalists :

.....

Address :

.....

.....

Telephone No :

E-mail :

Number of people present :

Equipment list : (camera, tripod, lighting, etc...) enumerate

.....
.....

By signing this document, the department of public relations of the Raelian Movement grants the journalist mentioned above to assist the event

This privilege is granted only for this current event. The Raelian Movement reserves the right to retract all manner of accreditation if a journalist or any member of its team does not respect the following conditions :

- It is forbidden to take photographs or to record on film any religious ceremony or meditations;
- It is forbidden to record speeches, presentations, without authorization;
- It is forbidden to take photographs or to film a person without his written authorization (ex : do not walk around the room to take images without getting special authorization);
- It is agreed that the technical equipment and other materials brought by the journalists will be checked by the security team of the Raelian Movement at your arrival;
- It is agreed that in the presence of His Holiness Rael or a speaker, you need to have had scheduled the meeting beforehand with the press service before your arrival;
- Only journalists who have signed this accreditation can be present at the event.

Please present this signed accreditation and have your press card with you upon arrival.

Signature of the producer or editor

[30] Mrs C mentioned that the information sheet distributed on location during the American seminars containing information on the organisers and animators of the seminars and schedule of activities was not meant to be given to the Medias and as such, she was not responsible for this document. We will get back to this information sheet farther down.

[31] She declared having received no requests from the Journal de Montreal to gain access to the American seminars.

[32] She finally mentions that she was not associated with Clonaid and that Clonaid is an organisation that functions outside of the Raelian Movement and whose press attaché in 2003, Mrs Nadine Gary, was based in Las Vegas. Mrs C affirms that she knows nothing of Clonaid's activities.

[33] The plaintiffs also had Mr Alain Bouchard testify, a professor at the Ste-Foy College, also teaching at the Laval University and specialist in religions and spiritual movements, such as the Raelian Movement. Mr Bouchard was asked by Sun Media Corporation to contribute to the publication of the articles that are at the heart of this dispute.

[34] Mr Bouchard submitted to the Court a short written report concerning the pertinence of using infiltration to gather information contained in the Raelian Movement case, diffused by the Journal de Montreal and the Journal de Quebec. He also submitted two articles he published on the Raelian Movement⁴.

[35] According to him, the infiltration of the Raelian Movement by the envoys of Sun Media Corporation was not necessary, because the essence of the information gathered existed already through other sources. Thus, according to him, the contents of the reports were not surprising for whoever nominally follows the activities of the Raelian Movement.

[36] He considers even that, as a general rule, the Raelian Movement is relatively open to everyone and reiterates his professional opinion that the investigative method used by Sun Media Corporation, based on the use of clandestine methods was not susceptible to generate new information.

[37] Let's get back to Mrs McCann and Poirier.

[38] These women, carrying false identities and addresses, with cellular phone numbers and e-mails reserved strictly for their mission and armed with arranged employer references, all part of the depositions made by Sun Media Corporation, have participated during nine months at the various activities of the Raelian Movement, including an expedition to New York and the awakening seminars and guide seminars held in Maricourt from July 12th to July 26th 2003, and this, until the point where Mrs Poirier was recognized by a member of the Movement when she was working at the Journal de Montreal at the Bell Center, which caused the end of the infiltration and accelerated the publishing of the reports.

⁴ Alain BOUCHARD, « Les médias carburent au scandale, comme les raëliens carburent au ... La secte, le sexe et la rationalité : du divertissement à l'exclusion sociale », in Jean DUHAIME and Guy-Robert ST-ARNAUD, *La peur des sectes*, Montréal, Éditions Fides, 2001; Alain BOUCHARD, « Le mouvement raëlien », in *Nouvel âge ... nouvelles croyances : répertoire de 25 nouveaux groupes spirituels-religieux / sous la direction du Centre d'information sur les nouvelles religions* », Montréal, Éditions Paulines, 1989.

[Corporation A]
Registration forms for the American seminars
From July 12th to July 26th 57 A.H. (2003)

Important information you must read before reading this form

Awakening seminars from July 12th to July 18th 57 A.H. (2003)

To become active members of the Raelian Church (in Canada), the annual donation of 3% (minimum 100 \$) of net revenue after income tax is required. The first payment of 100 \$ must be paid before June 15th 57 A.H. (2003). There is possibility of payment by credit VISA card. Furthermore, an adhesion form or renewal form must be filled out and signed.

Guide seminar from July 20th to July 26th 57 A.H. (2003)

The guide seminar is directed towards members of the International Raelian Religion and to those who wish to become members. To become members of the structure of the International Raelian Religion for year 58 A.H., the donation of 7 % (minimum 200 \$) of net revenue after income taxes is required. A first deposit of 200 \$ must be paid before June 15th 57 A.H. (2003).

For more information, contact Suzanne Péloquin at (450) 785-2736 or stagesameriques@rael.org.

For more information concerning the registration to the seminars

Canadian Participants, contact Serge Trépanier at (418) 877-2516 or stagesameriques@rael.org.
Participants from outside Canada, contact Gabriel Bluteau at +1 (514) 723-5451 or stagesameriques@rael.org.

ENGAGEMENT IMPORTANT

I, undersigned Brigitte Doucet, wish to live in the Raelian atmosphere on the grounds of the [corporation A] during the two weeks of the seminars.

On the grounds [of corporation A], I promise as a Raelian, sympathiser or citizen to :

- ✓ Not to possess or use drugs, narcotics, alcohol, tobacco, or coffee;
- ✓ Not to have any sexual contact with or in the presence of minors (less than 18 years old);
- ✓ Not use cameras, video cameras, or recording devices during classes or seminar workshops;
- ✓ Respect provincial and federal laws.

If I notice anyone who behaves in a manner that doesn't respect any of these restrictions, I will notify the people responsible for the seminars so that they may either exclude from the grounds the offenders or, if necessary, include the police in the matter.

As a participant, I give [corporation A], under all its names and to organizations and persons that may be mandated to do it, permission to register me on computer lists including a photo of myself.

20-05-2003

Date

—(S) Brigitte Doucet

Signature

Signature of partner if needed

[40] Mrs Poirier did signed a similar document under her own alias, Chantal Fortin.

[41] A DVD disk was also filed with the Court case where one can see and hear Mrs. B recall, on July 12, 2003, the rules applying to the participants of the seminar in matters of confidentiality in particular as to taking photographs (P-5).

[42] A flyer with the photographs of the organizers and moderators of the seminar, their names and their functions as well as those of the « resource contacts » for each region, the whole with by a plan of the site and the schedule of a typical day for the participants was distributed to the participants on site with a circulation of about 800 copies (P-25). Only one English version of the flier was filed with the Court.

[43] A photograph of Mrs. B appeared at the top of the flier in the center in a size slightly larger than that of the other photographs with her name below and the mention « coordinator of the American seminar ».

[44] A photograph of Mr. A appeared on the bottom of the flier on the left with those of six other people under the heading « resource contacts per region » with his name and the mention « Eastern Quebec ».

[45] The adventure lived for nine months by Mrs. McCann and Mrs. Poirier, in particular their participation to the American seminar, allowed the publication in the *Journal de Montréal* and the *Journal de Quebec*, from October 6 to 13, 2003, of a series of articles with photographs of various members of the Raelian Movement taken mainly during these seminars, all with catchy titles, describing the organization and the lifestyle of the members of the Raelian Movement as seen from the inside:

THE TRUTH ON RAËL (Front page, October 6, 2003)

- A reporter in the universe of the guru during nine months read it tomorrow

NINE MONTHS UNDERCOVER WITH RAËL (front page, October 7, 2003)

- The secret world of Raël (pages 2 and 3)
- Nine months of investigation into a guru who skids (pages 2 and 3)
- The chief shows signs of paranoia (pages 2 and 3)
- Sex objects ready to die (pages 4 and 5)
- The opinion of experts (pages 4 and 5)
- Raël says he is the victim of many plots (pages 4 and 5)
- The testing period... (Pages 4 and 5)

RAËL MISLED PEOPLE! (Front page, October 8, 2003)

- The secret world of Raël (pages 2 and 3)
- No trace of cloning (pages 2 and 3)
- Next fraud: stem cells (pages 4 and 5)
- Boisselier wanted to grow back the arms of the young Ali Abas (pages 4 and 5)
- A doctor from Montreal collaborator of Clonaid (pages 4 and 5)
- The manipulation of stem cells soon a crime? (Pages 4 and 5)

WALL-TO-WALL SEX WITH THE RAE LIANS (Front page, October 9, 2003)

- The secret world of Raël (pages 4 and 5)
- Sex in abundance (pages 4 and 5)
- Undress yourself ... (pages 4 and 5)
- The opinion of the experts (pages 4 and 5)

RAËL EMPTIES THE POCKETS OF HIS DISCIPLES (Front page, October 10, 2003)

- The secret world of Raël (pages 4 and 5)
- \$9,200 for photographs of his wife bare breasted (pages 4 and 5)
- The guru uses the seminar to empty the pockets of his followers (pages 4 and 5)
- « When one is rich that's when it counts » (Raël, pages 4 and 5)
- Missionary in New York... (Pages 4 and 5)
- In the Big Apple (pages 4 and 5)
- The Raelian awakening, it is not cheap! (Pages 6 and 7)
- The guru lives like a millionaire (pages 6 and 7)
- And not a penny of tax to be paid (pages 6 and 7)
- The Raelian Church reacts (pages 6 and 7)

OUR JOURNALIST, BAPTIZED BY RAËL (Front page, October 11t, 2003)

- The secret world of Raël (pages 4 and 5)
- Masters of the indoctrination... (Pages 4 and 5)
- That's it, I'm Raelian... (Pages 4 and 5)
- Raelians say they are more intelligent than the remainder of the population! (Pages 4 and 5)
- To disavow one family is not abnormal (pages 4 and 5)
- The opinion of the experts (pages 4 and 5)

MINORS AT THE RAE LIAN CAMP (Front page, October 12th, 2003)

- The secret world of Raël (pages 4 and 5)
- Portrait of the guru's « family » (pages 4 and 5)

- Raelian medal around his neck, D still teaches psychology in *Cégep A* (pages 4 and 5)
- The secret world of Raël (page 6)
- Contributions in freefall (page 6)
- Welcome to the minors! (Page 6)

THE SECRET WORLD OF RAËL (October 13, 2003)

- 9 months of assiduous work

[46] The portrait of the guru's « family », on pages 4 and 5 of the October 12, 2003 issue consisted in a montage of nineteen photographs of influential members of the Raelian Movement with, beside each photograph, a title describing the person and a catchy description of the latter. The montage linked with arrows to a photograph of a community meal of the members of the movement taken during the American seminar, where most of the members being the subject of the nineteen columns, were present around the table.

[47] Mr. A and Mrs. B did not appear however on the photograph of the meal in question.

[48] The titles accompanying the photographs were the following (P-14):

1. THE GURU
2. THE GUARDIAN OF KNOWLEDGE
3. THE MASTER OF ENDOCTRINATION
4. THE ORGANIZER
- 5.6. CLAN X
7. THE DIPLOMAT
8. THE MISSIONARY
9. THE ACCOUNTANT
10. THE ARTIST
11. THE SALESMAN
12. THE ACE OF WELLBEING
13. THE NERD
14. THE FORMER MP
15. THE AFRICAN
16. THE WIFE
17. THE BODYGUARD
18. THE MODERATOR
19. THE DRUID
20. THE BEAUTIFUL ONE

[49] The column concerning Mrs. B was the one with the title « the organizer » (number 4). The photograph used was the one appearing on the American seminar flier. The descriptive text accompanying the photograph and the title is the following:

THE ORGANIZER

Member in due form of the psychologists of Quebec, B, organized the two weeks annual Raelian seminar, the event of the year.

The tall thin blonde with tight clothing works at a private medical clinic A, in the region of city B.

Last August, she was invited as a psychologist on the TV show « *Sexe et Confiance* » at TQS. She gave an interview on « reconciliation sexuality », without revealing her Raelian affiliation.

[50] Mr. A, was listed under the column carrying numbers 5 and 6 with the title « CLAN X ». His photography, which was also taken from the American seminar flier, appears in the company of his two brothers, D and E. The descriptive text referring to the three brothers and also to their sister, C, is the following:

CLAN X

Three brothers and a sister. The X form a small dynasty managing the movement. Guide in Montreal, E belonged to the list fellow lecturer with Performa, an improvement and training program intended for the professors of the collegial level.

His course, entitled « *the emotional intelligence applied to your teaching strategies* », is sanctioned by the University of Sherbrooke. He tells of a school headmaster of La Pocatière who tore his contract when discovering he was Raelian, E preferred to keep silent. « *If I went to the court of the Rights of the person, you can be sure that I would never again have some contracts* », declared the guide during a « seminar » in April.

Guide of Eastern Quebec, A, is president of [corporation A], a campsite of 179 sites, site of UFOland and the annual Raelian seminar.

Their sister, C, is the official spokesperson of Claude Vorilhon.

[51] As mentioned in the introduction, the series of articles published in the *Journal de Montréal* and the *Journal de Québec* was followed by the publication of a book by Stanké publisher, Québecor Média, entitled « *Raël: Le journal d'une infiltrée* »⁵, book written by Mrs. McCann, with a foreword of the well-known journalist, Mr. Michel Auger, and illustrated by the photographs of Mrs. Chantal Poirier.

[52] The book contains the following introduction text, which is, to some extent, closing the loop on the whole operation carried out by Sun Media Corporation:

Shortly after the announcement of the birth of the first cloned baby, on December 27, 2002, the *Journal de Montréal* entrusts one of its journalists the mission of infiltrating the Raelian Movement, one of the most discussed religious groups of the moment. Thus Brigitte McCann is sent without warning in an exemplary investigation, which makes her discover the unseen side of the movement of *Claude Vorilhon*, alias Raël. Slowly but surely, from appointments to meetings, from trip to the seminar, she becomes acquainted with Raelians, guides,

⁵ Brigitte MCCANN, *Raël: Le journal d'une infiltrée*, Montréal, Éditions Internationales Alain Stanké, 2004.

outstanding figures of the organization – up to being baptized by the guru himself. She will even be among the few candidates retained by Brigitte Boisselier for the next media move projected by Clonaid.

[53] In her book, Mrs. McCann relates, her arrival on the case in the following way⁶:

It was not even my idea

Yesterday, it was my last day off. I still have the head full with memories of the holidays of Christmas. At my office, in the newsroom half empty, I check my emails quietly. Especially the automatic ones, such as the headlines of the New York Times. No scoops. Just routine. Wait, our national Raël starts a clone nursery. What would he not do to ...

All of a sudden, my boss, Dany Doucet, shouts my name without raising the nose of his computer.

At once, I join him in his glass office, located in front of mine. After a small pause, he turns to me and asks me the question:

- Would you like to become Raelian?

Silence.

My eyes are wide open.

His glance riveted on mine, my boss waits. I must decide, and quickly. He does not like journalists who lack enthusiasm. Especially when he offers them the reportage of their life on a silver plate. After four seconds, I feel that time expires. Following my instinct, I answer:

- Well... ye... yes.
[...]

I have only one reserve: no way to rush that in three weeks.

- How long do I have?

- The time you want.

- Months?

- Yes.

- Good answers.

- O.K., I will do it.

⁶ *Id.*, p. 19, 20, 21.

I leave his office.

That's all. No other questions. Your Honor. A quick decision, as is often taken, without fuss, in the newsroom of the *Journal de Montréal*.

But, this time, I really didn't know what I was embarking in.

When I am set on a new investigation, I always feel the same overwhelming elation. I have the impression that everything is possible.

I had a similar feeling these last months while starting my reportage on abandoned school yards, morbid obesity, defective breathalyser tests, an old man misled by his tutor. However, in four years of work, I never did some infiltration journalism. In the press, in Quebec, few ventured there. This technique of investigation does not appear on the university program of journalism studies. How to go about it? Where to start?

Oddly, I unearth the basic principles of infiltration in one of my favourite films: *Reservoir Dogs*, an American movie classic, of Quentin Tarantino. A police double agent receives these invaluable advices before infiltrating a gangsters group:

To do this job, you must be a marvellous actor. You must be natural, natural to the bone. [...] You memorize what is important, and the remainder, you make it yours, O.K.? The things you must remember are the details. It's the details that tell your history. What you must do is to take all the details and appropriate them. And while you do that, it is necessary for you to remember that this history, it's yours.

The police officer dies at the end, well.

I thus need a fictitious identity. A name, a job, an address, a past that I will know on the tip of my fingers. I decide to protect my true identity, but without distancing myself from it to avoid some errors.

[...]

[54] October 13, 2003, before the publication of the book, a last article had been published in the *Journal de Montréal* and the *Journal de Québec*, summarizing the investigation approach of Sun Media Corporation. The undersigned considers that it is interesting to reproduce the complete article because it describes very well the state of mind, which motivated the leaders of the defendant and its journalists:

THE SECRET WORLD OF RAËL

Monday, October 13, 2003 - *Journal de Montréal*.

The announcement of the supposed cloned babies' birth all over the news headlines throughout the world, on December 28.

However, in front of Clonaid lack of evidence, the *Journal de Montréal* decided to put the news on page 9, far behind the strike at the Horn foundry in Rouyn-Noranda. And no reference on the front page, contrary to other daily newspapers from Montreal.

But an idea emerges: let us check ourselves this clones story.

A few days later, the *Journal* launched an incognito investigation aimed at revealing in broad daylight the potential imposture.

To arrive to their ends, the journalists had to use unconventional methods of investigation.

The approach bore fruits. Nine months later, the publication of the series of articles had repercussions all over the world.

January 21, 2003, Dany Doucet, information director, convenes Brigitte McCann in his office.

« Would you like to be Raelian? » he asks her.

- How long do I have?

- All the time you want.

- OK

The investigation is launched.

First step: finding a fictitious name. The journalist changes her family name, creates an email account on Hotmail and rents a post office box. She adapts the answering message of her cell phone and finds a fictitious employer, in on the deal.

Office clerk

January 23. The new « employee » presents herself to her first meeting on Laurier Street. She is re-invited and meets Raelians who, little by little, adopt her.

February 16. The journalist becomes member of the movement.

March 1. She recruits in New York. She uses this opportunity to introduce to Raelians a « friend » who ends a six months stay in the Big Apple, Chantal Poirier, photographer of the *Journal*, is thus introduced into the investigation under a fictitious name. The latter takes the first photographs of a series of 500.

April 6. Returning to Montreal, the photographer takes photographs in front of 250 Raelians as a « souvenir » of the baptism of her « friend ». She then goes up to the mezzanine of the Canadian Pavilion, on the *Gilles-Villeneuve* racetrack,

and photographs Raël's close associates. The numerous security guards don't see a thing.

The two journalists will take part in several formal and informal meetings in the following months. Lunch or coffee at the restaurant suppers between Raelians friends, etc. They also exchange several emails and receive many invitations by phone.

Two weeks at UFOland

July 11. Big departure for the pow-wow of the year: a two weeks awakening seminar at the Raelian campsite in Maricourt, site of UFOland.

The journalists spend two painful weeks under the tent, surrounded by more than 400 Raelians, 24 hours a day. The photographer is constantly solicited. An unpleasant influenza complicates the task of the journalist.

The days are busy.

9 a.m.: Meditation at the auditorium.

10 to 12:30 p.m.: Indoctrination course.

1 to 5 p.m.: Free period.

The journalists do their shopping at the close by village and call the *Journal*.

5 to 7 p.m.: Workshops.

9 p.m. to...: Party, evenings, shows, campfire

The photographs are prohibited there. Like several Raelians, the photographer takes some nevertheless and pretends ignorance when she is warned.

Each night, under candles light, the journalists burn on CD their texts and photographs. No trace of their work is left in the computer, hidden inside a sleeping bag in their tent. During the trip to the village, the burned CD is stored with a local storekeeper, also involved.

All the equipment is brought back to Montreal at the end of the seminar.

On returning to the office, many colleagues provide Brigitte McCann with invaluable help in their field of expertise, of which Marc Pigeon, Mathieu Turbide, Eric-Yvan Lemay, Sebastien Ménard and Olivier Jean, to name only a few.

It took time and energy to bring the investigation to conclusion.

[55] During his testimony, Mr. A affirmed that he considered to be entitled to the respect of his private life and that the journalist and the photographer of Sun Media Corporation should have asked him for his authorization before using his photography taken from the information flier distributed during the seminar.

[56] Even if he recognizes being a level « 4 » in the hierarchical structure of the Raelian Movement and having the responsibility for a region while being the director of [corporation A] which is owner of the site of the American seminar, he is not a spokesperson of the movement. Moreover, he does not regard himself as being a public personality.

[57] During his testimony, he wears a medallion with the emblem of the Raelian Movement.

[58] He asserts that he suffered a prejudice because of the use, at ends of pure sensationalism, of the title « CLAN X » as if he belonged to a criminal organization.

[59] He owns a building firm - [Company A] - in city B and affirms that a person who had been referred to him by a manpower office as an evaluator, would have refused the job offered to him because he did not want to be associated with the Raelian Movement. He filed with the Court case the fees in the amount of \$5,521.20 paid to Manpower (P-23).

[60] He would have also been the subject of « insinuations » and « pointers » on the part of some of his employees, notably about his affiliation to a « clan ».

[61] He felt much concern and stress following the publication of the article on October 12, 2003 and « had to defer appointments to let things cool down ».

[62] Mrs. B, testified that she was not known as being a member of the Raelian Movement, except for her immediate family, and that as a psychologist specialized in the treatment of suicide attempts and depressions, she had always taken care of drawing a very clear line between her personal beliefs and her profession as psychologist.

[63] She thus applies the rules of ethics of her profession as to the distance that must be kept between the therapist and her customers. She also takes care of not wearing at work some distinctive signs - rings, chain or medallion – allowing identifying her as being Raelian.

[64] When on October 7, 2003 she learned that a series of sensational articles would be published in the *Journal de Montréal* and the *Journal de Québec* concerning the Raelian Movement, she told herself: « it is clear that I am finished! » and was very stressed.

[65] The articles started to follow and even if she lived difficult days, her photograph did not appear nowhere and she was not mentioned.

[66] However, when on October 12, 2003 the article on the « guru's family » was published with her photograph naming her « the organizer » with a descriptive text where her profession of psychologist, with the real address of the private clinic where she worked, was revealed, « she freaked out! » to quote her remarks made at the hearing.

[67] For her, her role as organizer of the American seminar had nothing to do with her occupation as psychologist. « She couldn't think that the flier would be used ».

[68] In addition, she did not understand how the newspaper had been able to learn that she was a psychologist - the proof demonstrates that it is by cross referencing with the TQS show « *Sexe et Confidences* » that the link was established by Sun Media

Corporation – without mentioning that she had never spoken to Mrs. McCann or Mrs. Poirier. « She panicked completely! ».

[69] Her apprehensions as to the impact of the article on her profession and her personal life turned out to be real, because relationships with the personnel of the private clinic A immediately cooled and she stopped getting references from the doctors - her main source of customers - who also stopped talking to her.

[70] On the day of the publication of the reportage of October 12 and the following day, she received calls from two anxious customers who affirmed to her that, with what they had just learned, they ended their therapy with her. These customers never booked an appointment again.

[71] When in January 2004, the doctors of the private clinic told her to go settle somewhere else; which she had to do for she only had five customers left. In addition, she did not dare advertise her new office not to further the controversy.

[72] Embarrassed by everything that happened to her, she did not communicate with her parents for six months.

[73] She also explains why she always fled any public appearance because of her profession and always paid attention not to mix the kinds.

[74] Besides, she had discussed with the leaders the Raelian Movement the question of her membership of the movement, because of her psychologist status and it had been agreed that her profession would never be revealed because there was no relationship between the two.

[75] On this aspect, Mrs. B had Mr. D heard, himself a psychologist, who is a person in authority within the Raelian Movement and one of its known spokespersons.

[76] The latter confirmed that after the admission of Mrs. B within the Order of psychologists, in March 1996, she had met him concerning her professional status as to her implication in the movement and that it had been agreed that she would never be a spokesperson of the movement, and this, in spite of her ability to be so.

[77] Questioned by the Court, Mrs. B affirmed that following the reportages published in the *Journal de Montréal* and the *Journal de Québec* or concerning any other subject connected to her practice, she had never been contacted by the Quebec Order of psychologists.

[78] She insists on the fact that after all that she lived, Sun Media Corporation should be condemned to pay punitive damages with interest so that what she was subjected to, in particular the disclosure of her profession, is never again experienced by other people.

[79] As to Mr. Labrosse, he underlined with the Court that Mr. D indeed wore his medallion with the emblem of the Raelian Movement and that he was far from hiding his affiliation with the movement. For him, X, brothers and sister, are very united and they could for this reason be described as a « clan ».

[80] He also filed with the Court case the result of a search made on the Internet through Google search engine, which indexed some articles written by Mrs. B as organizer of the American seminar, within the framework of the newsletter « CONTACT » intended for the members of the movement (D-10 and D-31).

[81] He maintains that one can also see her photograph, another one than the one used on the flier of the American seminar- on her Facebook site - and that it is possible to identify, among the photographs of her friends on her site, certain known members of the Raelian Movement.

[82] He points finally that madam B acknowledges being one of the « Angels of Raël », entirely at his service, which in itself is far from being insignificant and shows a close tie with the Raelian Movement. Besides, he considers that as to professional ethics, considering the nature of the Raelian Movement and her involvement within this one, madam B cannot exercise her profession without revealing her membership in the Raelian Movement.

[83] He also emphasizes that the flier distributed as part of the American seminar in 800 copies was not subjected to a restrained circulation or even picked up at the end of the seminar and that as such, it was a public document; consequently an absence of guilt on behalf of Sun Media Corporation when it used the photographs of the applicants on which moreover, they did not detain any copyright.

[84] He ends his testimony by trying again to maintain that in spite of the appearance of openness, the Raelian Movement is closed to mass media and that information revealed during the reportages, notably practices with anatomic or sexual connotation, would never have been revealed without the use of undercover methods.

[85] As to the collection of photographs in the article of October 12, 2003 on the « guru's family », with descriptive texts and with catchy titles, « it was justified in his opinion, because it was about persons occupying key posts within the movement ».

[86] He reiterates that it is possible that a detriment can be caused to the applicants, but that the benefit to the public of acquiring quality information constitutes the superior principle that justifies the inquiry undertaken by Sun Media Corporation and the methods used.

THE APPLICABLE LEGAL FRAMEWORK

[87] Considering the complexity of the legal stakes raised by the litigation, the Court judges finds it timely to first set pertinent principles and rules of right which it will apply later on, as part of its analysis, to facts revealed by the evidence submitted.

The competence of the Court

[88] Let us retain first that the Court can only be interested in the dimension of « breach of the right of respect of the private life » of the litigation opposing the parties, since under the terms of article 954 of the *Code of civil procedure* (C.p.c.), L.R.Q., C.C-25, the Court of Quebec in session in the Small Claims Division has no competence as to legal proceedings for libel.

[89] It was as established on several occasions by the Court of Quebec and the Superior Court that breach to the reputation of a person matched with the concept of libel contained in article 954 C.p.c.⁷.

The Law on the press

[90] Under the terms of the *Law on the press*, L.R.Q C P-19, a person who wants to sue a newspaper or a periodical must beforehand have sent it a three days preliminary notice and have given it the opportunity to retract. The suit must also be brought to court in the three months following the publication of the incriminating article.

[91] Because of the admissions made by Sun Media Corporation that were enumerated in the introduction, the Court will not have to consider the question of the prescription of the proceedings since articles 1, 2 and 3 of the *Law on the press* were respected.

The civil responsibility of the defendant, Sun Media Corporation

[92] Like any person living in society, Corporation Sun Media and its employees are subject to the codes of conduct enacted by the Civil code of Quebec (C.c.Q.) as regards to civil responsibility, in particular articles 1457 and 1463 C.c.Q. A wrong behavior generates the obligation of reparation for the damage caused by the wrong in question:

1457. Every person has a duty to abide by the rules of conduct that lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

1463. The principal is liable to reparation for injury caused by the fault of his agents and servants in the performance of their duties; nevertheless, he retains his recourses against them.

[93] Corporation Sun Media and its employees are also subjected to the mode of the contractual liability enacted by article 1458 C.c.Q.:

1458. Every person has a duty to honor his contractual undertakings.

Where he fails in this duty, he is liable for any bodily, moral or material injury he causes to the other contracting party and is liable to reparation for the injury; neither he nor the other party may in such a case avoid the rules governing contractual liability by opting for rules that would be more favorable to them.

⁷ *Arpin c. Grenier*, J.E. 2004-1172 (C.Q.); *Payette c. Beaudoin*, J.E. 94-574 (C.S.).

[94] The requirements of good faith foreseen in articles 6.7 and 1375 C.c.Q also applied to the defendant and to its appointees:

6. Every person is bound to exercise his civil rights in good faith.

7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, which is contrary to the requirements of good faith.

1375. The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished.

[95] It is the same for the rules as regards contract concerning the freely enlightened assent mentioned in articles 1399 and 1401 C.c.Q.:

1399. Consent may be given only in a free and enlightened manner.

It may be vitiated by error, fear or lesion.

1401. Error on the part of one party induced by fraud committed by the other party or with his knowledge vitiates consent whenever, but for that error, the party would not have contracted, or would have contracted on different terms.

Fraud may result from silence or concealment.

[96] The person who alleges having been victim of a wrong and having suffered an injury from it, has the right to claim from the author of the wrong some punitive damages in compensation for prejudice. She has however the burden to prove in a paramount way the existence of the fault, the nature of the undergone damage and a link between the two:

1607. The creditor is entitled to punitive damages for bodily, moral or material injury, which is an immediate and direct consequence of the debtor's default.

1611. The damages due to the creditor compensate for the amount of the loss he has sustained and the profit of which he has been deprived.

Future injury which is certain and able to be assessed is taken into account in awarding damages.

2803. A person wishing to assert a right shall prove the facts on which his claim is based.

A person who alleges the nullity, modification or extinction of a right shall prove the facts on which he bases his allegation.

2804. Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.

The right to respect for privacy

[97] The right for any person to respect for privacy invoked by the plaintiffs is codified in the articles 3, 35 and 36 C.c.Q. :

3. Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.

These rights are inalienable.

35. Every person has a right to the respect of his reputation and privacy.

No one may invade the privacy of a person without the consent of the person unless authorized by law.

36. The following acts, in particular, may be considered as invasions of the privacy of a person:

- 1) entering or taking anything in his dwelling;
- 2) intentionally intercepting or using his private communications;
- 3) appropriating or using his image or voice while he is in private premises;
- 4) keeping his private life under observation by any means;
- 5) using his name, image, likeness or voice for a purpose other than the legitimate information of the public;
- 6) using his correspondence, manuscripts or other personal documents.

[98] It also concern a fundamental right in the sense of the *Charter of Human Rights and Freedoms*, L.R.Q., c. C-12, listed in the article 5 and subject to a measure of rectification foreseen in the article 49 :

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

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

Punitive damages.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

[99] The granting of punitive damages mentioned in the second indent of the article 49 of the *Charter* is indicated in the article 1621 C.c.Q., most particularly in the second indent :

1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.

Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

[100] As the Supreme Court specified in *Fidler c. Sun Life du Canada, life insurance company*⁸, where it mentioned the remarks used in the judgment *Whiten c. Pilot Insurance Co.*⁹, judgment based itself on *Hill c. Church of Scientology of Toronto*¹⁰, the punitive damages are not compensatory punitive damages. They have for object punishment, dissuasion and denunciation.

[101] The undersigned adds they also have a character of exemplarity and they aim to make similar situations not to happen in future, at the level of the behaviour of the implicated person as well as the persons acquainting the pronounced condemnation.

[102] It also was established by the Supreme Court in *Aubry c. Éditions Vice-Versa inc.*¹¹ that the application of the articles 5 and 49 of the *Charter of Human Rights and Freedoms* was articulated around the great principles of civil liberties codified by the *Civil Code of Quebec*.

[103] In this judgment, the Supreme Court qualified the problem raised by the litigation in the following manner :

49 The case at bar raises a problem of civil law and it is in light of that law that it must be resolved. The infringement of a right guaranteed by the *Charter of Human Rights and Freedoms* (hereinafter the “Quebec Charter”) gives rise, under s. 49 para. 1, to an action for moral and material prejudice. Such an action is subject to the civil law principles of recovery. As a result, the traditional elements of liability, namely fault, damage and causal connection, must be established.

[104] It was also determined in the same judgment *Vice-Versa* that the right regarding the image is an element of the right for privacy :

51 There is a debate in French law, and a corresponding uncertainty in Quebec law, as to whether the right to one's image is a separate right of personality

⁸ [2006] R.C.S. 3.

⁹ [2002] 1 R.C.S. 595, par. 36 et 43.

¹⁰ [1995] 2 R.C.S. 1130, par. 196.

¹¹ [1998] 1 R.C.S. 591.

or an element of the right to privacy. See in this regard L. Potvin, *La personne et la protection de son image: étude comparée des droits québécois, français et de la common law anglaise* (1991), at p. 33, and É. Deleury and D. Goubau, *Le droit des personnes physiques* (2nd ed. 1997), at pp. 168-70. In our view, the right to one's image, which has an extrapatrimonial and a patrimonial aspect, is an element of the right to privacy under s. 5 of the Quebec *Charter*. This is consistent with the liberal interpretation given to the concept of privacy in the recent decision *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, and in past judgments of this Court. See *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 427.

52 In *Godbout v. Longueuil (City)*, the Supreme Court held that the purpose of the protection accorded to privacy is to guarantee a sphere of individual autonomy for all decisions relating to "choices that are of a fundamentally private or inherently personal nature" (para. 98). If the purpose of the right to privacy guaranteed by s. 5 of the Quebec *Charter* is to protect a sphere of individual autonomy, that right must include the ability to control the use made of one's image, since the right to one's image is based on the idea of individual autonomy, that is, on the control each person has over his or her identity. It can also be stated that this control implies a personal choice. It should be noted, finally, that art. 36 of the new *Civil Code of Québec*, S.Q. 1991, c. 64, although not applicable here, confirms this interpretation since it recognizes that the use of a person's name, image, likeness or voice for a purpose other than the legitimate information of the public is an invasion of privacy.

53 Since the right to one's image is included in the right to respect for one's private life, it is axiomatic that every person possesses a protected right to his or her image. This right arises when the subject is recognizable. There is, thus, an infringement of the person's right to his or her image, and therefore fault, as soon as the image is published without consent and enables the person to be identified. See *Field v. United Amusement Corp.*, [1971] C.S. 283.

54 The right to respect for one's private life should not be confused with the right to one's honour and reputation under s. 4 of the Quebec *Charter* even though, in certain cases, wrongful publication of an image may in itself result in an injury to one's honour and reputation. Since every person is entitled to protection of his or her privacy, and since the person's image is protected accordingly, it is possible for the rights inherent in the protection of privacy to be infringed even though the published image is in no way reprehensible and has in no way injured the person's reputation. In the case at bar, the judges at trial and on appeal found that the photograph was in no way reprehensible and did not injure the respondent's honour or reputation. The Court of Appeal also found that the manner in which the photograph was juxtaposed with the text did not make it possible to associate the two elements and that, at any rate, the text was serious and not open to ridicule.

[105] It can also be stated that according to the writings of M^e France Allard, a specialist on the right of personality, in a text created for a training offered by the Bar of Quebec¹² :

Are also considered as part of the privacy of a person, its sexual orientation, its health condition, its anatomy or physical intimacy, its political, religious or philosophical opinions.

[106] It is also good to note that an infringe to the right of the image as an element of the right to respect for privacy – which constitute a fault – does not generate any prejudice by itself for the only fact of the infringe in question. The proof of the suffered damages has always to be done.

[107] Finally, the Supreme Court, still in the aforesaid judgment *Vice-Versa*, marked the main lines in the frame of reference applicable when the right for privacy is clashing with the right of freedom of expression that include the element of « right of the public to information », fundamental freedom also recognized in the article 3 of the *Charter* replicated further¹³ as it will be developed in the following section.

[108] The most relevant parts of this judgment regarding our litigation about the weighting of these two fundamental rights – and which are constituting its heart – are the following :

57 The public's right to information, supported by freedom of expression, places limits on the right to respect for one's private life in certain circumstances. This is because the expectation of privacy is reduced in certain cases. A person's right to respect for his or her private life may even be limited by the public's interest in knowing about certain traits of his or her personality. In short, the public's interest in being informed is a concept that can be applied to determine whether impugned conduct oversteps the bounds of what is permitted.

58 The public interest so defined is thus conclusive in certain cases. The balancing of the rights in question depends both on the nature of the information and on the situation of those concerned. This is a question that depends on the context. Thus, it is generally recognized that certain aspects of the private life of a person who is engaged in a public activity or has acquired a certain notoriety can become matters of public interest. This is true, in particular, of artists and politicians, but also, more generally, of all those whose professional success depends on public opinion. There are also cases where a previously unknown individual is called on to play a high-profile role in a matter within the public domain, such as an important trial, a major economic activity having an impact on the use

¹² France ALLARD, « Les droits de la personnalité », in Collection de droit 2008-2009, École du Barreau du Québec, vol. 3, *Personne, Famille et Succession*, Cowansville, Éditions Yvon Blais, 2008, p. 59.

¹³ *Infra*, par. [110].

of public funds, or an activity involving public safety. It is also recognized that a photographer is exempt from liability, as are those who publish the photograph, when an individual's own action, albeit unwitting, accidentally places him or her in the photograph in an incidental manner. The person is then in the limelight in a sense. One need only think of a photograph of a crowd at a sporting event or a demonstration.

59 Another situation where the public interest prevails is one where a person appears in an incidental manner in a photograph of a public place. An image taken in a public place can then be regarded as an anonymous element of the scenery, even if it is technically possible to identify individuals in the photograph. In such a case, since the unforeseen observer's attention will normally be directed elsewhere, the person "snapped without warning" cannot complain. The same is true of a person in a group photographed in a public place. Such a person cannot object to the publication of the photograph if he or she is not its principal subject. On the other hand, the public nature of the place where a photograph was taken is irrelevant if the place was simply used as background for one or more persons who constitute the true subject of the photograph.

60 In the context of freedom of expression, which is at the heart of the public's interest in being informed, the person's express or tacit consent to the publication of his or her image must, therefore, be taken into account. For a more thorough analysis of these various exemptions, see Potvin, *supra*, at pp. 351-431.

[109] It is thus self-evident that if these principles of rights developed from the *Civil Code of Quebec* and the *Charter of Human Rights and Freedoms* are immutable, each case a tribunal have to decide remains a specific judgment tributary of the revealed circumstances by the administrated proof by the parties.

The freedom of expression

[110] This fundamental freedom is codified under the articles 3 and 44 of the *Charter of Human Rights and Freedoms*. Meanwhile, the article 44 doesn't have prevalence on the whole of the laws of Quebec in accordance with the article 52 :

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

44. Every person has a right to information to the extent provided by law.

52. No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

[111] An unlawful infringe of this freedom is subject to measures of rectification specified in the article 49 of the *Charter* duplicated above¹⁴.

[112] The freedom of expression, including the freedom of press, is also a fundamental freedom in the sense of the *Canadian Charter of Rights and Freedoms*, L.R.C. (1985), App. II, n° 44. However, the *Charter* is essentially governing the relations between the State and its citizens, which makes it less relevant in the means of the judgment to form in the actual litigation :

2. Everyone has the following fundamental freedoms:

a) freedom of conscience and religion;

b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

c) freedom of peaceful assembly; and

d) freedom of association.

[113] Through the years, the right to freedom of expression, the freedom of press and the right of the public to information came to create an indivisible whole, notably in accordance with several key judgment of the Supreme Court.

[114] The undersigned refers, for example, to the judgments *Reference re: Alberta Bills*¹⁵, *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*¹⁶, *Société Radio-Canada c. Lessard*¹⁷ et *Gilles E. Néron Communication Marketing inc. c. Chambre des notaires du Québec*¹⁸ which, while reaffirming the principle wanting that the information intended for the public has to circulate with the less possible hindrance, have also recognized the corollary principle that in order for the press to practice its right to inform the public, one has to understand that the notion of freedom of press contains not only the right to diffuse information, but also the right to gather them.

[115] However, the jurisprudence and the doctrine are more laconic regarding what exactly is the notion of « gathering information » and if this permit the use of means named « undercover » in order for this journalist commonly qualified of « investigative journalist » to reach his own ends.

[116] In the perspective of an optimal gathering of information, only the Quebec Press Council and the Professional Federation of Quebec Journalists directly addressed the question : the first one by the publication of a document titled « the rights and

¹⁴ *Supra*, par. [98].

¹⁵ [1938] R.C.S. 100.

¹⁶ [1996] 3 R.C.S. 480.

¹⁷ [1991] 3 R.C.S. 421.

¹⁸ [2004] 3 R.C.S. 95.

responsibilities of the press »¹⁹ and the second one by issuing a « Code of Ethics »²⁰ intended for the use of its members.

[117] However, the Quebec Press Council is not a tribunal. This is the non-profit self-ruling organization developed by the written and electronic press, which is functioning by a voluntary membership regarding its financing and the recognition of its competence. It acts in a certain way as a Court of Honour from which the decisions, following a complaint, are seen as being an authority, not in matter of their coercive character, but more en regard of the prestige of the institution.

[118] The Professional Federation of Quebec Journalists, as its name indicates, is a professional gathering of journalists acting and talking in the name of its members on various subjects. Here again, no juridical value can be granted to the Code of Ethics issued from this federation.

[119] Nevertheless, in regard of the respect these two organizations inspire, of the seriousness of their functioning and their diffusion in the public, we can consider that the rules they issued could constitute, in a certain manner, the ethic rules to apply in regard of journalism.

[120] In a few occasions, the courts incidentally referred to these texts on their analyse of litigation regarding the balance between the right of the image and the freedom of expression²¹.

[121] In both cases, the use of undercover methods in investigative journalism is restricted and it is clear that such use should only be an ultimate recourse :

GUIDE OF THE PRESS COUNCIL :

Investigative journalism

The term “investigative” here refers to a particular process of gathering and verifying facts that can include research, the examination of documents, testimony and evidence, and interviews with experts. Investigative work involves deeper and more detailed study of a subject or problem than do other types of journalism. “Investigative journalism” sheds light on specific activities, affairs, issues, or on certain events and social phenomena not yet well known or understood due to their complexity or to their having been previously shrouded in secrecy.

The problems and difficulties inherent in doing investigative work sometimes make it acceptable to use clandestine methods to gather facts and evidence, such as using hidden microphones and cameras, concealing one's identity,

¹⁹ Quebec Press Council, « Rights and responsibilities of the press », 3rd ed., online : http://www.conseildepresse.qc.ca/index.php?option=com_content&task=view&lang=en&id=183 (site consulted on February 18, 2009).

²⁰ Professional Federation of Quebec Journalists, « Code of Ethics of the Quebec Journalists », adopted on November 24 1996, online : <http://www.fjpg.org/index.php?id=82> (site consulted on February 18, 2009).

²¹ *Aforesaid*, note 1.

penetrating organizations under false pretences, and surreptitiously following individuals. The Press Council recognises that at times the press must and should employ these methods, but stipulates that they be used only in exceptional cases: when the public interest demands it and when more conventional methods are insufficient to obtain the information required.

Journalistic ethics demand that journalists clearly identify themselves when gathering information and conducting interviews. The use of clandestine methods can be justified only when the information required cannot be obtained in any other way. The media must use such methods judiciously. In all cases, the public must be informed of the methods used at the time the story is published or broadcast.

The media and journalists must avoid tendentious behaviour toward the subjects of their investigations and avoid depriving them of the presumption of innocence. The press must avoid descending into what might be called "gotcha journalism". Abuses of this sort ultimately weaken the effectiveness of investigative journalism and diminish the credibility of journalists, the media and the information that they convey.

Misrepresentation and Betrayal of Trust

Journalists must clearly identify themselves when gathering information. However, in truly exceptional cases, for example, when the journalist's personal safety is at stake and the information being sought would serve an important public interest, it may be necessary for the journalists to hide their true identity.

Journalists must refrain from using techniques that betray the trust of their sources, such as recording a person's comments for broadcast without his or her knowledge of it, or not telling an interviewee that he or she is on the air. Journalists must also avoid trespassing or invasions of privacy. These are matters of both professional and personal integrity.

CODE OF ETHICS OF THE FEDERATION OF JOURNALISTS :

4. Gathering information

Journalists exercise their profession openly by always identifying themselves as journalists. They gather information by established journalistic methods: interviews, bibliographic research, consultation of files and contacts, etc.

4a) Undercover procedures

In certain cases, journalists are justified in obtaining the information they seek through undercover means: false identities, hidden microphones and cameras, imprecise information about the objectives of their news reports, spying, infiltrating...

These methods must always be the exception to the rule. Journalists use them

when:

* the information sought is of definite public interest; for example, in cases where socially reprehensible actions must be exposed;

* the information cannot be obtained or verified by other means, or other means have already been used unsuccessfully;

* the public gain is greater than any inconvenience to individuals.
The public must be informed of the methods used.

[122] The Quebec Press Council also took decisions following complaints regarding the use of aggressive investigative journalism methods, which rephrase the main lines of its Code in matter of the use, only in ultimate recourse, of the named « undercover » means²².

Freedoms of consciousness, of religion and of opinion

[123] The freedoms of consciousness, of religion and of opinion are also part of the fundamental freedoms in the sense of the *Charter of Human Rights and Freedoms* in accordance with its article 3 duplicated above²³. Another article, the article 41, handles the right of parents to guarantee the religious and moral education for their children, according to their convictions, in the respect of the rights of their children and in their interest. This last article doesn't have prevalence on the laws of Quebec in accordance with the article 52.

[124] An unlawful interference with the freedom of consciousness, of religion and of opinion is opening the possibility granting punitive damages in accordance with the article 45 of the *Charter*.

[125] The freedoms of consciousness, of religion, of thought and of belief are also pointed in the article 2 of the *Canadian Charter of Rights and Freedoms* duplicated above²⁴

The copyright on a photograph

[126] The jurisprudence established in several occasions, notably in *RTI Turbo inc. c. Canada Allied Diesel Company Ltd.*²⁵, *Salons Marcel Pelchat inc. c. Breton*²⁶ et *Ateliers Tango Argentin inc. c. Festival d'Espagne et d'Amérique Latine inc.*²⁷, that a photograph can be qualified of artistic work and therefore benefit the protection of the *Copyright Act*, L.R.C. (1985), c. C-42, but under the condition of the character of originality constituting

²² *Hamerski c. Tyszka-Kozłowska*, D1998-03-024 (Press Council); *L'Allier c. Maurais*, D2002-05-064 (Press Council); *Reeves c. Gagnon*, D2005-12-031(2) (Press Council).

²³ *Supra*, par. [110].

²⁴ *Supra*, par. [112].

²⁵ JE 2007-2117 (C.A.).

²⁶ JE 2004-603 (C.S.).

²⁷ [1997] R.J.Q. 3030 (C.S.).

the base itself of the process of creation as protected by the law²⁸. This character of originality should result of a talent and a judgment of an author²⁹.

ANALYSIS

[127] We should be grateful to Mr. Labrosse to have, on behalf of Sun Media Corporation, and through his admissions and his presentation of the issues, eased the establishment of the evidence and especially for having well seated the debate intellectually and legally : "Yes, there was infiltration, identity theft and violation of contracted commitments; yes, it may be that ultimately, damage was caused to the plaintiffs due to the publication of the report of 12 October 2003. However, in the end, the public's right to information is a fundamental right that should prevail and justify the actions taken by Sun Media Corporation."

[128] It is obvious that under the legal framework outlined above, the dispute between the parties resulted in several rights and freedoms, each as fundamental as the others - freedom of expression, right of the public to the information, freedom of conscience, opinion and religion, right to privacy - coming into opposition, without it being possible, in a free and democratic society like ours, to make a clear precedence in this area of law of one value over another.

[129] So let's see what it is about.

The infiltration of the Raelian Movement

[130] First, it is easy to agree that using false identities and contact information and providing references of phony employers in order to get to infiltrate an organization, all this objectively constitutes conduct which derogates from the rules of conduct that should be expected of a reasonable person living in society, all this as stated in the basic article of civil responsibility, article 1457 Q.c.C.

[131] To sign, again under a false identity, a form of commitment to confidentiality – the one from the seminar of the Americas - with the firm intention not to comply, and this against the requirements of good faith, is also a fault which can both be considered as an extra contractual fault under article 1457 Q.c.C. or a breach of contract under article 1458 Q.c.C.

[132] Such errors, in any other context, under sections 1457 and 1458 Q.c.C., would surely result in the civil liability of the person who commits them, with the obligation to repair the damage caused to the victim.

[133] Can one, however, moderate such misconduct by relying on the public's right to information, and, from the principle that the said public has a right to the best information possible at any time and that therefore, faced with an organization or a movement that refuses to be straightforward with journalists, is it justified for a media company to use so-called "illegal" means?

²⁸ *Salons Marcel Pelchat*, Aforesaid, note 26, par. [23].

²⁹ *CCH Canadienne ltée c. Barreau du Haut-Canada* [2004] 1 R.C.S. 339; *Betaplex inc. c. B & A. Construction ltée*, J.E. 2006-1388 (C.A.).

[134] This is the thesis put forward by the *Quebec Press Council* and the *Professional Federation of Quebec Journalists*, provided, however, that even if the principle of the use of undercover methods in certain circumstances is admitted, such use should be limited to extreme cases, all as set out in their guides reproduced above.

[135] While recognizing that this is a sizable legal issue that easily exceeds the framework of small claims, and that the Raelian movement which was the subject of the infiltration is not a plaintiff in the context of this proceeding, although the plaintiffs have themselves directly suffered the effects of this infiltration, the Court has serious reservations about the basic premise of the reasoning of Sun Media Corporation.

[136] Who indeed, if not the concerned media itself, will decide if whatever organization: association, movement, assembly, political party, trade union and even a company - which also has the right to freedom of expression, association and peaceful assembly, and whose members in the case of a group or association hold fundamental freedoms of thought, conscience and religion in addition to their right to safeguard their reputation and respect for their privacy – displays such a lack of openness to address the questions of the said media, that it should use undercover methods of investigation ?

[137] There is here a certain form of subjectivity and arbitrariness that very poorly coexists with the rights and freedoms at stake.

[138] As for the intervention of the *Quebec Press Council*, which could serve as a Court of Honor to stay the keenness of the press in its investigative techniques, should be reminded that it intervenes only afterwards when the used clandestine methods have already had their effect ?

[139] With this, are we not at risk of allowing the use of undercover techniques by journalists for various self-justified reasons, which may include the infiltration of groups or organizations operating entirely within the law when even the police department itself would not have the right to use similar techniques without having very serious evidence from the commission on criminal acts ?

[140] And if a media suspected the presence of illegal activities, is it not a responsibility that lies first and foremost with the police and not with the media holding the information ?

[141] It should be noted that such infiltrations, especially in the sixties and seventies, of organizations, movements or political parties by the police have always been criticized and some have even been the subject of famous investigation commissions.

[142] Finally, if the activities of a group or organization are legal and private in nature, what could *prima facie* justify, on behalf of the public's right to information, the use of so-called "undercover" investigation methods ? The non-conformism of ideas and activities? Their oddity? Their occult character? Popular stigma? And what else?

[143] The legal and democratic issue is therefore sizable and indications remain to be received from the higher courts.

[144] However, since the Court has other legal avenues to resolve the dispute, it will focus its attention on the other legal issues that were raised, from the ground assumption that the use of undercover methods is possible if it is marked-out.

The use of so-called "undercover" methods

[145] Again, even with this assumption, the shoe pinches for Sun Media Corporation. Indeed, it was its duty to prove that it was facing a situation similar to that described in the guides of the *Quebec Press Council* and the *Professional Federation of Quebec Journalists* that allow the use of undercover methods under certain conditions.

[146] Mr. Labrosse referred to the press review filed with the Court (D-4) on the Raelian movement, Rael, some other leaders of the movement as well as Clonaid. For him, it is more than clear that the Raelian movement should be infiltrated in order to know more about it; the Clonaid case constituting the last straw.

[147] Even if the actions of Rael and some other leaders of the movement are deliberately dramatic and can be perceived as provocation and as many attempts to taunt the media, the fact remains that nothing in the filed press review demonstrates a systematic refusal by the Raelian movement to respond to questions from the media. This is very superficial evidence on the part of Sun Media Corporation, in light of the fundamental rights and freedoms in question.

[148] No other evidence from Mr. Labrosse, apart from his own testimony, was made in support of Sun Media Corporation's thesis that it faced a brick wall in its attempts to gather information on the Raelian movement and Clonaid which, by the way according to the evidence, are technically separate entities, related only by the person of Ms. Boisselier and the high sponsorship of Rael.

[149] Also, no evidence shows that representatives of Sun Media Corporation had really tried to obtain information in an official and straightforward way, quoting the words of the *Quebec Press Council*, on the activities of the movement, including the holding of the seminar of the Americas.

[150] The submitted evidence even tends to prove the contrary : the "Would you like to become Raelian?" thrown on the fly by Mrs. McCann's boss, with what is perceived as a hint of amused defiance, the little time she is left with to make her decision, the patent absence of explanations and discussions with her on the democratic issues raised by infiltration with regards to the rights and freedoms in question, the choice of means left to Ms. McCann, who inspired herself in an almost caricatural way by the fiction film *Reservoir Dogs* by Quentin Tarantino – the whole thing as described by Ms. McCann with full spontaneity and candor in her book -, all this gives Sun Media Corporation's approach a character of casualness and a lack of seriousness which are hardly compatible with the principles of investigative journalism set out by the guides of the *Quebec Press Council* and the *Professional Federation of Quebec Journalists*.

[151] Reading what is reported in Ms. McCann's book and in the article of October 13, 2003 summarizing the approach of the *Journal de Montreal*, the Court even wonders if Sun Media Corporation adequately assessed the scope of what it requires of its employees concerning their safety and protection, once the reports are broadcast and their true identities are revealed, when it asks them to use undercover methods.

[152] The fact, for example, that an infiltration could go wrong or that their journalist and photographer could be harassed afterwards did not seem to touch the minds of the leaders of the newspapers involved.

[153] As for the plaintiffs, they called as witness the press agent and spokeswoman of the Raelian movement, Mrs. C, who described the movement's ways concerning journalists, particularly in regard to their presence during the seminars of the Americas.

[154] The Court was also able to read the report of professor Alain Bouchard, dated November 30, 2008, and to hear his testimony that it found credible - Sun Media Corporation itself had already found him competent enough to interview him as part of its own reports on the Raelian movement - about the fact that the information collected through the undercover techniques could have been obtained otherwise.

[155] It is true, as was pointed out by Mr. Labrosse, that some activities held during the seminars of the Americas could not have been known to the general public without the undercover methods used and the non-compliance with the commitments made, but beyond their sensationalist aspect, was it in itself significant enough material to justify the undercover investigative journalism that was used?

[156] Given the foregoing, the Court comes to the conclusion that the report of October 12, 2003 which is the one concerning the plaintiffs has been documented and published based on undercover acts which were not justified and which constituted a misdemeanor on the part Sun Media Corporation, such misdemeanor engaging its civil liability towards the plaintiffs.

The right of the plaintiffs to the respect of their privacy

[157] With respect to the use of the photographs of the plaintiffs that illustrate the article of October 12, 2003 and its editing, it was argued by the plaintiffs that such use without consent from them, violated their copyright on the photographs and their fundamental right to the respect of their privacy.

[158] Sun Media Corporation, for its part, argued the lack of copyright of the plaintiffs on their photographs, their non-private nature due to their presence on the leaflet freely circulating on the site of the seminar of the Americas and the public's right to information which, here again, according to Sun Media, prevails over the image rights of the plaintiffs as part of their right to the respect of their privacy.

[159] The Court agrees with Sun Media on the issue of copyright. The photographs appearing on the leaflet are most ordinary photographs, of passport style, and no artistic or creative input distinguishes them, hence the non-application of the copyright act under the case law mentioned above.

[160] The argument of Sun Media Corporation about the non-private nature of the leaflet however cannot be accepted.

[161] This is clearly an explanatory leaflet circulated in a limited way on the site of the seminars and designed to inform participants and observers, who also had all signed a commitment not to use the material picked-up on the site, on the activities and schedule of seminars.

[162] Mr. A and Mrs. B could therefore reasonably expect that their photograph would not be used outside the seminars' activities without their permission, especially as those

involved in the seminars had committed not to do any such thing, and had received verbal warnings from the organizers at the beginning of the seminars.

[163] Ms. McCann and Ms. Poirier are known to also have contracted to that effect, but under their aliases.

[164] If one applies the criteria justifying the unauthorized publication of a photograph laid down in the *Vice-Versa* judgment cited above, nothing justified the publication of the photograph of Mrs. B and that of Mr. A, and their use in the spectacular editing supporting the article of October 12, 2003, when these people – Mr. A and Mrs. B - were, respectively, only one of the leaders and the organizer of an event private in nature taking place on a private site, without them otherwise holding hierarchical functions within the movement : spokesperson, organizer or leader at the national level, holder of a of high responsibility position, that would justify the fact that their expectation of privacy was low or non-existent.

[165] It is appropriate here to separate the cases of the two plaintiffs, which are different.

The situation for mister A

[166] In the case of Mr A, even if he is level « 4 », thus a guide, and that he is in charge of the Raelian Movement for Eastern Quebec, also being the president of [corporation A], the corporation owner of the site where were held the seminars for America, the Court holds no proof demonstrating he conducted himself like a public figure even looking for Media coverage and publicity.

[167] His brother D is a lot more known of the public then he is, being very active in the public circle on behalf of the Raelian Movement – this is the « [...] » in *Chabot c. Corporation Sun Media* aforesaid³⁰, entreaties in matter of which the case was dismissed precisely in regard of his notoriety.

[168] His other brother E is also a well-known propagandist for the Raelian Movement, easily using this title in interviews and photo sessions³¹.

[169] Their sister C, who presented a testimony in front of the hearing, but her photograph does not appear in the article of October 12, 2003, also play an active role within the Raelian Movement as a spokesperson and press attaché for the movement.

[170] It is very different however in the case of Mr A who operate his construction business in Quebec and who seems relatively discrete according to his allegiance to the Raelian Movement. The proof presented did not show any implication of public character on his side with the exception of his role of president of the [corporation A].

[171] For all these reasons, his cautious approach regarding his privacy were sufficiently high considering his participation finally very little publicized within the movement, that Corporation Sun Media would have to request his authorization before publishing his photograph, which was obviously not the case.

³⁰ Aforesaid, note 1.

³¹ Aforesaid note 1, par. [105].

[172] However, we should say that in the case of Mr A, the only infringement of the respect for his privacy consist on the fact of the publication of his photograph all along with the ones of his brothers and the revelation of his family links. What touches the use of the word « clan » is of the nature of defamation and of the infringement to his right to the respect for his reputation, which is not in the competence of this Tribunal serving in the Small Claims Division.

The situation for Mrs B

[173] The situation for Mrs B is even clearer at the level of her cautious approach regarding her privacy.

[174] Put asides her activities of organizer for the seminars for America and in her status of « Angel of Rael » Mrs B voluntarily stepped aside all activities or public appearance concerning the Raelian Movement.

[175] She most especially never publicly mentioned her profession as a psychologist and this even prevailed within the movement, the information was circulating in a limited way. She discussed the matter with one of the leaders of the Raelian Movement, Mr D, and he agreed with her she was better to keep the information for herself and that she should never appear on public event in order that no link could be made between her profession and her contribution to the Raelian Movement

[176] Mrs B presented a testimony in a very credible manner concerning the Wall of China she was setting between the practice of her profession, working with a vulnerable clientele, and her activities within the Raelian Movement.

[177] The few articles she signed for the Raelian Movement newsletter « Contact » regarding the seminars for America and her presence on Facebook in a personal respect – her photo showing her slightly leaning is more of artistic nature, she shows less of her face and it is completely different from the one used by the organization of the seminars for America – cannot make the weight against her desire of anonymity.

[178] Incidentally, no useful conclusion can infer from the fact among some of her friends, which names and photograph appear on her Facebook page, we can identify some members of the Raelian Movement by cross-checking.

[179] Her cautious approach regarding her privacy, in view of her role finally very limited at the public level within the Raelian Movement, can therefore be qualified of elevated. Corporation Sun Media absolutely had to solicit her authorization before using her photograph and even more before revealing her psychologist status.

[180] It can also be stated that more then revealing her psychologist status, the article of October 12 2003 goes to the extent of revealing the name of the clinic where she practice her profession, a name fatally revealing where she works : « Medical clinic A in the region of city B ». There is presumably only one medical clinic with such name in city C.

[181] It therefore consist of another important element of the right to respect for privacy from which infringement was suffered.

[182] In this consideration, her situation is not without recalling, on another scale, the case heard by the Court of Appeal in *Gazette (The) (Division Southam Inc.) c. Valiquette*³² when the Court decided that the newspaper The Gazette harmed the right to respect for his privacy, for a professor, by revealing he suffered a cancer caused by aids while he always kept secret his health condition.

[183] The Court of Appeal then confirmed the judgment of a Judge at trial who stated this case was showing the commercial interest to prevail on the public interest and its right for privacy.

[184] She is also characterized as « the tall thin blonde with skin-tight clothes », which constitute some remarks on her anatomy and her way to dress, that are also some elements of her right to respect for privacy³³.

[185] The descriptive text accompanying her photograph state also that Mrs B participated as a psychologist to the TV show « Sexe et Confiance » on TQS on the theme « sexuality - reconciliation », but without revealing her Raelian affiliation.

[186] During his testimony, Mr Labrosse stated that according to the nature of the Raelian Movement, Mrs B had to reveal her belonging to her clients and to the public at large.

[187] The Tribunal opinion is that this question firstly concerns the Ordre des psychologues du Québec (Nationally Certified School Psychologist) which, according to the non contradicted testimony of Mrs B, did not addressed her any reproach following the published articles or in matter of her belonging to the Raelian Movement.

[188] The sole opinion expressed by Mr Labrosse, on behalf of Corporation Sun Media, concerning the conduct of Mrs B regarding the exercise of her profession as a psychologist cannot by itself justify the infringement of her right to respect for privacy which, must we notice, was affected in many ways, even if part of the article insinuations are also of the nature of infringement of her right to the respect for her reputation.

Civil liability of Corporation Sun Media

[189] In summary, in both cases, Corporation Sun Media was able to obtain photographs of Mr A and Mrs B by faulty ways and by the non-respect of a contractual commitment by its appointees. The civil liability of Corporation Sun Media is therefore generated in their respect and cannot be discarded, for the reasons previously explained, in the name of the freedom of expression and the right of the public to information.

[190] In both cases also, the authorizations to publish the photographs included in the brochure of the seminars for America should have been obtained from the plaintiffs who had a sufficient cautious approach for privacy to expect it would be the case.

[191] In regard of Mrs B, Corporation Sun Media was also unauthorized to reveal, without her agreement, her profession as a psychologist, the name of the medical clinic where she worked and to make a description of her anatomy and her way to dress.

³² [1997] R.J.Q. 30 (C.A.).

³³ *Supra*, par. [105].

[192] The right of the plaintiffs to the respect for their privacy was thus reached and the committed faults generate the civil liability of Corporation Sun Media with the obligation to repair the suffered prejudice.

The requested punitive damages

[193] It was established above that the plaintiffs had to prove the suffered damages if they wish to obtain reparation following a fault committed by Corporation Sun Media³⁴.

[194] It was also necessary, concerning the claimed punitive damages of \$2,000 and \$3,000, respectively by Mr A and Mrs B, to demonstrate an illicit and intentional breach to their fundamental right from Corporation Sun Media, in addition to the simple existence of the fault, all this in accordance with the article 49 of the *Charter of Human Rights and Freedoms* and the principles emerging from this article by the Supreme Court in the judgment *Québec (Public Trustee) c. Syndicat national des employés de l'Hôpital St-Ferdinand*³⁵.

[195] Mr A was able to demonstrate he suffered stress following the publication of his photograph along with the ones of his brothers – the photograph in question precisely appeared in *Journal de Montréal* and in *Journal de Québec* which total up a readership of 1,300,000 persons per day, which is not little – and that he was subject to « allusions » from some of his employees.

[196] He cannot really complain his Raelian status to have been revealed since he is not hiding his belonging to the movement, that he is proud of it and that he appears on the annual summary foreseen by the article 133 of the *Canada Corporations Act* that he is public as one of the executive of [corporation A].

[197] As mentioned previously, the title accompanying his photograph and affiliating him to a « clan » according to the negative connotation alleged by Mr A is concerning defamation and infringement to the right to respect for reputation, which is not in the competence of this Tribunal serving in the Small Claims Division.

[198] The loss of an evaluator referred by Manpower, alleged by Mr A, is also linked to his reputation.

[199] By sovereign appreciation and after examining the jurisprudence in matter of quantum in the case of infringement to the right of image as an element of the right to respect for privacy³⁶, he will be granted of punitive damages for the amount of \$1,000 in

³⁴ *Supra*, par. [106].

³⁵ [1996] 3 R.C.S. 211.

³⁶ *Brisson c. Virtually Magazine* J.E. 2002-1362 (C.S.); *Deslauriers-Girard c. Trudeau* J.E. 2002-660 (C.S.); *Bonneville vs Brasseurs du Nord inc.*, J.E. 2000-245 (C.S.); *Laoun c. Malo* [2003] R.J.Q. 389 (C.A.); *Podolej c. Rogers Media inc.* J.E. 2005-225 (C.S.); *Sourour c. Clavet* J.E.

reparation for the moral prejudice suffered in reason of the non-authorized publication of his photograph.

[200] The circumstances bringing Corporation Sun Media to obtain and use his photograph, which were largely discussed as part of the present analyse, are insuring that the infringement to his fundamental right can be qualified of unlawful and intentional in the sense of the article 49 of the *Charter of Human Rights and Freedoms*.

[201] Taking into account the objective gravity of the committed fault, of the relative casualness of Corporation Sun Media regarding all this operation, even if it was thinking to act on behalf of the right of the public for information, of the financial situation of Corporation Sun Media who published the article of October 12 2003 in a commercial goal – with a presumably positive effect on the edition – and according to the article 1621 C.c.Q., some punitive damages and interest for the amount of \$1,000 will be granted to Mr A.

[202] Corporation Sun Media will thus have to pay the plaintiff, Mr A, the amount of \$2,000, including \$1,000 in compensatory punitive damages and \$1,000 in punitive damages, to wish adds the interest calculated under the legal rate and the additional indemnity foreseen by the article 1619 C.c.Q. from the date of the present judgment for the second.

[203] Mr A legal fees to be paid by Corporation Sun Media will be those applying, on January 9 2004, for a request of an amount of \$2,000.

[204] Regarding Mrs B, the Tribunal opinion is that she made the proof in a paramount way of the negative consequences on herself of the non-authorized publication of her photograph as well as the description, in the text accompanying the photograph, of several important elements regarding her privacy.

[205] She lost some clientele, she had to leave the clinic where she worked while suffering the ostracism and the lack of understanding from her work environment; her future as a psychologist is certainly affected, she couldn't talk with her family for a while, she was enormously stressed and anybody would have been for lesser. It concerns financial damages and moral damages at the same time.

[206] She will thus be granted with the total claim of compensatory punitive damages, being \$4,000.

[207] Regarding the punitive damages, for the reasons enumerated previously in paragraphs [200] and [201], and considering also that Corporation Sun Media, moreover, did not think of minimizing the infringement of her right to the respect for privacy by making sure to omit some unnecessary details on herself – the name of the clinic and the allusion to her allure, for example – Mrs B will thus be granted of the total of the claim and \$3,000 of punitive damages will be concede to her.

[208] Corporation Sun Media will therefore have to pay the defender, Mrs B, the amount of \$7,000, including \$4,000 in compensatory damages and \$3,000 in punitive damages,

with the interest calculated under the legal rate and the additional indemnity foreseen by the article 1619 C.c.Q. from the date of the present judgment for the amount of \$3,000.

[209] On January 16 2009, as agreed during the hearing, the plaintiffs sent to the Tribunal the invoice for their expert witness, Mr Alain Bouchard, on the date of December 12 2008, at the amount of \$750 for the ten hours dedicated to the writing of his report and his testimony in Court.

[210] Without being absolutely essential, his report and testimony were useful to the undersigned in regard of the appreciation of the proof.

[211] The fees for Mr Bouchard will thus be paid by the defender in equal part in each entreaties.

THE REMOVAL OF DISTINGUISH MARKS FOR THE NAMES OF THE PLAINTIFFS

[212] In accordance with the article 46 of the *Code of Civil Procedure*, in order not to aggravate the suffered prejudice caused to the plaintiffs and in order to respect their right for privacy, the Tribunal will command the removal of distinguish marks for their names.

BY THESE GROUNDS, THE TRIBUNAL :

COMMANDS the removal of distinguish marks for the names of the plaintiffs in the eventuality of the publication or the diffusion of the present judgment;

In the file n° 200-32-034788-041 :

WELCOMES in part, the request of the plaintiff, Mr A;

CONDEMNNS the defender, Corporation Sun Media, to pay to the plaintiff, Mr A, the amount of \$2,000, including \$1,000 in compensatory punitive damages and \$1,000 in punitive damages, to which adds the interest calculated under the legal rate and the additional indemnity foreseen by the article 1619 of the *Civil Code of Quebec* from January 9 2004 for the amount of \$1,000 and from March 31 2009 for the other amount of \$1,000;

CONDEMNNS the defender, Corporation Sun Media, to pay to the plaintiff, Mr A, the judicial fees for an amount of \$88 and half the expertise fees for Mr Alain Bouchard, which sums \$375;

In the file n° 200-32-034787-043 :

WELCOMES the request of the plaintiff, Mrs B;

CONDEMNNS the defender, Corporation Sun Media, to pay to the plaintiff, Mrs B, the amount of \$7,000, including \$4,000 in compensatory damages and \$3,000 in punitive damages, with the interest calculated under the legal rate and the additional

indemnity foreseen by the article 1619 of the *Civil Code of Quebec* from January 9 2004 for the amount of \$4,000 and from March 31 2009 for the other amount of \$3,000;

CONDEMNNS the defender, Corporation Sun Media, to pay to the plaintiff, Mrs B, the judicial fees for an amount of \$140 and half the expertise fees for Mr Alain Bouchard, which sums \$375

CHARLES G. GRENIER, J.C.Q.

Date of hearing : December 1st 2008

NON-OFFICIAL TRANSLATION