



Date: 20110921

Docket: T-308-11

Citation: 2011 FC 1088

Vancouver, British Columbia, September 21, 2011

**PRESENT: Roger R. Lafrenière, Esquire
Prothonotary**

BETWEEN:

**SOCIETY OF COMPOSERS, AUTHORS
AND MUSIC PUBLISHERS OF CANADA**

Plaintiff

and

**IIC ENTERPRISES LTD. C.O.B.
AS CHEETAH'S NIGHTCLUB**

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Plaintiff, Society of Composer, Authors and Music Publishers of Canada (SOCAN) has brought an *ex parte* motion pursuant to Rules 210 and 369 of the *Federal Courts Rules* for the following relief:

- (a) default judgment pursuant to Rule 210 against the Defendant in accordance with the draft Judgment attached as Schedule "A" to the Notice of Motion;

- (b) costs of this motion fixed in the amount of \$3,000, or in such other amount as this Court may deem just; and
- (c) such further and other relief as this Honourable Court may deem just.

Nature of SOCAN's claim against the Defendant

[2] SOCAN is a not-for-profit corporation, as well as a collective society under s. 67 of the *Copyright Act*. It carries on the business of granting licences for the public performance and communication to the public by telecommunication in Canada of dramatico-musical and musical works. The approved royalties or fees that SOCAN is entitled to collect for the performance in public of musical works by means of performers in person have been approved by the Copyright Board in accordance with the *Copyright Act* and are published each year in the Canada Gazette as Tariff 3C.

[3] Tariff 3C requires a licensee to report applicable figures annually to SOCAN and authorizes SOCAN or its agent to examine the licensee's books and records at any time during normal hours to verify the fees payable by the licensee.

[4] The Defendant, IIC Enterprises Ltd., carries on the business of an adult entertainment club known as Cheetah's Nightclub in the City of Kelowna, British Columbia, where it presents to the public performances of musical works by means of recorded music. Since 2005, the Defendant has been licensed by SOCAN under the Tariff 3C to publicly perform SOCAN's musical works at the nightclub.

[5] On October 27, 2005, the Defendant reported to SOCAN that for the year 2005 the estimated number of days the nightclub was open was 114 days and that its authorized seating and standing capacity was 232. The Defendant also reported that for 2006, the estimated number of days the club would be open was 312 days, with the same seating capacity.

[6] Based on the Tariff 3C, the provisions of s. 68.2(3) of the *Copyright Act*, and the estimated figures provided by the Defendant in 2005 and 2006, the total amount of the provisional licence fees owed by the Defendant for the years 2005 to 2011 is \$21,628.54. SOCAN claims that the Defendant has to date only paid \$1,245.18 to account for the provisional fees for 2005 and failed to report any data since October 2005.

[7] SOCAN alleges that despite repeated requests, the Defendant has refused to pay the outstanding fees owed and report all relevant figures.

[8] In the prayer for relief, SOCAN seeks judgment against the Defendant in the amount of \$20,383.36, which represents the balance of the estimated royalties due under Tariff 3C, or in the alternative, an award of statutory damages pursuant to s. 38.1(4) of the *Copyright Act* in the sum of not less than three and not more than ten times the amount of estimated royalties on any additional royalties found to be payable pursuant to an accounting and audit.

Motion for Default Judgment

[9] On a motion for default judgment, the Court has two questions before it; first, is the defendant in default, and second, is there evidence to support the plaintiff's claim: *Chase Manhattan Corp v 3133559 Canada Inc* 2001 FCT 895.

[10] With respect to the first question, the Plaintiff must establish that the Defendant was personally served with the Statement of Claim and that the deadline for service and filing of a statement of defence has expired.

[11] Rule 130(1) of the *Federal Courts Rules* provides various methods to effect personal service on a corporation, including in the manner provided before a superior court in the province in which the service is being effected. Rule 4-3(2)(b)(iv) of the British Columbia *Supreme Court Civil Rules* allows for service in the manner provided by the *Business Corporations Act*, which in turn allows service of a record by mailing it by registered mail to the mailing address shown for the registered office of the company in the company register.

[12] Based on the Affidavit of Service of Jennifer Lundeen sworn March 17, 2011, a copy of the Statement of Claim was sent by registered mail to the mailing address of the Defendant's registered office. A person named Dharampal Singh acknowledged receipt of the item on March 4, 2011. I am therefore satisfied that personal service of the Statement of Claim was effected on the Defendant.

[13] Since there is no record of a statement of defence being filed within the time provided in Rule 204, or any request for an extension of time, I conclude that the Defendant is in default.

[14] With regard to the second question, the evidence submitted on this motion establishes that SOCAN owns and/or administers the right of public performance in Canada, and the right to authorize and permit such public performance in virtually all popular musical works in current use in Canada. Copyright subsists in Canada in SOCAN's musical works.

[15] The Defendant was licensed by SOCAN under Tariff 3C (Adult Entertainment Clubs) for the public performance of the Plaintiff's musical works at the Cheetah's Nightclub for the years 2005 and 2006. SOCAN has established, on the balance of probabilities, that the Defendant remained open for business from 2005 to the date of issuance of the Statement of Claim (Claim Period), and beyond, except for a temporary period for renovations in 2007. The Defendant has throughout the Claim Period presented, authorized and permitted performances in public of SOCAN's musical works at the nightclub by means of recorded music, but failed to pay provisional licence fees under Tariff 3C for the years 2006 to 2011, inclusive.

[16] The Plaintiff has made reasonable assumptions regarding the number of days that the nightclub was open during the Claim Period, relying on the estimated number of days reported by the Defendant for the year 2006. In the circumstances, I am satisfied that the Defendant owes the Plaintiff \$20,383.36 for its outstanding provisional licence fees, including the applicable taxes, under Tariff 3C.

Statutory Damages

[17] Under s. 38.1(4) of the *Copyright Act*, a collective society referred to in section 67 can elect, in lieu of any other remedy of a monetary nature provided by the *Act*, to recover an amount of

statutory damages in a sum of not less than three and not more than ten times the amount of the applicable royalties owing. SOCAN made such an election and seeks an order to recover an award of statutory damages in a sum of seven times the amount of applicable royalties.

[18] In exercising its discretion under s. 38.1(4) of the *Copyright Act*, the Court is required to consider all relevant factors, including: (a) the good faith or bad faith of the defendant; (b) the conduct of the parties before and during the proceedings; and (c) the need to deter other infringements of the copyright in question.

[19] SOCAN has identified a number of factors that would justify granting an award of statutory damages in excess of the prescribed minimum. First, the Defendant has displayed a complete disregard for the terms of its licence with the Plaintiff over an extended period of time. Second, the Defendant has brazenly continued to advertise and publicly perform SOCAN's musical works at the nightclub. Third, the Defendant has repeatedly ignored SOCAN's letters, calls and visits, and evaded service of documents. Fourth, the Defendant has continued its infringing activities after notice of the present action was given. I find the Defendant's conduct clearly demonstrates bad faith both before and during the proceedings.

[20] Although the Defendant's conduct is deserving of sanction, the Court is required to relate the facts of the particular case to the underlying purpose of statutory damages. It must ask itself how the award of statutory damages would further one or other of the objectives of the law and what is the lowest award that would serve the purpose. Any higher award would not be justified.

[21] Taking into account the factors listed above, and the absence of any mitigating circumstances, I conclude that an award of statutory damages of six times the outstanding licence fees is appropriate in this case. The substantial award should serve as sufficient deterrent to the Defendant, as well as to others, who seek to profit from the Plaintiff's musical works with impunity. It will be a reminder to all licensees of the potentially serious consequences of non-compliance with the annual reporting requirements and non-payment of the applicable licence fees under Tariff 3C. Damages available to copyright holders under the *Copyright Act* serve an important function and should not be treated as just another cost of doing business.

Pre-Judgment Interest

[22] SOCAN seeks pre-judgment interest from the date the cause of action arose, rather than the date of the Statement of Claim.

[23] Section 36(2) of the *Federal Courts Act* provides for pre-judgment interest as follows:

Prejudgment Interest – cause of action within province:

36 (1) Except as otherwise provided in any other Act of Parliament, and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceeds in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

[24] Since the cause of action in this proceeding arose in British Columbia, the applicable law governing the calculation of pre-judgment interest is the *Court Order Interest Act*, RSBC 1996 Chapter 79.

Court Order Interest:

1 (1) Subject to section 2, a court must add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances from the date on which the cause of action arose to the date of the order.

[25] According to SOCAN, the cause of action for each year's licence fees arose on February 1 of each year because the provisional licence fees for each year were due on January 31 of that year, but not paid. While that may be, statutory damages are awarded "in lieu of any other remedy of a monetary nature" provided by the *Copyright Act*. By electing statutory damages, SOCAN has essentially waived its right to pursue its claim for provisional licence fees, and any interest that may have accrued. In short, SOCAN can't have its cake and eat it too.

[26] In any event, I am not prepared to grant pre-judgment interest before the issuance of the Statement of Claim for the following reasons. First, SOCAN has failed to establish any contractual or statutory right to charge interest on outstanding licence fees. Second, there has been substantial delay by SOCAN in bringing the present action to recover license fees dating back to 2006. Third, the claim for statutory damages was first made and only crystallized when the proceeding was instituted.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Defendant shall pay to the Plaintiff statutory damages in accordance with the *Copyright Act*, in the amount of \$122,300.22, which is six times the provisional licence fees of \$20,383.37 (including GST/HST) owed by the Defendant to the Plaintiff under Tariff 3C for the years 2005 through to 2011.
2. The Defendant shall pay to the Plaintiff pre-judgment simple interest at the rate of 2.5% on the amount referred to in paragraph 1 above, from February 23, 2011 to the date of judgment.
3. The Defendant shall pay to the Plaintiff forthwith its costs of this motion, hereby fixed in the amount of \$3,000.00 plus HST, being the total amount of \$3,360.00.
4. This Judgment shall bear interest at the rate of 3.0% per annum from its date.

“Roger R. Lafrenière”

Prothonotary

SOLICITORS OF RECORD

DOCKET: T-308-11

STYLE OF CAUSE: SOCIETY OF COMPOSERS, AUTHORS
AND MUSIC PUBLISHERS OF CANADA
v IIC ENTERPRISES LTD., C.O.B. AS
CHEETAH'S NIGHTCLUB

**MOTIONS IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA,
PURSUANT TO RULE 369**

REASONS FOR ORDER AND ORDER: LAFRENIÈRE P.

DATED: September 21, 2011

WRITTEN REPRESENTATIONS BY:

Christopher S. Wilson
Esther Jeon

FOR THE PLAINTIFF

N/A

FOR THE DEFENDANT

SOLICITORS OF RECORD:

Bull Houser & Tupper
Barristers and Solicitors
Vancouver, British Columbia

FOR THE PLAINTIFF

N/A

FOR THE DEFENDANT