

Date: 20100707

Docket: T-2221-04

Citation: 2010 FC 731

Ottawa, Ontario, July 7, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

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

Plaintiff

and

MAPLE LEAF SPORTS & ENTERTAINMENT

Defendant

REASONS FOR ORDER AND ORDER

I. INTRODUCTION

[1] The proceeding at issue was a Motion for Summary Judgment under the previous Rules of the Court in regard to summary judgments. The Rules have been amended prior to the hearing of the motion to provide for summary trials but those amendments had no material effect on this matter.

[2] The motion occupied three days of argument about whether there was anything to argue about – at trial. The parties argued the motion as if it was the trial on the merits of the claim and the

trial evidence was the affidavits and cross-examination thereon. It will be worthwhile to return to first principles of a motion for summary judgment.

[3] The history of this litigation has been clouded by efforts to make discovery difficult and by attempts to avoid having this matter go to trial despite the best efforts of the case management judge. Given the time and effort expended on this motion to dispose of the litigation without a trial, one wonders if that same time, effort and client expense would have been better spent getting this case ready for trial.

[4] Much was made about the time that a trial would take. Claims of 80 plus witnesses, 30 days of evidence and so forth were bandied about. Given what evidence has been taken to date, with a modicum of reasonableness and a focus on efficiency, one cannot help but wonder if some of the time estimates could not be reduced by more efficient use of existing evidence.

[5] As this motion will be dismissed, the Court will restrict its comments to that which is absolutely necessary such as to avoid any influence on the trial process and on the trial judge.

II. BACKGROUND

[6] The Plaintiff, commonly known as SOCAN, is a collective society under section 67 of the *Copyright Act*, R.S. 1985, c. C-42 (Act). It administers the performance rights of virtually all copyright protected musical works in Canada. This is done through agreements with Canadian artists whereby members-artists assign their rights to SOCAN. SOCAN also has reciprocal

agreements with similar performing rights organizations (PROs) in other countries. These agreements empower SOCAN to administer these PRO members' rights (essentially foreign artists) on their behalf. Even the nature and extent of SOCAN's mandate and the breadth of its coverage is at issue in this litigation. The Defendant even challenged the notion that SOCAN had reciprocal agreements with virtually all other PROs because 50 countries were not included – yet all the major countries are.

[7] SOCAN has the ability, through these various agreements, to authorize public performances of works assigned to it when performed in Canada. SOCAN licenses the performance of the works (usually *ex post facto* after the performance), collects royalties/fees based on approved tariffs and pays out the royalties to the members whose works have been performed.

[8] The Defendant, Maple Leaf Sports Entertainment Ltd. (MLSE), owns and operates the Air Canada Centre (ACC). In addition to the sports played at ACC, the facility is used for concerts and other entertainment. Most of the concerts are promoted by third parties who enter into agreements with MLSE. The nature, type and obligations flowing from these agreements, particularly in respect of the obligation to pay royalties, are an important element of this litigation.

[9] SOCAN has sued MLSE in late 2004 for failure to pay royalties in respect to more than 40 concerts. The number of concerts at issue is something of a “moving target” and has been changed from time to time. SOCAN has alleged that it is the owner of the works performed at these concerts and that MLSE has authorized their performance without obtaining a licence (either pre or

post performance) and has failed to pay the applicable fees governed by Tariff 4A, the operative tariff.

SOCAN claims a declaration of failure to report and pay and of infringement, and an order for payment of royalties plus interest, damages, statutory damages and ancillary relief.

[10] The Defendant raises numerous defences including limitation periods, denies that SOCAN has the rights claimed, denies knowledge of the works performed and denies that it is responsible for payments as it neither performs or authorizes performance of the “works” and asserts that any liability rests with the concert promoters.

In essence, MLSE claims that it merely leases or rents out the space for the performance of the concerts and that it therefore is not liable to obtain a licence or to pay royalties.

[11] From the pleadings and the material before the Court on this motion, there appears to be three central issues to this litigation:

- 1) Are any of the concerts before December 16, 2002 barred by any limitation period?
- 2) Can SOCAN show the requisite elements for copyright infringement including but not limited to ownership, performance of the works at issue, absence of consent of the owner and applicability of the tariffs to the concert?
- 3) Has MLSE authorized or allowed infringing performances in such manner as to render it liable for royalties?

[12] On this motion, the Court must consider:

- (a) whether there are genuine issues for trial;
- (b) should any issues be determined by summary trial; and
- (c) are there any orders with respect to trial, summary or otherwise, which ought to be made.

III. ANALYSIS

A. *Genuine Issue*

[13] As indicated earlier, the parties tended to focus their arguments on the merits of the litigation not on the more limited issue of “genuine issue” which is the cornerstone of a motion for summary judgment.

[14] The summary judgment, and now summary trial, procedures are important tools for a court to control its case load. Particularly with respect to summary judgments, the Supreme Court of Canada has confirmed its importance in the administration of justice.

... The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

Canada (Attorney General) v. Lameman, 2008 SCC 14, para. 10

[15] However, these summary procedures have their limits. Trials are the ways by which true disputes are resolved. People have a right to their day in court to deal with legitimate claims. Courts must be mindful that the effect of a summary judgment motion can deprive a party of that right.

[16] In *Granville Shipping Co. v. Pegasus Lines Ltd. (T.D.)*, [1996] 2 F.C. 853, this Court outlined the general principles applicable to summary judgments.

8 I have considered all of the case law pertaining to summary judgment and I summarize the general principles accordingly:

1. the purpose of the provisions is to allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried (*Old Fish Market Restaurants Ltd. v. 1000357 Ontario Inc. et al*);

2. there is no determinative test (*Feoso Oil Ltd. v. Sarla (The)*) but Stone J.A. seems to have adopted the reasons of Henry J. in *Pizza Pizza Ltd. v. Gillespie*. It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;

3. each case should be interpreted in reference to its own contextual framework (*Blyth and Feoso*);

4. provincial practice rules (especially Rule 20 of the Ontario Rules of Civil Procedure, [R.R.O. 1990, Reg. 194]) can aid in interpretation (*Feoso and Collie*);

5. this Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court (this is broader than Rule 20 of the Ontario Rules of Civil Procedure) (*Patrick*);

6. on the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so (*Pallman and Sears*);

7. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge (*Forde and Sears*). The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved (*Stokes*).

[Emphasis added]

[17] The parties are to put their “best foot forward” in a summary judgment motion. This does not entail turning a summary judgment motion into the trial itself by requiring all the trial evidence. It does require putting forward the best evidence to satisfy the test on a summary judgment and not leave dangling the promise that better evidence will be available at trial to show that there is a genuine issue for trial.

We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. ...

Canada (Attorney General) v. Lameman, 2008 SCC 14, para. 19

[18] Much was made of SOCAN’s reliance on hearsay and particularly its use in a motion for summary judgment where the Rules (Rule 81) require personal knowledge in affidavits. The Plaintiff had to refile and limit some of its evidence to address this requirement.

[19] Rule 81 has been interpreted to permit exceptions on a principled basis. Rule 55 gives the Court that flexibility. It would be contrary to the intent of the summary judgment rules to preclude all hearsay evidence particularly where that evidence may be admissible at trial. To take an unduly restrictive view of the Court's Rule would create unintended mischief. A party could on a motion be deprived of the right to trial on an evidentiary technicality yet could have succeeded at a trial where hearsay is admissible.

Parts of SOCAN's case is dependent on hearsay evidence of what works were played because neither party has direct personal evidence on that point. It would be unjust on this motion to ignore that hearsay evidence or its existence and that it may be admissible at trial.

[20] Central to this litigation is the scheme of SOCAN's mandate and the rights and obligations which flow from the interpretation of that scheme. It controls or influences many, if not most, of the issues in this litigation including potentially the admissibility of hearsay. It is SOCAN's premise that as a self-reporting licensing royalty regime, the responsibility of reporting and thus of record keeping rests with those who may be liable for obtaining a licence and paying royalties. In this case, that responsibility falls to MLSE.

MLSE denies that SOCAN is required to have a self-reporting system and submits that SOCAN has the obligation to prove all the elements of its case; that there is no place for adverse inferences or reverse onus or similar concepts which place the legal burden on MLSE.

[21] The overarching general issue is broken down to a more manageable dispute as to whether infringement has been shown and whether MLSE is liable because it has authorized performance and whether, even if MLSE is liable, the claims or some of them are statute barred.

[22] SOCAN has made three separate allegations which tend necessarily to interact with each other and thus make the case difficult to segregate. The allegations are copyright infringement, authorization, and failure to pay.

[23] The interrelationship of issues is exemplified by the relationship between infringement liability and limitation periods. Part of the claim of MLSE's potential liability rests on s. 27(5) of the Act.

27.(5) It is an infringement of copyright for any person, for profit, to permit a theatre or other place of entertainment to be used for the performance in public of a work or other subject-matter without the consent of the owner of the copyright unless that person was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

27.(5) Le titulaire du droit d'auteur sur le livre ou le titulaire d'une licence exclusive s'y rapportant ou le distributeur exclusif du livre ne peuvent exercer les recours prévus à la partie IV pour la violation prévue au présent article que si, avant les faits qui donnent lieu au litige, l'importateur ou la personne visée au paragraphe (2) ont été avisés, selon les modalités réglementaires, du fait qu'il y a un distributeur exclusif du livre.

[24] The provision, in the context of this litigation, raises the question of MLSE's awareness, or the "reasonable grounds for suspecting" that infringement would occur because royalties would not likely be paid.

[25] MLSE's knowledge, expectation or reasonable belief ties into its limitation defence under s. 41(1) of the Act which also addresses knowledge and reasonable expectations.

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

(a) in the case where the plaintiff knew, or could reasonably have been expected to know, of the infringement at the time it occurred, the proceedings for infringement are commenced within three years after the infringement occurred; or

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

(2) The court shall apply the limitation period set out in

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

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

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

(2) Le tribunal ne fait jouer la prescription visée aux

paragraph (1)(a) or (b) only in respect of a party who pleads a limitation period. alinéas (1)a) ou b) qu'à l'égard de la partie qui l'a invoquée.

[26] Those issues raise the question about MLSE's obligations to report as well as SOCAN's obligations to monitor performance. The resolution of those issues is at least in part fact driven and dependant on the quality of the evidence and the credibility of the respective positions.

[27] In respect of the specific concerts at issue, the issues of infringement and payment are made more complex by SOCAN's refusal to accept offers to pay tendered by MLSE for some of the concerts.

[28] On the motion the Defendant took the Court through the details of each of the concerts at issue. MLSE claims that SOCAN has not "put its best foot forward" because it relied on hearsay evidence (grainy YouTube videos of performances, Wikipedia entries describing artists and their songs).

[29] This is a somewhat disingenuous assertion given MLSE's efforts to frustrate pre-trial disclosure. Some of the frailties of SOCAN's evidence are attributable to its inability to meaningfully discover MLSE's evidence, including MLSE's recently uncovered "set list" which surfaced when MLSE finally agreed to ask former employees about the concerts at issue.

[30] There are undoubtedly evidentiary difficulties for SOCAN. SOCAN appears to rely on hearsay to make its case on the merits. It will have to persuade a trial judge that such evidence is reliable and necessary. Those two criteria may be influenced by a consideration of who had the obligation to maintain evidence of performances which then ties in to what type of system is mandated for or by SOCAN. These are issues best left to a trial judge to decipher.

[31] The Court has viewed the videotapes and while not likely to win any award for cinematography, they may be no worse, for example, than the quality of some surveillance videos used in trials. A judge may be prepared to admit that evidence and assess its weight as the circumstances of the case develop. It would be premature to reach a final conclusion of the admissibility of this evidence and foreclose a trial on that basis.

[32] A further critical issue which relates to all the concerts at issue is that of authorization by MLSE of performance of works for which SOCAN has the copyright. MLSE takes the position that it simply rents the space to promoters and is not authorizing the performance of specific works. The Defendant relies heavily on the decision in *De Tervagne v. Beloeil (Town) (T.D.)*, [1993] 3 F.C. 227.

[33] It is evident that each concert is separately negotiated and each has its own contract. In some cases MLSE pays royalties on behalf of the promoter, in others it does not. SOCAN takes the position that each contract must be examined in detail focusing on such aspects, among others, as MLSE's control or influence over the performance, its financial interests in the performance, its

efforts to pass off responsibilities to the promoters, its indifference to the rights of SOCAN and its members.

[34] Authorization and/or control are questions of mixed law and fact. They depend often on a matrix of factors which require detailed analysis. The factors address issues previously referred to in respect of s. 27(5) and s. 41(1) of the Act. This is but one instance where the complexity of the law and the facts are such that there is a genuine issue to be tried.

[35] A further and somewhat unique issue is whether SOCAN has the right to claim infringement where the performer is also the creator of the work. MLSE asserts that clearly there is consent from the artist/performer to perform the work and therefore SOCAN has no right to claim for royalties.

[36] It is a relevant issue whether in circumstances of exclusive assignment to SOCAN or where others may have an interest in the works, royalties are payable to SOCAN. It is clearly an arguable point that an assignee has the right to sue for royalties in these circumstances.

[37] Lastly, the Defendant has raised the issue of limitation periods, either under the law of Ontario (two years) or the *Copyright Act* (three years). Quite apart from this clearly triable issue, the situation is complicated by the principle of “discoverability”. The parties acknowledge that this principle applies here.

[38] An important issue in this context is when the infringing acts were discoverable. The answer to that issue engages the issue of respective responsibilities of the parties to maintain records, monitor performances and obtain licences. The issue takes one full circle to the overarching issue of the nature and operation of the SOCAN system and the rights and obligations flowing therefrom.

[39] There are a host of other issues raised in this litigation. The above are sufficient to convince the Court that it cannot be satisfied that the issues in the case are not deserving of a trial. There are complex legal issues, and difficult evidentiary determinations including admissibility and credibility which do not make this a proper case for summary judgment.

B. *Determination by Summary Trial*

[40] While neither party strongly advanced the argument that one or more issues should be separated out and determined by summary trial, the Court has a duty to consider the matter.

[41] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, the British Columbia Court of Appeal set out a number of factors a judge should consider in determining whether a summary trial is appropriate:

- amount involved;
- complexity of the matter;
- cost of a conventional trial relative to amount claimed; and
- course of proceedings.

[42] To this list, other factors were set forth in *Dahl v. Royal Bank of Canada*, 2005 BCSC 1263:

- is the litigation extensive and will a summary trial take considerable time?
- is credibility a crucial factor and has there been cross-examination on affidavits?
- will the summary trial involve a substantial risk of wasting time and effort and producing unnecessary complexity?
- does the summary trial process result in litigating in slices?

[43] The Court, having considered these factors, is not persuaded that summary trials of one or more issues is appropriate in these circumstances.

[44] The complexity of issues is not itself a reason to avoid summary trials or summary judgments. However, in this case, there are virtually no issues of pure law and the facts underlying most other issues are in dispute.

[45] Without intending to stray into the trial judge's territory, it appears that credibility and/or plausibility will be an issue. That much is clear from some of the cross-examination. The explanations of contracting, the expectations of the parties, and the reliability of hearsay evidence are all matters best resolved in a trial where the judge has the whole landscape before her.

[46] Given the pattern of conduct of the litigation to date, even of this motion, the Court has little confidence that there will be any material savings of time, money or effort if some of the issues are

determined by summary trial. There is also the issue of the effect of a summary trial judgment on the remainder of the case and on the trial judge assigned to it.

[47] As a result of the interrelationship between issues, the use of a summary trial process would not be efficient or effective and would result in “litigation in slices”. There is no one issue which can be easily segregated and which is dispositive of the case. Even the limitation periods’ defence applies to only some of the performances at issue.

Therefore, a summary trial will not be ordered. It is more efficient and effective to have all the issues addressed at once against the backdrop of all of the evidence.

C. *Other Orders*

[48] The Court is of the view that in all the circumstances the most effective and efficient resolution is to return this case to the case management judge who can now force the parties “to get on with it” one way or the other. Timetables can be set, and methods of using existing evidence or shortening the witness evidence can be explored.

[49] It may be useful to have a trial date fixed first and the pre-trial schedule established to meet that trial date.

IV. CONCLUSION

[50] The Court will dismiss this motion with costs to the Plaintiffs forthwith.

ORDER

THIS COURT ORDERS that the motion is dismissed with costs to the Plaintiffs
forthwith.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2221-04

STYLE OF CAUSE: SOCIETY OF COMPOSERS, AUTHORS AND
MUSIC PUBLISHERS OF CANADA

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MAPLE LEAF SPORTS & ENTERTAINMENT

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**REASONS FOR ORDER
AND ORDER:** Phelan J.

DATED: July 7, 2010

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