

Federal Court



Cour fédérale

Date: 20220329

Docket: T-428-19

Citation: 2022 FC 435

Ottawa, Ontario, March 29, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

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

Plaintiff

and

**1730395 ALBERTA LTD. COB AS SILVER POINT
PUB & EATERY AND YOGESH PATEL**

Defendants

REPORT ON A REFERENCE AND REASONS

I. Overview

[1] The Plaintiff, a copyright collective known as SOCAN, grants licences, pursuant to section 67 of the *Copyright Act*, RSC 1985, c C-42, for the public performance and communication to the public by telecommunication, in Canada, of musical and dramatico-musical works. SOCAN owns and/or administers the right of public performance in Canada, and

the right to authorize and permit such public performances, in respect of virtually all popular musical works in current use in Canada [SOCAN's Musical Works].

[2] The Defendants carry on business as a cabaret, café, club, cocktail bar, dining room, lounge, restaurant, roadhouse, tavern, karaoke bar, or similar establishment, under the name Silver Point Pub & Eatery, in Calgary Alberta [Establishment].

[3] SOCAN pursued a claim in March 2017 against the Defendants for infringing copyright in SOCAN's Musical Works. The Defendants did not defend the action.

[4] The Plaintiff thus obtained default judgment on September 9, 2019 [Judgment], and the Court subsequently ordered (i) on September 17, 2019, a reference, in respect of which I was designated the referee, to determine the damages owed to the Plaintiff by the Defendants [Referee Designation Order], and (ii) on August 4, 2021, that the reference proceed on an *ex parte* basis [Reference] in light of the Defendants' continuing default [Motion Order].

[5] In preparation for the reference, SOCAN served on the Defendants a copy of the Judgment and SOCAN's Statement of Issues. As of the time when SOCAN filed its record in support of this Reference [Record], the Defendants had not served on the Plaintiff either their Statement of Issues or an Affidavit of Documents.

[6] Based on SOCAN's evidence and submissions contained in its Record, in my view SOCAN is entitled to recover from the Defendants the amount of \$143,682.97, comprising

damages, profits, pre-judgment interest, and costs and disbursements for the Reference, for the reasons provided below, in addition to the amounts of \$3,000 and \$500 previously awarded in the Judgment and the Motion Order respectively if not recovered yet.

II. Main Issues

[7] The main issues for determination in this Reference, therefore, are: (a) the damages and profits owed by the Defendants to the Plaintiff for copyright infringement in relation to (i) Tariff 3A (live music) from 2016 to 2019, and (ii) Tariff 20 (karaoke) from 2017 to 2019; (b) pre-judgment interest; and (c) costs and disbursements.

III. Principles Applicable to Reference and Preliminary Issue

[8] A referee shall adopt the simplest, least expensive and most expeditious manner of conducting a reference: *Federal Courts Rules*, SOR/98-106 [*FCR*], Rule 156.

[9] A referee has broad powers regarding the conduct of the reference, subject to limited exceptions: *Society of Composers, Authors and Music Publishers of Canada v 960122 Ontario Ltd.*, 2002 FCT 985 (CanLII) at para 13, citing *Midway Mfg. Co. v Bernstein* (1988), 23 CPR (3d) 272 [*Midway*]; *FCR*, Rule 159.

[10] The scope of the referee's powers are determined by the original order for a reference; the referee must follow the wording of the order of judgment mandating the reference: *Midway*,

above at 274; *Society of Composers, Authors and Music Publishers of Canada v 960122 Ontario Ltd., c.o.b. as Blue Mountain Gateway Tavern*, 2003 FCA 256 [960122 Appeal] at para 21.

[11] Although the Referee Designation Order mentions only “damages,” I infer that “profits” are included, because the Referee Designation Order flows from the Judgment mentioned in it. In his Judgment, Justice Grammond specifically ordered that the Defendants pay the Plaintiff’s damages **and profits**, pursuant to section 35 of the *Copyright Act*, for the years 2016 to 2019 under Tariff 3A and the years 2017 to 2019 under Tariff 20, and that there be a reference to determine the damages **and profits** owed. [Emphasis added.]

[12] Subsection 35(1) of the *Copyright Act* contemplates that profits can be taken into account in calculating damages or separately:

35 (1) Where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to those damages, **such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages** as the court considers just.

[emphasis added]

35 (1) Quiconque viole le droit d’auteur est passible de payer, au titulaire du droit qui a été violé, des dommages-intérêts et, en sus, **la proportion**, que le tribunal peut juger équitable, **des profits qu’il a réalisés en commettant cette violation et qui n’ont pas été pris en compte pour la fixation des dommages-intérêts.**

[emphase ajoutée]

[13] Under the above provision, damages and profits are considered cumulative forms of relief: *Society of Composers, Authors and Music Publishers of Canada v 348803 Alberta Ltd.* 1997 CanLII 5389 (FC), 79 CPR (3d) 449 [348803] at 452-454.

[14] Regardless of my consideration of the Referee Designation Order, it is the Judgment, in my view, that contains the original order for the reference (per *960122 Appeal*), while the Referee Designation Order simply appoints the referee. In other words, the *FCR* Rule 153(1) encompasses two steps – the first step involves the Court referring any question of fact in a proceeding to a judge or other person designated by the Chief Justice, while the second step involves the Chief Justice designating the particular judge or other person (such as a prothonotary) to conduct the reference originally ordered by the Court.

[15] In keeping with the principle of securing the just, most expeditious and least expensive outcome of this proceeding with due regard to proportionality, I thus have reviewed the Plaintiff's evidence filed in support of this Reference with a view to determining the amount of damages and profits, to be paid by the Defendants to the Plaintiff, as ordered by Justice Grammond: *FCR* Rule 3. Justice Grammond also ordered the Defendants to pay to the Plaintiff pre-judgment interest on the amounts found due and owing to the Plaintiff, at the rates prescribed by the *Alberta Judgment Interest Regulation*, to the date of the Judgment

[16] On an *ex parte* reference, the only evidence before the referee is that of the plaintiff. The referee must make factual determinations based on this evidence. Further, this Court has recognized that where defendants fail to appear and to protect their interests by providing appropriate information and documents, and the plaintiff has had no access to the defendants' records, it is not improper for the referee to estimate the plaintiff's damages and lost profits in a "rough and ready" manner: *348803*, above at 455.

IV. Analysis

(a) *Damages and Profits Owed by Defendants*

[17] Having regard to the following framework, and based on SOCAN's evidence and submissions, in my view the total damages and profits to which SOCAN is entitled under Tariff 3A and Tariff 20 for the Defendants' infringing activities are \$140,359.98.

[18] The calculation of damages and profits in this case involves a determination of the royalty or licence fees pursuant to Tariff 3A (live music) from 2016 to 2019 and Tariff 20 (karaoke) from 2017 to 2019, as well as the appropriate portion of the net profits to go to SOCAN: *Performing Rights Organization of Canada Ltd. v. 497227 Ontario Ltd.* (1987) 11 CPR (3d) 289 [497227] at 291; 348803, above at 452.

[19] The Judgment entitles SOCAN to collect damages from the Defendants for all unpaid royalty or licence fees owed by them under these Tariffs for the periods indicated. The fees that SOCAN thus is entitled to collect, for the performance in public of SOCAN's Musical Works by means of background music and karaoke, have been approved by the Copyright Board in accordance with the *Copyright Act*, and are published each year as Tariffs 3A and 20, respectively, in the *Canada Gazette* in accordance with previous subsection 68(4) of the *Copyright Act* (now section 70.1, by reason of amendments to the *Copyright Act* that came into force on April 1, 2019).

[20] In the absence of the Defendants' participation in this proceeding, I must "calculate the licence fees as best I can": *Society of Composers, Authors and Music Publishers of Canada v*

728859 *Alberta Ltd.*, 2000 CanLII 15162 (FC) at para 4, [2000] FCJ No 590 (QL), 6 CPR (4th) 354, citing 497227 at 293.

[21] On several occasions, this Court previously has relied on the evidence of SOCAN's field representatives in determining the damages and profits in a reference, including: *Society of Composers, Authors and Music Publishers of Canada v Cook County Saloon Ltd.* (1996), 72 CPR (3d) 63 at 65-66; 497227, above at 294-295; 348803, above at 456; *Société canadienne des auteurs, compositeurs, et éditeurs c Flagship Bar and Disco Ltd.*, 1997 CanLII 17559 (CF); and *Society of Composers, Authors and Music Publishers of Canada v Average Joe's Sports Bar (2010) Ltd.*, dated January 12, 2018 (Court File No. T-1480-15).

[22] SOCAN's field representative in the matter before me is Adriana Verhaeghe who swore two affidavits, one dated August 30, 2019, and the other dated August 27, 2021. SOCAN also relies on the affidavits of Jaimie Marshall dated August 29, 2019 and August 25, 2021, and of Amy L. Jobson dated December 17, 2020 and September 1, 2021, in connection with this Reference.

(i) Tariff 3A

[23] The total damages and profits to which SOCAN is entitled under Tariff 3A, in my view, are \$65,582.40.

[24] I agree that SOCAN is entitled, under the Judgment, to damages and profits for copyright infringement as a result of the Defendant's failure to obtain a performing rights licence under

Tariff 3A. Damages include the amount of licence fees that ought to have been paid by the Defendant under Tariff 3A for the years 2016 to 2019.

[25] SOCAN's evidence shows that the applicable royalties, or licence fees, calculated pursuant to Tariff 3A (live music) per calendar year are based on a percentage of the total annual compensation paid to performers, with a minimum of \$89.76 for the years 2015 to 2017. While SOCAN has filed a proposed Tariff 3A with the Copyright Board for each of the years 2018 to 2024, they have not been approved yet. The rate for the years 2015 to 2017 will continue to apply to subsequent years until then.

[26] Based on SOCAN's evidence, I therefore am satisfied that the total estimated licence fees due to SOCAN for this period under Tariff 3A are \$3,931.20, including GST.

[27] SOCAN's evidence and submissions are that conservatively estimated profits are calculated in accordance with the number of customers (20) at the Defendants' Establishment and their expenditures per hour (\$150.00) when live music is being performed, which is estimated to take place 416 hour per year, less operating expenses and entertainment costs (87% of gross revenues) and reduced by 5% to reflect profit at the Establishment related to the public performance of live music.

[28] I also am satisfied that, in the circumstances, the total estimated net profits earned by the Defendants relating to the public performance of live music for 2016 to 2019 are \$61,651.20.

(ii) Tariff 20

[29] The total damages and profits to which SOCAN is entitled under Tariff 20, in my view, are \$74,777.58.

[30] I agree that SOCAN is entitled, under the Judgment, to damages and profits for copyright infringement as a result of the Defendant's failure to obtain a performing rights licence under Tariff 20. Damages include the amount of licence fees that ought to have been paid by the Defendant under Tariff 20 for the years 2017 to 2019.

[31] SOCAN's evidence demonstrates that the applicable royalties, or licence fees, calculated pursuant to Tariff 20 (karaoke) per calendar year are based on the number of days per week when music is performed by way of karaoke. The approved tariff rates for 2015 to 2017 are \$205.20 (1-3 days/week) or \$295.68 (4-7 days/week). While SOCAN has filed a proposed Tariff 20 with the Copyright Board for each of the years 2018 to 2022, they have not been approved yet. The rate for the years 2015 to 2017 will continue to apply to subsequent years until then.

[32] Based on SOCAN's evidence, I therefore am satisfied that the total estimated licence fees due to SOCAN for this period under Tariff 20 are \$646.38, including GST.

[33] SOCAN's evidence and submissions are that conservatively estimated profits are calculated in accordance with the number of customers (20) at the Defendants' Establishment and their expenditures per hour (\$150.00) when karaoke is being performed, which is estimated to take place 8 hours per week or 416 hour per year, less operating expenses (67%) and reduced

by 40% to reflect profit at the Establishment related to the public performance of music by means of karaoke.

[34] I also am satisfied that, in the circumstances, the total estimated net profits earned by the Defendants relating to the public performance of karaoke for 2017 to 2019 are \$74,131.20 (i.e. 3 x \$24,710.40), as opposed to the sum claimed of \$74,313.20 (which, in my view, is a minor misstatement, akin to a transposition error, of the amount arrived at when \$24,710.40 is multiplied by 3).

(b) *Pre-judgment Interest*

[35] Further to the Judgment (para 13), and based on the following interest rates prescribed by the Alberta *Judgment Interest Regulation*, Alta Reg 215/2011 [*JIR*] for each of the years 2016 to 2019, in my view SOCAN also is entitled to pre-judgment interest on the damages and profits in the amount of \$2,118.24:

| Year | <i>JIR</i> Interest Rate Per Year |
|------|-----------------------------------|
| 2016 | 0.55% |
| 2017 | 0.53% |
| 2018 | 0.87% |
| 2019 | 2.2% |

(c) *Costs and Disbursements*

[36] SOCAN also claims total costs and disbursements of \$4,704.75, including GST, comprising the previous awards of \$3,000 (in the Judgment) and \$500 (in the Motion Order), and incremental costs of \$1,000 for this Reference and attendant disbursements of \$204.75 (including

GST). In my view, SOCAN's evidence supports the incremental award of \$1,204.75 for its costs and disbursements for this Reference.

V. Conclusion

[37] For all the above reasons, I therefore report and order that the following total amounts are owed to SOCAN in this matter:

| | | |
|-------|-------------------------------------|--------------|
| (i) | damages and profits under Tariff 3A | \$65,582.40 |
| (ii) | damages and profits under Tariff 20 | \$74,777.58 |
| (iii) | pre-judgment interest | \$2,118.24 |
| (iv) | costs* and disbursements | \$4,704.75 |
| | TOTAL JUDGMENT* | \$147,182.97 |

(*less any amounts previously awarded and recovered, further to the Judgment and the Motion Order)

ENDORSEMENT in T-428-19

THIS COURT THEREFORE DIRECTS that:

1. By reason of this Reference, the Plaintiff is entitled to recover from the Defendants:
 - (a) damages, pre-judgment interest and costs and disbursements in the amount of \$143,682.97. This sum does not include the amounts of \$3,000 and \$500 previously awarded, and to which the Plaintiff also is entitled if not recovered yet, further to the Judgment dated September 9, 2019 and the Motion Order dated August 4, 2021 respectively; and
 - (b) post-judgment interest at the rates specified in the *JIR*, pursuant to the *Judgment Interest Act*, RSA 2000, c J-1, subsection 6(2).
2. This Report on a Reference shall be filed as soon as possible, in accordance with the *FCR* Rule 161(2), and notice of it shall be sent to the parties without delay, in accordance with the *FCR* Rule 161(3).

"Janet M. Fuhrer"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-428-19

STYLE OF CAUSE: SOCIETY OF COMPOSERS, AUTHORS AND MUSIC
PUBLISHERS OF CANADA v 1730395 ALBERTA
LTD. COB AS SILVER POINT PUB & EATERY AND
YOGESH PATEL

REFERENCE IN WRITING CONSIDERED AT OTTAWA, ONTARIO

REPORT ON A REFERENCE: FUHRER J.

DATED: MARCH 29, 2022

APPEARANCES:

Karen F. MacDonald
Madeleine A Hodgson

FOR THE PLAINTIFF

SOLICITORS OF RECORD:

Karen F. MacDonald
Madeleine A Hodgson
Norton Rose Fulbright Canada LLP
Vancouver, British Columbia

FOR THE PLAINTIFF