Date: 20081001

Docket: T-2221-04

Citation: 2008 FC 1099

Ottawa, Ontario, October 1, 2008

PRESENT: The Honourable James K. Hugessen

BETWEEN:

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA

Plaintiff

and

MAPLE LEAF SPORTS & ENTERTAINMENT LTD.

Defendant

REASONS FOR ORDER AND ORDER

[1] This is an appeal by the plaintiff by way of motion from an Order of the case management prothonotary who was called upon to deal with a large number of issues arising on the examinations for discovery in this copyright infringement action. Only one paragraph of the Order is in issue. That paragraph freed the defendant's representative from making any further inquiries of the defendant's past and present employees as to the alleged performances of certain musical works at the Air Canada Centre in Toronto.

[2] The plaintiff, the Society of Composers, Authors and Music Publishers of Canada (SOCAN), performs the function of enforcing and collecting license fees for the public performance

of musical works in Canada. For practical purposes it may be said to hold the copyright in almost all copyright musical works performed in Canada.

[3] The defendant (MLSE) is the operator of Air Canada Centre (ACC), a large sports arena used primarily for indoor sports events (hockey and basketball) but also not infrequently for public concerts and other shows.

[4] In its action the plaintiff alleges that the defendant has authorized or permitted a large number of unlicensed musical performances at the ACC over the past ten years. The defendant denies this allegation and puts plaintiff to strict proof of all its allegations, including its claims of copyright.

[5] On the oral examination for discovery of the defendant's representative the plaintiff asked the latter to give the detail of all performances which had been put in issue by the pleadings, including names of performers and works performed. In the single paragraph of the Order under appeal on this motion the case management prothonotary ordered as follows:

> (xi) MLSE shall answer the following question to the extent as directed in its undertaking, and in particular, MLSE's representative on discovery shall provide the name of the performer(s) and songs performed where it is known to her for concerts at issue. For greater clarity, MLSE is not required to make inquiries with its employees beyond its representative on discovery.

[6] The restriction of the obligation to answer an admittedly relevant question to the representative's personal knowledge and the denial of any further obligation to make further enquiries of defendant's servants, agents and employees is very unusual. Rule 241 is clear:

> 241. Subject to paragraph 242(1)(d), a person who is to be examined for discovery, other than a person examined under rule 238, shall, before the examination, become informed by making inquiries of any present or former officer, servant, agent or employee of the party, including any who are outside Canada, who might be expected to have knowledge relating to any matter in question in the action.

[7] The rigour of the rule is tempered however by Rule 242 and notably paragraph 1 (d) which reads:

> 242. (1) A person may object to a question asked in an examination for discovery on the ground that
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> …
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> (d) it would be unduly onerous to require the person to make the inquiries referred to in rule 241.

[8] It would seem to be common ground that in ruling as she did the prothonotary was relying on this provision and on the evidence which showed that for the almost ten year period in issue the defendant had had approximately 2,400 full and part time employees in the ACC (stage hands, ushers, security agents, salespersons, etc.) whose duties might have allowed (but did not require) them to notice who was performing and what musical works were being performed. To require the defendant's representative to interview such vast numbers of people on matters of which they might be expected to have only imperfect recollection, if any, was at first blush a matter on which the prothonotary was fully entitled to exercise her discretion and find that the obligation would be unduly onerous.

[9] If this were the end of the matter it would also be the end of these Reasons for the impugned decision is manifestly one which lay within the prothonotary's discretion and nothing that I have so far said indicates that such discretion was improperly exercised.

[10] But there is more: it appears, particularly from the cross-examination on affidavit of the defendant's representative, that the defendant was actively obstructing legitimate attempts by the plaintiff to marshal its evidence. The following questions and answers are particularly instructive:

> 2 Q. Will the defendant provide the names and contact particulars of all its employees who work at concert events and allow SOCAN to contact them and ask them questions about the concert performances at issue?
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> MR. BLOOM: Refused. R/F
>
> BY MR. GILL:
>
> 3 Q. Will MLSE provide the names and contact particulars of all its former employees who worked at concert events and allow SOCAN to contact them and ask them questions about the concert performances?
>
> A. No. R/F

[11] This refusal can have no proper legal basis. Rule 240 is clear and specific on the point:

> 240. A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that
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> …
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> (b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.

[12] The defendant cannot have it both ways. If the task of interviewing its present and former employees is too burdensome for it it cannot refuse to reveal the names and addresses of such employees to plaintiff so that the latter can do the work. On the other hand, by refusing to reveal the employees' identities and addresses it lost its right to object to the onerous nature of obtaining the information required of it. One cannot plead hardship when one is oneself solely responsible for the creation of the conditions giving rise thereto. The defendant was itself the sole source of the difficulty which it now seeks to invoke in its favour. In my respectful view, by overlooking this extremely relevant factor and failing to take it into consideration the prothonotary acted upon a wrong principle and her exercise of discretion was fatally flawed. Her decision cannot stand.

[13] The appeal will be allowed with costs and the defendant will be ordered to answer the question on the basis of information which it shall seek and obtain from all its present and former employees at the ACC.

ORDER

THIS COURT ORDERS that

1. Paragraph 1 (b) (xi) of the Order under appeal is set aside and the following substituted therefor:

> (xi) MLSE shall answer the following question to the extent as directed in its undertaking, and in particular, MLSE's representative on discovery shall provide the name of the performer(s) and songs performed in all concerts at issue where such information can be obtained by diligent inquiry of all of MLSE's present and former employees who might reasonably be expected to have such knowledge.

2. Plaintiff shall have its costs to be assessed.

"James K. Hugessen"

Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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