

1962
*Dec. 11,
12, 13
—

COMPOSERS AUTHORS AND PUB-
LISHERS ASSOCIATION OF CAN-
ADA LIMITED (*Plaintiff*)

} APPELLANT;

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Jan. 22
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AND
INTERNATIONAL GOOD MUSIC, INC., (formerly
KVOS INC.), ROGAN PROPERTIES LTD. (for-
merly KVOS (CANADA) LTD.), LAFAYETTE
ROGAN JONES AND GORDON MUNRO REID
(*Defendants*)

RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Practice—Exchequer Court—Copyright—Infringement—Notice of state-
ment of claim—Order for service out of jurisdiction—Material required
in affidavit in support of application—Whether proper case for order
for service ex juris—Exchequer Court Act, R.S.C. 1952, c. 98, s. 75(1)—
Rr. 42, 76—English Order XI Rr. 1, 4.*

The plaintiff, who was the owner of the performing rights in Canada of certain musical works, brought an action for infringement of its copy-right against four defendants, two of whom were located out of the jurisdiction of the Exchequer Court. The defendant KVOS Inc. oper-ated a radio and television station in the State of Washington. It was alleged that this company had communicated, by radio communication of television programmes beamed at Canada, musical works within the repertoire of the plaintiff. It was also alleged that the company's president, the defendant J, had caused or authorized such communica-tion. An order was made by Dumoulin J. permitting the plaintiff to serve a notice of statement of claim on each of the non-resident defendants. Subsequently, an application to set aside that order was granted by Thorson P. Pursuant to leave, the plaintiff appealed from the latter order.

Held: The appeal should be allowed.

The power to grant an order for service *ex juris* was given by s. 75(1) of the *Exchequer Court Act*, R.S.C. 1952, c. 98. The combined effect of that section and of Rules 76 and 42 of the Exchequer Court was to make applicable Order XI of the Supreme Court of Judicature in England. *Muzak Corporation v. Composers, Authors and Publishers Association of Canada Ltd.*, [1953] 2 S.C.R. 182, referred to.

The submission that Thorson P. was without jurisdiction to make the order setting aside the order for service *ex juris* was rejected. The application to the President was not an application for rescission of, or an appeal from, the prior order, but was an application by a party, who had not appeared on the initial application, to set the order aside. The English practice which, pursuant to Rule 42 of the Rules of the Exchequer Court, would become applicable, is that such an order, obtained *ex parte*, can be set aside, upon the application of the defendant, after service.

The affidavit of the executive assistant to the general manager of the plain-tiff in support of the plaintiff's application for an order *ex juris* stated the deponent's belief that the plaintiff had a good cause of action. It

*PRESENT: Kerwin C.J. and Cartwright, Abbott, Martland and Ritchie JJ.

stated that to the best of his knowledge and belief the facts set out in the statement of claim were true. The facts stated in the statement of claim clearly showed where the two non-resident defendants were or might probably be found. Those two matters were all that was required by s. 75 of the Act and by Rule 76. In addition to those matters Rule 4 of Order XI required the affidavit to show whether or not the defendant was a British subject. However, under s. 75 of the Act, there was no necessity for a statement in the affidavit, in proceedings in the Exchequer Court, as to whether or not the defendant was a British subject. The final requirement of Rule 4 that the affidavit state the grounds on which the application is made was considered to have been met.

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This was a proper case for an order for service *ex juris* within the requirements of the concluding words of Rule 4. The test to be applied was whether the plaintiff had "a good arguable case". On the basis of the allegations contained in the statement of claim and the other material which was before the President, the plaintiff had such a case.

APPEAL from an order of Thorson P. of the Exchequer Court of Canada¹, setting aside a prior order for service out of the jurisdiction. Appeal allowed.

M. B. K. Gordon, Q.C., and *J. J. Ellis*, for the plaintiff, appellant.

Cuthbert Scott, Q.C., and *G. S. Hugh-Jones*, for the defendants, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal, pursuant to leave, from an order of the learned President of the Exchequer Court¹, setting aside a prior order, made by Dumoulin J., *ex parte*, giving leave to serve out of the jurisdiction two of the defendants in this action.

The action is against four defendants for infringement of the appellant's copyright in certain musical works. The statement of claim alleges that KVOs Inc. (which is now named "International Good Music, Inc." and which is hereinafter referred to as "the American company") was incorporated in the State of Washington, with its principal place of business in the town of Bellingham, in that State, and that KVOs (Canada) Ltd. (now named "Rogan Properties Ltd." and hereinafter referred to as "the Canadian company") is its subsidiary. The respondent Jones is stated to reside in Bellingham and to be a director of both companies. The respondent Reid is stated to reside in the City of Vancouver and to be the manager of the Canadian company. It

¹ (1962), 38 C.P.R. 237.

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is further alleged, *inter alia*, that the American company has communicated, by radio communication of television programmes beamed at Canada, and particularly at the Province of British Columbia, musical works within the repertoire of the appellant and that the respondent Jones has caused or authorized such communication.

Marland J.

The affidavit in support of the appellant's application for an order for service *ex juris* was that of John V. Mills, the executive assistant to the general manager of the appellant, and it read as follows:

1. That I am executive assistant to the General Manager of the plaintiff herein and as such have knowledge of the facts herein deposed to.

2. That I have read the statement of claim filed herein and can say of my own knowledge or alternatively as a result of enquiries I made personally of various people in the City of Vancouver, in the Province of British Columbia, including the British Columbia agent of the plaintiff herein and the defendant Gordon Munro Reid, that to the best of my knowledge and belief the facts set out in the statement of claim are true.

3. That I have been advised by Counsel for the plaintiff and do verily believe that the plaintiff has a good cause of action against all the defendants herein.

Upon this material the order for service *ex juris*, upon the American company and upon the respondent Jones, was made. Upon the application to set aside that order, there was filed an affidavit of the respondent Jones, of the City of Bellingham, in the State of Washington, in which he stated, *inter alia*, that he was the president of the American company, which was incorporated under the laws of the State of Washington, having its head office in the City of Bellingham, in that State, and which operated the business of a radio and television station in that State, the transmitter being situated on Orcas Island, in the State of Washington. In cross-examination on his affidavit, he acknowledged that he was responsible for the operation of that station. He also testified that the major part of the viewing and listening audience of programmes from that station, roughly 80 per cent, was in Canada.

Another affidavit was filed of the respondent Reid. He was also cross-examined on his affidavit and on this cross-examination there was filed, as an exhibit, an advertising brochure, paid for by the American company, which stated that the American company's transmitter was located 39 air miles from Vancouver and 30 air miles from Victoria. A map, which formed part of the brochure, showed the station

on Orcas Island and indicated that over 1,000,000 people in British Columbia were within its reach, and 300,000 in northwestern Washington.

The power to grant an order for service *ex juris* is given by s. 75(1) of the *Exchequer Court Act*, R.S.C. 1952, c. 98, which provides:

75. (1) When a defendant, whether a British subject or a foreigner, is out of the jurisdiction of the Exchequer Court and whether in Her Majesty's dominions or in a foreign country, the Court or a judge, upon application, supported by affidavit or other evidence, stating that, in the belief of the deponent, the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, may order that a notice of the information, petition of right, or statement of claim be served on the defendant in such place or country or within such limits as the Court or a judge thinks fit to direct.

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Rules 76 and 42 of the Exchequer Court Rules provide as follows:

RULE 76

Service out of jurisdiction

When a defendant is out of the jurisdiction of the Court, then upon application, supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, the Court or a Judge may order that a notice of the information, petition of right, statement of claim or other judicial proceeding be served on the defendant in such place or country or within such limits as the Court or a Judge thinks fit to direct, and the order is, in such case, to limit a time (depending on the place of service) within which the defendant is to file his statement in defence, plea, answer or exception, or otherwise make his defence according to the practice applicable to the particular case, or obtain from the Court or a Judge further time to do so.

RULE 42

Practice and procedure not provided for by Statute or by these Rules

In any proceeding in the Exchequer Court respecting any patent of invention, copyright, trade mark or industrial design, the practice and procedure shall, in any matter not provided for by any Act of the Parliament of Canada or by the Rules of this Court (but subject always thereto) conform to, and be regulated by, as near as may be, the practice and procedure for the time being in force in similar proceedings in Her Majesty's Supreme Court of Judicature in England.

In the case of *Muzak Corporation v. Composers, Authors and Publishers Association of Canada, Limited*¹, three of the five Judges who sat expressed the view that the combined effect of s. 75 of the *Exchequer Court Act* and of Rules 76 and 42, above cited, was to make applicable

¹[1953] 2 S.C.R. 182, 19 C.P.R. 1.

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v. The other two members of the Court expressed no opinion
INTER- on this point.

NATIONAL The relevant portions of Rules 1 and 4 of that Order are
GOOD MUSIC, as follows:
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1. Except in the case of a writ to which Rule 1A of this Order applies,
Martland J. service out of the jurisdiction of a writ of summons or notice of a writ of
summons may be allowed by the Court or a Judge whenever

* * *

(ee) The action is founded on a tort committed within the jurisdiction;
or

* * *

4. Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court or Judge that the case is a proper one for service out of the jurisdiction under this Order.

Counsel for the appellant, at the outset, contended that the learned President was without jurisdiction to make the order setting aside the order for service *ex juris*. He submitted that after the order of Dumoulin J. had been made it must stand, unless it was rescinded by him pursuant to Rule 259 of the Rules of the Exchequer Court, or unless an appeal was successfully taken from it to this Court under s. 82 of the *Exchequer Court Act*.

I do not agree with this submission. The initial order was made by Dumoulin J., *ex parte*. The application to the learned President was not an application for rescission of, or an appeal from, that order, but was an application by a party, who had not appeared on the initial application, to set the order aside. The English practice which, pursuant to Rule 42, would become applicable is that such an order, obtained *ex parte*, can be set aside, upon the application of a defendant, after service. (See *The Annual Practice*, 1963, vol. I, p. 154.)

It, therefore, becomes necessary to consider the matter upon the merits. The learned President, in his reasons for setting aside the order, was of the opinion that the material in the affidavit in support of the order was plainly insufficient to enable the judge to whom the application was made to exercise his discretion to grant it. In his opinion, the

affidavit of Mills was inadequate, because it did not show in what place or country the American company and the respondent Jones were or probably might be found; that it did not state the facts which, if proved, would be a sufficient foundation for the action; and that it did not state any grounds for the application. He pointed out that the affidavit did not specify, except as to the respondent Reid, the source of Mills' information.

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While the form of Mills' affidavit may be subject to some criticism, I would not be prepared to find that it was totally insufficient to warrant Dumoulin J. in making the order which he did. The affidavit states the deponent's belief that the appellant has a good cause of action. It states that to the best of his knowledge and belief the facts set out in the statement of claim are true. The facts stated in the statement of claim clearly show where the American company and the respondent Jones are or might probably be found.

Those two matters are all that is required by s. 75 of the Act and by Rule 76. In addition to those matters, Rule 4 of Order XI requires the affidavit to show whether or not the defendant is a British subject. This requirement arises because, under Rule 6 of Order XI, when the defendant is neither a British subject nor in the British Dominions, notice of the writ, and not the writ itself, is to be served upon him. However, s. 75 of the *Exchequer Court Act* begins with the words "When a defendant, whether a British subject or a foreigner, is out of the jurisdiction of the Exchequer Court . . ." and then it goes on to provide for service of a *notice* of the information, petition of right, or statement of claim. There is, therefore, no necessity for a statement in the affidavit, in proceedings in the Exchequer Court, as to whether or not the defendant is a British subject.

The final requirement of Rule 4 is that the affidavit state the grounds on which the application is made. When the affidavit in this case is read in conjunction with the statement of claim, it appears to me that it sufficiently alleges that the appellant's claim is that the respondents have committed a tort in Canada by the transmission of programmes, beamed at Canada, in which musical works, in respect of which the appellant had a copyright, were played.

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However, in any event, when there is added to what is contained in Mills' affidavit the affidavit of the respondent Jones, and the cross-examinations of the respondents Jones and Reid upon their respective affidavits, in my opinion, the formal requirements of Rule 4 have been met.

This does not end the matter, because the learned President was of the opinion that this was not a proper case for an order for service *ex juris* within the requirements of the concluding words of Rule 4. He considered that, on an examination of all of the material before him, there was nothing to indicate an infringement of the appellant's copyright, and he went on to say:

... I am unable to see how it could reasonably be said that this right was infringed by a broadcast or telecast of a programme emanating from a television station outside Canada, even if such programme included musical works which would in Canada be within the plaintiff's repertoire and in which it would have in Canada the copyright referred to and even if the programme was beamed towards Canada in order to reach Canadian audiences. There is nothing to indicate the commission of any tort in Canada.

There is no dispute as to the tests which have been established for the application of Rules 1 and 4 of Order XI. They were stated by the present Chief Justice of this Court in the *Muzak* case, in which the disagreement between the majority and the minority was not as to the tests to be applied, but as to whether or not the facts in that case met those tests. The Chief Justice, at p. 187, cited extracts from the judgment of Lord Davey in *Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabrik*¹ and from that of Lord Simonds in *Vitkovice Horni A Hutni Tezirstvo v. Korner*², as follows:

.... Lord Davey said at page 735:

This does not, of course, mean that a mere statement by any deponent who is put forward to make the affidavit that he believes that there is a good cause of action is sufficient. On the other hand, the court is not, on an application for leave to serve out of the jurisdiction, or on a motion made to discharge an order for such service, called upon to try the action or express a premature opinion on its merits,

* * *

If the Court is judicially satisfied that the alleged facts, if proved, will not support the action, I think the court ought to say so, and dismiss the application or discharge the order. But where there is a substantial legal question arising on the facts disclosed by the affidavits which the plaintiff *bonâ fide* desires to try, I think that the court should, as a rule, allow the service of the writ.

¹(1904), 90 L.T.R. 733.

²[1951] A.C. 869, 2 All E.R. 334.

In *Vitkovice Horni A Hutni Tezirstvo v. Korner*, Lord Simonds stated at page 878:

... the obligation of the plaintiff is, not to "satisfy" the court that he is right, but to make it sufficiently appear . . . that the case is a "proper one for service out of the jurisdiction under this order."

Referring to the remarks of Lord Davey in 90 L.T.R., p. 735, (*supra*) Lord Simonds, at page 879, stated:

It is, no doubt, difficult to say precisely what test must be passed for an applicant to make it sufficiently appear that the case is a proper one.

and at page 880:

The description "a good arguable case" has been suggested and I do not quarrel with it.

The Chief Justice adopted the test of "a good arguable case" and that is the test which the learned President states, in his reasons, should be applied in the present case.

With great respect, I am not in agreement with the conclusion which the latter has reached in applying that test. The issue which would have to be determined in the present case, if it is tried, is as to whether a person who operates a television transmitter outside Canada, but with the primary object of transmitting programmes for reception in Canada, can be held to have communicated a musical work by radio communication in Canada, so as to have infringed the rights of the holder of the Canadian copyright in such work.

This is a matter on which there does not appear to be any direct authority. The closest analogy which was brought to our attention by counsel is that in the case of *Jenner v. Sun Oil Co. Ltd.*¹, which dealt with an application to set aside an order for service *ex juris*. The issue raised in that case was as to whether, when defamatory statements were broadcast in the United States and received in Ontario, a tort had been committed in Ontario. McRuer C.J.H.C. reached the conclusion that there was "a good arguable case" that the defamatory words were so transmitted as to be published within Ontario.

I have not formed, and would not, at this stage of the proceedings, wish to express, an opinion as to whether or not, assuming as established the allegations contained in the statement of claim, the appellant has a good cause of action against the respondents, but I am satisfied that, on the basis of those allegations and the other material which was before the learned President, the appellant has got

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¹ [1952] O.R. 240, 2 D.L.R. 526.

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“a good arguable case”. To me it seems arguable that a person who has held himself out to advertisers as being able to communicate, by means of his American television transmitter, with some 1,000,000 persons in British Columbia, if he transmits musical works, of which the appellant has the Canadian copyright, to viewers in Canada who receive such programmes, has thereby communicated in Canada such musical works by radio communication, within the provisions of the *Copyright Act*, R.S.C. 1952, c. 55. The purpose of this action is to determine that very legal point and, in my opinion, it should not be determined at this stage of the proceedings, but ought to be tried.

For these reasons, in my opinion, the order for service *ex juris* should not have been set aside and the present appeal should be allowed, with costs, in the cause, to the appellant in this Court and in the Court below.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Smart and Biggar, Ottawa.

Solicitors for the defendants, respondents: Farris, Stultz, Bull & Farris, Vancouver.
