1954

*Feb. 17, 18, 19

*Oct. 5

MAPLE LEAF BROADCASTING COMPANY LIMITED (*Defendant*) — APPELLANT

AND

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LIMITED (*Plaintiff*) ..... — RESPONDENT

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyright—Infringement—Test case—Copyright Appeal Board, powers of —Validity of Tariff established by the Board—Radio broadcasting stations—Copyright Act, R.S.C. 1927, c. 32 and amendments.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke and Cartwright JJ.

Action for infringement of copyright, damages and an injunction, brought to test the validity of the tariff (Tariff No. 2) applicable to radio broadcasting stations for the year 1952. The tariff as fixed by the Copyright Appeal Board called for a charge based on a defined percentage of the Stations' gross revenue for their previous fiscal year and directed that the respondent would have the right, in order to verify that gross revenue, to examine the books of the licencees. The defence contended that the imposition of such a charge was not within the power of the Board as it was not a statement of "fees, charges or royalties" within the meaning of those words in the *Copyright Amendment Act,* 1931. Furthermore, the power of the Board to impose as a term in the tariff the right for the respondent to inspect the books of the stations, was also questioned. The action was maintained by the trial judge.

Held: The appeal should be dismissed (Rand and Locke JJ., dissenting, would have allowed the appeal in part).

Per Kerwin C.J., Taschereau and Cartwright JJ.: The statements filed by the respondent before the Board and the statements certified by the Board were both statements of "fees, charges and royalties" within the meaning and contemplation of the *Act.*

The inconvenience which might result from the statements of fees requiring the stations to ascertain their gross revenue by the last day of their fiscal year, when such a day was the last day of the calendar year, was not a sufficient reason to void the tariff. The statute must be construed *ut res magis valeat quam pereat,* and to give effect to this argument would render the statute, in its present form, unworkable. Nor was the inconvenience resulting from the fact that for a certain period in each year the respondent could not know what to charge for a licence and that those wishing to obtain a licence could not know what they might be called upon to pay, a sufficient reason for construing the statute as imperatively requiring the Board to certify the fees for a calendar year on or before the first of the year under penalty of voidance. The statements, upon certification, relate back to the commencement of the year.

Since the Board was within its powers in fixing the fees at a percentage of the gross revenue, it was within its powers to approve or prescribe the manner in which the amount of such revenue was to be ascertained or verified.

Semble, that the word "tendered" in section 10B(9) of the *Copyright Act* should be construed as "offered to undertake to pay".

Per Rand J. (dissenting in part): The contention that there was no authority in the society to use the gross revenue as a basis of the fees is untenable. Since the terms of the licence allow any work to be used at any time of the day for any length of time, the contribution of the works to the total activities and thus to the total revenues of the stations is directly related to that revenue and becomes a legitimate basis for the fees. That basis has been aproved by the Board and considering its broad discretion, it could not be held that it was beyond the scope of that discretion. Provisions of this nature for which a practical workability has proved itself could not, because of a logical or theoretical difficulty, be nullified by interpretation. But it was not necessary to the establishment of the fees that the books should be opened to inspection. There is a legitimate distinction

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between the disclosure of the total revenue and the disclosure of the details of that revenue. However, that part of the statement was clearly severable.

Per Locke J. (dissenting in part). As the *Act* does not state the basis on which the Board is to fix the rates, the matter being left to its discretion and judgment, it was not beyond its powers to approve such a charge. The possible injustice which might result from the method used was a matter solely for the consideration of the Board and the Courts were without power to intervene.

It was not within the powers of the Board to authorize the inspection of the books of the appellant. The Board, upon the true construction of the statute, has merely the power to fix the rate but not the other terms of any licensing agreement to be made between parties.

Subsection 9 of section 10B of the *Copyright Act* was a clear indication of the intention of Parliament that the licences should amount to a simple permission to use the works and did not contemplate that, in addition to the payment of fees, the copyright holder might impose further terms such as the one in question. Nor was it reasonably necessary for, or incidental to, the discharge of the Board's implied functions that it should have the power to settle such a term of the licence to be given.

The matter being one of jurisdiction, no assistance can be derived from the fact that the respondent might be deprived of its fees unless the revenue of the stations could be verified by it.

The damages awarded should be reduced to $1. and there should be no costs here or in the Exchequer Court.

APPEAL from the judgment of the Exchequer Court of Canada, Cameron J.(1), maintaining an action for infringement of copyright.

S. Rogers Q.C. and *G. W. Ford Q.C.* for the appellant.

H. E. Manning Q.C. for the respondent.

The judgment of Kerwin C. J. and Taschereau and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal, brought pursuant to leave granted by my brother Locke, from a judgment of Cameron J. (1) pronounced on the 23rd of February, 1953, declaring that the respondent is the owner of that part of the copyright in a number of musical works which consists of the sole right to perform the same in public throughout Canada, declaring that the appellant has infringed the said copyright, and awarding damages of $500 and an injunction.

(1) [1953] Ex. C.R. 130; 18 C.P.R. 1.

The performances complained of took place on the 5th, 6th, 7th, 8th, 20th and 21st of May, 1952. The respondent's action was commenced on May 22, 1952. The action was tried on November 28 and December 1, 1952. No witnesses were called. An agreed statement of facts and a number of exhibits therein referred to were filed by consent.

The appellant admitted, for the purposes of the action, that the respondent is the owner of the public performing right in the musical works set out in the Statement of Claim, that the appellant had performed by means of broadcasting the works referred to on the dates alleged in the Statement of Claim and that such broadcasting is a performance in public within the meaning of the Copyright Act.

In paragraph 6 of the agreed statement of facts the purpose of the action is stated as follows:—

This action is brought to determine whether the alleged statements of fees, charges or royalties as filed by the Plaintiff on or about November 1, 1951, and the said statements as modified and approved by the Copyright Appeal Board and published in the Canada Gazette under date of March 27, 1952, as follows:—

Tariff No. 2

RADIO BROADCASTING

(1) Domestic Broadcasting

For a general licence to all operating broadcasting stations covering the broadcasting for private and domestic use only at any time during 1952 and as often as desired of any and all the works for which the Association has from time to time power to grant a performing licence the following fees,

(*a*) By the Canadian Broadcasting Corporation a fee of $.01 per capita of the population of Canada as latest reported by the Dominion Bureau of Statistics, plus the sum provided for in paragraph (*b*) hereunder written, which is made applicable mutatis mutandis to the Corporation with respect to its gross revenue from commercial broadcasting.

(*b*) By each licensee of the Association operating a commercial broadcasting station or stations a sum equal to $1\frac{3}{4}$ per cent of the gross revenue of such station or stations as defined in P.C. 5234, enacted on the 14th day of October, 1949 in the operation of such station or stations for the fiscal year of the licensee ending on or before the 31st day of December, 1951: provided that, if the licensee shall not have operated in 1951 for a full fiscal year, the gross revenue shall be computed on the basis of the period during which the station was in operation until the 31st day of December, 1951, prorated for a full twelve months.

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The Association will, if payments are punctually made accept fees payable by any licensee in twelve equal monthly instalments paid in advance on the first of each month.

The Association shall have the right by a duly authorized representative at any time during customary business hours to examine books and records of account of the licensee to such extent as may be necessary to verify any and all statements rendered by the licensee.

is a valid statement of fees, charges or royalties under the provisions of Sections 10, 10A and 10B of the Copyright Amendment Act, Chapter 8, 1931, as enacted by Section 2 of Chapter 28, 1936.

On or about October 30, 1951, the appellant filed with the Secretary of State certain statements of proposed fees, charges or royalties which were intended to comply with the provisions of section 10 (2) of the *Copyright Act*. The Minister and the Copyright Appeal Board followed the procedure laid down by sections 10A and 10B of the *Act*. The Board made certain alterations in the Statements and transmitted them as altered and revised to the Minister certified as the approved statements and the Minister published them in the *Canada Gazette* on March 27, 1952.

The appellant contends that the statements filed by the respondent are not statements of fees, charges or royalties within the meaning of sections 10, 10A and 10B of the *Copyright Act,* that consequently the respondent has not complied with section 10 (2) and was disabled by the terms of section 10 (3) from bringing this action without the consent of the Minister given in writing. It is common ground that no such consent was given. The appellant further contends that the statements certified by the Copyright Appeal Board and particularly Tariff 2 quoted above are not statements of fees, charges or royalties within the meaning of the sections mentioned and are accordingly null and void. I agree with the conclusion of the learned trial judge that both these contentions must be rejected and I am in substantial agreement with his reasons. I wish, however, to add some observations as to the grounds of attack upon the tariff in question as certified by the Board which are set out in paragraphs 1(*a*) and 1(*d*) of the appellant's counter-claim.

Paragraph 1(*a*) reads as follows:—

1. The said purported statement of fees, charges or royalties approved by the Copyright Appeal Board for the year 1952 is not a statement of fees,

charges or royalties in accordance with the provisions of the said Copyright Amendment Act, as amended, and is accordingly null and void for the following amongst other reasons:—

(a) The defendant was unable on the 1st day of January, 1952, and still is unable to ascertain by reference to the said purported statement the specific amount which it is required to pay to the plaintiff in order to acquire a licence for the public performance of the works controlled by the plaintiff as aforesaid.

It is admitted that approximately 70 per cent of the privately owned broadcasting stations in Canada have fiscal years which end on December 31 and counsel for the appellant contends that, although no evidence was given on the point, it is obvious that it would be a practical impossibility for the owners of such stations to ascertain their gross revenue for the fiscal year for a period of at least some days after December 31, and consequently during such period they could not avail themselves of the protection against an action for infringement afforded by section 10B (9). It is argued that this result indicates that the tariff certified by the Board is not within the contemplation of the *Act* and particularly of the sub-section mentioned and is therefore void.

Subsections 8 and 9 of section 10B read as follows:—

(8) The statements of fees, charges or royalties so certified as approved by the Copyright Appeal Board shall be the fees, charges or royalties which the society, association or company concerned may respectively lawfully sue for or collect in respect of the issue or grant by it of licences for the performance of all or any of its works in Canada during the ensuing calendar year in respect of which the statements were filed as aforesaid.

(9) No such society, association or company shall have any right of action or any right to enforce any civil or summary remedy for infringement of the performing right in any dramatico-musical or musical work claimed by any such society, association or company against any person who has tendered or paid to such society, association or company the fees, charges or royalties which have been approved as aforesaid.

For the purposes of this argument, I will assume that in the case of broadcasting stations whose fiscal years terminate on December 31 there would be a period early in the ensuing calendar year in which the owner of such station could not ascertain his gross revenue with exactitude. From this certain inconveniences might result but I do not find it a sufficient reason for declaring the certified tariff to be void. The statute nowhere provides expressly that the Board shall so proceed that persons desirous of

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using the works shall be able to ascertain at all times on and after January 1st in each year the amount of the fees payable certified by the Board and indeed in view of the procedure laid down by the *Act* it would appear most unlikely that the Board would be able in any year to certify the statements to the Minister until some time after January 1. It is admitted that it has never as yet done so. The statute must be construed *ut res magis valeat quam pereat* and to give effect to this argument of the appellant would render the statute in its present form unworkable.

It will be observed that in the year 1952 it was not until March 22, that the Board certified the statements of fees, charges and royalties which might be collected by the respondent for the issue or grant of licenses for or in respect of the performance of its works in Canada for the year 1952, and that the tariff with which we are concerned as certified provides rates substantially lower than those proposed in the statements filed by the respondent and published in the Canada Gazette of November 2, 1951. Assuming that the owner of a broadcasting station whose fiscal year ended on December 31 would not know early in January what his gross revenue was for the preceding year, he would no doubt be able to calculate it approximately. He would, however, still be in ignorance as to what percentage of this revenue he would be required to pay for a license and it is at least conceivable that there might be cases in which such owner would decide against taking a license at the fee stipulated in the statement filed but would be willing to take a license at the fee finally certified by the Board. While it may not be strictly necessary to the decision of this appeal to express an opinion upon the point, it appears to me that the word "tendered" in section 10B (9) should be construed as "offered to undertake to pay" and that the owner of a broadcasting station in the position suggested above could avail himself of the protection afforded by section 10B (9) by offering to undertake to pay the fees approved by the Board so soon as the same were approved, while a person using the works without having made such offer would appear to be liable to an action for infringement. That it is inconvenient that for a certain period in each year the respondent can not know what it may charge for a license for the performance of its works and those wishing to use

the works can not know what they may be called upon to pay is not to be denied, but such inconvenience does not appear to me to be a sufficient reason for construing the *Act* as imperatively requiring the Board to certify the statements of fees which may be collected during a calendar year on or before January 1 of such year and rendering void any statements certified thereafter. I think the better view is that it is an implied duty of the Board to proceed with all possible expedition and that the statements if certified later than January 1 relate back upon certification to the commencement of the year. This is not to say that a person who before certification performs the works of the respondent without its consent and without offering to undertake to pay the fees certified by the Board as soon as the same are certified necessarily becomes liable to pay those fees if it does not then take a license from the respondent; that question does not arise in this action in which the respondent seeks damages and does not allege any implied contract with the appellant.

Paragraph 1 (d) of the appellant's counter-claim is as follows:—

> (*d*) The provisions in the last paragraph of section 1 of the said Tariff No. 2 in the said purported statement of fees, charges or royalties deal with matters other than quantum of fees, charges or royalties and is accordingly beyond the jurisdiction of the Copyright Appeal Board which, by the terms of Section 10B of the said Act, is limited to the approval with or without modification of the quantum of fees, charges or royalties.

The last paragraph of section 1 of Tariff 2 referred to reads as follows:—

> The Association shall have the right by a duly authorized representative at any time during customary business hours to examine books and records of account of the licensee to such extent as may be necessary to verify any and all statements rendered by the licensee.

I have already expressed my agreement with the reasons of the learned trial judge for upholding the validity of Tariff 2 *in toto* including this final paragraph. Once it has been held that the Board was acting within its powers in fixing fees at a stated percentage of the gross revenue of a licensee it appears to me to follow that it must be within its powers to approve or prescribe the manner in which the amount of such gross revenue is to be ascertained or verified.

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I would not interfere with the award of damages made by the learned trial judge. In dealing with this question the learned trial judge says in part:—

> It was agreed, also, that the Canadian Association of Broadcasters should do its utmost to secure the undertakings of its members to do certain things, including payment by them to the plaintiff of a sum equivalent to that paid in 1951, pending the final outcome of the proposed litigation, which amount, if the chosen defendant were finally successful in the action, would be accepted in full settlement for the period of litigation; on the other hand, if the plaintiff succeeded in upholding the validity of the tariff, such stations would then pay such balance as might be due the plaintiff under the said tariff. The defendant herein, while a member of the Canadian Association of Broadcasters, was not a party to that agreement and has not paid the plaintiff any amount whatever in respect of the year 1952 as contemplated by the said agreement.

I do not understand this statement of fact to have been challenged and neither the appellant's pleadings nor its factum contain any statement that it is willing to make payment to the respondent in accordance with the Tariff certified by the Board in the event of such certification being held valid.

I agree with the view of my brother Locke that the paragraph of the formal judgment of the Exchequer Court reading:—

> AND THIS COURT DOTH FURTHER DECLARE that the defendant has infringed the plaintiff's said copyright in the said musical works by the performance thereof or by authorizing the performance thereof in public without the consent of the plaintiff and by permitting the premises operated by it to be used for the said performance for the defendant's private profit without the consent of the plaintiff.

should be amended to read:—

> AND THIS COURT DOTH FURTHER DECLARE that the defendant has infringed the plaintiff's said copyright in the said musical works by the performance thereof or by authorizing the performance thereof in public without the consent of the plaintiff.

and that the paragraph of such formal judgment reading:—

> AND THIS COURT DOTH ORDER AND ADJUDGE that the defendant, its, and each of its agents, servants and employees be, and they are hereby perpetually restrained from infringing the plaintiff's copyright in the said musical works by the performance of the same or any substantial part thereof in public without the consent of the plaintiff.

should be amended by deleting the last six words thereof.

Subject only to these variations in the formal judgment, I would dismiss the appeal with costs.

RAND J. (dissenting in part):—The question in this appeal must take into account the broad purposes of the statute. Here is the regulation of copyright in respect of the use of musical works in a mode which has become a feature of the development of radio. That and other developments have led to the organization of performing rights societies. So extensive have the functions of this new agency become that special provisions were enacted by s. 2 of c. 28, 1936 and ss. 1 and 4 of c. 27, 1938, of the statutes of Canada which deal exclusively with them; these have now become s. 10 of c. 8, 1951. They require that each such society shall file with the Minister at the copyright office lists of all dramatic-musical and musical works over which it has licensing and other powers. On or before the 1st day of November in each year, the society shall likewise file "statements of all fees, charges or royalties" which it proposes to collect in respect of its works for the ensuing calendar year; and in case of neglect or refusal to file those statements, the right to move against infringements by action or other proceeding, without the consent of the Minister, is forbidden.

An Appeal Board is also set up. S. 10(*b*) directs that after the Minister shall have referred these statements to the Board, it "shall proceed to consider the statements and the objections, if any" and the Board itself may raise any objection which appears to it proper to be taken. Upon the conclusion of its consideration, the Board is to make such alterations in the statements as it may think fit and transmit them so altered or revised or unchanged, to the Minister as approved. Upon their publication in the official gazette, they become the legal "fees, charges or royalties" which the society may collect or sue for in respect of licenses issued by it.

The fees set forth on the statements which are objected to are a sum equal to $1\frac{3}{4}$ per cent of the "gross revenue" of each station as that revenue is defined in Order-in-Council P.C. 5234 made on October 14, 1949. For the year 1952, that in question here, the gross revenue is that of the station for its next previous fiscal year ending on or before December 31, 1951.

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The first contention urged against the statement is that there is no authority in the society to use the gross revenue as the basis of its charges, but a consideration of the manner in which these works are used by the stations shows it to be untenable. The terms of the license allow any work to be used at any time of the day for any length of time and that mode of use has become the means of what might be called the unbroken performance of the radio. From this it is plain that the contribution which the works make to the total activities and thus to the total revenues of each station is directly related to that revenue and becomes a legitimate basis for charges. For some years prior to 1952 the basis was the number of radio receiving sets used throughout Canada, but that appears to me to be much less germane to the functional participation of the works than what is now contested.

But it is urged that it is inconsistent with the requirements of the statute. If, for example, the fiscal year ends on December 31, how can it be that the fees should have a datum of determination which could not be applied to the use on the 1st day of January following? This, no doubt, is theoretically formidable: but the statute provides for a quasi-administrative function of the Board and the dates fixed and the times contemplated for the work of the Board, must, as a practical necessity, contain a period in which no approved fees may be in force; at the same time it must equally contemplate a retroactive effect to the approval. This in fact has been the history of the Board's administration and I do not understand that provisions of this nature for which a practical workability has proved itself can, because of a logical or theoretical difficulty, be nullified in interpretation.

But the basis has been approved by the Board and considering the broad discretion directly related to that action, it would be quite out of the question to hold that it was beyond the scope of that discretion. I agree, therefore, with the judgment of Cameron J. that the basis is unobjectionable.

Against the statement a further objection is raised. There has been included in it a requirement incidental to the license that the society shall have the right to examine

the books and accounts of the licensee in order to verify the gross revenue returned. It is argued that this is beyond any scope of a statement of "fees, charges or royalties" and, as a term of any agreement to pay them, equally beyond any obligation imposable on a prospective licensee.

Admittedly there is nothing express in the statute to authorize such an inspection, but in the view of Cameron J. as the fees could have as their basis of calculation the gross revenue, it must be taken to be a reasonably necessary implication of the statute that there be a power of inspection. I agree that whatever may be reasonably necessary to the establishment of the fees is impliedly authorized, but I am unable to assent to the view that it is necessary in that sense here that the private books and accounts of the broadcasting stations should be opened to the inspection of the society. It is a question of degree. There is a legitimate distinction between the disclosure of the total revenue of a station and the disclosure of the details of that revenue. Under the Act authorizing the licensing of the broadcasting stations, the fees are likewise related to the gross revenue, but for the purposes of administration the proof of that revenue appears to be satisfied by the statement of the broadcasting company verified by the oath of one of its officers. It would seem to me that that furnishes a standard which can be taken to mark the reasonable limits of the implication of the statute in the matter before us.

On the other hand, although the right of inspection forms part of the statement of the fees, it is clearly a severable provision. Its whole function is ancillary and its elimination cannot affect the validity of the basis or the fee resulting from it. The statement must then be taken as having been approved with this provision eliminated.

The appeal must be in part allowed and the judgment below modified by striking out the second last paragraph and by substituting for it a declaration that provision for an inspection of the books and accounts of the broadcasting station is invalid, and by reducing the damages to $1.00. There should be no costs in either court.

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LOCKE, J.: (dissenting in part)—This is an appeal from a judgment of Cameron J. delivered in the Exchequer Court (1) finding, inter alia, that the appellant has infringed the respondent's copyright in a number of musical works by authorizing their performance in public without the consent of the plaintiff, restraining the appellant, its agents, servants and employees from further infringement and awarding damages in the sum of $500.

The appellant is the operator of a radio broadcasting station in Hamilton, Ontario, licensed under the Broadcasting Act of Canada and it is admitted that, without the respondent's permission, the appellant, during the month of May, 1952, caused to be broadcast a number of musical works, that part of the copyright in which, which consists of the sole right to perform the same in public in Canada, was the property of the respondent. The action is of the nature of a test action upon which the rights of the respondent against a large number of other broadcasting stations in Canada depend.

The relevant facts and the provisions of the *Copyright Act* (R.S.C. 1927, c. 32) as amended which affect the matter are stated in the reasons for judgment delivered at the trial. Prior to November 1, 1951, the respondent filed at the Copyright Office a statement purporting to be a statement of the fees, charges or royalties which it proposed to collect during the next ensuing calendar year, in compensation for the issue or grant of licences in respect of the performance of its works in Canada, as required by subsection 2 of section 10 of the Act.

This statement contained a number of proposed tariffs relating to the performance of the copyrighted works but, of these, we are, in my opinion, concerned only, with Tariff No. 2 for radio broadcasting, which set forth a schedule of charges to cover the broadcasting for private and domestic use only during the year 1952 as often as desired of all the works for which the respondent had power to grant a performing licence for privately owned broadcasting stations. These included a sum equal to $2\frac{1}{4}\%$ of the gross billings for the sale of broadcasting by each licensee of the respondent during its preceding fiscal period ending in 1951. The tariff

(1) [1953] Ex. C.R. 130; 18 C.P.R. 1.

further proposed that each licensee should furnish to the respondent, not later than the end of each month, a complete record of all musical programs radio broadcast from its station during the preceding month and that the fees payable might be paid in twelve equal monthly instalments. The tariff contained the following further proposed term:—

> The Association shall have the right by a duly authorized representative at any time during customary business hours to examine books and records of account of the licensee to such extent as may be necessary to verify any and all statements rendered by the licensee.

As required by the *Act*, the Secretary of State published the statements so filed in the Canada Gazette of November 2, 1951, and gave notice that any person having any objection to the proposals contained in the statements must lodge particulars of his objection at the Copyright Office on or before December 8, 1951.

In the Canada Gazette of March 27, 1952, the Secretary of State published the statement in the form in which it had been, after certain changes, approved by the Copyright Appeal Board. Tariff No. 2, as so approved, fixed the charge for a general licence to all operating broadcasting stations for broadcasting for private and domestic use only for 1952 as follows:—

> (*b*) By each licensee of the Association operating a commercial broadcasting station or stations a sum equal to 1¾ per cent of the gross revenue of such station or stations as defined in P.C. 5234, enacted on the 14th day of October, 1949, in the operation of such station or stations for the fiscal year of the licensee ending on or before the 31st day of December, 1951: provided that, if the licensee shall not have operated in 1951 for a full fiscal year, the gross revenue shall be computed on the basis of the period during which the station was in operation until the 31st day of December, 1951, prorated for a full twelve months.

The provision that the Association should have the right to examine the books and records of account of the licensee was approved in the form proposed.

The tariff of fees to be paid to the respondent so approved differed in their nature from those which had been proposed by the respondent and approved by the Copyright Appeal Board and paid by broadcasting stations in previous years. In the years 1944 to 1946 both inclusive, the Copyright Appeal Board had approved a schedule of fees calling for the payment to the respondent of a stated lump sum for the issue of its licences to broadcast which was

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prorated between the Canadian Broadcasting Corporation and the private broadcasting stations in Canada. For the purpose, inter alia, of avoiding annual hearings before the Copyright Appeal Board as to these charges, the respondent and the Canadian Association of Broadcasters entered into an agreement dated January 31, 1947, for a term of five years commencing on January 1 of that year, which provided that the respondent should receive from all privately owned broadcasting stations in Canada ·07 cts per radio receiving set licensed by the Department of Transport for the year ending March 31 next preceding the commencement of each calendar year of the agreement. The amount so payable was prorated by the Canadian Association of Broadcasters among the privately owned stations and the amounts so payable were submitted to and approved by the Copyright Appeal Board throughout the term of the agreement.

It is the change made by the statement filed prior to November 1, 1951, as approved by the Copyright Appeal Board, fixing the charges at a percentage of the gross returns of the broadcasting stations and assuming to give to the respondent the right to inspect the business records of the various stations, which has given rise to the present litigation.

The respondent's action, as pleaded, was for a declaration that it was the owner of that part of the copyright for the specified musical works which consists of the sole right to perform the same in public throughout Canada, that the appellant had infringed the said copyright, for damages and an injunction.

By the defence, the appellant admitted having broadcast from its station CHML at Hamilton, without the permission of the respondent, the musical works referred to, but denied that doing so constituted an infringement on the ground that the respondent had not filed a statement of the "fees, charges or royalties" which it proposed to collect during the calendar year 1952, as required by the *Copyright Act* as amended, but had filed a statement which, after amendment, had been approved by the Copyright Appeal Board, which did not comply with the requirements of the said *Act* and was accordingly of no legal effect. A

further defence raised was that the plaintiff having failed to file the required statement of fees, charges or royalties, the action failed as the consent in writing of the Minister had not been obtained prior to the commencement of the action, as required by section 10(3) of the *Act*. By way of counterclaim, the appellant set forth the grounds upon which its claim that the statement did not comply with the requirements of the Act was based and claimed a declaration that such statement, as filed and as modified and certified by the Copyright Appeal Board, did not comply with the statute and was null, void and of no legal effect.

By way of defence to the counterclaim, the respondent put in issue the allegations that the statement did not comply with the statute and the claim raised by the appellant in its counterclaim that it desired to acquire a licence for the year 1952 but was unable to do so since no statement of fees, charges or royalties had been included in Tariff No. 2, and alleged that the appellant had at all times been able to obtain a licence to perform these works under Tariff No. 1 which had been approved by the Copyright Appeal Board and fixed a schedule of charges for the performance of such works in fixed amounts.

While this last mentioned contention of the respondent raised an issue which did not arise upon the pleadings in the principal action, I mention it by reason of the argument addressed to us on behalf of the respondent that in any event it is entitled to damages under the provisions of Tariff No. 1.

The action was tried upon a statement of facts agreed upon between the parties which rendered it unnecessary to call evidence. The agreement, in my opinion, and the course of the trial restricted the issues to be determined to the questions as to whether the charges proposed by Tariff No. 2 complied with the provisions of the *Act* and as to whether the Copyright Appeal Board acted within its powers in approving that tariff, including that portion of it which required the appellant to permit the respondent to have access to its business records for the purpose of verifying the statements as to the gross revenue of the station during the year in question.

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The agreement between the parties expired on December 31, 1951, and the tariffs filed prior to November 1 of that year were not approved by the Copyright Appeal Board until March 22, 1952. The fact that there was thus an interval between January 1 and March 22, 1952, when persons affected by the tariff did not know what the approved rate would be for the purpose of negotiating for a licence with the respondent or of taking advantage of the provisions of subsection 9 of section 10B, need not be considered in disposing of the present action, the real issues of which are as to the validity of Tariff No. 2 as ultimately approved.

I respectfully agree with the learned trial Judge that, as the *Act* does not state the basis on which the Board is to fix the rates, that matter being left to its discretion and judgment, it cannot be said that it was beyond its power to approve a charge or royalty for the use of the copyrighted works as a defined percentage of the gross revenue of the broadcasting station as defined in P.C. 5234.

That such a method of fixing the charge may require the station to pay to the owner of the copyright a part of its earnings from activities quite divorced from the use of the copyrighted works, or that the percentage required to be paid may result in the payment of amounts much greater than those theretofore paid by the operators of broadcasting stations, were matters, in my opinion, solely for the consideration of the Board and in which the courts are without power to intervene.

I am, however, unable, with respect, to agree with the conclusion of the learned trial Judge that it was within the power of the Copyright Appeal Board to approve the term of the tariff which would authorize the respondent to examine the business books and records of the appellant, for the purpose of ascertaining the accuracy of statements as to its gross revenue made by it. It is true that such a provision may at times be agreed upon by licensees of patents but that is where the matter is one of agreement between the parties and is not a relevant consideration in determining the powers of the Board unless, upon the true construction of the statute, those powers include not merely that of fixing the rate or royalty but the other terms of a licensing agreement to be made between the parties.

The duties and the powers of the Copyright Appeal Board are defined in section 10B of the *Copyright Act* as amended. When the society or association owning the copyright has filed the statement of fees, charges or royalties which it proposes to collect for the ensuing year, as required by section 10(2), the Minister, after such statement has been published in the *Canada Gazette* pursuant to section 10A(1) is required to refer it to the Board, together with the objections, if any, which have been received in respect to it. The duty of the Board is then to consider the statements and the objections, if any, and:—

> make such alterations in the statements as it may think fit and shall transmit the statements thus altered or revised or unchanged to the Minister, certified as the approved statements.

Subsection 8 of section 10B provides that the statements of fees, charges or royalties so certified shall be those which the society or association concerned:—

> may respectively lawfully sue for or collect in respect of the issue or grant by it of licences for the performance of all or any of its works in Canada during the ensuing calendar year in respect of which the statements were filed as aforesaid.

Subsection 9 declares that no society or association shall have any right of action to enforce any remedy for infringement of the performing right in any dramatico-musical or musical work against any person who has tendered or paid the fees, charges or royalties which have been approved as aforesaid.

The respondent takes the attitude that the terms of such licence other than the amount of the charges or royalties is for it to decide and it was apparently upon this theory that the statement filed by it with the Minister contained the proposed term that it should have the right to examine the books and records, of licensees, to such extent as may be necessary to verify any statements of their gross revenue rendered by them. The charges or royalties approved by the Copyright Appeal Board are a percentage of the gross revenue of the station as defined by Order-in-Council P.C. 5234. Section 1 of that Order defines "gross revenue" for the purpose of the Regulation as:—

> the total revenue earned by the licensee in the operation of the station, less agency commissions, as set forth in the financial return made under oath by the licensee to the Minister covering the operation of the station for the fiscal year of the licensee.

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Since the activities of private broadcasting associations would not be confined to broadcasting the musical works of the respondent, the latter obviously intended to impose as a condition of a licence to perform its copyrighted works that the operator of the station pay not merely a portion of the revenue derived from performing its copyrighted works but also of all of its revenue-producing activities.

In my opinion, subsection 9 of section 10B above quoted is a clear indication of the intention of Parliament that the licences to be granted, if they were indeed requested, should amount to a simple permission to utilize the copyrighted works or any of them during the ensuing calendar year in Canada and did not contemplate that, in addition to the payment of the prescribed charges or royalties, the copyright holder might impose further terms such as the one in question. Under the terms of that subsection, a broadcasting station might lawfully broadcast any of the copyrighted works of the respondent on tendering to it an amount equal to the prescribed percentage of its net income in its previous fiscal year without obtaining any licence from the respondent. It cannot, I think, have been intended that those obtaining licences would be required to submit to an examination of their business records at the instance of the respondent as a term of doing what they could lawfully do without any such licence.

The Copyright Appeal Board is the creature of the statute and as such it has, in my opinion, in addition to the express powers vested in it, implied power to do such things as may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorized (*Attorney-General* v. *Great Eastern Railway* (1). *Attorney-General* v. *Pontypridd Urban District Council* (2)). Those functions, in so far as they affect the present matter, are limited to considering the statements of fees, charges or royalties filed and the objections, if any, made to them and to alter the terms if, in its opinion, this should be done and to certify the statement as submitted or as so altered or revised. It is not, in my opinion, reasonably necessary for, or incidental to, the discharge of these functions that the Board shall have the power to settle the terms of the licence to be given and to direct that, in order to enable the holder

(1) (1880) 5 A.C. 473 at 478. (2) [1906] 2 Ch. D. 257 at 266.

of the copyright to verify the accuracy of the statements made by licensees as to the amount of their gross revenue, the owner of the copyright may examine the books of account in the manner which has been authorized.

Since the matter is one of jurisdiction, it does not assist the position of the respondent that, unless it is enabled in some manner to ascertain the true amount of the gross revenue of its licence holders, it may be deprived of charges or royalties to which it is entitled. The difficulty has been caused by the respondent's own action in endeavouring to include this term in the statement of the fees, charges or royalties proposed to be collected and asking the Copyright Appeal Board by its approval to assist it in enforcing it. I am not, moreover, impressed with the suggestion that under a tariff which requires a licence holder, or person who wishes without a licence to use the copyrighted works to pay a fixed proportion of its gross revenue, there need be any loss to the respondent. Statistics are available to it indicating, at least generally, the extent of the activities of the various private broadcasting stations and, in any case where the respondent might suspect that the amount of the gross revenue of any station has been understated in an action properly framed, the operator of the broadcasting station might be compelled to produce his business records and the true amount of the gross revenue thus ascertained.

The formal judgment entered in the Exchequer Court reads in part:—

> And this Court doth further declare that the defendant has infringed the plaintiff's said copyright in the said musical works by the performance thereof, or by authorizing the performance thereof in public without the consent of the plaintiff and by permitting the premises operated by it to be used for the said performance for the defendant's profit without the consent of the plaintiff.

A further clause perpetually restrains the defendant, its agents, servants and employees from infringing the plaintiff's copyright in the said musical works without the consent of the plaintiff.

The appellant objects to that portion of the first quoted clause which follows the word "plaintiff" in the sixth line thereof, on the ground that there was no evidence to support that portion of the plaintiff's claim which is pleaded in paragraph 7 of the Statement of Claim and is based

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upon subsection 3 of section 17 of the *Copyright Act*. I agree with this contention and would direct that that portion of the judgment at the trial be deleted.

The part of the judgment which contains the restraining order is also objectionable in that it restrains the appellant from utilizing the copyrighted works without the consent of the plaintiff. This is contrary to the terms of subsection 9 of section 10B under which the appellant is entitled at will to broadcast any of the copyrighted works after it has tendered or paid to the respondent the charges or royalties specified in the tariff approved by the Board. Accordingly, the words "without the consent of the plaintiff" which appear in the concluding lines of the paragraph should be deleted.

The learned trial Judge considered that despite the fact that, by arrangement, the appellant agreed to pay and the respondent agreed to accept charges in the amounts paid under the agreement which expired on December 31, 1951, pending the final disposition of this action, and that it was admittedly a test action to determine the validity of the Tariff No. 2, as approved by the Copyright Appeal Board, there should be an award of damages.

By the counterclaim a declaration was asked that Tariff No. 2 be declared "null and void and of no legal effect" and, in my opinion, the appellant is entitled to a declaration that the paragraph of that tariff which assumed to authorize the respondent to examine the books and records of licensees is not binding upon the appellant as being beyond the powers of the Copyright Appeal Board.

The appellant did not, as it might well have done, tender to the respondent the percentage of its gross revenue for its fiscal year ending January 31, 1951, which would have been a bar to any claim of infringement, but elected to put the whole question of the validity of Tariff No. 2 in issue. As, in my opinion, the main ground for the failure to comply with the tariff as approved was the objection of the appellant and the other private broadcasting associations to exposing their business records to examination by the respondent and as success on the real

issues is divided I would further amend the judgment at the trial by reducing the amount of damages awarded to the sum of $1.00.

In all the circumstances, I think there should be no costs in this Court or in the Exchequer Court.

Appeal dismissed with costs.

Solicitors for the appellant: *Rogers & Rowland.*

Solicitors for the respondent: *Manning, Mortimer & Kennedy.*