BETWEEN:

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED ..... PLAINTIFF;

1955
Apr. 14
Dec. 6

AND

ELMWOOD HOTEL LIMITED ..... DEFENDANT.

Copyright—Motion to have point of law set down for hearing dismissed—Competence of Court to hear action to collect fees fixed by Copyright Appeal Board—Constitutional law—Rule 149 of Rules of Court—The Copyright Act, R.S.C. 1952, c. 55, s. 20(6), 50(9)—Exchequer Court Act, R.S.C. 1952, c. 98, s. 21(c)—The British North America Act, 1867, s. 91, clause 23.

Held: That the Court has jurisdiction to hear an action brought to recover fees approved and certified by the Copyright Appeal Board, such right being a statutory one conferred on the Court by the Parliament of Canada.

2. That it was within the competence of Parliament under s. 91, clause 23, of the British North America Act, 1867 to vest this Court with jurisdiction to hear and determine such action as the one now before it.

MOTION to have hearing on point of law.

The motion was heard before the Honourable Mr. Justice Fournier at Ottawa.

D. W. Mundell, Q.C. for plaintiff.

G. F. Henderson, Q.C. for defendant.

FOURNIER J. now (December 6, 1955) delivered the following judgment:

This is a motion of the defendant for an order that the defence of the defendant contained in paragraph 2 of the statement of defence be set down for hearing and disposal of at a date to be fixed.

(1) [1938] 1 K.B. 786.

1955

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LTD. v. ELMWOOD HOTEL LTD.

Fournier J.

The facts are disputed, but the defence is subject to the objection of the defendant to the jurisdiction of the Court and the constitutionality of section 21 of the Exchequer Court Act and section 20 of the Copyright Act. As no factual dispute is involved in the consideration of the objection raised by the defence as to jurisdiction and constitutionality, it is assumed that the allegations contained in the statement of claim may be assumed as accurate.

The plaintiff, a duly incorporated company, is the owner of performing rights in Canada in a substantial number of musical works. The defendant is the owner and operator of the Elmwood Hotel at 400 Dougall Road, in the Township of Sandwich West, in the County of Essex, Province of Ontario, in which it has provided entertainment of which music forms a part and has performed in public musical works in which the plaintiff owns the performing rights. On September 7, 1947, the defendant applied to the plaintiff for the plaintiff's license to perform all musical works which are the property of plaintiff. By license No. G1863, dated February 20, 1948, the defendant became entitled to perform the said works in public at the Elmwood Hotel after payment of the fees for 1947 and thereafter the fees therefor approved by the Copyright Appeal Board, and the license has at all times material remained in full force and effect.

The fees for the years 1951, 1952, 1953 and 1954 were approved by the Copyright Appeal Board and were set out in the Canada Gazette, as mentioned in the statement of claim. As holder of its license, the defendant was obligated to pay the fees for its license under the appropriate items No. 6 in the tariffs for the above years, which was "a proportion of the total amount paid for all entertainment of which music forms a part, including the amount paid to the orchestra, vocalists and all other entertainers."

At all material times, the plaintiff was entitled after the last day of January in each of the years 1952, 1953, 1954 and 1955 to examine, by duly authorized representative, at any time during business hours, the books and records of accounts of the defendant to such extent as may be necessary to verify all statements rendered by the licensee. The defendant has always declined to render to the

plaintiff full and proper statements of the fees payable by it and has refused and neglected to furnish statements to permit inspection by the plaintiff and to pay fees to which the plaintiff is entitled. Now, substantial sums of money are due by the defendant to the plaintiff for fees for the years 1951, 1952, 1953 and 1954, which have not been accounted for by the defendant. The plaintiff claims that it is entitled to examine the defendant's books to verify the accounts of expenses of the defendant on entertainment of which music forms a part and to recover from the defendant the amount of the license fees it is owing to the plaintiff.

As it was entitled to do by the General Rules and Orders of this Court, the defendant, in its defence, raised certain questions of law. The legal points are in paragraph 2 of the statement of defence, which reads as follows:

2. The Plaintiff's cause of action is for fees or charges alleged to be payable under a certain license referred to in paragraph 6 of the Statement of Claim whereby the Plaintiff alleges that the Defendant became entitled to perform in public in the Elmwood Hotel the musical and dramatico-musical works of which the Plaintiff allegedly owns or controls that part of the copyright therein known as the public performing right, in consideration of the payment of the fees as provided for in the said license. The jurisdiction of this Court is statutory and the relevant statutory provisions are the Exchequer Court Act, R.S.C. 1952, Chapter 98, Section 21, and the Copyright Act, R.S.C. 1952, Chapter 55, Section 20, Subsection (6). The Plaintiff's cause of action does not fall within the provisions of the said statutes and this Court has no jurisdiction to try the issues raised in the Statement of Claim. In the alternative, if the provisions of the said statutes purport to confer upon this Court jurisdiction in the premises then such provisions are ultra vires of the Parliament of Canada by reason of the provisions of the British North America Act (Imp.) 30-31 Victoria, Chapter 3, Section 92, Clause 13, and the amendments thereto.

In support of this application to set down for hearing before trial the points of law raised by the above paragraph of the defence, the defendant invokes Rule 149 of the General Rules and Orders of this court. This rule reads as follows:

149. No demurrer, as a separate pleading, shall be allowed, but any party shall be entitled to raise by his pleading any point of law; and any point so raised shall be disposed of by the Court or a Judge at or after the trial: provided that by consent of the parties, or by order of the Court or a Judge, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

The defendant submits that Rule 149 should be invoked where a point raised by the pleadings depends upon legal

1955

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LTD. v. ELMWOOD HOTEL LTD.

Fournier J.

rather than factual consideration and that the point should be one which would result in a disposition of the proceedings before the Court. I agree that the point should be one *which would* result in a final disposition of the case, but that the rule should not be invoked if it is not clearly established that it would have that result. If the hearing and disposition of the points of law raised did not have the effect of disposing of the proceedings so that a trial became unnecessary, the granting of this application would result in delaying the disposal of the action. To justify the setting down of the hearing of the points of law for argument, the applicant must establish a strong probability that they will be decided in a way that will dispose of the proceedings before the Court. At least a *prima facie* case must be made that the defendant will succeed. In the present instance, the setting down of the hearing before the trial was not agreed to by the plaintiff, so the defendant must show the Court that it would be more convenient to have the legal points decided before any evidence is given or any question or issue of fact is tried.

The learned counsel for the defendant argued that the cause of action did not fall within the provisions of the statutes above mentioned. He submitted, if I understood him well, that even if it were taken for granted that the Copyright Appeal Board had the necessary powers to establish a tariff of fees and to approve and certify the statements of fees, charges or royalties of the association or company concerned, and had exercised these powers, the plaintiff did not have the right to recover the fees thus certified and approved from the defendant in the Exchequer Court. His right to recover was a civil right and his recourse was before the provincial Courts. I cannot agree with this submission when the Copyright Act, R.S.C., 1952, chapter 55, deals with the recovery of fees by a "performing right society".

Section 20 (6) reads as follows:

> The Exchequer Court of Canada shall have concurrent jurisdiction with provincial courts to hear and determine all civil actions, suits, or proceedings that may be instituted for violation of any of the provisions of this Act or to enforce the civil remedies provided by this Act.

There is no doubt that this section of the Copyright Act, passed by Parliament, gives the Exchequer Court jurisdiction to try and dispose of this action.

As to the approval of the fees, charges or royalties to be charged by a performing right society, section 50 (9) provides for same and reads:

> 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.

In the *Maple Leaf Broadcasting Company Limited* v. *Composers, Authors and Publishers Association of Canada Limited* (1) the Supreme Court of Canada expressed the view that the Parliament of Canada had the legislative authority to enact laws regulating the licensing of performing rights by associations such as the plaintiff and fixing the amount of fees, charges or royalties and the terms of the licenses. And it was held that "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."

According to this section of the Act, the plaintiff may sue for or collect in respect of the issue or grant by it of licenses, etc. There is no doubt in my mind that the remedy sought by the plaintiff lies in the Exchequer Court of Canada which is given jurisdiction by section 20 (6) of the Act.

The Exchequer Court Act, R.S.C. 1952, chapter 98, also clothes this Court with jurisdiction to hear and determine claims for the recovery of fees for copyright licenses by section 21 (*c*).

The section reads:

> 21. The Exchequer Court has jurisdiction as well between subject and subject as otherwise,
>
> (*c*) in all other cases in which a remedy is sought under the authority of any Act of the Parliament of Canada or at common law or in equity, respecting any patent of invention, copyright, trade mark, or industrial design.

(1) [1954] S.C.R. 64 et seq.

1955

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LTD. v. ELMWOOD HOTEL LTD.

Fournier J.

In my view this section of the Act extends the jurisdiction of the Exchequer Court of Canada to all claims based on copyright to the full limit that Parliament may confer jurisdiction in that Court. Paragraph (*c*) covers all matters within the legislative authority of Parliament arising from copyright. Legislation on licenses and fees for copyright being within the authority of Parliament, it would follow that the present claim and the plaintiff's right to recover fees approved and certified by the Copyright Appeal Board is a statutory right, and actions respecting these matters therefore are within the jurisdiction of this Court.

So far, it has not been established before me that this Court is not vested with jurisdiction to try and dispose of this claim, nor that the plaintiff's claim does not fall within the ambit of the statutes mentioned in paragraph 2 of the defendant's statement of defence. I am rather of the opinion that the jurisdiction of the Exchequer Court as set out in the Exchequer Court Act extends to the hearing and disposing of matters within the legislative authority of Parliament for recovery of fees on a license granted to use a copyright.

The second point of law propounded by the defendant is that if the provisions of the said statutes purport to confer upon this Court jurisdiction in the premises then such provisions are unconstitutional. I believe that legislation on the subject of copyright is within the competence of Parliament under section 91, clause 23, of the British North America Act, 1867.

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—
>
> 23. Copyrights.

This being the case, Parliament had the authority to give jurisdiction to this court to try and determine actions such as this.

1955

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LTD. v. ELMWOOD HOTEL LTD.

Fournier J.

On this point I would refer the parties to a recent decision of the President of this Court, in the case of *Composers, Authors and Publishers Association of Canada Limited* v. *Sandholm Holdings Limited* (1).

That was an action by the plaintiff to recover in this Court from the defendants unpaid license fees in respect of the issue by it to the defendants of a license to perform in public all or any of the musical works in which it owned the performing rights and, if so, whether it was entitled to any other remedy.

At page 10 of his reasons for judgment the learned President says:

> . . . The fees for a license to perform the musical works in which a performing rights society owns the performing rights are no longer a matter of contract between the society and the user of the music but a matter of statutory fixation by the Copyright Appeal Board. Consequently, we are not here concerned with any question of contract between subject and subject. Thus the assumption on which I based my doubt as to the competence of Parliament is without foundation. The legislation under consideration is clearly legislation on the subject of copyright and, as such, within the competence of Parliament under head 23 of section 91 of the British North America Act.
>
> That being so, it was within the competence of Parliament to vest this Court with jurisdiction to hear and determine such an action as this.

The cause of action in the *Sandholm Holdings Limited* case was, as above stated, for the recovery of unpaid license fees and the claim in the present instance is for fees or charges payable under a certain license to perform musical works the performing rights of which are owned by the plaintiff. In both cases, there was objection based on the jurisdiction of this Court and the competence of Parliament to vest jurisdiction in the Exchequer Court of Canada. The only difference is that in the former case no application was made for a hearing of the points of law before trial, whilst in this action the defendant has moved that an order be issued setting down a date for a hearing before trial.

For the reasons stated, I find that the defendant has failed to show that there was any probability that the proceedings could be finally disposed of by the hearing prayed for in this motion. I have no hesitation in stating that nothing was invoked in the oral argument or the written submission to indicate that the defendant would succeed on

(1) [1955] Ex. C.R. 244.

1955

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LTD. v. ELMWOOD HOTEL LTD.

Fournier J.

the points of law at issue. At all events, the points of law raised in the defence may be more conveniently tried and disposed of at the trial, thus avoiding delay in the final disposition of all the matters involved. Furthermore, I concur in and make mine the remarks of the learned President of this Court in the *Sandholm* case *(supra)* on the same questions of law.

Therefore, there will be judgment that the motion for an order setting down a date for the hearing and disposition of the defence contained in paragraph 2 of the statement of defence is dismissed with costs.

Judgment accordingly.