



10-21
BETWEEN:

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

Plaintiff

- and -

**1041977 ONTARIO INC., carrying on business as CLUB ENERGY,
and ANTHONY GROSSI**

Defendants

REASONS FOR ORDER AND ORDER

GILES, A.S.P.:

The motion before me under Rule 324 is by the defendants, for an order granting the defendants an extension of time to file their Amended Statement of Defence. It is not open to me to extend time for filing an Amended Statement of Defence without knowing what the proposed Amended Statement of Defence contains. I had previously given leave to file an Amended Defence in accordance with instruction given from the bench. The plaintiff has alleged that the proposed Amended Statement of Defence does not include all those matters which I indicated were to be included, amongst which were particulars.

The proposed Amended Defence not having been submitted by the defendants with its application, I should technically refuse to extend the time.

The plaintiff has however exhibited a proposed defence which was served upon it, to an affidavit filed in opposition to the motion. I do not intend to go

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through all the particulars which would be required to flesh out the defence for it to be acceptable, but will concentrate on one submission and that is, that the proposed paragraph 4 upon which the defence appears to rest, does not constitute a reasonable defence. The standard practice with regard to granting leave to amend, is to refuse leave when the proposed amended pleading would be struck out under Rule 419(1)(a). Here the proposed defence, that the corporate defendant did not authorize or cause the performance or any live or recorded music, does not provide a defence to claim under s. 27(5) that the defendant permitted a place of entertainment to be used for the performance in public of the work.

The motion for an extension of time must therefore be dismissed.

The matter of whether further time should be granted to file an Amended Defence should be considered in the same manner as any right to file an Amended Claim is considered when a claim is struck under Rule 419(1)(a). That is to say, where there is the least scintilla of a cause, a right to claim should not be permanently extinguished. Similarly, where there is a suggestion of a defence, the right to defend should not be extinguished finally by striking out the defence without leave. When I originally struck, I gave leave which I would not have done, had I have not detected a suggestion of a defence. In the most recent allegations it is indicated that the defendant does not make a profit, that suggests to me the possibility of a defence based on s. 75(3) and in these circumstances a further opportunity to file a defence should be considered. Because this second attempt has failed, I am requiring that the defendants seek leave to file an Amended Defence.

Further the plaintiff cannot be expected to suffer innumerable attempt uncompensated. In my view, I should award costs of a somewhat penal nature in this case.

ORDER

The motion for an extension of time to file an Amended Statement of Defence is dismissed without prejudice to the defendants' right to seek leave, to file an Amended Defence on or before the 28th day of October, 1996. The defendants shall pay to the plaintiff the costs of opposing this motion fixed in the amount of \$700.00, payable forthwith and before taking any further step in the action other than an appeal of this Order.

"Peter A.K. Giles"

A.S.P.

Toronto, Ontario
October 4, 1996

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

COURT NO: T-363-96

STYLE OF CAUSE: SOCIETY OF COMPOSERS, AUTHORS
AND MUSIC PUBLISHERS OF CANADA

- and -

1041977 ONTARIO INC., carrying on
business as CLUB ENERGY, and
ANTHONY GROSSI

CONSIDERED AT TORONTO, ONTARIO UNDER THE PROVISION OF
RULE 324.

REASONS FOR ORDER
AND ORDER BY: GILES, A.S.P.

DATED: OCTOBER 4, 1996

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