



T-1939-95

BETWEEN:

SOCIETY OF COMPOSERS, AUTHORS AND  
MUSIC PUBLISHERS OF CANADA,

Plaintiff,

and

FLAGSHIP BAR AND DISCO LTD.  
and HERMEL LURETTE,

Defendants.

Report on a Reference

F. Pilon, Arbitrator

This reference was held in Fredericton, New Brunswick, on February 27, 1997, pursuant to a default judgment given by the Honourable Mr. Justice Nadon on February 29, 1996. That judgment ordered in part that:

(a) the defendants pay the plaintiff damages for or arising from the infringement by the defendants of the plaintiff's copyright, and that the question of the amount of the said damages be determined by a reference;

(b) in addition to damages, the defendants pay the profits made by the defendant as a result of their infringement of the plaintiff's copyright, pursuant to section 35 of the *Copyright Act*, and that the question of the amount of the said profits be determined by the said reference;

(c) the defendants pay to the plaintiff interest both before and after judgment on the said damages and profits; and

(d) the Administrator of this Court, or any other of the Court that the Administrator may designate, be appointed as an Arbitrator for the purposes of determining the damages and profits referred to above.

The plaintiff is a collective copyright society under section 67 of the *Copyright Act*, R.S.C. 1985, chapter C-42. Under subsection 67.2(2) of the Act, the plaintiff is entitled to collect the royalties specified in its approved statement or, in default of their payment, recover them in a court of competent jurisdiction. These royalties have been approved by the Copyright Board from year to year, in accordance with the Act. In addition, the plaintiff is entitled to bring action for infringement of copyright against any person or corporation who has not been granted a licence and infringes its exclusive rights, by permitting or authorizing the performance in public of the musical works for which it holds the copyright.

During the material period, the defendant Hermel Lurette was the president, manager and sole shareholder, and also the founder, of the defendant

Flagship Bar and Disco Ltd. During the period covered by the action, Mr. Lurette managed the business in question, and directly or tacitly authorized the performance of musical works and the infringement of the plaintiff's copyright.

The approved statements for music performed live, payment of which the plaintiff is entitled to charge establishments, were published for 1992, 1993, 1994 and 1995 in the Canada Gazette as Tariff 3A. Under that tariff, the royalties chargeable each year are calculated as a proportion of the total compensation for entertainment during the year. Tariff 3A requires that the licence holder submit a report on the compensation for entertainment with its payment.

The approved statements for the performance of recorded music for dancing were published for 1992, 1993, 1994 and 1995 in the Canada Gazette as Tariff 18. Under that tariff, the royalties chargeable each year are calculated on the basis of the number of seats available in the rooms on the premises where such performances take place and the number of months that the premises were in operation. Tariff 18 requires that the licence holder submit a report on the capacity of the rooms of the premises with its payment.

On numerous occasions, the plaintiff informed the defendants that the performance in public of musical works for which the plaintiff holds the performance rights without obtaining the appropriate licences violated the Act (Exhibit 1, tabs 4, 10, 12 and 13).

The defendants were duly served with a copy of the statement of claim and the notice of the hearing of the reference. Mr. Lurette chose not to attend at the hearing. Virtually all the documentary evidence submitted by the plaintiff consists of documents served on the defendants with a covering notice requesting that documents be admitted pursuant to Rule 468(2). Consequently, that evidence is determined to have been admitted to be genuine. Daniel Boivin, counsel for the plaintiff, filed Exhibits 1 (volume containing a number of exhibits), 2 and 3, and the examination of the witness Richard Albert.

The method of calculating damages (Exhibit 2) used by Mr. Albert is a rough and ready estimate, a method long recognized by the industry and in the Canadian case law. The witness stated that he had visited the defendants' premises in 1992, 1993 and 1994. In 1995, an inspector for the Montréal region, Daniel Lemai, visited the Flagship Bar. On each of their visits, the inspectors discussed SOCAN's rights with the owner or another responsible person, and also the royalties for any public performance of musical works, and advised that operating without a SOCAN licence was a violation of the *Copyright Act*. On each visit, the inspector left documents published by Consumer and Corporate Affairs Canada explaining the nature and mandate of SOCAN. Application forms for the appropriate licences were left with the person in charge on each occasion. The inspector wrote up an inspection report that is included in the plaintiff's evidence, and subsequently, from time to time, SOCAN sent a letter to the owner of the establishment requesting that he fill out a licence application. All these letters are in evidence, in volume 1 of the exhibits filed at the hearing. Over the years, the defendants failed to communicate with the plaintiff or its

representatives. I would add that in this case, Mr. Albert testified that he visited the Flagship Bar in 1996 and 1997 and that the owner is still authorizing the public performance of musical works in violation of the Act.

#### Calculation of damages

##### A. Infringement of Tariff 3A (music performed live)

Mr. Albert calculated the total compensation for entertainment for each of the four years in question, based on the following facts and factors:

- the known number of evenings with groups
- an estimate of the door
- other compensation

These figures are taken from the tariff of royalties that may be collected by the Copyright Board for a licence. A percentage is established each year and is published in the Canada Gazette.

I would like to note here that the known number of evenings with groups is based on advertising published in the local newspapers; that the estimate of the door is \$300.00 per evening, which is a very conservative figure according to Mr. Albert, since it is known that some doors might go as high as \$4,000 per evening; and that in this action the figure of \$600.00 per month has been added because the owner made free accommodation available to the bands, a practice

that is very common in the industry. The total royalties under Tariff 3A were determined to be \$4,977.90.

B. Violation of Tariff 18 (recorded music used for dancing)

The royalties under this tariff are fixed by the Copyright Board and are based on the capacity of the room(s) in the establishment and the number of months it is open. These royalties have been proved for the four years, in the amount of \$3,681.72.

C. Calculation of profits relating to the use of the music

First, the gross revenue for each year is calculated by multiplying the annual figure for compensation for entertainment by four. It is well known in the industry that entertainment expenses account for 25 per cent of an establishment's gross revenue. The total operating cost is obtained by deducting the following items:

- the cost of sales (35%)
- wages and benefits (22%)
- shrinkage (2%)
- bar supplies (2%)
- breakage (1%)

These items are deducted from gross revenue and make up the operating cost. At this point, compensation for entertainment is added, to obtain a final figure for total expenses. Net profits are obtained by subtracting total expenses from gross revenue. The witness calculated the amount of profits for the four years to be \$98,904.00.

Pre-judgment interest is \$13,170.75 and the G.S.T. on royalties under Tariffs 3A and 18 amounts to \$606.17.

Mr. Boivin also claimed exemplary damages in the amount of \$15,000.00. He contended that it must be remembered that SOCAN represents creators and composers, people whose job it is to write songs and create music. It is important that these people be compensated for their creative energy, since the works it produces benefit everyone. Counsel for the plaintiff submitted that a number of other arbitrators who have had to decide similar cases have awarded exemplary damages. In my view, the conduct of the defendant Hermel Lurette demonstrates a serious lack of responsibility in dealing with the repeated requests by the plaintiff, by failing to obtain the appropriate licences. He has refused any communication with the plaintiff. The evidence shows that he has continued, since 1995, to authorize the performance of musical works in violation of the Act. In the circumstances, I think that the claim for \$15,000.00 in punitive damages is entirely reasonable.

In conclusion, I therefore recommend to the Court that the plaintiff be compensated in the following amounts:

1.	royalties under Tariff 3A	\$ 4,977.90
2.	royalties under Tariff 18	\$ 3,681.72
3.	G.S.T. on items 1 and 2	\$ 606.17
4.	profits	\$ 98,904.00
5.	interest	\$ 13,170.75
6.	exemplary damages	\$ 15,000.00
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	total	\$ 136,340.54

Signed Signé  
François Pilon

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François Pilon  
Arbitrator

Halifax, N.S.  
April 9, 1997

Certified true translation

C\ Delon, LL.L.



FEDERAL COURT OF CANADA  
NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO: T-1939-95

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PLACE OF REFERENCE: Fredericton, N.B.

DATE OF REFERENCE: February 27, 1997

REASONS OF THE ARBITRATOR: F. PILON

REPORT OF THE ARBITRATOR: Halifax, April 9, 1997

APPEARANCES:

Daniel Boivin for the plaintiff

SOLICITORS OF RECORD:

Gowling, Strathy & Henderson  
Ottawa, Ontario for the plaintiff