Date: 20090311

Docket: A-517-08

Citation: 2009 FCA 78

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
TRUDEL J.A.

BETWEEN:

MAPLE LEAF SPORTS & ENTERTAINMENT LTD.

Appellant

and

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA

Respondent

Heard at Toronto, Ontario, on March 10, 2009.

Judgment delivered at Toronto, Ontario, on March 11, 2009.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
NADON J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] The respondent (SOCAN) has commenced an action against the appellant (MLSE) claiming, *inter alia*, that MLSE had authorized the live performance of protected musical works at concerts held at the Air Canada Centre in Toronto since 1999 without fulfilling its various obligations under the *Copyright Act*, R.S.C. 1985, c. C-42 and the applicable Tariffs.

[2] This appeal arises from an interlocutory order of Hugessen J. (the Motions Judge) [2008 FC 1099, October 1, 2008] who set aside a previous order of the case management Prothonotary (T-2221-04, June 19, 2008) made in the context of a motion by the respondent to compel MLSE to answer various questions put during discovery to a representative of MLSE.

[3] The respondent, through question No. 36, sought to probe MLSE's knowledge, information and belief as to who performed and which songs were performed at a number of identified concerts.

[4] The Prothonotary ordered that the question be answered but held that MLSE was "not required to make inquiries with its employees beyond its representative on discovery" (Prothonotary's Order, at subparagraph 1(*b*)(xi)).

[5] The Motions Judge, who incidentally was also authorized to act as the case management judge, concluded that "to require the [appellant's] representative to interview [a] vast numbers of people on matters of which they might be expected to have only imperfect recollection, if any, was at first blush a matter on which the Prothonotary was fully entitled to exercise her discretion and find that the obligation would be unduly onerous" (Reasons at paragraph 8).

[6] For him, nonetheless, this did not end the matter. On the basis of a cross-examination on affidavit of the appellant's representative, the Motions Judge found that MLSE was "actively obstructing legitimate attempts by the [respondent] to marshal its evidence" by refusing to answer

questions related to the issues on discovery and that such refusal had no proper legal basis pursuant to Rule 240 (*ibid.* at paragraphs 10 and 11). More particularly, MLSE had refused to provide the names and contact particulars of all its former and present employees who worked at concert events and to allow the respondent to contact them and ask them questions about the concert performances at issue.

[7] There is no doubt that the appellant's knowledge and the information it possesses is highly relevant and at the core of the respondent's attempt to identify those who performed musical work at these concerts, as well as the works performed. This information is necessary to determine the extent of the copyright infringements, the sums due as royalties under the Tariffs and the damages claimed.

[8] The Motions Judge ruled that MLSE could not have it "both ways. If the task of interviewing its present and former employees is too burdensome for it, it cannot refuse to reveal the names and addresses of such employees to [the respondent] so that the latter can do the work" (*Ibid.* at paragraph 12.). The Motions Judge also concluded that MLSE's active obstruction led to the loss of its right to object to the onerous nature of obtaining the information required from it.

[9] In light of all the circumstances, I have not been persuaded that the Motions Judge made an error in compelling, as he did, MLSE to answer question No. 36.

[10] More particularly, I am satisfied that the Motions Judge did not err in concluding that the Prothonotary had acted upon a wrong principle when she overlooked the fact that the appellant was responsible for creating the conditions of hardship. I am satisfied that his intervention was warranted on that basis. This is sufficient to dispose of the present appeal without having to decide on the application of Rule 240.

CONCLUSION

[11] I would dismiss the appeal with costs.

"Johanne Trudel"
J.A.

"I agree
Gilles Létourneau J.A."

"I agree
M. Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-517-08
STYLE OF CAUSE:	MAPLE LEAF SPORTS & ENTERTAINMENT LTD. and SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA
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CONCURRED IN BY:	LÉTOURNEAU J.A. NADON J.A.
DATED:	March 11, 2009

APPEARANCES:

Glen A. Bloom	FOR THE APPELLANT
Diane Cornish Roger Tam	FOR THE RESPONDENT

SOLICITORS OF RECORD:

OSLER, HOSKIN & HARCOURT LLP Ottawa, Ontario	FOR THE APPELLANT
GOWLING LAFLEUR HENDERSON LLP Toronto, Ontario	FOR THE RESPONDENT