1952

Nov. 24, & 28, Dec. 1

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Feb. 23

BETWEEN:

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

AND

MAPLE LEAF BROADCASTING COMPANY LIMITED ..... } DEFENDANT.

Copyright—Action for infringement of copyright, damages and an injunction—Copyright Appeal Board—The Copyright Amendment Act, 1931, S. of C. 1931, c. 8, ss. 10(1) (2) (3), 10(B) (6) (6) (a) (7) (8) (9)—An Act to amend the Copyright Amendment Act, 1931, and the Copyright Act, S. of C. 1938, c. 27, s. 3—The Copyright Act, R.S.C. 1927, c. 32—Radio broadcasters—Validity of tariff of "fees, charges or royalties" established by the Copyright Appeal Board—Tariff No. 2 including provision authorizing inspection of licensee's books and records and statements certified by the Copyright Appeal Board intra vires the Board—Counterclaim dismissed.

Pursuant to the provisions of the Copyright Amendment Act, 1931, 21-22 Geo. V, c. 8, S. of C. 1931, plaintiff which carries on in Canada the business of acquiring performing rights in musical works and deals with the grant of licences for the performance in Canada of such works duly filed at the Copyright Office within the time specified in the Act what purported to be the statement of all fees charges or royalties it proposed to collect during 1952 in compensation for the grant of said licences. In due course the Copyright Appeal Board proceeded to consider the statement and objections thereto, and after hearing the interested parties, certified its approved statements to the Minister, notice thereof being given in the *Canada Gazette*.

Defendant performed over its station certain of plaintiff's works without its consent and without securing a licence or paying any fees. The action is one for infringement of copyright, damages and an injunction but, actually, was brought to test the validity of the tariff of "fees, charges or royalties" established by the Board as those which plaintiff might charge radio broadcasters for a general licence for the calendar year 1952 (Tariff No. 2.) In its counterclaim defendant asked for a declaration that the tariff was *ultra vires* the Board, mainly on the ground that being based on the "gross revenue" of the broadcasting companies it is not a statement of "fees, charges or royalties" within the meaning to be attributed to those words in the Act.

Held: That under the provisions of the Copyright Amendment Act a purely administrative function was given to the Board by Parliament, namely, to fix the rates which the plaintiff could legally charge for the use of its works; or at the most that it was of a quasi-judicial nature. If it be the former, it is not open to review by the Court; if it be the latter, all that was necessary was that those opposed in interest to that of the plaintiff should have had a fair opportunity to be heard in the dispute. *The King* v. *Noxzema Chemical Company of Canada* [1942] S.C.R. 178; *Pure Spring Company Limited* v. *Minister of National Revenue* [1946] Ex. C.R. 471 referred to.

2. That the words "fees, charges or royalties" as used in the Copyright Amendment Act, 1931, do not permit of a narrow interpretation. Parliament by using them must have intended that there would be included every form of toll, be it a fee, a charge or a royalty, which would enable the Copyright Appeal Board to establish a suitable tariff of rates which was its primary task. "The statement of fees, charges or royalties" in the Act is equivalent to "statement of the tariff rates". They do not mean only tolls or rates fixed at a specific amount in dollars and cents.

3. That the difficulty for the broadcasting companies which have a fiscal year corresponding to the calendar year to precisely ascertain their "gross revenue" on December 31 was a matter for consideration by the Copyright Appeal Board and its reasonableness or otherwise is not for the Court to determine. *Carltona Limited* v. *Commissioners of Works* [1943] 2 A.E.R. 560 referred to.

4. That in carrying out its duties, while it was not absolutely necessary for the Copyright Appeal Board to base the rates for annual licenses on the income or a proportion of the income of the licensees or to fix the rates for annual licenses to broadcasting stations on a percentage of their gross revenue, yet in view of all the classifications involved it was reasonably necessary to do so and in the absence of any direction in the Act, it could do so.

5. That the Copyright Appeal Board having the power to fix a tariff of rates on the basis of the income or on the gross revenue of a licensee, it must necessarily have the power to impose reasonable conditions upon those who desired to take advantage of an annual license where the tariff was based in some way or other on income, on gross revenue, or in any way other than on a fixed dollar amount. The provision in Tariff No. 2 authorizing the inspection of a licensee's books and records seemed not only reasonable, but absolutely necessary if suitable protection were to be afforded to plaintiff.

6. That Tariff No. 2, including the provision relating to the inspection of a licensee's books and records and the whole of the statements certified by the Copyright Appeal Board were *intra vires* the Board.

ACTION for infringement of copyright, damages and an injunction.

The action was tried before the Honourable Mr. Justice Cameron at Toronto.

H. E. Manning, Q.C. and *R. F. Reid* for plaintiff.

Samuel Rogers, Q.C. and *G. W. Ford, Q.C.* for defendant.

The facts and questions of law raised are stated in the reasons for judgment:

CAMERON J. now (February 23, 1953) delivered the following judgment:

The plaintiff herein is a company incorporated by Letters Patent under the Companies Act of the Dominion of Canada, having its head office at Toronto. It carries on in

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Canada the business of acquiring copyrights of dramatico-musical or musical works or performing rights therein and deals with or in the issue or grant of licenses for the performance in Canada of such works. The defendant is a corporation with its head office in Hamilton, Ontario, and operates there a broadcasting station, licensed under the Broadcasting Act of Canada, having the station identification "CHML."

In form, the action is one for infringement of copyright, damages and an injunction. Actually, in its major aspect, it is brought to test the validity of the tariff of "fees, charges or royalties," established by the Copyright Appeal Board (hereinafter to be called "the Board") as the "fees, charges or royalties" which the plaintiff might charge radio broadcasters for a general licence for the calendar year 1952 (Tariff No. 2). In its counterclaim the defendant asks for a declaration that the said tariff is null and void. I propose to consider that issue first.

The dispute centres around the interpretation to be placed upon certain sections of the Copyright Amendment Act, 1931, as amended, and which by s. 3 of c. 27, Statutes of Canada, 1938, is to be read and construed with and as part of The Copyright Act, R.S.C. 1927, c. 32 amended. The relevant sections are as follows:

10. (1) Each society, association or company which carries on in Canada the business of acquiring copyrights of dramatico-musical or musical works or performing rights therein, and which deals with or in the issue or grant of licences for the performance in Canada of dramatico-musical or musical works in which copyright subsists, shall, from time to time, file with the Minister at the Copyright Office lists of all dramatico-musical and musical works, in current use in respect of which such society, association or company has authority to issue or grant performing licences or to collect fees, charges or royalties for or in respect of the performance of its works in Canada.

(2) Each society, association or company shall, on or before the first day of November, one thousand nine hundred and thirty-six, and, thereafter, on or before the first day of November in each and every year, file, with the Minister at the Copyright Office statements of all fees, charges or royalties which such society, association or company proposes during the next ensuing calendar year to collect in compensation for the issue or grant of licences for or in respect of the performance of its works in Canada.

(3) If any such society, association or company shall refuse or neglect to file with the Minister at the Copyright Office the statement or statements prescribed by the last preceding subsection hereof, no action or

other proceeding to enforce any civil or summary remedy for infringement of the performing right in any dramatico-musical or musical work claimed by any such association, society or company shall be commenced or continued, unless the consent of the Minister is given in writing.

10A. (1) As soon as practicable after the receipt of the statements prescribed by subsection two of the last preceding section, the Minister shall publish them in the *Canada Gazette* and shall notify that any person having any objection to the proposals contained in the statements must lodge particulars in writing of his objection with the Minister at the Copyright Office on or before a day to be fixed in the notice, not being earlier than twenty-one days after the date of publication in the *Canada Gazette* of such notice.

(2) As soon as practicable after the date fixed in said notice as aforesaid the Minister shall refer the statements and any objection received in response to the notice to a Board to be known as the Copyright Appeal Board.

10B. (6) As soon as practicable after the Minister shall have referred to the Copyright Appeal Board the statements of proposed fees, charges or royalties as herein provided and the objections, if any, received in respect thereto, the Board shall proceed to consider the statements and the objections, if any, and may itself, notwithstanding that no objection has been lodged, take notice of any matter which in its opinion is one for objection. The Board shall, in respect of every objection, advise the society, association or company concerned of the nature of the objection and shall afford it an opportunity of replying thereto.

(6) (*a*) In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection and shall fix the amount of the same. In so doing the Board shall take into account all expenses of collection and other outlays, if any, saved or saveable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this subsection.

(7) Upon the conclusion of its consideration, the Copyright Appeal Board shall 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. The Minister shall thereupon as soon as practicable after the receipt of such statements so certified publish them in the *Canada Gazette* and furnish the society, association or company concerned with a copy of them.

(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.

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(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.

As shown by these sections, the scheme which Parliament adopted was briefly as follows: dealers in performing rights are to file at the Copyright Office lists of all dramatico-musical and musical works in current use in respect of which the dealer has the right to grant licences or to charge fees for performances, and to file statements on or before the 1st of November in each year of all fees, charges or royalties which such dealer proposed during the next ensuing calendar year to collect in compensation for the issue or grant of licences in respect of the performance of such works.

There was set up a Copyright Appeal Board whose duty it is to consider these proposed charges and to make such alterations in the statements as may seem just and transmit the statements so altered or revised or unaltered, as the case may be, to the Minister, certified as approved statements. The statements so certified are published in the *Canada Gazette;* and the fees, charges or royalties so certified are the fees, charges or royalties which the performing rights dealer may collect in respect of the issue of licences during the ensuing calendar year. The Act provides that no dealer shall have any right of action or have any right to enforce any civil or summary remedy for the infringement of the performing rights in any of its works against any person who has tendered or paid to such dealer the fees, charges or royalties that have been approved.

Pursuant to the requirements of the Act, the plaintiff duly filed at the Copyright Office within the time specified what purported to be the statement of all fees, charges or royalties which it proposed to collect during the year 1952 in compensation for the issue or grant of licences in respect of the performance of its works.

In due course the Board proceeded to consider the statement and objections thereto, and after hearing the interested parties, certified its approved statements to the Minister, notice thereof being given by the Secretary of State in the *Canada Gazette* of March 27, 1952. Insofar

as the plaintiff is concerned the approved statement contains some sixteen tariffs but only Tariff No. 2 is of direct importance on this particular issue. It is in part 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 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 Association will, if payments are punctually made, accept fees payable by any licensee in twelve equal monthly instalments paid in advance on the first day 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.

It will be noted that Clause (A) affects only the Canadian Broadcasting Corporation and that the charges to be paid by it consist of the levies made under both Clauses (A) and (B). Presumably no objection has been raised by that Corporation and in any event it is not here represented. The action is brought against the defendant pursuant to an agreement dated May 14, 1952 (Ex. B) entered into between the plaintiff and a representative of the privately owned broadcasting stations—The Canadian Association of Broadcasters.

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I am of course not concerned with the amounts which the defendant—or other private broadcasting stations—may be called upon to pay under Tariff 2. That is entirely a matter for the Board. The Copyright Amendment Act provides no appeal from the statements so certified by the Board but specifically provides that such statements "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." (s. 10 B. (8)). It is of some interest, however, to note that Tariff 2 for the year 1952 imposes charges which, if paid by the private broadcasting stations, would increase the income of the plaintiff from that source by something in excess of 100 per cent over such income for the preceding year.

For each year prior to 1952, the Board had fixed the fees for radio broadcasting at a fixed dollar amount based on the number of radio receiving sets licenced by the Department of Transport. For the previous five years, the total of such fees was at the rate of fourteen cents for each such receiving set, of which seven cents was paid by the Canadian Broadcasting Corporation and seven cents by the privately-owned radio stations. As I understand the matter, the total amount to be paid by the privately-owned stations was apportioned between themselves by their representatives, and that apportionment was approved by the Board in a schedule to its findings.

The proposed tariff which the plaintiff filed at the Copyright Office as being its fees, charges or royalties for the year 1952 was not approved by the Board. It proposed the following: (*a*) payment by the privately-owned broadcasting stations to be divided between them according to a schedule to be approved, at the aggregate rate of eight-tenths of a cent per capita of the population of Canada; (*b*) payment by the Canadian Broadcasting Corporation of a fee of one cent per capita of the population, plus the sum provided for in (*c*); (*c*) payment by each licensee of a sum equal to 2¼ per cent of the gross billings for the sale of broadcasting on the station or stations owned and operated by such licensee during its fiscal period ending in 1951.

It provided, also, that each licensee furnishing certain required data at the end of each month should be entitled to a discount of 9 per cent; that the association would accept payments in twelve monthly instalments if regularly made; it also contained the same provisions for examination of the licensee's books as appears in the statement later approved by the Board.

I have summarized the nature of that statement inasmuch as the defendant by way of defence also alleged that it was not a statement of fees, charges or royalties as required by s. 10(2); that therefore under s. 10(3) the plaintiff, having neglected to file a statement of its fees, charges or royalties, was barred from taking any action for infringement unless the consent of the Minister had been given in writing. It is admitted that no such consent had been asked for or granted.

It will be seen, therefore, that the Board in establishing the plaintiff's tariff for 1952 in respect of broadcasting, did not state a specific dollar amount which each broadcasting station is required to pay for a general licence, although it did so for another similar association—B.M.I. Canada, Ltd. Insofar as private broadcasting stations are concerned, each licensee was required to pay a sum equal to $1\frac{3}{4}$ per cent of its gross revenue for its fiscal year ending in 1951, the term "gross revenue" being as defined in P.C. 5234 of October 14, 1949 (Ex. L). That Order in Council established regulations under the Radio Act, 1938, Part I, and part of s. 1 thereof is as follows:

> For the purpose of this regulation "gross revenue" means 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.

It may be noted here that the Radio Act, 1938, empowers the Minister of Transport (*inter alia*) to make regulations regarding the issue of licences to broadcasting stations, and authorizes the Governor in Council "to prescribe the tariff of fees to be paid for licences."

P.C. 5248 establishes a schedule of license fees for private commercial broadcasting stations varying in amount from $100 for stations whose annual gross revenue is under $25,000 to $6,000 for those whose annual gross revenue is $400,000 and over.

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Further, it will be noted that in respect of Tariff 2 applicable to broadcasting stations, the Board for the first time incorporated the provision giving the plaintiff the right by its authorized representative to examine the books and records of the licensee to such extent as may be necessary to verify the statements rendered by the licensee. A similar provision had appeared in previous approved statements in regard to other categories of licensees, whose licence fees were based on such matters as the amount paid for entertainment (in cabarets, restaurants and the like), or on the receipts from admission charges (in ballrooms, dance halls, rinks, etc.); or for performances conveyed by telephone wire to non-industrial establishments other than domestic where the fees were a percentage of the gross amount paid for entertainment and servicing of equipment, and the furnishing of programs. It is obvious that the new Tariff 2 included the provision for inspection of books and records because of the change in the licence fee from a fixed dollar amount to a charge based on gross revenue, which latter amount could not be verified by the plaintiff until such inspection had been made.

The main submission by the defendant is that the approved statement of "fees, charges or royalties" as published in the *Canada Gazette*, is not a statement of "fees, charges or royalties" within the meaning of the sections of the Copyright Amendment Act which I have quoted and is therefore null and void. The alleged reasons as found in para. 1 of the counter claim are briefly as follows: It says—

(*a*) That on January 1, 1952, it was unable to ascertain by reference to the said purported approved statement the specific amount which it was required to pay to the plaintiff to acquire a licence in 1952; and that as of the date of the counter claim—June 20, 1952—it was still unable to do so.

(*b*) That an impost based on the gross revenue of the defendant as set out in section 1(B) of Tariff 2 is not in law a statement of fees, charges or royalties.

(*c*) That an impost based on gross revenue bears no relationship to the revenue derived from the use of the rights acquired by the defendant under the plaintiff's licence.

(*d*) That the provision in the last paragraph of section 1 of Tariff 2 in the approved statement deals with matters other than quantum of fees, charges or royalties and is therefore beyond the jurisdiction of the Board.

(*e*) That an impost which by its terms or for its enforcement involves access to the books or other private records of the defendant is an invasion of and inconsistent with the civil rights of the defendant.

Later herein consideration will be given to that clause in Tariff 2 which gives the plaintiff the right to inspect the defendant's books, both as to its validity and as to its effect on Tariff 2. The first point to be considered is whether Tariff 2, certified as approved by the Board and based on the gross revenue of the broadcasting companies, is a statement of "fees, charges or royalties" within the meaning to be attributed to those words in the Act.

The purpose of the Copyright Amendment Act was to control and provide for the fixation of the prices or rates which a Performing Rights Society could lawfully charge for the user of those works in which it owned or controlled copyright in Canada. For that purpose, Parliament created a Copyright Appeal Board charged with the annual duty of considering proposed rates for the following year, hearing objections thereto, considering the proposed statements and objections and, when necessary, taking notice of any matter which in its opinion was one for objection. The Board could alter or revise the proposed statements "as it may think fit," and was required to transmit the statements thus altered, revised or unchanged to the Ministry as the approved statements. It is of particular importance to note that such statement of "fees, charges or royalties" so certified, "shall be the fees, charges or royalties which the Society . . . may lawfully sue for or collect during . . . the ensuing calendar year."

The entire matter was left to the judgment and discretion of the Board. No right of appeal was provided; the statements so certified were not subject to the approval of the Minister and were not required to be laid before Parliament. Moreover, the statute does not specify what principles the Board is to follow in considering and fixing the rates. It is required to consider the proposed rates and any objection thereto, but in reaching its conclusions the Board is quite free to determine the rates as it deems best.

Under these circumstances it seems to me that a purely administrative function was given to the Board by Parliament, namely, to fix the rates which the plaintiff could legally charge for the use of its works; or at the most that it was of a quasi-judicial nature. If it be the former, it is not open to review by the Court; if it be the latter, all that

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was necessary was that those opposed in interest to that of the plaintiff should have had a fair opportunity to be heard in the dispute, and no suggestion to the contrary has been made.

In *The King v. Noxzema Chemical Company of Canada, Ltd.* (1), the Court considered the nature of a power conferred on the Minister of National Revenue by s. 98 of the Special War Revenue Act, which was as follows:

98. Where goods subject to tax under this Part or under Part XI of this Act are sold at a price which in the judgment of the Minister is less than the fair price on which the tax should be imposed, the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined.

In that case, Davis J. said at p. 180:

The important question that arises upon this appeal is one of law, as to the position of the Minister under this section of the statute—that is, whether his act is purely an administrative act in the course of settling from time to time the policy of his Department under the statute in relation to the various problems which arise in the administration of the statute, or whether he is called upon under the section of the statute to perform a duty of that sort which is often described as a quasi-judicial duty.

My own view is that it is a purely administrative function that was given to the Minister by Parliament in the new section 98; to enable him to see, for instance, that schemes are not employed by one or more manufacturers or producers in a certain class of business which, if the actual sale price of the product is taken, may work a gross injustice to and constitute discrimination against other manufacturers or producers in the same class of business who do not resort to such schemes which have the result of reducing the amount on which the taxes become payable. If that be the correct interpretation, in point of law, of the section in question, then the administrative act of the Minister is not open to review by the Court. It is to be observed that no statutory right of appeal is given.

If, on the other hand, the function of the Minister under the section may be said to be of a quasi-judicial nature, even then all that was necessary was that the taxpayer be given a fair opportunity to be heard in the controversy; and to correct or to contradict any relevant statement prejudicial to its interests. Reliance has consistently been put by the courts since 1911 upon the language of Lord Loreburn in *Board of Education* v. *Rice*, [1911] A.C. 179, at 182:—

> In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial.

(1) [1942] S.C.R. 178.

They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal from the determination of the Board under s. 7, sub-s. 3, of this Act. The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the local education authority. The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

In the same case Kerwin, J. said at p. 186:

The legislature has left the determination of that matter and also of the fair prices on which the taxes should be imposed to the Minister and not to the court. In my view, section 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal. In such a case the language of the Earl of Selborne in *Spackman* v. *Plumstead District Board of Works* (1885) 10 App. Cas. 229, at 235, appears to be particularly appropriate:—

> "And if the legislature says that a certain authority is to decide, and makes no provision for a repetition of the inquiry into the same matter, or for a review of the decision by another tribunal, prima facie, especially when it forms, as here, part of the definition of the case provided for, that would be binding."

In the case of *Pure Spring Co. Ltd.* v. *Minister of National Revenue* (1), the President of this Court considered the nature of the discretion conferred on the Minister of National Revenue by s. 6(2) of the Income War Tax Act. He held that the Minister's discretionary determination thereunder was an administrative act with quasi-legislative effect done in the course of administration and definition of public policy. It was held (Headnote 10):

10. That neither the opinion of the Minister nor the material on which it was based is open to review by the Court; it has no right to examine into or criticize the reasons that led the Minister to his opinion or question their adequacy or sufficiency; it is not for the Court to lay down the consideration that should govern the Minister's discretionary determination; Parliament requires the Minister's opinion, not that of the Court; the Court has nothing to do with the question whether the Minister's opinion was right or wrong; nor has it any right to decide that it was unreasonable. The accuracy or correctness of the Minister's discretionary determination is outside the Court's jurisdiction.

In the instant case it seems to me that Parliament gave to the Board the fullest possible discretion to determine

(1) [1946] Ex. C.R. 471.

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the "fees, charges or royalties" to be charged by societies such as the plaintiff and that it intended that such determination should be final and conclusive, without any right of review by the Court, where the procedure laid down in the Act has been fully and properly carried out. Statutory authority is given to the statements so certified, by the provisions of s. 10B (8) which I have quoted.

It becomes necessary, however, to consider the plea of *ultra vires* raised by the defendant. It does not deny the right of the Board to fix the fees, charges or royalties, but says that the Board has misused the powers delegated to it, in certifying statements which are not actually statements of fees, charges or royalties.

I am asked by counsel for the defendant to find that the words "fees, charges or royalties," as used throughout the sections quoted, refer only to such levies as are stated precisely in dollar amounts. I was referred to a large number of dictionary definitions of these words, but have been unable to reach the conclusion that they must be given the limited meaning contended for. "Fees" and "charges" are common words which have much the same significance and are used frequently both in reference to a fixed amount in dollars, or as a percentage or proportion of something, such as the amount recovered or the value of a thing sold or used. Royalties also may be expressed as a specific amount in dollars or cents and related to the number of articles manufactured, sold or used; or as a percentage of the total sale value of the articles in which royalties are reserved, or of the articles of which they form a part.

In my opinion, these words as used in the Act do not permit of a narrow interpretation. The raison d'etre of the legislation regarding performing rights societies was set out in the judgment of Duff, C.J. in *Vigneux* v. *The Canadian Performing Rights Society, Ltd.* (the predecessor of the plaintiff company), (1). At p. 353 he said:

> It is of the first importance, in my opinion, to take notice of this recognition by the Legislature of the fact that these dealers in performing rights, which rights are the creature of statute, are engaged in a trade which is affected with a public interest and may, therefore, conformably to a universally accepted canon, be properly subjected to public regulation.

The purpose of the enactment was to deprive performing rights societies of the right which they had therefore enjoyed of setting their own tolls for the use of works in

(1) [1943] S.C.R. 348 at 353-4.

which they held copyright in Canada. In the public interest, such tolls had to be controlled and regulated and the duty of fixing the tolls annually for each calendar year was placed on the Copyright Appeal Board. I think that Parliament must have understood the somewhat complex nature of the task assigned to the Board which would be required to fix the tolls for the use of its rights in a great many different ways, and that by using the words "fees, charges or royalties" there would be included every form of toll, be it a fee, a charge or a royalty, which would enable it to establish a suitable tariff of rates. It was concerned primarily with the establishment of such tariffs (and not with the name or names given to any particular part of the toll) as would constitute a suitable compensation—the word used in s. 10(2)—for the issue or grant of licences. In my opinion, "the statement of fees, charges or royalties" is equivalent to "statement of the tariff rates." I am unable to find that they mean only tolls or rates fixed at a specific amount in dollars and cents.

A further reason advanced for alleging that "the statement of fees, charges or royalties" must be in a specific amount of dollars and cents in that the Act implies that the tolls should be payable in advance and that unless the amount was known precisely to both licensor and licensee on January 1, 1952, the licensee would not know the proper amount to which it was entitled and likewise the licensee would not know how much it was required to tender or pay on that day—or at the earliest moment of that day—if it were to avoid a charge of infringement. It is pointed out that the stations operate daily and in many cases for as many as twenty hours each day. It is submitted that under the formula adopted in Tariff 2(1) (B), it would be impossible for any station whose fiscal year ended on December 31, 1951, to ascertain by the end of that day precisely what its gross revenue—as defined by P.C. 5234—would be for that year. It was stated that some 70 per cent of the private broadcasting stations had fiscal years corresponding to the calendar year. Further, it is contended that under the definition in P.C. 5234, the "gross revenue" must be "as set forth in the fiscal return to the Minister of Transport covering the operation of the station for the fiscal year of the licence," that such return in 1952 was not due until March 15, 1952, and was not actually filed by the defendant until June 15, 1952.

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As far as this defendant is concerned, however, this submission cannot be supported. Its fiscal year on which the licence toll was based ended on January 31, 1951, and its return to the Minister of Transport was presumably due on March 15 of that year, so that it had full knowledge as to its "gross revenue" many months before the 1952 tariff came into effect.

It is admitted, however, that approximately 70 per cent of the broadcasting stations affected have a fiscal year ending on December 31. Now while it is vigorously contended that it would be quite impossible for the companies to precisely ascertain their "gross revenue" on December 31, there is no evidence on the point. I think the difficulties suggested are not very substantial. The definition of gross revenue found in P.C. 5234 is well known to all broadcasting companies, as well as the items that are included and excluded in the necessary computation. If their accounts were kept completely up-to-date, the final computation would be readily completed. In any event, that was a matter for consideration by the Board and its reasonableness or otherwise is not for the Court to determine. In *Carltona Ltd.* v. *Commissioners of Works* (1), the Court of Appeal held that Parliament had committed to the Executive the discretion of deciding when an order for requisition under the Defence (General) Regulations, 1939, should be made, and with that discretion, if *bona fide* exercised, the Courts could not interfere. Lord Greene, M.R. said:

> All that the Court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction.

There is a further submission that a tariff based on the gross revenue of the defendant is not a fee, charge or royalty, it being contended that such a charge or rate bears no relation to the use made by a broadcasting company of the works controlled by the plaintiff. Now as I have pointed out above, the Act itself does not state the basis on which the Board shall fix the rates. That is left entirely to the Board's discretion and judgment. It is well settled, I think, that in addition to the powers conferred by statute, certain

(1) [1943] 2 A.E.R. 560.

additional powers may be implied. In Halsbury (2nd Ed.), Vol. 31, p. 501, it is stated:

> Para. 642. A duty imposed or a power granted by Parliament carries with it the power necessary for its performance or execution. Similarly, an authority given by statute to do certain work authorizes the doing not only of all things absolutely necessary for its execution, but of all things reasonably necessary. This is especially the case with enabling Acts.

It will be conceded, of course, that in carrying out its duties it was not absolutely necessary for the Board to base the rates on a percentage of the gross revenue of the broadcasting companies, but a consideration of the complex nature of the duties involved satisfies me that it was reasonably necessary to do so and that in the absence of any direction in the statute itself to the contrary, it could do so.

While it was the Board's duty to fix a fair compensation, it was also its duty to see that the tariffs established were applicable to all classes of users. A reference to Ex. J. shows that for the year 1952, sixteen different tariffs were established, and I think I may assume that in prior years approximately the same number of tariffs were in use. With respect to single performances of an individual work or an extract therefrom, no great difficulty would be encountered as the rate could be fixed at a specific dollar amount, as in Tariff 1. It seems to have been realized, however, by all parties, that it would be desirable to establish also tariffs for a general licence for the calendar year, a licence which would permit the licensee to use any or all of the plaintiff's works throughout the year and as often as desired. Such a licence would be a great advantage to both licensor and licensee and perhaps more particularly to the latter, as it would be much less expensive and would eliminate a great deal of work in keeping records as to the works used, the time involved, and computations of that sort.

But the establishment of tariffs based on an annual payment involves the necessity of considering the nature of the business carried on by the various classes of such licensee and the extent to which the use of music or musical works was involved. In some cases the licensee would operate for twelve months and in other cases for only a portion of the year, or at irregular intervals. When the various classes of users had been placed in designated groups, it became necessary to determine the basis on which the rates should be established for each group.

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The Board apparently decided that in cases where licensees derive income directly or indirectly from the use of the plaintiff's works, the rate would be based on the proportion of the income either actually or reasonably anticipated. In the case of theatres (Tariff 4) it was based on the seating capacity; for baseball parks, arenas and the like (Tariff 9) it was based on the capacity of the premises, and for steamships (Tariff 16) it was based on carrying capacity. For large exhibitions (Tariff 12), rates were fixed in accordance with the actual attendance. For ballrooms and rinks (Tariff 7) the rate was based on the receipts from admission charges and for cabarets, cafes, restaurants and taverns (Tariff 6), it was based on the amount paid for entertainment, the cost of which was no doubt included in the price paid for the food or beverages supplied. Had an attempt been made to base the fee for an annual licence on a purely "royalty" basis (and by "royalty" I mean here the charge based on the actual user by a licensee of all or any of the works or parts of the works owned or controlled by the plaintiff), the necessary records, checks and computations would have been extremely complicated and very expensive. The difficulties are apparent from the evidence that the defendant alone in one week of operations broadcasts approximately 1800 selections of an average duration of less than two minutes each, of which approximately 42 per cent are owned or controlled by the plaintiff. In my opinion, it was reasonable and necessary for the Board, in view of all the classifications involved, to base the rates for annual licences on the income or a proportion of the income of the annual licensees, that income reflecting to a greater or less degree the user by the licensee of the defendant's works and the number of persons who would hear the performances of the licensee's works. It was a relatively simple method, the details of which could be readily worked out from information in the possession of the licensees.

For the same reason, I think it was proper and reasonable to fix the rates for annual licences to broadcasting stations on a percentage of their gross revenue. In adopting the definition of gross revenue as defined in P.C. 5324, the Board was using a term well known to all commercial broadcasting stations. Each had to apply annually for a licence, the fee for which was based on its gross revenue for the preceding year and was required to furnish the Department

of Transport with the particulars necessary to ascertain its gross revenue. In effect, therefore, they were required to pay the plaintiff on the basis of the same formula as they were required to supply to the Department of Transport.

It is the fact that the defendant—and I assume all other broadcasting stations as well—derives its income from various sources, some of which do not involve the use of music. In a typical month such as September, 1952, 14.2 per cent of the defendant's revenue was from spot announcements containing music, and 14.5 per cent from programmes containing music, the balance being derived from sources such as newscasts and announcements and programmes which did not contain music. On the other hand, it is shown that in one week of the same month, the defendant's station was on the air approximately 123 hours, over 65 per cent of the time was made up of musical programmes of which 42 per cent were owned or controlled by the plaintiff, and 58 per cent by others. From these facts it appars to be well established that while not all the income of a broadcasting station is derived from the use of music, that such a user bears a direct (but perhaps not a definitely ascertainable) relationship to the income of such a station.

Finally, it is submitted that Tariff 2 is invalid because of the inclusion therein of the provision authorizing a representative of the plaintiff to examine the books of a licensee to such extent as may be necessary to verify any and all statements rendered by the licensee. It is contended that such a provision was *ultra vires* the Board, whose statutory powers were confined to certifying its statements of "fees, charges or royalties" in that such a provision for inspection of books forms no part of "fees. charges or royalties." It is said that such a provision constitutes an invasion of the common law rights of privacy of a licensee and that if such a power were to be conferred by the Board, the right to do so must be found in express terms in the Act itself.

This contention has caused me a good deal of concern. It is clear that the Board is not given any express power in the Act to incorporate such a provision in its approved statements. I have stated above that in my opinion the Board did have implied powers which were reasonably necessary to enable it to carry out the duties imposed upon it. Having found that the Board did have the power to

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fix a tariff of rates on the basis of the income or on the gross revenue of a licensee, it seems to me also that it must necessarily have power to impose reasonable conditions upon those licensees who desired to take advantage of an annual licence or other type of licence where the tariff was based in some way or other on income, on gross revenue, or in any way other than on a fixed dollar amount. The condition here imposed seemed not only reasonable, but absolutely necessary if suitable protection were to be afforded to the plaintiff. I do not suggest that any of the proprietors of the broadcasting stations are dishonest in any way. But it is patent that the plaintiff could be defrauded out of its just revenue by an unscrupulous proprietor unless it had an opportunity of verifying the licensee's statements and payments by inspection of its records. Indeed, counsel for the defendant, while arguing that the inclusion of this clause invalidated the whole of Tariff 2, practically conceded that if a tariff validly established were based on income, the Board must confer on the plaintiff some way of checking on the accuracy of the licensee's statements. It may well be that the broadcasting stations resent any one having knowledge of the particulars of their gross revenue, particularly as a substantial part thereof is derived from sources other than from the use of music. On the other hand, it is well known that in contracts providing for the use of patents or for the right to reproduce works in which copyright subsists, it is a very common, if not a general practice, to provide for verification of the amount of such user by conferring on the licensor the right to inspect the books of the licensee. In establishing a tariff for an annual licence under which the licensee was entitled to use any or all of the works of the plaintiff, the Board was conferring on the licensee something of a very useful and valuable nature. It was necessary in doing so that consideration should be given to the rights of the plaintiff and that was done by adding the clause in question. For these reasons I have reached the conclusion that it was not beyond the powers of the Board to append that clause to Tariff 2.

In the result I must hold that Tariff 2, including the concluding paragraph thereof, was *intra vires* the Board. The defendant in its counter claim also asked for a declaration that the whole of the statements certified by the Board as set out in Ex. J. were *ultra vires* the Board on the grounds

which I have already discussed in considering the validity of Tariff 2. For the reasons stated above, I find that the statements so certified were in their entirety within the powers of the Board.

In the result, the counter claim will be dismissed with costs.

There remains for consideration only the question of the plaintiff's claim against the defendant for a declaration that it is the owner of that part of the copyright in the musical works set out in para. 4 of the Statement of Claim, for a declaration that the defendant has infringed the plaintiff's copyright therein by the performance thereof or by authorizing the performance thereof in public without the consent of the plaintiff, for an injunction, damages in the sum of $500, and costs.

The defendant submits that the plaintiff's action should be dismissed on the ground of non-compliance with the provisions of s. 10(3) of the Copyright Amendment Act (*supra*). It alleges that the statement of fees, charges or royalties filed with the Minister in November, 1951, pursuant to the requirements of s. 10(2) does not contain a statement of the fees, charges or royalties which it proposed to collect during the following year, and that therefore, without the consent of the Minister, it was deprived of any right of action. The details of the proposed charges have been set out above. The first ground of attack is the same as in relationship to that made on the statement of fees, charges or royalties certified by the Board and for the reasons stated above I must reject it. The other ground of attack is that ss. (*a*) of s. 1 of the proposed Tariff 2 is not a statement of fees, charges or royalties inasmuch as it proposes not a fee to be charged to individual broadcasting stations for an annual licence, but a formula applicable to all the privately owned stations, "to be divided between them according to a schedule approved by the Copyright Appeal Board." That part of the schedule is as follows:

> (*a*) By the privately owned broadcasting stations to be divided between them according to a schedule approved by the Copyright Appeal Board fees at the aggregate rate of $.008 per capita of the population of Canada as latest reported by the Dominion Bureau of Statistics or the census authorities, plus the sum provided for in para. (*c*) hereunder written.

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In my view, s. 10(2) was enacted for the purpose of initiating the proceedings to be brought before the Board for its consideration. Without such a statement there would be nothing to communicate to parties opposed in interest and the Board would have nothing to consider. The society was therefore required to state the details of its proposed compensation and in the broad view that I have taken of the words "fees, charges and royalties," I cannot agree that the form in which they were proposed for the year 1952 is not within the intention of the subsection. In my opinion, the provisions of s. 10(3) could only be invoked when the society had failed to file an adequate statement so that the procedure laid down could be followed out. Moreover, the provisions of that subsection are entirely inapplicable after the board has certified its approved statements to the Minister, by virtue of the provisions of s. 10B(8) which confers on the Society the statutory right to sue for and collect the amounts so certified. Once the validity of the certified statements has been established, as has been done in this case, it is no longer open to a defendant to invoke the invalidity of the Society's proposed statement of charges. It may be noted also that for the previous five years at least the plaintiff's proposed charges had been based on a sum to be distributable between the various stations by themselves and that had been carried into effect. That was entirely a reasonable provision, the society being concerned with the total amount that it might collect rather than with the various amounts to be paid by each station. Only the broadcasting stations would have the necessary data to enable an equitable apportionment to be made as between themselves. I have little doubt that they were in no way concerned with or embarrassed by that part of the proposal until the tariff as fixed by the Board was based on "gross revenue" and it was desired to find some means of attacking that fixation. This defence must also be rejected.

In the agreed Statement of Facts, the defendant admits for the purpose of this action that the plaintiff is the owner of the public performing rights in the said musical works, that it performed by means of broadcasting over its station upon the dates mentioned the works referred to and that such a broadcasting was a performance in public within the meaning of the Copyright Act. It is admitted, also, that the defendant performed the said works without the

consent of the plaintiff and neither secured a licence from nor paid the plaintiff any fees in respect of the said performances. The validity of Tariff 2 having been established, it follows that the plaintiff has established its claim for a declaration that it is the owner of the performing rights for Canada in the works in question and that the defendant has infringed such rights.

The defendant, however, submits that the proceedings were taken as a test case to determine the validity of the tariff and that therefore the plaintiff is not entitled to an injunction or damages. By the terms of the agreement of May 14, 1952, between the plaintiff and a representative of the Canadian Association of Broadcasters (Ex. B), it was agreed that the plaintiff should institute proceedings against one of the members of the association to be mutually agreed upon "for the purposes of legally testing the validity of a tariff of fees, charges and royalties based upon a percentage of gross revenue." It was further agreed that the action should be based on infringement and that therein the plaintiff should not seek an *interlocutory* injunction against such broadcasting station. Certain other proceedings pending between some of the broadcasting stations and the plaintiff were to be discontinued without costs.

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. Under the circumstances disclosed, I do not think that the claim for damages in the sum of $500 is excessive.

I have no doubt, however, that the failure of the defendant to enter into the undertaking contemplated in the agreement of May 14, 1952, and to pay the plaintiff on the basis of the 1951 tariff pending the litigation was deliber-

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ately for the purpose of putting it completely in default and not for the purpose of permanently evading its legal liability to the plaintiff. It is therefore essentially a test case mutually agreed upon for the purpose of avoiding a multiplicity of actions in this and other courts.

I think that the plaintiff has made out its claim to an injunction. There is ample evidence that after the performances on the dates mentioned, the defendant continued to use the works of the plaintiff to a very considerable extent without payment of any fee. Moreover, there is nothing in the agreement which provides that if the plaintiff be successful in the litigation it is not entitled to ask for an injunction at the trial.

The claim for an injunction will be allowed but under all the circumstances I propose to make it subject to the conditions and limitations set out below.

There will therefore be judgment

(*a*) declaring that the plaintiff is entitled to the declarations claimed in clauses (*a*) and (*b*) of para. 10 of the Statement of Claim;

(*b*) declaring that the plaintiff is entitled to damages against the defendant in the sum of $500;

(*c*) declaring that the plaintiff is entitled to the injunction as claimed in Clause (*d*) of para. 10 of the Statement of Claim, but subject to the following limitations:

(1) The said injunction shall be stayed and be of no effect until after the expiry of sixty clear days from the date of this judgment;

(2) Leave is given to the defendant to apply to a Judge of this Court (due notice of such application to be served upon the plaintiff or its solicitors) at any time prior to the expiry of sixty days from the date of this judgment for an order extending the stay of the injunction for such further period of time as the defendant may deem necessary and advisable;

(*d*) dismissing the counter claim with costs;

(*e*) that the plaintiff is entitled to its costs of the action.

Judgment accordingly.