

Court File No. 73592/04

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**MORRIS & CLAMAN ASSOCIATES LTD. carrying on business as
VINE MAPLE MUSIC and ABSOLUTE PRODUCTIONS INC.
carrying on business as COPYRIGHT MUSIC AND VISUALS**

Plaintiffs

- and -

THE CANADIAN BROADCASTING CORPORATION

Defendant

STATEMENT OF DEFENCE

1. The defendant admits none of the allegations contained in the Statement of Claim.
2. The defendant denies the allegations contained in paragraphs 1, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 and 48 of the Statement of Claim.
3. The defendant has no knowledge in respect of the allegations contained in the remaining paragraphs 2, 3, 4, 5, 6, 7, 8 and 49 of the Statement of Claim.

CBC, Hockey Night In Canada and the Theme

4. The defendant the Canadian Broadcasting Corporation ("CBC") is one of Canada's largest cultural institutions. It operates as a national television, radio and Internet broadcaster. It was created as a Crown corporation in 1936 by an Act of Parliament following a Royal Commission that was concerned about the growing American influence in radio. CBC's

current mandate is set out in the *Broadcasting Act* (1991, c.11). CBC is accountable to Canadians, reporting annually to parliament through the Minister of Canadian Heritage.

5. CBC is the creator, owner and producer and broadcaster of the television show Hockey Night in Canada ("HNIC"). Broadcasting in Canada since 1952, HNIC is one of the most popular and well known television shows on CBC. The show features the broadcast of professional hockey games with accompanying commentaries.

6. CBC is the exclusive owner of the registered trade-mark and Official Mark, "Hockey Night In Canada".

7. HNIC uses as its theme song, the Composition at issue in these proceedings (the "Composition"). This means that the Composition is played at the opening of the show and from time to time during the show.

The Agreements

8. CBC is licensed to use the Composition for this and a number of purposes as set out in agreements between itself and the plaintiff, Copyright Music and Visuals (a division of Absolute Productions Inc.), which purports to have the exclusive right to license use of the Composition.

9. CBC puts the plaintiffs to the strictest proof thereof to demonstrate that they are the rightful owners of all rights in the Composition, as stated in paragraphs 3 and 4 of the Statement of Claim.

10. CBC entered into two agreements which are relevant to these proceedings. An agreement dated October 8, 1998 which ran from September 15, 1998 to September 14, 2002 (the "October 1998 Agreement") and a Synchronization Licence, which was entered into January 23, 2003 commencing September 1, 2002 and terminating August 31, 2007 (the "Synchronization License". These two agreements (collectively the "Agreements") govern the use of the Composition by CBC during the relevant period.

CBC Has Not Breached the Agreements

11. CBC has committed no acts nor omissions that constitute a breach of the Agreements.

Dealings With Third Parties

12. The acts complained of in paragraphs 15 to 24 were not acts committed by CBC, but by entities using CBC broadcasts. To the extent that these parties reproduce, retransmit, perform in public or otherwise use the Composition without authorization, they do not do so with the knowledge of CBC, either express or implied, nor with CBC's permission. CBC has no control over these complained-of acts.

13. Contrary to the allegations in paragraphs 25-27, there is no time gap between the date of the expiry of the October 1998 Agreement and the Synchronization License because the Synchronization License takes effect *nunc pro tunc* as of September 2002.

14. With respect to the allegations in paragraphs 28-30 of the Statement of Claim, CBC did not send any letters demanding that third parties cease and desist use of the Composition in circumstances where CBC had no authority to do so.

15. CBC does from time to time request that persons not use CBC's trade-mark and Official Mark, "Hockey Night in Canada" without its permission. Hockey Night In Canada is a valuable trade-mark and Official Mark. CBC takes care to ensure that this mark is not diminished, misused, misappropriated, rendered generic or otherwise infringed.

16. With respect to the "Ring Tone Agreement" referred to at paragraphs 31 to 33 of the Statement of Claim, CBC disputes the allegations set out in paragraph 32, that in breach of the Synchronization License, it refused to approve the mobile telephone proposal at issue. In any event, CBC is within its rights under the Agreements to prevent the use of the Composition where such use would diminish the value of HNIC. CBC has the exclusive right to license (and refuse to license) use of its Hockey Night in Canada trade-mark and Official Mark as it sees fit.

17. The complained of acts do not constitute a breach of contract or an intentional interference with contractual relations, as alleged.

Other Complained-Of Uses

18. CBC's responses to the allegations contained in paragraph 34, are as follows:

- (a) any alleged use by CBC of the Composition in a documentary called "The Circus is in Town" was in accordance with its Fair Dealing rights under the *Copyright Act* and authorized explicitly in the Agreements;
- (b) with respect to screen credits, CBC has always adhered to the sections of the Agreements which prescribe the form and content of screen credits respecting

the Composition. CBC denies any allegation that it breached the moral rights of the plaintiffs and puts the plaintiffs to the strictest proof thereof. In any event, a claim for moral rights may only be made by Dolores Claman in her individual capacity and may not be asserted by any of these plaintiffs;

- (c) CBC denies that it neglected to forward third party requests to the licence to the plaintiffs and puts the plaintiffs to the strictest proof thereof;
- (d) CBC denies that it refused to permit the use of the Composition in any third party commercial unless the third party who sought to use the Composition, also purchased significant advertising time on CBC and puts the plaintiffs to the strictest proof thereof;
- (e) any alleged use of the Composition in association with HNIC merchandise is permitted under the contract as a use in connection with commercials for the purpose of advertising HNIC;
- (f) the "billboard" ads complained of in are a licensed use, explicitly provided for in the Agreements;
- (g) any alleged use of the Composition in HNIC broadcasts featuring games of the 2004 World Cup of Hockey was a licensed use under the terms of the Synchronization License;
- (h) CBC denies that it ever misrepresented to third parties that the Composition should be called "CBC's Hockey Night in Canada Theme Song". CBC permitted the use of the song where the trademark "Hockey Night in Canada"

was not used as is evidenced by the fact that the Composition is currently licensed as a ring tone by the plaintiffs on the Bell Mobility network by another name;

- (i) any alleged use of the Composition on "Classic Game" broadcasts is a licensed use, explicitly covered under the Agreements;
- (j) the used complained of in paragraphs 34(j), (k), (l) and (m) are permitted under the terms of the Agreements and in addition are Fair Dealing pursuant to the *Copyright Act*; and
- (k) any alleged use of the Composition in the Hockey Day in Canada videos is a licensed use under the Agreements.

Alleged International Use

19. CBC has not used or authorized the use of the Composition outside of Canada in breach of the terms of the Synchronization License. CBC puts the plaintiffs to the strictest proof of any allegation that CBC used or authorized use of the Composition in the complained-of manner.

20. CBC does not admit not has it ever admitted, that it has used or authorized use of the Composition outside the terms of the licence and consequently denies paragraphs 37, 38, 39, 40 and 41 of the Statement of Claim.

Improper Pleadings in the Statement of Claim

21. The statements contained in paragraphs 10-14 and 42-44 are irrelevant, scandalous and improper.

Damages

22. CBC denies that it was unjustly enriched, as alleged in paragraph 45, by virtue of any alleged breach and puts the plaintiffs to the strictest proof thereof.

23. CBC denies that the plaintiffs have suffered any damages at all, and if they have, denies that any such damages are of the quantum alleged.

24. CBC demands full particulars for any alleged damages suffered.

CBC Has Acted In Good Faith

25. CBC denies that it has used or continues to use the Composition in a manner contrary to the terms set out in the Agreements as alleged in paragraph 46 and puts the plaintiffs to the strictest proof thereof.

26. CBC's conduct throughout the term of this agreement has been in accordance with accepted business practices and is by no means highhanded, reprehensible or oppressive.

27. CBC has and continues to act in good faith with respect to the exercise of its rights.

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and
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**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Newmarket

STATEMENT OF DEFENCE

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