

Court File No.: 73592-04

**ONTARIO
SUPERIOR COURT of JUSTICE**

B E T W E E N :

**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 CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence. **IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.** If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid office.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$1,500.00 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$500.00 for costs and have the costs assessed by the court.

Date: NOV 17 , 2004

Issued
by: "M Derbidge"
Local Registrar

Address of
Court office

50 Eagle Street West
Newmarket, Ontario
L3Y 6B1

TO: THE CANADIAN BROADCASTING
CORPORATION
250 Front Street West
Toronto, Ontario
M5W 1E6

CLAIM

1. The plaintiffs claim:
 - a. damages in the amount of \$2,000,000.00 for breach of copyright, breach of contract, breach of fiduciary duty and intentional interference with economic relations.
 - b. punitive, aggravated and exemplary damages in the amount of \$500,000.00;
 - c. prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, as amended ("*Courts of Justice Act*");
 - e. postjudgment interest in accordance with section 129 of the *Courts of Justice Act*;
 - f. the costs of this action on a substantial indemnity basis, including applicable Goods and Services taxes; and
 - g. such further and other relief as this Honourable Court may deem just.

PART I - THE PARTIES

2. Dolores Claman ("Dolores") is a Canadian citizen who resides in the United Kingdom. Dolores is the composer of the musical composition known as the *Hockey Night in Canada Theme* (the "Composition").
3. Morris and Claman Associates Ltd carrying on business as Vine Maple Music ("Vine Maple Music") is a corporation incorporated in accordance with the laws of British Columbia. Vine Maple Music is the owner of all rights in and to the Composition.

4. Absolute Productions Inc. carrying on business as Copyright Music and Visuals (the "Administrator") is a corporation incorporated in accordance with the laws of Ontario. In 1993 the Administrator acquired the exclusive rights to administer the Composition throughout the world.
5. The Canadian Broadcasting Corporation ("CBC") is a corporation created by a 1936 Act of Parliament. The CBC acts as a national public broadcaster throughout Canada. One of the programs broadcast by the CBC throughout Canada features games between teams of the National Hockey League and is known as *Hockey Night in Canada*.

PART II - BACKGROUND

6. In or about 1968 Dolores created the Composition. Dolores was engaged by the MaLaren advertising agency to create the Composition as a commercial jingle to air at the beginning of the hockey broadcasts of the CBC for a term of one year. Dolores retained all copyright interest, including moral rights, in and to the Composition.
7. In 1987 Dolores transferred all of her rights in and to the Composition to Vine Maple Music.
8. In December 1993 Vine Maple Music granted the Administrator exclusive rights to administer the Composition throughout the world.
9. From or about 1970 to 1995 the CBC and/or Molstar Communications, A Division of Molson Breweries ("Molson Breweries"), used the Composition as

the musical introduction and theme to the national *Hockey Night in Canada* television broadcasts without the payment of any synchronization license fee and in breach of copyright of Dolores and/or Vine Maple Music.

PART III - THE LICENSE AGREEMENT

10. In April 1995 the Administrator, on behalf of Vine Maple Music, entered into an agreement whereby the Administrator granted Molstar Breweries a license to exploit the Composition for a fixed term for use in the production known as "Molson Hockey Night in Canada on CBC" and "La Soiree du Hockey Molson a Radio-Canada". As part of this agreement Molstar Breweries insisted upon a Release with respect to all uses of the Composition prior to 1995.
11. In or about 1998 Molson Breweries lost the right to produce the television broadcast known as Molson Hockey Night in Canada ("HNIC"). The production of HNIC was thereafter assumed by CBC.
12. In October 1998 Vine Maple Music and the Administrator entered into an agreement with CBC whereby it granted CBC the limited right, license and privilege to use the Composition for broadcast in Canada for a term of four years commencing September 15, 1998 in synchronism with the productions known as "Hockey Night in Canada" and "La Soiree du Hockey" (the "CBC License Agreement" and "Productions", respectively).

13. Paragraph 6(e) of the CBC License Agreement states as follows:

In the event during the term of this agreement or any renewals thereof Licensee is able to broadcast the Productions over the air outside Canada, or license such broadcasts, Licensor agrees to grant all of the above-rights to Licensee in that regard, mutatis mutandis, for an additional fee to be negotiated in good faith by the parties hereto as soon as possible before such broadcasts are to commence.

14. It was a term of the License Agreement that the license to CBC was non-exclusive and that the Licensor had the right to exploit the Composition in other manners so long as they did not conflict with the Productions of the CBC. In addition, it was understood that the Composition would not be licensed for use in other product advertisements without written permission of the CBC and which permission was not to be unreasonably withheld.

PART IV - THE EXTRA-TERRITORIAL USES

15. In breach of the terms of the CBC License Agreement, and in breach of the plaintiff's copyright in and to the Composition, the defendant repeatedly used the Composition in jurisdictions outside of Canada without the knowledge of the Administrator and without the payment of an additional fee.
16. On or about February 19, 2002 the Administrator communicated with CBC with respect to reports that the HNIC game of February 2, 2002 was broadcast in the United Kingdom in its entirety and that the Composition was being included in rebroadcasts of historical games on other networks.

17. On February 20, 2002 a representative of CBC advised that CBC would get further information on the additional uses.
18. On June 25, 2002 the Administrator again raised the issue of unauthorized uses and "rumours" of other broadcasts beyond the territory permitted by the License Agreement. On July 12, 2002 a representative of the CBC responded and wrote: "I have noted your queries on your most recent emails and will address those as well." The CBC did not address the queries.
19. The Administrator raised the issue of unauthorized, extra-territorial uses of the Composition again on July 17, 2002.
20. On August 13, 2002 the CBC communicated with the Administrator and advised that they "...have requested from the NHL the parameters of any further use that they may have made...I will need information from them to confirm the extent of the use of our telecasts outside of Canada."
21. The CBC also represented that any further use of the HNIC program by the digital station know as "Leafs Channel" or the NHL network was limited to game footage. This was not an accurate representation.
22. On August 14, 2002 the Administrator communicated with a representative of CBC and reminded CBC that any use of the Composition by any other party must be authorized and licensed by the Administrator.

23. On August 23, 2002 the CBC acknowledged: "The NHL has confirmed that they provide England with 2 or 3 games per year. Some games are also provided on a sporadic basis to Japan and Scandinavia."
24. The Administrator immediately responded and identified these uses of the Composition as breaches of the License Agreement.
25. On August 28, 2002, Nancy Carrell of the CBC purported to renew the License Agreement notwithstanding that it was in breach of the License Agreement.
26. On or about September 15, 2002 the CBC License Agreement expired. Notwithstanding the expiry of the CBC License Agreement, the CBC continued to exploit the Composition without a license and in breach of the plaintiffs' copyright in and to the Composition.

PART V - THE SYNCHRONIZATION LICENSE

27. On January 23, 2003 the Administrator entered into a Synchronization License with the CBC with respect to the use of the Composition (the "Synchronization License") for the broadcast production of Hockey Night in Canada and La Soiree Du Hockey. At the insistence of the CBC, the commencement date of the Synchronization Agreement was backdated to commence September 15, 2002.
28. The Synchronization Agreement was limited to the territory of Canada (which was extended to the right to exhibit the Production at Canadian

Forces Bases outside of Canada and at Canadian Embassies and Consulates).

29. It was a term of the Synchronization Agreement that the license to CBC was non-exclusive and that the Licensor had the right to exploit the Composition in other manners so long as they did not conflict with the "Hockey Night in Canada" production of the CBC. Paragraph 9(c) of the Synchronization Agreement specifically provides that the Composition will not be licensed for use in other television, radio and internet commercials advertising a product or service not owned by CBC without written permission of the CBC and which permission was not to be unreasonably withheld.
30. In breach of the terms of the License Agreement, CBC nevertheless authored letters demanding that various third parties cease and desist any involvement and/or use of the Composition in circumstances where CBC had no authority to do so.

PART VI - THE "RING TONE" AGREEMENT

31. On or about November 1, 2002, the Administrator entered into an Agreement with a mobile telephone service provider for the Composition to be used as a ring tone option for mobile telephones. Regardless of any issue of the application of paragraph 9 of the Synchronization Agreement with respect to a "ring tone", the Administrator nevertheless submitted the proposal for approval as a courtesy to CBC.

32. In breach of the terms of the Synchronization Agreement, CBC refused to approve the mobile telephone proposal unless the telephone provider purchased several hundred thousands of dollars of advertising time on CBC.
33. The above-described conduct represents an unauthorized and intentional interference in the contractual relations of the Administrator.

PART VII - ADDITIONAL BREACHES OF THE CBC

34. In breach of the terms of the Synchronization Agreement, the CBC repeatedly used the Composition in broadcasts other than the Productions. Particulars of these breaches of copyright include the following:
 - a. CBC used the Composition in a 2002 documentary called "The Circus is in Town";
 - b. CBC consistently failed to provide proper screen credits in breach of the moral rights of Dolores;
 - c. CBC neglected to forward third party requests to license the Composition to the Administrator;
 - d. CBC refused to permit use of the Composition in any third party commercial unless the third party that sought to use the Composition also purchased significant advertising time on CBC;
 - e. CBC used the Composition in commercials for HNIC merchandise;
 - f. CBC created "billboard" ads for Ford Motor Company that used the Composition;
 - g. CBC used the Composition on broadcasts at the 2004 World Cup of Hockey;

- h. CBC misrepresented to third parties that the Composition should be called: "CBC's Hockey Night in Canada Theme Song";
 - i. CBC used the Composition on "Classic Games" broadcasts;
 - j. CBC used the Composition on a broadcast for Royal Canada Air Farce;
 - k. CBC used the Composition on a Guy LaFleur tribute;
 - l. CBC used the Composition on a Rick Mercer special;
 - m. CBC used the Composition on various curling broadcasts; and
 - n. CBC used the composition in Hockey Day in Canada videos.
35. Further, CBC substantially altered the musical arrangement of the Composition without appropriate approval and in breach of the moral rights of Dolores.
36. In addition, CBC continued to use the Composition outside of Canada in breach of the terms of the Synchronization License.
37. On June 5, 2003 the Administrator again communicated with CBC and sought particulars of all unauthorized uses of the Composition.
38. On July 28, 2003 the CBC replied as follows:

We have reviewed further use issues with regards to the theme. As we have stated to you, these are not significant and are aimed at increasing the visibility of HNIC in markets outside of Canada through the NHL Centre Ice package and through a small satellite distributor in the UK as part of what is called the North American Sports Network.

The further use for Centre Ice began modestly in the 1999-2000 season and increased for the 2000-01, 2001-2002, 2002-2003 seasons.

The further use is anticipated to continue over the next 4 hockey seasons. The North American Sports Network arrangement began last December.

39. The communication from CBC represents a clear and unequivocal acknowledgement that it flagrantly breached the License Agreement and continues to breach the Synchronization License. This conduct amounts to an unauthorized breach of the plaintiffs' copyright in and to the Composition.
40. On July 29, 2003 the Administrator communicated with CBC and sought clarification with respect to the previous stated uses in Japan, Scandinavia, the United States and other territories. In addition, the Administrator sought information regarding viewership and reach of these carriers and broadcasters.
41. On September 24, 2003 the Administrator sought a response to the email communication of July 29, 2003. That same day the Administrator forwarded a notice demanding that CBC advise of all uses not covered within the scope of the License Agreement and/or Synchronization License no later than October 17, 2003. The Administrator also advised CBC: "This is a clear infringement of copyright under all applicable laws and we would look forward to your full and immediate cooperation in remedying the situation."
42. On October 15, 2003, Nancy Carrell of the CBC communicated with the Administrator and advised, *inter alia*: "Although it appears that CBC is

stonewalling on the issue of use outside of the territory of the HNIC theme – we are in fact not.”

43. Notwithstanding the representation of Nancy Carrell, CBC has never provided the information sought with respect to unauthorized uses of the Composition.
44. By correspondence dated March 5, 2004 the solicitors for the Administrator corresponded with CBC with respect to additional unauthorized uses of the Composition. The CBC ignored this letter.
45. The plaintiffs state that by virtue of the conduct described herein the CBC has breached the terms of the License Agreement and Synchronization Agreement and have been unjustly enriched as a result thereof. Further, in consequence of the conduct of the defendant the plaintiffs have suffered damages.
46. Notwithstanding the above, CBC continues to exploit the Composition and/or permit the exploitation of the Composition in territories not authorized pursuant to the terms of the Synchronization Agreement.
47. In consequence, the plaintiffs have suffered damages and seek an injunction preventing any further exploitation of the Composition.
48. The conduct of CBC is high-handed, reprehensible and oppressive and is such to warrant the condemnation of this Honourable Court and entitle the plaintiffs to an award of punitive, exemplary and aggravated damages.

49. The plaintiffs propose that the trial of this action be conducted in Newmarket.

Date: November 17, 2004

Kevin E. Kemp
Barrister
1 Victoria Street East
Box 381
Alliston, Ontario
L9R 1V6

LSUC No. 31912U
Tel: (705) 434-0096
Fax :(705) 434-0097

Solicitor for the
Plaintiffs

43592-04

COURT FILE NO. 43592-04
THE CANADIAN BROADCASTING CORPORATION

v.

MORRIS & CLAMAN ASSOCIATES LTD. ET AL

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Newmarket

STATEMENT OF CLAIM

KEVIN E. KEMP
1 Victoria Street East
PO BOX 381
ALLISTON, Ontario
L9R 1V6
LSUC 31912U
Tel: 705-434-0096
Fax: 705-434-0097

Solicitor for the plaintiffs