

REPORT of The Honourable Mr. Justice Aving upon the  
activities of The Canadian Performing Right Society Limited  
pursuant to Order in Council No. 169, dated January 28th, 1932.

TO  
The Governor General in Council,  
Ottawa.

I have the honour to report that pursuant to the above named Order in Council and the Commission issued in accordance therewith I caused an Inquiry to be held and have heard all the evidence which was tendered by the parties interested. As it appeared that no one was immediately interested except the petitioners and the respondents no public notice of the time and place of holding the Inquiry was thought necessary and as both parties were represented by counsel it was not thought necessary to employ special counsel for the Commission. The petitioners are owners of six broadcasting stations in the Province of Alberta, namely:

Edmonton Journal Limited, C. J. C. A.

Calgary Herald Limited, C. F. A. C.

The Alberta Pacific Grain Co. Ltd. C. K. L. C.

The Albertan Publishing Co. Ltd. C. J. C. J.

The Voice of the Prairies Limited, C. F. C. N.

Lethbridge Broadcasting Ltd. C. J. O. C.

The respondent is the Canadian Performing Right Society, hereinafter referred to as the "Society." Sitzings of the Commission were held at the City of Calgary in the Province of Alberta commencing on Monday, April 18th, 1932, and were continued until

Wednesday, April 27th, 1932. The petitioners were represented by Mr. S. B. Woods, K.C., of Edmonton, Alberta, while the respondent was represented by Mr. R. C. Cassels, K.C., of Toronto, Ontario.

The evidence taken constitutes a volume of 690 pages which together with 72 Exhibits filed are submitted herewith. I would like to add that both parties placed all the evidence in their possession fully and frankly before the Commission and both counsel assisted in every possible way.

I have been asked to investigate and report upon the following:

- (1) Whether the Canadian Performing Right Society Limited has complied with the provisions of clauses (a) and (b) of sub-section (1) of Section 10 of The Copyright Amendment Act, 1931;
- (2) Whether said Company exercises in Canada a substantial control of the performing rights in dramatico-musical or musical works;
- (3) Whether said company unduly withholds the issue or grant of licenses for or in respect of the performance of such works in Canada;
- (4) Whether said company proposes to collect excessive fees from all or any of the said petitioners in compensation for the issue or grant of such licenses for the communication of such works to the public by radio communication, which is commonly known as "broadcasting;"
- (5) And generally such other matters set forth in the said petition as the said Commissioner may deem relevant and material to said investigation and his report thereon.

#### I Clause "A"

The Respondent Society carries on in Canada the business of acquiring copyright for dramatico-musical and musical works or of performing rights therein and issues licenses for the performance

in Canada of dramatico-musical or musical works in which copyright exists.

Under Section 10, Sub-section "A" of The Copyright Amendment Act, 1931, the Society is compelled to file with the Minister at the Copyright Office lists of all dramatico-musical and musical works in respect of which it claims authority to grant performing licenses and to collect fees.

The Society has endeavored to meet this statutory duty by filing over 100 printed publishers' catalogues. In each catalogue such works as are not included in the Society's repertoire are said to be stricken out. It was not thought necessary to examine the files of the Copyright Office as the Society was able to produce at the hearing duplicates of the catalogues so filed. As it seemed impractical to examine each of these catalogues counsel picked at random one catalogue from the mass and it was agreed to treat this catalogue as representative of all the others. A casual examination of the catalogue showed that it contained numerous works of the old masters such as Mendelssohn, Chopin, Beethoven, Mozart, Schubert, Handel, Haydn and Verdi, all of whose works are in the public domain. As these catalogues had been sent from England the representatives of the Society at the hearing were unable to offer any explanation. A request for information was cabled to England and a reply was received to the effect that these works had been "re-arranged" and that these "re-arrangements" had been copyrighted. This may or may not be entirely correct but in any case these catalogues contain musical works which are not in the Society's repertoire, e.g. the list contains operettas or operas as a whole whereas the Society can only license instrumental excerpts for these

operas. The Society claims that as a matter of technical compliance with the Act it may file lists of works in respect of which it claims authority to license and the fact that these lists include other works over which the Society has no control would not affect the filing. This may be so but it is scarcely conceivable that Parliament had in mind the inclusion in these lists of works not in the Society's repertoire. In view of the discussion which took place in the Special Committee of Parliament which dealt with copyright and of the opinions therein expressed it would be difficult to say that the method of filing publishers' catalogues was not in contemplation as a compliance with the Statute. If all the works not in the Society's repertoire had been scored out one would be bound to say that technically, at least, the Statute had been complied with.

But the matter of filing and publishing lists goes to the root of much of the difficulty between the Society and the music user and should therefore be further considered. It is obvious that from the point of view of a person searching the files of the Copyright Office to ascertain whether or not a given work is in the Society's repertoire this method of filing is wellnigh useless. The lists are not classified except under the names of publishers nor are they indexed. A list of composers would be a very unsafe guide because the Society controls only such works of composer members as are published through publisher members. It is urged by the Society that it controls a huge number of works variously estimated at from 2,000,000 to 3,000,000 and that the collating and indexing of these works would be a stupendous if not an impossible task. The answer to this argument is that only a small percentage

of these works are ever actually played in Canada. Leaving out of consideration the very exceptional case it is estimated that a list of from 200,000 to 300,000 works would include all works which are under any circumstances played in Canada. In England a so-called working list has been prepared and it ought to be equally possible to prepare such a list here. If such a list were filed as well as sold to music users it would serve a double purpose. Those who had not the Society's general license could thereby easily learn what they must avoid while those who had the Society's license would have warning before using music not in the Society's published list. The advantage of such a list would seem to out-weigh the trouble and expense of its preparation.

#### I. Clause "B"

The Society is also required to file at the Copyright Office statements of all fees which the Society proposes from time to time to collect in compensation for the issue of licenses or for the performance in Canada of the works referred to in sub-section "A". Sub-section 3 of Section 10 provides that the Society shall not be entitled to sue for or collect fees in respect of licenses for the performance of works not specified in the lists filed as above provided nor shall the Society be entitled to collect fees in excess of those specified in the statements filed.

The plain intention of these sections would appear to be that the Society shall file a statement of the fees which it "proposes to collect." The filing of this statement would not, I think, preclude the Society under special circumstances from accepting a lower fee. The only other statutory restriction is

that the Society shall not in any case collect a fee higher than that specified. In my opinion the intention of the Act is not, - as is suggested - that the Society shall be permitted to file a list of fees perhaps extravagantly high but at any rate bearing no relationship to the actual fees which the Society intends to collect and then proceed to collect any fee it chooses provided only that such fee is not more than is prescribed in the statement filed.

A certified copy of the statement of fees filed by the Society was forwarded to me by the Commissioner of Patents. It appears from this statement that the schedule of fees for radio broadcasting stations is based on power output commencing with a 5 watt station for which the annual fee is \$100.00 and ending with a 20,000 watt station for which the annual fee is \$12,500. Later, on October 8th, 1931, there was also filed a unit fee of \$5.00 for a license for any performance of any work by anyone. A form of license issued by the Society to broadcasting stations was filed at the hearing (Exhibit 48). To this form is attached as Schedule "A", a copy of the schedule broadcastir as filed, to which the following additional paragraph is attr :

"The above fees are payable when a station wishes to have the right to perform the Society's repertoire during a maximum period of ten hours or more a day. When a maximum daily period of desired protection is less than ten hours the rate is proportionately reduced."

No explanation was given why this important modification was omitted from the statement filed. The evidence establishes that the broadcasting stations in Alberta are on the air with the Society's music only a small fraction of ten hours per day. This fraction varies roughly from one-third to one quarter of ten hours per day. Even if the paragraph mentioned could be

construed as having reference only to the number of hours during which music of any kind is played this period is usually about one half of the total time on the air. These facts must have been known to the officers of the Society who prepared and filed the statement of fees. These officers must also have known that the statement did not in any case indicate the actual fee which would be charged to any Alberta Broadcasting Station. The correspondence filed and the evidence submitted go to show that the Society did not intend to charge the fees set out in the schedule.

The result is that the Society has filed a statement of fees for broadcasting stations but it is clear that these are not the fees which it proposes to collect and to that extent it has not complied with Clause "B" of Section 10 of the Act.

II.

It was admitted at the hearing by both the Society and the Petitioners that the Society does exercise in Canada a substantial control of the performing rights in dramatico-musical and musical works and I so find. The exact percentage of the total works which the Society controls is impossible of ascertainment but is variously estimated at about 60% to 80%. The Society controls an even higher percentage of those selections in common use.

III.

No evidence as submitted that the Society has at any time withheld its license for any reason other than the non-payment

of the fee which it demanded. It may be assumed that the Society has the right to withhold its license until its fee is settled and paid. In doing this it cannot be said to have unduly withheld the issue of its license no matter what construction be placed reasonably on the words "unduly withholds." This question must therefore be answered in the negative.

#### IV.

Much of the evidence at the hearing was devoted to the question of excessive fees.

While several matters entered into the fixing of a proper fee to be paid by a broadcasting station for broadcasting copyright music, it was generally admitted that the basic determining factor is the number of people reached by the station in question, that is to say, the "audience." The number of broadcasting audience obviously does not depend on mere area. Some portions of Canada - particularly eastern Canada - are densely populated while most of western Canada is sparsely populated. The Society in fixing a scale of fees uniform throughout Canada went on the principle that the power output or "wattage" of the broadcasting station was a fair and convenient measure of the audience reached. In the first place this could only be true if there were an even distribution of population throughout Canada which, as pointed out, is not the case. In the second place the idea seems to prevail among non-technical people that with the increasing range of broadcasting stations a high power station can be heard over practically the whole of Canada and that therefore it did not matter where the station is located it reaches the whole.



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audience and should pay the same fee. At the hearing this was shown to be a popular misconception. It appears that the waves sent out by a broadcasting station may reach the receiving set in two ways. One way is by the "direct" or "ground" wave- that is to say, the wave leaving the station goes direct to the receiver. The other way is by the "reflected" or "skip" wave, that is to say, the waves leaving the station are projected upward in all directions and at a distance of about 100 miles above the earth they strike an impenetrable layer known as the "Heaviside layer." These waves are then reflected back to the earth and in this way reach the receiver. The angle of reflection depends, of course, upon the angle at which the wave happens to strike the ever changing surface of the layer. Then too, these waves may be interfered with or broken<sup>n</sup> up by sunlight or even moonlight. The direct wave as well as the reflected wave is affected by interference from other stations. The effective range of the direct wave is, however, very limited. Quotations were read from a book written by Dr. Goldsmith, who is said to be a leading authority on radio transmission, showing that the service range of the direct wave under average conditions is about ten miles. By service range is meant the range within which coverage is certain and complete. This is sometimes called intense coverage. This service range has been somewhat extended by later inventions but it is still very limited. Beyond the distance of intense coverage the coverage gradually diminishes in effectiveness but may still for a limited distance be called good coverage. Beyond this coverage are dead spots and the coverage is intermittent and inefficient. Mr. Grant of the "Voice of the Prairies Station", who is a recognized authority on radio broadcasting, says that competent radio engineers

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have set the service range of a 5,000 watt station at 125 miles and of the 1000 watt station at about 27 miles. The National Broadcasting Company can only guarantee to their advertisers a service range of 100 miles. It is this limited service range - this more or less complete coverage which the advertiser is willing to pay for. From a business standpoint it is the only coverage that is taken into consideration.

The "reflected" or "skip" wave is the wave which results in long distance reception. By reason, however, of the very nature of the wave transmission the reception is irregular, intermittent and uncertain. This form of reception has no business value and is not considered from a business standpoint.

These considerations vitally effect the question of advertising fees as a simple comparison of the population in different areas will readily show.

<u>EDMONTON:</u>	Population within city limits	22,000
"	" a radius of 10 miles	25,000
"	" " " " 30 "	100,000

<u>CALGARY:</u>	Population within city limits	22,000
"	" a radius of 10 miles	25,000
"	" " " " 30 "	100,000

<u>MONTREAL:</u>	Population within a radius of 10 miles	1,200,000
"	" " " " 30 "	1,800,000

It will thus be seen that the population in the Montreal area is about twelve times that within the Edmonton area.

In other words, the radio audience in and about Montreal is twelve times as great as in and about Calgary or Edmonton. The antennae power, i.e., the wattage of the station is little or no indication of the population served. The Society has claimed the right to collect and has endeavored to collect the fees as filed subject only to reduction on the basis set out in the paragraph attached to the license above referred to. In fixing the fees the Society has left out of consideration the population within the service range of the station. When the facts as to service range, coverage and relative populations were brought out in evidence the representative of the Society very properly admitted that the statement filed was made up without appreciating some of the factors above mentioned as affecting western Canada and this situation ought to be remedied. Without taking advantage of an admission so made it must be said that the Society has proposed to collect excessive fees <sup>from</sup> for the petitioners.

It was urged upon me in the argument that I should not be content with a categorical answer to the effect that the fees proposed to be charged were excessive but that I should face the much more difficult task of recommending to the Minister what, in my opinion, a proper fee would be. However reluctant one may be to undertake this task the results of such an undertaking may be of some assistance to the Minister. It is agreed that the two main considerations affecting the question of fees to be charged to broadcasting stations are:

1. The relative population within the area of the service range of the station.
2. The proportion which the time on the air devoted to music daily bears to ten hours (the latter being fixed as the maximum daily time ordinarily devoted to

broadcasting) or alternatively, the proportion which the time devoted daily to broadcasting the Society's music bears to ten hours.

Counsel for the broadcasting stations maintains that the Society has no right to collect fees in respect of time occupied in broadcasting music other than the Society's music and that as far as time is a consideration the scale of fees should be based on the time occupied in broadcasting music controlled by the Society. He maintains that it is possible in the premises to fix the fees mathematically. He argues that the statement filed represents the maximum fees payable where conditions are most favourable as to population and where the full time of ten hours is occupied in broadcasting music. The population in the given area in and about Montreal is about ten or twelve times the population in the area around Calgary and Edmonton. The time occupied in broadcasting the Society's music in Calgary or Edmonton is roughly one quarter of ten hours. Assuming the maximum fee to be \$1400.00 for the Calgary Herald or the Edmonton Journal this process would reduce the fee to about \$350.00. The Society replies that the statement represents a flat rate for all Canada and this rate, as it is, is not subject to reduction in a particular area of the country population. Then further it is said that the rate could be reduced according to the number of hours occupied in broadcasting music. The statement is founded on this principle. If the Society had contemplated further reductions according to the number of hours occupied by the Society's music, it would have stated a basic rate upon which the calculation is made. As the basic element is concerned the Society holds strongly to the view that the hours consumed in broadcasting all music is the only basis. The Society's music is interposed in the program

the musical programme and the Society contends that it is quite impracticable to compile from day to day statements of the time consumed by the Society's music. An attempt was made to do this for the purposes of the hearing by three of the petitioning stations with the following results:

The Alberta Pacific Grain Company Station in a test week found that 158 selections out of 356 selections played were copyright. That is to say, slightly less than one half were copyright.

The Alberta Publishing Company Station found in a test week that 240 out of 392 selections played were copyright. That is to say, somewhat more than one half were copyright.

The Calgary Herald Station in a test week found that out of 328 selections played 56% were copyright.

Some additional weight is given to the argument of the Society by the fact that the three stations above mentioned during a test week in which they concentrated on the problem, were apparently able to give only the total number of selections which were copyrighted as against the total selections played and were not apparently able to give the aggregate time occupied with the Society's music. In any case an examination of these figures shows that the ratio between the total music hours and the total hours of Society's music is fairly constant through the stations. The Society wishes to base its fee on the hours of musical performance during which the station wishes to perform the Society's repertoire and it would appear that in view of the figures quoted it matters little which period is taken as the yard stick.

While I think that mathematical considerations are a guide in matters of this kind they are not the only factor as there are many elements entering into business transactions which elude mathematical analysis. If the process were reversed and a minimum

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fee were fixed for the station with the smallest population it would not, I think, be possible for the Society to multiply this fee by ten in order to fix the fee for another station merely because the latter station served ten times the audience. The Society considered \$700.00 a fair fee basing it on the total music time. I think it would not be unfair to divide this sum by five instead of ten in order to correct the results of inequalities of population. This is, of course, arbitrary, but I am further confirmed in my opinion by the fact that Mr. Giffen, Business Manager of the Edmonton Journal, thought \$100.00 would be a fair fee.

A high powered station like "The Voice of the Frontier" has, of course, a wider service range. It has a service range of about 100 miles as against 25 miles or 30 miles for a 500 watt station. But it is apparent from a knowledge of the country that the added area of coverage probably does not increase the audience by more than 20%. The fee for this station might be increased by that percentage. It may be further suggested that any fee should be regarded merely as an interim fee. There are about 100 broadcasting stations in Canada and the number will probably be reduced in the near future. It would not be a difficult task and if the Society is to preserve satisfactory relations with its clientele it must face some of the less difficult problems to apply the considerations above named to the stations and attach a fee to each station and to fix a fee for each station would seem to be the most satisfactory course to pursue.

## V.

Under this general heading there is little that need be added but this may be a convenient place to refer to the unit fee of \$5.00 filed by the Society as being the fee for a license for any one performance or any one work by anyone. This fee is not applicable solely to broadcasting stations. It is at once apparent that if all the Society's repertoire amounting to some two million selections were performed once the revenue to the Society would be ten million dollars. Even if the 200,00 selections said to be in common use were performed once the revenue would be one million dollars. The Society however says that this is merely a maximum fee and that there may be a large concert performing only one of the Society's numbers for which this fee would be quite justifiable and further that the Society has no intention of charging such a fee for the single performance for a few minutes of a popular piece of music. This can only mean that the Society has filed a fee for the occasional or exceptional case but has given no indication of any kind as to what the unit fee will be for the vast majority of cases. The Society expresses itself as being favorable to the system of general licenses but says it is quite ready to grant a single unit license if required. One can readily understand the difficulties connected with the fixation of a unit fee but surely the Society could without much expenditure of time or labor put on record some informative scale of unit fees - some particular or details or, if nothing else, the statements and explanations made at the hearing. By so doing the Society would be entitled to the credit of making a frank and reasonable effort to

to comply with the requirements of the Statute.

All of which is respectfully submitted.

A. F. Ewing

Commissioner.

EDMONTON, June 29th, 1932.