Copyright Board Canada


Commission du droit d'auteur Canada

**Date** 2023-11-15

**Citation** [CB-CDA 2023-057]

**Member** The Honourable Luc Martineau

**Matter** 71-2023-01 – Totem Media Inc. v CONNECT Music Licensing Service Inc.

## RULING ON A MOTION TO DISMISS A SEC.71 APPLICATION

## I. OVERVIEW

[1] Totem Media Inc. (Totem) is a background music supplier that provides its services to commercial establishments that publicly perform recorded music. Totem provides each customer with copies of sound recordings of musical works that are stored on a hard drive at the customer's premises.

[2] CONNECT Music Licensing Service Inc. (CONNECT) is a collective society. CONNECT administers the rights of record companies, independent labels, and artists and producers who own or control the copyright in sound recordings and music videos produced and/or distributed in Canada.

[3] Totem filed an application (the Application) under section 71(1) of the *Copyright Act* (the *Act*) on May 5, 2023. It asks the Board to fix the royalties that Totem pays to for the right to reproduce published sound recordings in CONNECT's repertoire for the purpose of supplying background music to businesses.

[4] On June 30, 2023, CONNECT filed, with leave, a motion to dismiss the Application on the grounds that

- the Board does not have jurisdiction to hear the Application; and
- in the alternative, that Totem's Application is improper.

[5] The motion to dismiss the Application was heard on October 19, 2023.

[6] The motion is denied.

## II. BACKGROUND

*Procedural history*

[7] CONNECT was permitted to respond to Totem's application (Ruling 2023-035).

[8] Totem stated (July 14, 2023 ) that:

- CONNECT has misrepresented the interactions between itself and CONNECT and has provided no substantive response to Totem's application; and

- it has since learned of changes to CONNECT's repertoire (and that they would therefore seek a lower rate.

[9] Subsequently (July 19, 2023), CONNECT sought leave to file a reply to Totem's response. Totem then argued (July 20, 2023) that CONNECT should only be able to respond to the issue of change in repertoire and that it should not be entitled to additional submissions on issues arising from Totem's initial Application.

[10] CONNECT replied (July 20, 2023) that the claims of misrepresenting the parties' interactions are serious, and deserve a reply.

[11] The parties were given the opportunity to make detailed representations during the hearing. The Board ruled that there would be no motion record filed for the purpose of the hearing. The parties could rely on the record as it currently stood,[1] except for outlines of arguments.[2]

## III. ISSUES

[12] We need to decide whether the Application meets the criteria in the Act. In the affirmative, we need to determine if the Board should nonetheless deny the Application. We consider three issues:

1. Were the parties unable to agree at the time of Application?

2. Has the applicant given proper notice?

3. Should the Board deny the Application?

## IV. ANALYSIS

### ISSUE 1: WERE THE PARTIES UNABLE TO AGREE?

*Finding*

[13] We find that the parties were unable to agree, which means that, when it was filed, the Application met this statutory condition.

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[1] Ruling of the Board CB-CDA 2023-046, September 8, 2023.
[2] Ruling of the Board CB-CDA 2023-048, September 18, 2023.

*Law*

[14] The *Act* provides that:

> If a collective society and a user are unable to agree on royalties to be paid with respect to rights under section 3, 15, 18, 19 or 21, other than royalties referred to in subsection 29.7(2) or (3) or paragraph 31(2)(d), or are unable to agree on any related terms and conditions, the collective society or user may, after giving notice to the other party, apply to the Board to fix the royalty rates or any related terms and conditions, or both.[3]

*CONNECT's Submissions*

[15] CONNECT argues that the Board does not have jurisdiction to hear Totem's application because the statutory pre-conditions for the application of subsection 71(1) of the *Act* were not met, particularly the condition that the Application is valid only if the collective society and user are "unable" to agree.

[16] CONNECT claims that the negotiations between the parties were ongoing at the time of Totem's application. As such, when the Application was filed, "the statutory requirement had not crystallized."

*Totem's Submissions*

[17] Totem had a license from CONNECT since July 1, 2011. The most recent licence expired on June 30, 2022.

[18] On December 2, 2022, CONNECT provided a ready-to-sign electronic agreement with *status quo* rates and conditions, effective July 1, 2022. The fees demanded by CONNECT are described by Totem as "disproportionately excessive and not economically sustainable."

[19] On March 9, 2023, Totem provided CONNECT with a formal written offer seeking a reduction in the royalty rates. Totem reserved its rights to apply to the Board under s. 71(1) in the event no agreement could be reached between the parties.

[20] On April 11, 2023, CONNECT responded that the proposed fees are standard fees for all CONNECT licensees, and it did not anticipate that its members would agree to decreasing the fees. CONNECT provided a take-it-or-leave it offer to either sign the proposed license or terminate the licensing agreement with CONNECT and obtain direct licensing deals with labels going forward.

[21] Totem gave notice to CONNECT on May 5, 2023, informing CONNECT it would file an application with the Board under s. 71(1).

[22] Totem submits that conditions to file an application under subsection 71(1) were met: first, there was no agreement between the parties at the time of application. This is reinforced by the French version of subsection 71(1), which provides that the application may be filed "à défaut

[3] *Copyright Act*, LRC 1985, ch. C-42, subsection 71(1). [Act]

d'une entente",[4] in other words, "in the absence of an agreement." Second, Totem notified CONNECT in advance of filing its application.

[23] Totem provided the details of its interactions with CONNECT. These included a response, dated April 11, 2023, from Janet Turner, CONNECT's Senior Manager, Licensing, to Totem's proposal:

> I wanted to follow-up on our correspondence below.
>
> Please note that the licensing Agreement between CONNECT and TOTEM MEDIAS INC. has been expired since June 30, 2022. It's imperative that we either renew or terminate the Agreement as soon as possible.
>
> We understand your concerns regarding the licensing fees but please note that they are standard fees for all of our MSS HD Compression licensees. As per your request, we do have this as a discussion point to bring up to our members in our next meeting with them but we don't anticipate that our members will be decreasing the fees.
>
> If you prefer to terminate your CONNECT Agreement and obtain direct licensing deals with the labels going forward, please let us know.
>
> Otherwise, please sign the renewal Agreement at your earliest convenience.

[24] According to Totem, it is clear that, from CONNECT's perspective, its rates are standard for all licensees. While it does refer to a future discussion of rates among members, it states that a decrease is unlikely. The email closes by giving Totem a choice: either sign the renewal agreement without any change in rates or terminate the agreement.

[25] Totem claims that it was left with few choices: attempt to enter into licensing deals with the labels directly, use recorded music not represented by CONNECT or its members, change its business model (supply music without making reproductions of sound recordings), or cease its operations.

[26] Totem explained that in its opinion all four alternative options are not viable. As a result, Totem reasonably understood CONNECT's position to be that the *status quo* renewal was a take-it-or-leave-it proposal.

[27] Totem submits that this interpretation was reinforced by CONNECT's June 30, 2023, submission where it states that this is "not a bespoke licensing negotiation between a collective and a user" but rather "standard background music services licence." For Totem, this statement directly contradicts any suggestion by CONNECT that it was willing to engage in good-faith negotiations with Totem to agree on fair and reasonable rates.

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[4] *Idib.*: "À défaut d'une entente sur les redevances à verser relativement aux droits prévus aux articles 3, 15, 18, 19 ou 21, ou sur toute modalité afférente, la société de gestion ou l'utilisateur peuvent, après en avoir avisé l'autre partie, demander à la Commission de les fixer, à l'exclusion des redevances visées aux paragraphes 29.7(2) ou (3) ou à l'alinéa 31(2)d)."

[28] In Totem's opinion, if CONNECT was sincere in its willingness to negotiate, it could have provided a substantive counteroffer to Totem at any point in the more than four months since Totem provided its written offer and it could still provide a counteroffer at any time.

*Consideration*

[29] The sequence of interactions between the parties prior to the Application is not disputed. What is disputed is how to interpret those facts.

[30] We prefer Totem's interpretation: when the Application was filed, the parties were unable to agree on the royalties. The discussions had been ongoing for nine months, with little indication that they would reach a mutually satisfying outcome.

[31] When reading both the French and English version of s.71 of the *Act*, it is clear that the intended threshold to be met, is rather low. It seems to have been designed to ensure that some attempt at arriving at an agreement is present.

[32] Applying the facts to the law, we conclude that the requirement regarding the inability to agree under s. 71(1) is met in this case.

**ISSUE 2: DID TOTEM GIVE PROPER NOTICE?**

*Finding*

[33] We find that Totem provided proper notice to CONNECT, which means that, when it was filed, the Application met this statutory requirement.

*Law*

[34] Subsection 71(1) provides that if a collective society and a user are unable to agree, the collective society or user may, after giving notice to the other party, apply to the Board to fix the royalty rates or any related terms and conditions, or both. [Emphasis added]

*Parties' Submissions*

[35] CONNECT argues that the Application was premature. Totem initiated it before it had even received CONNECT's substantive response to its licensing proposal, much less engaged in good-faith negotiations.

[36] CONNECT claims it advised Totem that it did not have instructions from its members to offer Totem a lower licence rate, but that it would raise the matter at an upcoming meeting to obtain the necessary instructions. Instead of waiting for the results of that meeting, Totem simply filed its application with less than one hour's notice to CONNECT.

[37] Totem submits that in its March 9 written proposal to CONNECT, it explicitly provided CONNECT with notice that, in the event the parties were not able to reach an agreement, Totem was reserving to its right to apply to the Board for an order fixing the rates and terms of the licence. Therefore, CONNECT had almost two months notice that Totem would file the application if there was no agreement.

[38] Totem gave notice to CONNECT on May 5, 2023, informing CONNECT it would apply to the Board under s. 71(1).

*Consideration*

[39] The *Act* does not provide specific details on the notice's timeframe, form, content or level of formality.

[40] A strict approach to the notice requirement could run afoul of s. 12 of the *Interpretation Act*.[5] It would mean that a party could rely on a strict application of the notice requirement—a technicality—to deprive a user from the safe harbour normally associated with a subsection 71(1) application, which allows a user to legally maintain its course of business under certain conditions.[6]

[41] A flexible approach best serves the purpose of the regime, which, in our view is to ensure uncoerced, balanced negotiations and continuation of operations without resorting to less cost-effective ways to licence content. Such a flexible approach takes into account the entire set of circumstances specific to the matter at hand.

[42] In this case, given the state of negotiations, which had been initiated for several months yet had not induced any meaningful outcome, and the combined written communications of March 9 and May 5, 2023, CONNECT had received proper notice of the Application. In other words, CONNECT was not taken by surprise.

[43] Applying the facts to the law, we conclude that the requirement for a valid application under s. 71(1) regarding proper notice is met.

**ISSUE 3: SHOULD WE DENY THE APPLICATION?**

*Finding*

[44] We refuse to deny the Application.

*Law*

[45] Subsection 71(2) of the Act provides that "[T]he Board may, for a period that the Board may specify, fix the royalty rates or their related terms and conditions, or both, as the case may be." [Emphasis added]

[46] Subsection 71(4) of the Act specifies that "[F]or greater certainty, the Board may deny an application made under subsection (1) or any part of one."

*CONNECT's Submissions*

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[5] *Interpretation Act*, R.S.C., 1985, c. I-21, section 12 : "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[6] *Act*, subsection 73.5(2) : "If an application is made under subsection 71(1), a person in respect of whom royalties or terms and conditions may be fixed may, until the Board's final decision on the application, do an act referred to in section 3, 15, 18 or 21 to which the application applies if the person has offered to pay the applicable royalties in accordance with any applicable related terms and conditions."

[47] Even if the Board's jurisdiction is engaged, CONNECT contends that the Board has statutory discretion to deny an application to fix royalties at any stage, with or without a hearing on the merits.

[48] When exercising its discretion, the Board should deny such an application where (i) there is an established and functioning marketplace for the licence; (ii) the application does not raise any specific considerations that call for the Board to consider the appropriateness or applicability of the existing approach to licensing; and (iii) considerations of fairness or the public interest do not call for the Board to intervene.

[49] CONNECT claims that there is a functioning market for the licence. CONNECT explained that it represents a non-exclusive repertoire. There are 22 licensees operating under its standard background music service licence. The same rates and terms have been in place since 2006.

[50] CONNECT further explained that Totem (including under its prior corporate name) has operated under that licence since 2006. Totem's application seeks terms and royalties that depart from the traditional licensing scheme under which all of its competitors operate. According to CONNECT, Totem's only rationale is that the COVID pandemic has negatively affected its business and that CONNECT's standard rate is "high."

[51] CONNECT argues that Totem's application is unprecedented. The Board has never been asked to intervene this way in the operation of an established and functioning licensing market.

[52] CONNECT claims that the Application raises no specific considerations that call for the Board's intervention. Indeed, the Board has already determined in the tariff context that there is no justification for continued COVID-related rate discounts.

[53] Finally, according to CONNECT, both fairness and public interest considerations demand that the Board not intervene. This is the case for several reasons. First, it would be inefficient, costly, and needlessly disruptive to conduct a hearing to set a licence; it is already clear what willing buyers pay to a willing seller in this very market. Second, the public interest would not be served by granting a full hearing on the merits to a licensee that simply seeks a rate reduction from the standard licence terms. If the Board were required to set a licence every time a user asks, it would undermine collective administration—and Canada's international treaty obligations—by converting exclusive rights to rights of remuneration.

[54] Based on these criteria, CONNECT submits that the circumstances warrant denying the Application.

*Totem's Submissions*

[55] Totem argues that is has validly filed the Application and that the Board cannot decline to exercise its jurisdiction once an application has been validly filed under 71.

[56] Totem contends that the Board does not have a discretionary power under 71(4) to deny the application without considering the merits. The discretionary power contained to at 71(4) is limited in scope, that is, restricted to denying to fix the royalty as applied for on the merits.

[57] According to Totem, per the statutory scheme, the Board must consider Totem's application on the merits.

*Consideration*

[58] Situations may warrant denying an application that meets the statutory conditions or any part of one without considering the merits. For example, a tariff already covers fully or partially the scope of the disputed licence.

[59] We do not agree, however, that the grounds provided by CONNECT warrant denying the Application.

[60] First, the fact that there is an "established and functioning" marketplace for the licence does not mean that the royalties in that marketplace meet the criteria set out in the *Act*, mainly that they are "fair and equitable."[7]

[61] Second, the situation of a user may evolve in such a way that it can no longer sustain the market "price". The Board's mandate is to ensure that this situation is not due to the fact that the "price" is unfair. As stated by the Supreme court of Canada, the "price-setting powers of the Board" (including the subsection 71(1) regime, formerly numbered under sections 70.2 to 70.4 of the Act) "[…] protect users from the potential exertion of unfair market power by collective societies."[8]

[62] Third, CONNECT'S grounds for denying the Application and pertaining to fairness and the public interest are certainly valid but only to the extent that their premises are true. Under the *Act*, it is the Board's prerogative to confirm that the royalties are fair and equitable, in consideration of several criteria. Regarding CONNECT's concern related to the costs and inefficiencies of such an application, the Board will implement an expeditious and informal process in keeping with the principle of proportionality, which in our mind is best achieved through case management.

[63] We agree with CONNECT that the Board is not required to set a licence every time a user asks. As contemplated by the *Act*, and as already noted, there may be situations that warrant denying an application. When the Board fixes the royalties or related terms and conditions, it promotes collective administration by ensuring that through the pooling of exclusive rights collective societies carry out fair and cost-effective licensing practices.

## V. CONCLUSION

[64] CONNECT's motion to dismiss the Application is denied.

[65] A case management conference will be held shortly. The Parties are invited to provide jointly a date. Details on the case management conference will follow once the date is set.

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[7] See Act, section 66.501.

[8] *York University v Canadian Copyright Licensing Agency*, 2021 SCC 32 at para 67.