Competition Tribunal Tribunal de la Concurrence

Reference: *Stargrove Entertainment Inc. v. Universal Music Publishing Group Canada*, 2015 Comp. Trib. 17
File No.: CT-2015-009
Registry Document No.: 058

IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the *Competition Act*, RSC 1985, c C-34 as amended;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

BETWEEN:

Stargrove Entertainment Inc.
(applicant)

and

Universal Music Publishing Group Canada,
Universal Music Canada Inc.,
Sony/ATV Music Publishing Canada Co.,
Sony Music Entertainment Canada Inc.,
ABKCO Music & Records, Inc.,
Casablanca Media Publishing, and
Canadian Musical Reproduction Rights Agency Ltd.
(respondents)

Decided on the basis of the written record.
Before Judicial Member: Barnes J.
Date of Reasons for Order and Order: November 18, 2015

REASONS FOR ORDER AND ORDER REGARDING THE RESPONDENT'S MOTION TO EXCLUDE AN AFFIDAVIT

[1] The Respondent in this proceeding, Canadian Musical Reproduction Rights Agency Ltd. (“CMRRA”), has moved for an Order striking the affidavit of Mario Bouchard sworn on August 27, 2015, filed by the Applicant, Stargrove Entertainment Inc. (“Stargrove”) in support of its application for leave under section 103.1 of the *Competition Act*, RSC 1985, c C-34.

[2] The CMRRA contends that the Bouchard affidavit is inadmissible based on an asserted privilege and because its contents are said to be objectionable.

[3] In support of this motion, the CMRRA has filed an affidavit sworn by its President, Caroline Rioux. Ms. Rioux asserts that Mr. Bouchard acquired some of the evidence contained in his affidavit by being privy to confidential settlement discussions in an unrelated class action filed in the Ontario Superior Court of Justice, also involving the CMRRA and some of the Respondents in this proceeding. Ms. Rioux's affidavit expresses this concern in the following way:

> 5. As I explain in more detail below, CMRRA has participated in the Section 77 Discussions with the expectation that any information it provided to Mr. Bouchard was to be used only for the purpose of helping the parties to those discussions fashion a workable system for the issuance of mechanical licences pursuant to section 77 of the *Copyright Act*. CMRRA has understood that both the Copyright Board and Mr. Bouchard, as its designated representative, are impartial in the Section 77 Discussions. As such, we have not hesitated to provide him, often at his request, with information about mechanical licensing generally and about aspects of our own mechanical licensing processes specifically. I believe that at least some of that information was not, and is not, publicly available, and that Mr. Bouchard understood that when he received it.
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> 6. I was therefore shocked to learn that Mr. Bouchard had purported to provide expert evidence in support of the applicant in this proceeding, and especially that his evidence relied in part on knowledge gained solely through his participation on the Section 77 Discussions. Had I believed that there was any risk that information provided to Mr. Bouchard, as the designated representative of the Copyright Board, would later be used against CMRRA in this or any other proceeding, CMRRA would not have agreed to participate in a process facilitated by him, nor would we have shared information with him. Further, had Mr. Bouchard sought our consent to use information obtained as a result of his participation in the Section 77 Discussions, CMRRA would have refused.

[4] Further details of Mr. Bouchard's involvement in the settlement discussions in the Ontario class proceeding are set out in Ms. Rioux's affidavit. Mr. Bouchard was at that time General Counsel to the Copyright Board and represented its interests in ongoing discussions with the CMRRA about a new regime for issuing mechanical licenses under section 77 of the *Copyright Act*, RSC 1985, c C-42. According to Ms. Rioux, notwithstanding the issuance of an order settling the Ontario class action, the terms of a proposed Memorandum of Understanding (“MOU”) for a "future licensing system" have yet to be finalized. Ms. Rioux describes

Mr. Bouchard's involvement in the discussions with the CMRRA as follows:

23. Since the Settlement Approval Order was issued, the Section 77 Discussions have continued sporadically. At first, the parties were asked to submit written comments to the Copyright Board on the draft MOU, and did so through their litigation counsel. Since then, Mr. Bouchard has exchanged written correspondence, participated in telephone conferences, and attended in-person meetings, with representatives of CMRRA and SODRAC to discuss a variety of outstanding issues. Some of those issues have related to the language of the MOU, and of standard terms and conditions of the Section 77 Licences to be issued by the Board, while others have concerned the mechanics and logistics of the licensing process itself. I do not know whether Mr. Bouchard has engaged in similar individual consultations with the defendant record labels or any other interested party.

24. The Section 77 Discussions are not yet complete, and I believe that Mr. Bouchard is still actively involved in them. In fact, he was corresponding actively with CMRRA's counsel on outstanding issues as recently as July 2015.

D. Mr. Bouchard's Role In the Section 77 Discussions

25. I have been involved in the Section 77 Discussions in a number of different capacities at various times. Not only have I reviewed various drafts of the MOU to ensure that they were consistent with CMRRA's operational needs, I have also been primarily responsible for instructing Mr. Chisick and Ms. Syrtash in relation to the Section 77 Discussions since at least the beginning of 2013, even before my appointment as president of CMRRA, having been delegated that responsibility by Mr. Basskin.

26. Although Mr. McDougall and Mr. Majeau have communicated directly with Mr. Chisick and counsel to the defendant record labels at various times, Mr. Bouchard has always been CMRRA's primary contact in relation to the Section 77 Discussions. He has corresponded extensively not only with Mr. Chisick but also with Ms. Syrtash, as CMRRA's senior in-house counsel, and has met with them in person on multiple occasions.

27. When Mr. Bouchard first became involved in the Section 77 Discussions, I understood that, as General Counsel, he was functioning as an employee of the Copyright Board. After his retirement from the civil service in August 2013, I understood that he was intending to work as a lawyer in private practice and that his continued involvement in the Section 77 Discussions was as independent counsel to the Board. Consequently, I have always assumed that any information disclosed to Mr. Bouchard would be used only to facilitate the Section 77 Discussions and protect the interests of the Board.

28. I have always understood that the Copyright Board has its own interest in the outcome of the Section 77 Discussions, namely to ensure that any agreement

reached with the parties meets both its statutory obligations and its administrative requirements. However, it has also been my impression that the Board is otherwise impartial as between the other parties to the Section 77 Discussions (i.e., CMRRA, SODRAC, and the defendant record labels) and that the information disclosed to it during the course of those discussions was to be used only for the purpose of negotiating and finalizing an appropriate MOU.

29. In fact, my understanding has always been that the Copyright Board's principal interest is in facilitating this final aspect of the settlement of the Pending List Class Action, and that Mr. Bouchard was charged with doing exactly that. In practice, Mr. Bouchard has often appeared to function as a facilitator or intermediary between CMRRA and SODRAC, on one hand, and the defendant record labels, on the other, contacting CMRRA to discuss whether and how various outstanding deal points might be reconciled and resolved. As a result, CMRRA has felt that it was obliged to share with Mr. Bouchard details of its mechanical licensing processes and systems that would otherwise have been kept confidential.

30. Indeed, my impression throughout the Section 77 Discussions has been that Mr. Bouchard has limited knowledge of the actual mechanical licensing practices and processes in place at or between CMRRA and SODRAC, on one hand, and the record labels, on the other. I do not find that surprising; although I assume that Mr. Bouchard has heard testimony and/or reviewed documentary evidence about mechanical licensing in various Copyright Board proceedings, I do not believe he has any direct experience with the process.

31. As a result, it has been necessary for both CMRRA and SODRAC to provide Mr. Bouchard with a significant amount of information about mechanical licensing. This information has included not only formal documents such as our various forms of mechanical licensing agreement with major and independent record labels, but also anecdotal information about the mechanical licensing process, the contractual terms that are of primary importance to CMRRA (and why they are so important), specific challenges faced by CMRRA in the course of mechanical licensing, and other matters either that Mr. Bouchard has asked about or that have appeared relevant from time to time during the Section 77 Discussions.

32. Everything that CMRRA has disclosed to Mr. Bouchard has been disclosed on the understanding and belief that, as a representative of the Copyright Board in the Section 77 Discussions, he was acting as an impartial representative of an administrative tribunal and would use the information so provided solely for the purpose of helping to finalize the MOU. CMRRA has also understood that, since the Section 77 Discussions were taking place solely for the purpose of facilitating the court-approved settlement of the Pending List Class Action, any information disclosed to Mr. Bouchard, as a representative of the Board, was presumed to be confidential and would not be disclosed to any third party or used for any other purpose.

> 33. It never occurred to me, or to Mr. Basskin or Ms. Syrtash, that Mr. Bouchard might later use information provided to him in the context of the Section 77 Discussions against CMRRA in an unrelated proceeding. Had we known this, or even had reason to fear that this was a possibility, we would never disclosed any information to Mr. Bouchard or authorized our counsel to do so. In fact, we might well have asked the Board to appoint a different representative who could be trusted not to misuse the information that we were providing.

[5] Ms. Rioux's affidavit concludes with general concerns directed at the maintenance of the integrity and impartiality of the Copyright Board and the supposed misuse of information it receives from the parties with which it deals. She also expresses a pejorative opinion of Mr. Bouchard's competence to author an expert opinion concerning mechanical licensing practices.

[6] The CMRRA's principal legal argument for rejecting the Bouchard affidavit is based on an asserted settlement privilege and the associated risk of compromising the integrity and neutrality of the Copyright Board as a facilitator of the settlement of the Ontario class proceeding. In the alternative, the CMRRA contends that the Bouchard affidavit "blatantly opines on matters of domestic law and contractual interpretation" and thereby encroaches on the ultimate issue facing the Tribunal and otherwise lacks probative value.

[7] Based on the record put forward by the CMRRA, none of its arguments is sufficient to exclude the Bouchard affidavit.

[8] Mr. Bouchard's affidavit begins with some basic and non-controversial principles of copyright law and its application to musical work. Although this information undoubtedly trenches to some degree into the realm of domestic law, its obvious purpose is to offer context and background to the substance of his views about Canadian musical licensing practices.

[9] Among the topics covered by this report are the following:

(a) Key players in the mechanical licensing market (i.e. authors, publishers, collective societies and record labels) and their typical relationships to one another.

(b) The history of Canadian mechanical licensing processes.

(c) The typical contractual relationships between the CMRRA and other interested parties.

(d) The pricing of mechanical licenses.

(e) The Ontario class action settlement terms and their potential relevance to the issues raised in this proceeding.

[10] The argument that the Bouchard affidavit be expunged based on a settlement privilege has no legal or factual basis to support it.

[11] There is nothing in Ms. Rioux's affidavit that identifies any confidential information contained in the Bouchard affidavit. Indeed, the factual content of the affidavit appears to be made up of information that is in the public domain or that would be readily discoverable: see affidavit of David Basskin, exhibit A to the affidavit of Cathy McDonald. Nowhere is there any suggestion that information was conveyed to Mr. Bouchard that would potentially compromise the CMRRA's litigation or settlement interests.

[12] It is not enough to advance vague allegations of the sort made by Ms. Rioux. Something specific is required. The same issue was raised in *Huron-Wendat Nation of Wendake v Canada*, 2014 FC 1154, [2015] 3 CNLR 53, where Justice Yves de Montigny dealt with a similar motion. There, one of the parties complained that an opposing expert witness was privy to confidential information acquired from a previous mandate. Although the underlying concern was based on an asserted conflict of interest and not a settlement privilege, Justice de Montigny's observations are still applicable:

> [57] In this case, the applicant has not established that Mr. Delâge received confidential information, let alone that he used that information in preparing his affidavit. It is not enough to state, as Grand Chief Sioui did in his affidavit dated April 7, 2010, that Mr. Delâge had access to [Translation] "archived documents, confidential information, strategic information, their policy direction, information about the progress of historical research on the occupation and use of Nionwentsïo", that he was [Translation] "informed of the Huron-Wendat Nation Council's strategies" or even that [Translation] "[h]e attended and participated in numerous meetings and discussions with members of the Council and other employees of the Council regarding the approach and strategy of the Huron-Wendat Nation involving subjects related to the application for judicial review" (at paragraph 15 of the affidavit). The affidavits of Mr. Richard and Simon Picard are not that much more specific and do not provide us with more details about the nature of the "confidential" information.
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> [58] In contrast, Mr. Delâge stated in a second affidavit sworn on May 5, 2010, that he did not agree to a confidentiality clause with or cede his rights to the Huron-Wendat Nation Council, that the information gathered under his mandates from the applicant was already in the public domain, that he was not involved in the development or implementation of policy or legal strategies related to these mandates or the Council's litigation, that he did not refer to the Huron archives when drafting his first affidavit and that he did not carry out his mandates by consulting the documentation that the Hurons kept on their premises. Mr. Delâge was not cross-examined on his affidavit.
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> [59] Moreover, the applicant did not specify what parts of Mr. Delâge's affidavit were allegedly based on confidential information. A plain reading of the affidavit dated February 15, 2010, reveals that all of the sources cited by Mr. Delâge or that the affidavit relies upon are public historical or scientific sources, which are based on general knowledge and shared Canadian history. Mr. Delâge added that he did not rely in any way on the work and research results in the Seigneurie de Sillery file to draft his affidavit, because the purpose of the

> study is quite distinct and in no way involves the territories frequented, presence on the territory or the use of the resources.
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> [60] In short, I find that the applicant did not prove that there was a conflict of interest based on the confidential information that Mr. Delâge allegedly used in drafting his affidavit. On the one hand, the applicant did not specify the nature of the information or the documents that Mr. Delâge had access to that would be considered confidential. In any case, it was not proven that Mr. Delâge used any confidential information whatsoever in preparing his affidavit of February 15, 2010. The evidence in the record does not demonstrate a sufficient connection between the various mandates undertaken by Mr. Delâge on behalf of the Council and this case, and it has not been proven that he had access to any information regarding the litigation strategy.

[13] A further difficulty with CMRRA's argument is that Mr. Bouchard's involvement was not on behalf of a party to the Ontario class proceeding. He was acting on behalf of the Copyright Board which may well have had a role to play in giving practical effect to a settlement of that case; but he was decidedly not retained as a disinterested mediator of that dispute. Mr. Bouchard's role does not, therefore, fit within the legal parameters of a settlement privilege as described by the Supreme Court of Canada in *Union Carbide Canada Inc v Bombardier*, 2014 SCC 35 at para 31, [2014] 1 SCR 800:

> [31] Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming" (A. W. Bryant, S. N. Lederman and M. K. Fuerst, *The Law of Evidence in Canada* (3rd ed. 2009), at para. 14.315).

[14] There is nothing about Mr. Bouchard's role as described by Ms. Rioux that creates a privilege. The CMRRA was not obliged to disclose to Mr. Bouchard any information that it considered to be confidential or of a strategic nature. The CMRRA was also quite capable of requiring that Mr. Bouchard maintain any confidence it thought necessary as a precondition to discussions with the Copyright Board. It cannot advance its position now having neglected to take protective action at the time. Although a confidentiality agreement is not a requirement for establishing a settlement privilege as between the parties to a dispute, it would be expected where confidential discussions take place with an outside party. In those circumstances the disclosure of information would be presumed to be unrestrained unless protected by a confidentiality agreement.

[15] Indeed, the concerns expressed by Ms. Rioux about the CMRRA's loss of confidence in the Copyright Board and of the corresponding need to take protective steps in the future are an

implicit acknowledgement of its previous indifference. I would add that it is not the role of the Competition Tribunal when acting within its own jurisdiction to protect the supposed integrity of the processes of the Copyright Board. That Board is quite capable of protecting its own interests without interference from me.

[16] The remainder of the CMRRA's concerns about the content of the Bouchard affidavit are not a basis for wholly excluding the affidavit. Instead, they go to the assessment of its weight including the absence of relevance – a task that the Tribunal is quite capable of performing.

[17] As noted above, the passages of the affidavit touching on issues of domestic law are merely background. To the extent that any of these points are matters of controversy, they can be addressed in argument. I am not at all concerned that these submissions will cloak the evidence with an air of greater authority than it deserves. To the extent that Mr. Bouchard is said to have intruded into the area of contractual interpretation or legal argument, I am quite capable of ignoring his evidence.

[18] The final contention that Mr. Bouchard lacks the necessary expertise to offer his opinions is a matter of argument. It is also worth noting that much of what the CMRRA objects to is not opinion evidence at all. It is simply factual evidence bearing on asserted industry practices. This type of evidence is not the proper subject of objection under the rules applicable to the admission of expert opinion evidence.

[19] On the basis of the foregoing, this motion is dismissed with costs payable by the Respondent CMRRA to Stargrove.

NOW THEREFORE THE TRIBUNAL ORDERS THAT:

[20] This motion is dismissed with costs payable by the Respondent CMRRA to Stargrove under column III of Tariff B of the *Federal Courts Rules, 1998*, SOR/98-106. If the parties cannot agree on an amount for costs they are to return to the Tribunal to have an amount fixed.

DATED at Ottawa, this 18th day of November, 2015.

SIGNED on behalf of the Tribunal by the Presiding Judicial Member.

(s) R.L. Barnes

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