

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130228

**Dockets: A-516-12
A-527-12**

Citation: 2013 FCA 60

Present: MAINVILLE J.A.

Docket: A-516-12

BETWEEN:

CANADIAN BROADCASTING CORPORATION/SOCIÉTÉ RADIO-CANADA

Applicant

and

**SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS,
COMPOSERS AND PUBLISHERS IN CANADA (SODRAC) INC.
and SODRAC 2003 INC.**

Respondents

Docket: A-527-12

BETWEEN:

ASTRAL MEDIA INC.

Applicant

and

**SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND
PUBLISHERS IN CANADA (SODRAC) INC.**

Respondent

Heard at Ottawa, Ontario, on February 27, 2013.

Order delivered at Ottawa, Ontario, on February 28, 2013.

REASONS FOR ORDER BY:

MAINVILLE J.A.

Federal Court of Appeal



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ASTRAL MEDIA INC.

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**SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND
PUBLISHERS IN CANADA (SODRAC) INC.**

Respondent

REASONS FOR ORDER

MAINVILLE J.A.

[1] The Canadian Broadcasting Corporation/Société Radio-Canada (“CBC”) and Astral Media Inc. (“Astral”) have filed judicial review applications with this Court which have been consolidated by an order of this Court dated February 12, 2013. The applicants seek to set aside a decision of the Copyright Board of Canada (the “Board”) dated November 2, 2012 in Board files 70.2-2008-01 and 70.2-2008-02 (the “Decision”) by which the Board, pursuant to section 70.2 of the *Copyright Act*, R.S.C. 1985, c. C-42, fixed the royalties and their related terms and conditions in respect of the following licences:

- a. a licence authorizing the Canadian Broadcasting Corporation to reproduce works in the repertoire of SODRAC for the period from November 14, 2008 to March 31, 2012 (the “CBC Licence”); and
- b. a licence authorizing Astral to reproduce works in the repertoire of SODRAC for the period from December 19, 2008 to August 31, 2012 (the “Astral Licence”).

[2] The CBC and Astral have also filed motions seeking orders to stay the Decision and both the CBC Licence and the Astral Licence, until the judicial review applications have been finally dealt with by this Court. They seek to extend, for the duration of the stay, the prior interim licences which the Board had issued authorizing them to reproduce musical works in SODRAC’s repertoire pending its final Decision.

[3] The CBC has since filed another judicial review application in docket A-63-13 seeking to set aside an interim decision of the Board dated January 16, 2013 in Board file 70.2-2012-01 (the “Interim Decision”). In that decision, the Board extended, on an interim basis, the CBC Licence from November 3, 2012 until its final decision on an application by SODRAC for setting the terms for a new license authorizing the CBC to reproduce works in its repertoire from April 1, 2012 to March 31, 2016. The CBC has also filed a motion in docket A-63-13 seeking to stay the Interim Decision.

[4] Since the issues raised by all three motions are similar, they were heard together in Ottawa on February 27, 2013. These reasons concern the motions filed in dockets A-516-12 and A-527-12.

THE CONTEXT

[5] In these reasons, the Society for reproduction rights of authors, composers and publishers in Canada (SODRAC) Inc. and SODRAC 2003 Inc. shall be referred to as “SODRAC” and shall be treated as the same society. SODRAC is a collective society which administers the reproduction rights in musical works owned by those who have authorized it to act on its behalf. It represents the majority of rights holders in Quebec and holds in its repertoire most works written in French by Canadians. It also administers in Canada the repertoire of many foreign collectives holding similar rights.

[6] The CBC is Canada’s public broadcaster governed by Part III of the *Broadcasting Act*, S.C. 1991, c. 11. It operates an extensive network of services and facilities related to radio, television,

and internet communication. In 1992, the CBC first entered into an agreement with SODRAC for the use of its repertoire (the “1992 Agreement”). The 1992 Agreement was renewed until 2009 when the Board issued an interim licence. The yearly royalties under that agreement and its renewals reached \$520,000.

[7] Astral is a private sector corporation which operates speciality television channels. Unlike the CBC, it does not produce or co-produce any programming, but rather licences such programming from third party producers, either directly or through distributors. Unlike the CBC, Astral has never entered into an agreement with SODRAC.

[8] On November 14, 2008, pursuant to section 70.2 of the *Copyright Act*, SODRAC asked the Board to set the terms and conditions of a licence for the reproduction of musical works in its repertoire by the CBC from that date to March 31, 2012. On December 19, 2008, pursuant to the same provision, SODRAC asked the Board to set the terms and conditions of a similar licence for most of the speciality television channels of Astral from that date to August 31, 2012.

[9] As part of these proceedings, on March 31, 2009, the Board issued an interim licence for the CBC, which was renewed on April 30, 2012. That interim licence essentially extended the 1992 Agreement between the CBC and SODRAC - with certain minor adjustments - pending the Board’s disposition of the proceedings leading to its Decision.

[10] On December 14, 2009, the Board issued an interim licence for Astral authorizing Astral to reproduce musical works in SODRAC's repertoire for the first time. This interim licence set out interim royalties of \$7,368 a month, or approximately \$88,416 a year.

[11] The Board issued its final Decision on November 2, 2012. The royalties charged under the CBC Licence and the Astral Licence are substantially higher compared to the interim licences. The CBC is now obliged to pay retroactive royalties estimated to exceed \$6.8 million for the period from November 14, 2008 to March 31, 2012: Affidavit of Chantal Carbonneau at para. 25, CBC motion record in docket A-516-12 at p. 9. Astral estimates that the royalties set out in the Astral Licence would represent a fourfold retroactive increase in its royalty payments for the period of December 19, 2008 to August 31, 2012, the yearly payment increasing from \$88,416 a year to approximately \$370,000 a year: Affidavit of David Cantin at para. 11, Astral motion record in docket A-527-12 at p. 8.

ANALYSIS

[12] The applicable test is well-known. It was set out in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311. It includes three criteria.

[13] First, an assessment must be made of the merits of the concerned judicial review applications to ensure that there is a serious issue to be determined. There are no specific requirements which must be met in order to satisfy this test. A prolonged examination of the merits of the applications is neither necessary, nor desirable.

[14] Second, it must be determined whether the CBC and Astral will suffer irreparable harm if their stay motions are rejected. The only issue to be decided at this stage is whether the refusal to grant the stay could so adversely affect their interests that the harm could not be remedied in the event their judicial review applications are successful. Irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm which cannot be quantified in monetary terms or cured, usually because one party cannot collect damages from the other. The fact that one party may be impecunious does not automatically determine the application in favour of the other party ultimately unable to collect damages, although it may be a relevant consideration.

[15] Third, an assessment must be made, taking into account the circumstances related to the matter at hand, as to which of the parties would suffer greater harm from the granting or refusal of the stay pending the decision on the judicial review applications.

Serious Issue

[16] The CBC and Astral raise many issues in their judicial review applications. I am satisfied that at least some of these issues meet the requirements of the first criterion of the test concerning a serious issue. Moreover, SODRAC does not dispute that the requirements of this branch of the test have been met in these proceedings, although it does challenge this branch of the test in the motion submitted in docket A-63-13.

Irreparable Harm

[17] The CBC submits that if the stay is not granted, it will suffer irreparable harm resulting from (a) its disputes with the independent producers with which it has contractual relationships; (b) the financial consequences of the Decision, which would detrimentally affect its programming; and (c) the fact that it would not be in a position to recuperate the royalties paid to SODRAC, in the event it is successful in its judicial review application.

[18] For its part, Astral submits that irreparable harm would result from (a) the costs it would incur in order to comply with the administrative requirements of the Astral Licence; (b) the loss of the benefit of a royalty discount based on a faulty discount formula; and (c) the fact that it would not be in a position to recuperate the royalties paid to SODRAC, in the event it is successful in its judicial review application.

[19] I forthwith state that I do not accept that the CBC or Astral will suffer irreparable harm as a result of the financial consequences of the Decision or of the administrative measures that they would be required to implement in order to comply with it.

[20] As aptly noted by SODRAC, the estimated amount of \$6,800,000 which the CBC will be required to pay as additional royalties for the period of November 14, 2008 to March 31, 2012 (covering four of the CBC's financial years) is minimal compared to the CBC's annual revenues, which for its 2011-2012 financial year alone exceeded \$1.8 billion: Respondent SODRAC's record in docket A-516-12 at p. 62. Moreover, the CBC's financial statements for its 2011-2012 financial

year indicate that an amount for the additional royalties has already been provisioned in its financial statements: Respondent SODRAC's record in docket A-516-12 at p. 65.

[21] As for Astral, it has not established that it will suffer an irreparable harm in paying SODRAC approximately \$700,000 in retroactive royalties required pursuant to the Decision, or if it must assume the costs required to comply with the administrative aspects of the Decision. Astral's evidence in this matter is limited to vague allegations which are not supported by any convincing evidence.

[22] Regarding the CBC's allegations of disputes with independent producers as a result of the Decision, these would result from the fact the CBC Licence would no longer contemplate the synchronisation (*i.e.* the process of incorporating a musical work into an audiovisual work) effected by the independent producers with which the CBC has maintained a contractual relationship. Since the contracts which bind these producers with the CBC would provide that the CBC assumes the costs of the royalties for the works in SODRAC's repertoire which are so synchronized, these producers would now be threatening legal action against the CBC for the additional costs which are now to be assumed by them following the Decision. However, the evidence submitted by SODRAC shows that the CBC consented before the Board to exclude from its licence the synchronization effected by independent producers: Affidavit of Martin Lavallée para. 20 and Exhibit A thereto, Respondent SODRAC's record in docket A-516-12 at pp. 36 and 51-52, and Decision at paras. 31 and 115. It is not appropriate for the CBC to rely in support of its stay motion on harm (if harm exists) which it has itself agreed to.

[23] As for Astral's alleged loss of the benefit of a royalty discount based on a faulty discount formula set out in the Astral Licence, this is an issue related to the merits of the dispute and not to any irreparable harm.

[24] There remains the issue of recuperation of the amounts which would have been wrongly paid as royalties to SODRAC, in the event the judicial review applications are allowed by this Court.

[25] Both the CBC and Astral hold that they will not be in a position to recuperate these amounts in such circumstances, since these amounts will have been distributed to the concerned members of SODRAC. Consequently, SODRAC will not be in a position to reimburse the applicants.

[26] SODRAC submits that the amounts at issue will be paid by the CBC and Astral to it directly, and not for the benefit of the third parties who have assigned their right to SODRAC. It finds support for this proposition in an interim decision of the Board in another matter. SODRAC adds that the distribution of the amounts at issue to the entitled third parties will not affect its liability to reimburse the CBC and Astral in the event of an unfavourable judgment. SODRAC states that it collects approximately \$15 million in revenues annually and denies having financial difficulties or being in debt. It claims to act prudently and is ready to make the provisions suggested by its auditors when legal proceedings are pending.

[27] I have no reason to doubt the solvency of SODRAC with respect to its current and usual operations. However, here we are contemplating a financial operation which is unusual and major for SODRAC. The retroactive royalties to be paid to SODRAC to give effect to the Decision would be approximately \$6,800,000 for the CBC and approximately \$,700,000 for Astral, or approximately \$7,500,000 in all, without considering accumulated interest.

[28] These amounts would be paid to SODRAC as royalties for “all or part of a musical or dramatico-musical work for which SODRAC may authorize the reproduction in Canada, in proportion to the rights it holds”: definition of “work” in section 1 of the CBC Licence and the Astral Licence. These rights are held by SODRAC by means of assignments, grants or licences from authors, performers and sound recording makers: definition of “collective society” in section 2 of the *Copyright Act*. These royalties must in turn be distributed by SODRAC to these authors, performers and sound recording makers, taking into account the information relating to the use of each work which is provided to it by the CBC and Astral: Section 6 of the CBC Licence and of the Astral Licence; Affidavit of Martin Lavallée at para. 59, SODRAC’s record in docket A-516-12 at p. 44.

[29] Once the concerned amounts have been distributed by SODRAC, it would be difficult to retrieve them from the entitled third parties, SODRAC’s repertoire being comprised of a multitude of works from a very large community of individuals and corporations. SODRAC will thus have to assume the whole of the amount owed. According to the evidence submitted, the revenues at the disposal of SODRAC come from the collection of royalties. In light of the mechanisms set out in

the *Copyright Act* concerning the collective administration of copyright, it is improbable that SODRAC will be able to allocate the royalties paid to it under other tariffs, agreements or licences for the purpose of reimbursing the CBC or Astral. In such circumstances, SODRAC risks getting bogged down, with the CBC and Astral, in an avalanche of protracted and uncertain litigation.

[30] Consequently, and for this latter reason, I am of the view that, in the event their applications for judicial review are successful, the CBC and Astral will suffer an irreparable harm if the stay is not granted.

Balance of Inconvenience

[31] If the stay is granted, SODRAC will suffer no serious harm. Indeed, if it is successful in the judicial review applications, the CBC and Astral will then have to pay to it the amounts at issue, with accumulated interest calculated in accordance with the formula provided in section 12 of the CBC Licence and the Astral Licence, namely interest calculated daily at a rate equal to one per cent above the Bank Rate effective on the last day of the previous month.

[32] In light of my conclusion concerning the serious difficulties to reimburse, and considering that SODRAC will suffer no serious harm if the stay is granted, the balance of convenience clearly favours the CBC and Astral.

CONCLUSIONS

[33] For these reasons, it is appropriate to grant a stay and to order the appropriate measures which will maintain the *status quo* which prevailed between the parties prior to when the Decision was issued.

[34] The Court shall thus order (a) a stay of the operation of the Decision as it pertains to the CBC Licence and the Astral Licence; (b) a stay of the application of the CBC Licence and of the Astral Licence; (c) an extension, as of November 3, 2012, of the interim licence issued to the CBC by the Commission under its interim decision dated April 30, 2012; (d) an extension, as of November 3, 2012, of the interim licence issued to Astral by the Commission under its interim decision dated December 14, 2009, 2012. These measures will be in force until a final decision has been reached by our Court in the judicial review applications of the CBC and Astral in dockets A-516-12, and A-527-12.

[35] The CBC and Astral did not seek costs in their motions; consequently there shall be no order as to costs.

"Robert M. Mainville"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-516-12

**APPEAL FROM A DECISION OF THE COPYRIGHT BOARD OF CANADA DATED
NOVEMBER 2, 2012, DECISION NO. 70.2-2008-01**

STYLE OF CAUSE: *Canadian Broadcasting Corporation
and Astral Media Inc. v. SODRAC*

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: February 27, 2013

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

DATED: February 28, 2013

APPEARANCES:

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Colette Matteau

FOR THE RESPONDENT

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-527-12

**APPEAL FROM A DECISION OF THE COPYRIGHT BOARD OF CANADA DATED
NOVEMBER 2, 2012, DECISION NO. 70.2-2008-02.**

STYLE OF CAUSE: *Canadian Broadcasting Corporation
and Astral Media Inc. v. SODRAC*

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: February 27, 2013

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

DATED: February 28, 2013

APPEARANCES:

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