Copyright Board Canada

Commission du droit d'auteur Canada

[CB-CDA 2018-060]

RULING OF THE BOARD

Proceeding: Online Music Services [SOCAN: 2007-2018; Re:Sound: 2013-2018; CSI: 2014-2018; Artisti: 2016-2018]

March 27, 2018

I. INTRODUCTION

[1] On February 28, 2018, in Notice 2018-31, the Board ordered that Parties submit, jointly or separately, a proposed Confidentiality Order for this proceeding.

[2] Three separate proposed confidentiality orders were submitted. One by Pandora, CAB, Stingray, APPLE, Sirius XM Canada, and the Networks (Bell Canada, Canadian Broadcasting Corporation, Entertainment Software Association of Canada, Rogers Communications Canada Inc., Spotify AB, and Telus Communications Inc.; and the now-withdrawn objectors Google Inc., Shaw Communications Inc., Vidéotron GP, and YouTube LLC) (collectively hereinafter the "Objectors"), one by Re:Sound (supported by SOCAN, CSI, Music Canada, and ADISQ), and one by Artisti.

[3] The main difference among the proposed confidentiality orders is how certain information should be disclosed, and to whom.

[4] Broadly speaking, the Objectors submit that while *confidential* information provided to another party may be seen by in-house counsel of that party, *highly confidential* information may only be seen by the receiving party's external counsel.

[5] Re:Sound instead proposes that there be no significant distinction among *confidential* and *highly confidential* information (effectively proposing the same definition for both of these terms), such that both of these groups of information could be seen by in-house counsel. Only information designated as *commercially sensitive agreements* would be limited to being seen by external counsel of the recipient.

[6] Artisti supports Re:Sound's submission, but would add two more categories of information. The first relates to the fact that it and ADISQ are in on-going legal proceedings. According to Artisti, any information that has been disclosed subject to a protective order issued in those proceedings should not have to be disclosed on terms more permissive than the terms of that protective order. By this they seek to avoid a situation where a counsel may access information

to which they may not have access pursuant to the protective order issued in those other proceedings. The second would be to limit the divulgation of *sensitive personal information*(such as membership to a collective) to external counsel.

II. GENERAL PRINCIPLES

[7] The Board reminds Parties that the designation of information as Confidential or Highly Confidential should be exceptional. The default is that all information should be public. The Board's experience has shown that counsel for parties frequently over-classify information. When prompted by the Board, representatives of a party often cannot properly justify the designation of information as Confidential or Highly Confidential.

[8] Such over-classification of information not only erodes the open court principle, and impedes public access, but also hinders the Board's ability to freely use the information in its public reasons for decision. As such, the Board expects all participants' counsel to ensure that designating information as Confidential or Highly Confidential is done sparingly and diligently.

[9] In any event, a party disputing the particular designation of information by a supplier, or seeking derogation from the Confidentiality Order, may at any time seek direction from the Board, as contemplated in section 20 of the attached Order.

III. ANALYSIS

[10] Ultimately, there is no perfect solution to the issues raised by the Parties, or how to establish a confidentiality order in general. The Board appreciates that either approach to disclosure (less or more restrictive) may create some level of prejudice to one party or another.

[11] We thus consider the balance of prejudice (both magnitude and probability of materialization) in determining how to structure the confidentiality order.

[12] Re:Sound, Aritsti, and the Objectors all plead that not adopting their proposed Order would be prejudicial to them.

[13] Re:Sound submits that not permitting in-house counsel to see Highly Confidential information would effectively prevent in-house counsel from serving as co-counsel in this proceeding in any meaningful way, impede the ability of in-house counsel to consult with and instruct external counsel in a fully informed manner, and create unnecessary and significant legal costs. Artisti supports Re:Sound's submission and argues that the issue of costs is of particular concern to them, given their relatively small size.

[14] The Objectors' concern regarding the viewing of Highly Confidential information is not only in regard to in-house counsel of collectives, but also of other objecting competitors. They submit that a recipient of Highly Confidential information, even with the most honest of intentions to not allow such information to colour his or her negotiations, may be influenced by it, even unintentionally.

Balance of Prejudice

[15] Under most circumstances, it is possible for external counsel to provide their client with sufficient information to make enlightened choices without prejudicing the interests of any supplier. In some situations, this may be done by aggregating otherwise sensitive information, or obtaining a confidential version of the same information (e.g., a qualitative description of Highly Confidential figures), perhaps with the assistance of the Board. Thus, while the approach proposed by the Objectors does somewhat limit in-house counsel's capacity to act as co-counsel, we do not believe it do so insurmountably.

[16] Furthermore, the term "highly confidential information" as proposed by the Objectors, means documents or information that a supplier reasonably believes are so sensitive that their disclosure to in-house counsel would reasonably be expected to result in injury to the supplier or to the person who supplied the documents or information to the supplier. It is very reasonable to believe that some information disclosed pursuant to the interrogatory process would be of this nature. It is somewhat tautological to say that requiring suppliers to disclose such information to in-house counsel would, by the very definition of this term, risk causing significant prejudice.

[17] Re:Sound's proposal, which would restrict protection to only *commercially sensitive agreements*, as defined in their proposal, is unlikely to be broad enough to capture the various kinds of Highly Confidential information that may be required to be provided through the interrogatory process.

[18] Similarly, Artisti's proposal to add *sensitive personal information* to the kind of information that could only be seen by external counsel is an attempt to remedy just this issue: there may well be information whose disclosure beyond external counsel would be very prejudicial, and is not captured by the notion of *commercially sensitive agreements*.

[19] We conclude that adding additional designations of protected information does not resolve the issue adequately, and may even complicate the proceeding. The definition of Highly Confidential information is sufficiently flexible to capture both these kinds of information, where appropriate, and is self-limiting in scope by virtue of being defined in terms of the harm created by improper disclosure.

[20] Re:Sound argues that if there are specific documents or information in addition to commercially sensitive agreements that a party believes cannot be disclosed to in-house counsel for all or some of the other parties without suffering probable harm, section 20 of the proposed order provides for a process whereby the Parties can attempt to resolve the issues, failing which they may seek further direction from the Board. In addition, the disclosing party may object to disclosure to specific individuals pursuant to section 9. Therefore, a blanket order denying access to all highly confidential information to all in-house counsel should not be granted. The general principle should not be to deny access to in-house counsel unless they can establish that access should be granted, but rather the reverse.

[21] appears to us that, given the overwhelming amount of information sought through interrogatories in this particular proceeding, requiring a disclosing party to extablish the confidential nature for each individual document disclosed may prove unworkable. The potential number of documents and other forms of information on which the Board would likely have to

rule would be significant. This would be a poor use of the Parties' and the Board's time and resources.

[22] Lastly, a confidentiality order has recently been issued in the *Online Audiovisual Services – Music (2007-2018)* proceeding (the "OAS Proceeding"). Many parties, both objectors and collective societies, to the present proceeding are also parties to the OAS Proceeding. It is expected that some issues, both economic and legal, will be of a similar nature in both of these proceedings, likely resulting in the same type of information being disclosed. An order that is compatible with the Confidentiality Order issued in the OAS Proceeding diminishes the risk of inadvertent improper disclosure of information, and weighs in favour of using the distinction between Confidential and Highly Confidential information used in that proceeding.

[23] We note that the Objectors submit that the Board should adopt the Confidentiality Order issued in the OAS Proceeding in the present proceeding as well, on the basis that this is merely maintaining the *status quo*. However, as Re:Sound submits, the Board has adopted different provisions in the past—as this is often a function of agreement or submissions by the parties to a particular proceeding. Thus, while some level of consistency among the Board's various proceedings is desirable, it is not a deciding factor.

[24] The Objectors argue that the fact that the collectives have chosen to structure their legal teams with in-house counsel playing a more active role in litigating the proceedings should not be a factor that could result in serious commercial prejudice to the Objectors.

[25] We do not fully agree with the Objectors that the use of in-house counsel playing a more active role in Board proceedings is always a meaningful "choice." While retaining external counsel may be less of an issue for larger entities, the Board is sympathetic to the economic realities of smaller entities that wish to participate in Board proceedings. The decision to limit certain information to external counsel may prove to be more costly—and too costly for certain parties.

[26] Unfortunately, there is no perfect resolution to the tension between the protection of certain business information and the need for Parties to instruct counsel. While the Board attempts to accommodate such smaller entities in various ways, such as through the use of simplified proceedings, it is not always possible to do so.

[27] Ultimately, we conclude that the balance of prejudice favours Highly Confidential information being seen by external counsel only, subject to any derogations permitted by the Board. By adopting this approach, the Board relies on the Parties' diligence and good-faith in categorizing the information they supply to others.

Information Disclosed/Obtained in Other Proceedings

[28] Artisti states that it has been called to provide testimony and information in grievance proceedings between ADISQ and UDA. Confidentiality orders have been issued, or are about to be issued in those proceedings.

[29] It submits that any information that has been disclosed subject to a confidentiality order issued in those proceedings should not have to be disclosed on terms more permissive than the terms of that confidentiality order.

Artisti explains that

> [TRANSLATION] this would only apply if the terms of the confidentiality order issued in the other proceeding are more restrictive than those that would be applicable by virtue of the Board's Order. For example, if a certain document could only be provided to external counsel of a receiving party in another proceeding, the same treatment should apply in the present proceeding.

[30] While we appreciate Artisti's concern, the proposal does not appear to be workable. The Board would have to obtain all relevant confidentiality orders, and be ready to interpret the orders issued by another body. It is not clear that an evaluation of which order is more restrictive would be a trivial exercise.

[31] Moreover, it is possible that the proposed provision would also appear to require consideration of several confidentiality orders previously issued by the Board, as many parties to the present proceeding are also party to other proceedings before the Board.

[32] Finally, we believe that the adoption in substance of the Confidentiality Order from the OAS Proceeding should address many, if not all, of Artisti's concern, by the nature of the flexible definition of Highly Confidential information. If disclosure to in-house counsel of particular information would reasonably be expected to result in injury to the supplier, such information may properly be categorized as Highly Confidential, and thereby restricted to being seen by external counsel only.

Effect on Participation

[33] Lastly, while the Board welcomes and encourages broad participation, the possibility of withdrawal from these proceedings raised by some objectors was not a consideration in reaching our conclusion.

IV. CONCLUSION

[34] Given the above, the Board hereby issues the attached Order Dealing with Information for Which Confidential Treatment May Be Claimed.

Gilles McDougall
Secretary General