

Copyright Board
Canada



Commission du droit d'auteur
Canada

[CB-CDA 2024-049]

RULING OF THE BOARD

Matter: 71-2023-01 Totem Médias Inc. v CONNECT Music Licensing Service Inc.

June 26, 2024

I. OVERVIEW

[1] This Ruling rules on the following motions filed by the parties:

1. Totem Médias Inc. (“Totem”)’s motion for leave to amend their Statement of Case¹ (Motion 1) is granted;
2. Totem’s motion for leave to file a Supplementary Witness Statement of Bruno Fréchette² (Motion 2) is granted;
3. CONNECT Music Licensing Service Inc. (“CONNECT”)’s motion for leave to file a Supplementary Declaration of Janet Turner³ (Motion 3) is granted;
4. CONNECT’s motion for leave to file expert evidence⁴ (Motion 4) is granted in part, as per my directions below;
5. CONNECT’s motion for leave to pose interrogatories⁵ (Motion 5) is granted in part, as per my directions below; and
6. CONNECT’s motion for leave to cross-examine Bruno Fréchette⁶ (Motion 6) is denied.

¹ Motion Seeking Leave to File a Supplementary Witness Statement and to Amend Totem’s Statement of Case from Totem Médias Inc., May 29, 2024.

² *Ibid.*

³ Response to Totem’s Motion to File Supplementary Witness Statement and Amend its Statement Of Case from CONNECT Music Licensing Service Inc., June 5, 2024.

⁴ Motion for Leave to File Expert Evidence from CONNECT Music Licensing Service Inc., (2024-05-29).

⁵ Motion for Leave to Pose Interrogatories and Cross-Examine Witness from CONNECT Music Licensing Service Inc., May 29, 2024.

⁶ *Ibid.*

[2] Except for CONNECT's motion for leave to file expert witness evidence (Motion 4), the bulk of the other motions before me relate to allegations made by CONNECT in its Responding Case Record. I therefore start with these allegations and how they inform my consideration of the motions before me.

II. NEW ISSUES RAISED BY CONNECT IN RESPONDING CASE RECORD

[3] In short, CONNECT claims that, through its arrangement with Création Newmood inc. ("Newmood"), Totem has been misstating its true gross revenue. This, according to CONNECT, means that Totem has been evading "its full payment obligations to CONNECT" and "inflates Totem's alleged effective royalty rates."⁷

[4] Totem's Motion 1 and Motion 2 were brought to address these claims. In response to which CONNECT brought Motion 3. Moreover, CONNECT's motions for leave to pose interrogatories (Motion 5), and to cross-examine Bruno Fréchette (Motion 6), are based in part on these claims.

[5] I start by noting that I do not find the dramatic tone of these claims to be useful. This is not a proceeding for infringement of copyright or breach of contract. This proceeding is to fix fair and equitable royalties, terms, and conditions for a specific use, between a user and a collective society, when the user and collective society are unable to agree (s. 71.1⁸).

The appropriate rate base is an issue for the Board to determine

[6] That being said, CONNECT's submissions do lead me to conclude that one element on which the parties are unable to agree is the appropriate rate base.

[7] The consideration of the issue of rate base, and any necessary revenue allocation, is not unusual in Board proceedings.⁹ Indeed, the last-approved tariff for the communication to the public by telecommunication of sound recordings by background music suppliers explicitly provides that only a portion of revenues form the rate base for the purpose of determining royalties.¹⁰

[8] In the context of a revenue-based royalty rate, which is a rate structure both parties are advancing in this proceeding, it would be difficult to determine a fair royalty rate if there is no common understanding of the rate base to which that rate would apply.

⁷ Exhibit CONNECT-2.

⁸ *Copyright Act*, RSC, 1985, c. C-42.

⁹ See e.g., *Re: Sound and SOCAN – Stingray Pay Audio and Ancillary Services Tariff (2007–2016)*, 2021 CB 5 at paras. 51–143 (dealing with revenue allocation, including treatment of ancillary hardware).

¹⁰ *Re: Sound Tariff 3.A – Background Music Suppliers (2010-2013)* (2017-09-02), Gaz C Supplement, Vol 151, no. 35, p.1.

[9] As such, the issue of the appropriate rate base is one for the Board to determine in this proceeding.

[10] Furthermore, I agree with CONNECT that information about the financial relationship between Totem and Newmood are relevant, in this case, to the determination of an appropriate rate base.

[11] My conclusions that the rate base is at issue in this proceeding, and that the relationship between Totem and Newmood is relevant to the determination of that issue, informs my consideration of all of the motions before me, except for Motion 4—where these conclusions are not relevant.

[12] I now turn to the individual motions.

III. TOTEM'S STATEMENT OF CASE

[13] The motion is granted.

[14] Totem's application to amend its Statement of Case by appending four paragraphs relating to the issue of advertising is not opposed by CONNECT.

[15] Furthermore, given CONNECT's allegations, the issue of differential pricing for programs containing advertising and those that do not gains additional significance.

IV. SUPPLEMENTARY WITNESS STATEMENTS

[16] Totem's Motion 2 and CONNECT's responding Motion 3 aim to introduce evidence from 13 years ago about what AVLA (CONNECT's predecessor) did or did not know at that time.

[17] CONNECT opposes Motion 2; in the alternative, it brings Motion 3 as a condition of the Board granting Motion 2.

[18] I grant both Motion 2 and Motion 3.

[19] CONNECT argues that the Board should not permit Totem's Motion 2 on the grounds that Totem should have anticipated that CONNECT may dispute "the propriety of the Totem-Newmood enterprise."¹¹ However, neither the Joint Statement of Facts, nor CONNECT's Statement of Case clearly raise either the issue of revenue allocation between Totem and Newmood, or even the rate base more generally. I therefore disagree that Totem should have anticipated such claims.

¹¹ *Supra* note 3 at para 2.

[20] Furthermore, I have decided above that the rate base is an issue for the Board to determine in this proceeding, and this may entail examining the current relationship between Totem and Newmood. And while the supplementary statements appear to be only somewhat related to those issues, they may not be entirely irrelevant.

V. INTERROGATORIES

[21] CONNECT seeks leave to put eight sets of interrogatory questions to Totem.

[22] While Totem does not oppose CONNECT posing interrogatory questions to it per se, it argues that the questions proposed by CONNECT are either irrelevant, disproportionate, or both.

[23] I have reviewed the proposed questions and amended them as appropriate to ensure relevance and proportionality. In making any modifications, I considered, in particular:

- the actual period at issue in this proceeding (2022–2025);
- the likely probative value of the information sought; and
- the proportionality of the interrogatories as a whole in the context of this proceeding, whose value I have previously described as being “relatively modest” (Notice CB-CDA 2024-016).

[24] The amended questions are in Annex A.

VI. CROSS-EXAMINATION OF WITNESS FRÉCHETTE

[25] For the following reasons, I do not grant CONNECT’s motion for leave to cross-examine Bruno Fréchette.

[26] First, the interrogatory questions that I allow in this Ruling appear sufficient to address the evidentiary gaps identified by CONNECT.

[27] Second, CONNECT’s request is disproportionate. I have previously indicated that I am of the view that the value of these proceedings is “relatively modest” (Notice CB-CDA 2024-016). CONNECT proposes that the cross-examination could last a day and has not stated how it intends to limit its cross-examination, beyond it being related to the issue of the “financial and business relationship between Totem and Newmood.¹²”

¹² *Supra* note 5 at para 29.

[28] Last, CONNECT seeks to cross-examine Bruno Fréchette on any responses Totem may provide to interrogatory questions. Thus, any cross-examination would have to wait until the interrogatory process is complete. This would imply additional delay.

VII. EXPERT WITNESS

[29] CONNECT seeks leave to file expert evidence addressing the criteria in section 66.501 of the *Copyright Act* (the “*Act*”) and to “analyze Totem’s financial information and compare proxy rates.¹³”

[30] CONNECT’s motion is granted in part.

[31] I do not believe that the Board requires an expert to understand Totem’s financial information. Nor do I believe that the Board generally requires an expert to understand how to apply the evidence to the considerations in 66.501 of the *Act*, either from a legal or from an economic perspective. For example, it does not require an expert to opine on whether or not the agreements between CONNECT and other background music suppliers meet the criteria described in s. 66.501(a).

[32] However, in its motion, CONNECT stated that:

the report would address whether the rates charged by CONNECT can be reasonably considered to be within the range of what would have been agreed upon “between a willing buyer and a willing seller acting in a competitive market with all relevant information, at arm’s length and free of external constraints” under paragraph 66.501(a) of the *Act*.

[33] It is only in relation to this analysis where I find that the assistance of an expert witness would be appropriate: the identification of a method suitable for quantifying a range of prices for the present matter.

[34] As such, CONNECT may file an expert report, limited to providing the range of prices referred to in para 4 of its Application for Leave, explaining how the range was obtained.

[35] The report shall not exceed 15 pages, not including elements described in the *Copyright Board Rules of Practice and Procedure*, paragraphs 48(1)(a)(ii), (iii), (ix).

[36] Totem may file an expert witness report in response. This report shall also not exceed 15 pages and must be limited to addressing those issues raised by the expert report filed by CONNECT.

¹³ *Supra* note 4 at subsection C.

VIII. NEW SCHEDULE OF PROCEEDING

[37] Given my rulings above, and given the likely interrelationship between the interrogatories and the development of the expert report, I am modifying the Schedule of Proceeding as follows:

Step	Date
Responses to Board Questions	July 22, 2024
Totem responses to all interrogatory questions	July 22, 2024
Deficiency motions, if any	August 7, 2024
Replies to Responses to Board Questions	August 12, 2024
Ruling on any Deficiency motions	TBD
Final responses to interrogatory questions	September 11, 2024
CONNECT files Expert Report	October 16, 2024
Totem files any response Expert Report	November 15, 2024
Each Party files Final Submissions	December 6, 2024
Each Party files their Reply to Final Submissions	December 20, 2024

[38] This schedule may be revised if there are no deficiency motions.

Luc Martineau
Chair, Copyright Board

ANNEX A
Rulings on Proposed Interrogatory Questions

	Interrogatory Question as Proposed	Ruling
1.	Provide corporate organization charts for Totem and Newmood, or if unavailable, provide detailed information on Totem’s corporate structure and relationship to Newmood.	Granted as proposed.
2.	Provide any contracts, agreements, or documentation detailing the business relationship between Totem and Newmood or Totem and PJJ Productions.	<p>Granted, with modifications.</p> <p>The scope of the interrogatory question is narrowed to the period under consideration in this proceeding.</p> <p>Totem will provide any contracts, agreements, or documentation detailing the business relationship between Totem and Newmood during the period of 2022 to 2024.</p> <p>For certainty, this includes documents created prior to this period.</p> <p>The potential burden of this interrogatory question is also limited as follows: If the number of responding documents are too numerous (e.g., if a separate agreement exists for each customer), Totem will provide a sample of 10 such documents.</p>
3.	Provide a detailed explanation of the agreement between Totem and Newmood.	<p>Not granted.</p> <p>The proposed question is either duplicative of Question 2, or asks for creation of new documents, and may require judgement or opinion to produce.</p>
4.	Provide:	Granted, with modifications.

	<p>(i) audited financial statements if available (or unaudited financial statements, if not), and</p> <p>(ii) internal income statements, which provide detailed breakdown on revenues and expenses, for Totem, PJJ Productions, and Newmood from 2006 to 2024.</p>	<p>The scope of the interrogatory question is narrowed as follows:</p> <p>Totem will provide, for the years 2018 to 2024:</p> <p>i) audited financial statements if available (or unaudited financial statements, if not); and</p> <p>ii) if available, internal income statements for Totem and Newmood.</p> <p>Internal income statements do not have to be created if they do not exist.</p>
5.	<p>Provide a complete list of the Totem-Newmood enterprise revenue streams broken down by those that require the use of the licence from CONNECT, directly or indirectly, and those that do not (the “Revenue Streams”).</p>	<p>Not granted.</p> <p>Evaluating the condition of whether or not a revenue stream require the use of the licence from CONNECT, directly or indirectly, requires judgment or opinion.</p> <p>Moreover, It has not been established that there is such a single “Totem-Newmood” enterprise.</p>
6.	<p>Provide the following from Totem, PJJ, and Newmood for each year from 2006 through 2024 (or partial year information where applicable), separately for each Revenue Stream:</p> <p>a. The dollar amount of the Revenue Stream;</p> <p>b. A breakdown of the Revenue Stream by type of customer (e.g. retail, hospitality) as well as the number of customers served</p>	<p>Not granted.</p> <p>For the years 2018–2024, if documentation with such information exists, it will be provided in response to question 4.</p> <p>If documentation with this information does not exist, its production would require judgement or opinion.</p> <p>Furthermore, the Board would not grant leave to pose a question for the period 2006</p>

	<p>under each customer type and the number of programs sold to those customers;</p> <p>c. The dollar amount paid for each licence required to produce the Revenue Stream;</p> <p>d. The other direct costs associated with producing the Revenue Stream, including the dollar amount of each; and</p> <p>e. For any costs required to produce the Revenue Stream that are also required to produce other revenues, (i) detail on those costs and the other revenues they are shared with, and (ii) if the Totem-Newmood enterprise allocates these costs, details of how they are allocated and the rationale for that allocation.</p>	<p>to 2024, as the burden would be disproportionate to the probative value of the information.</p>
<p>7.</p>	<p>For any customer of the Totem-Newmood enterprise that pays Totem for the use of music that requires the CONNECT licence and is also being served otherwise by Totem-Newmood, provide details on the services provided to the customer and the fee arrangement for the services.</p>	<p>Granted, with modifications.</p> <p>To the extent that previously-filed evidence (including the Fréchette Supplementary Witness Statement) has not responded to this question, Totem shall provide:</p> <ul style="list-style-type: none"> - details of the kinds of services offered by Totem and Newmood to customers; and - prices or the amounts paid for these services. <p>If responding documents are not readily available, Totem shall provide a response that need not exceed 250 words.</p>
<p>8.</p>	<p>Provide Totem’s and Newmood’s latest official forecast or budget in detail sufficient to allow analysis of the</p>	<p>Granted, with modifications.</p> <p>Totem will provide the forecast budget for</p>

	forecasted revenues and costs associated with background music supply.	2024 and 2025 for Totem and, if available, for Newmood. Only those forecasts that include the greatest level of detail are to be provided.
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