



January 10, 2014

- BY EMAIL -

Mr. Gilles McDougall
Secretary General
Copyright Board
56 Sparks St.
Ottawa, Canada

Dear Mr. McDougall,

Re: Access Copyright Post-Secondary Tariff 2011-2013 (Confidential Documents)

[1] I am writing in response to Access Copyright's objection to place Exhibit AC-2H, the list of its affiliates, in the public record, as expressed in its counsel's letter from January 8, 2014.

[2] Pursuant to Section 8 of the Board's Directive on Procedure "Any document filed with the Board is placed on the public record unless the Board orders otherwise", and it requires anyone who seeks to exclude a document from the public record to file a request with the Board, setting out the reasons for the requested confidentiality.

[3] The Board's Directive reflects the law in Canada, where the openness of all public adjudicative proceedings is the norm, and confidentiality is the exception, and it places the burden of justifying exclusion from the public record on the party who seeks it. It is also elementary that the openness of the proceedings and all the documents filed therein protects the public interest, not that of any of the parties, and therefore, it is the Board's responsibility to ensure the openness of the proceedings before it, even if no other participant insists on that, and even if all parties agree to keep documents out of the public record. The proceedings before the Board are public proceedings, not private arbitration.

[4] Access Copyright ("AC") filed its Statement of Case nearly four months ago and included in its submission seven exhibits that it claims to contain confidential or highly-confidential information. Exhibit AC-2H is one of those exhibits. AC never bothered to follow the Directive on Procedure and file any request to exclude these documents from the public record, despite having ample time to do that. It has only raised objection to placing Exhibit AC-2H on the public record in response to my letter from December 20, 2013.

[5] In its letter from January 8, 2014, opposing the disclosure of Exhibit AC-2H, AC now makes two arguments. First, it argues that its list of affiliates should be excluded from the public record because it “does not publish anywhere its list of affiliates and treats this information as commercially-sensitive business information”, and because it “believes it is reasonable to conclude that if the list of Access Copyright affiliates is made public, it may be used in ways that are detrimental to both Access Copyright and its affiliates and that it may be made widely available online.” Second, it relies on the Board’s Ruling of May 18, 2012 (in the provincial and territorial government tariff proceeding), where “the Board granted Access Copyright’s application for confidential treatment of the list of affiliates.”

[6] However, as the Supreme Court of Canada reiterated recently, the burden of displacing the general rule of openness lies on the party making the application.¹ As I explain below, AC’s arguments fail to discharge this burden.

I. The *Sierra Club* test

[7] The test to be used for determining whether a document should be excluded from the public record was set out by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*,² which applied the analytic framework developed in the earlier *Dagenais* and *Mentuck* cases. The Court emphasized that

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b) [of the *Charter of Rights and Freedoms*]. Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.³

[8] The Court held that a confidentiality order should only be granted when such an order is necessary to prevent a serious risk to an important interest because reasonably alternative measures will not prevent the risk, and the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression, which includes the public interest in open and accessible court proceedings.⁴

[9] The Court emphasized that the risk from disclosure must be real and substantial, in that: (a) the risk is well grounded in the evidence, and (b) it poses a serious threat to the commercial

¹ *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3 (CanLII), [2011] 1 SCR 65, <http://canlii.ca/t/2fgn2>, para 13.

² *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](http://canlii.ca/t/2fgn2), [2002] 2 S.C.R. 522, 2002 SCC 41.

³ *Id.*, para 36,

⁴ *Id.*, para 53.

interest in question.⁵ Importantly, the Court clarified what a cognizable “important commercial interest” is, and what it is not.

In order to qualify as an “important commercial interest”, the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. ... Simply put, if there is no general principle at stake, there can be no “important commercial interest” for the purposes of this test. ... [T]he open court rule only yields “where the public interest in confidentiality outweighs the public interest in openness”.⁶

[10] The Court has consistently held that deviating from the principle of openness requires “sufficient evidentiary basis [that would] permit[] a reviewing court to determine whether the evidence is capable of supporting the decision.”⁷ Such “sufficient evidentiary basis” should include more than generalized assertions.⁸ “Bald assertions, without more”, and with “no tangible proof” of the supposed serious risk, would not suffice.⁹

[11] The *Sierra Club* test applies to “to all discretionary decisions that affect the openness of proceedings”,¹⁰ it is routinely applied not only by courts, but also by various administrative tribunals.¹¹ The Board’s own Directive on Procedure reflects these principles, and I trust the Board who enunciated these principles to follow its own directive and implement them in accordance with the Supreme Court’s rulings.

II. Access Copyright fails to meet the *Sierra Club* test

[12] AC’s arguments fail to meet the *Sierra Club* test. The test requires it to demonstrate that the risk from the disclosure of its list of affiliates is real and substantial, and this requirement has two components: one evidentiary, in that the risk is well grounded in the evidence, and the other substantive, in that it poses a serious threat to the commercial interest in question, which has to

⁵ *Id.*, para 54.

⁶ *Id.*, para 55.

⁷ *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996 CanLII 184 \(SCC\)](#), para 73.

⁸ *Toronto Star Newspapers Ltd. v. Ontario*, [2005 SCC 41 \(CanLII\)](#), [2005] 2 S.C.R. 188, para 9.

⁹ *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41 (CanLII), [2010] 2 SCR 592, <http://canlii.ca/t/2d190>, paras 92-94.

¹⁰ *Canadian Broadcasting*, *supra* note 1.

¹¹ See e.g., *Jolivet v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 1 (CanLII), <http://canlii.ca/t/fvv80> (The Public Service Labour Relations Board); *Law Society of Upper Canada v. Richard Keith Watson*, 2012 ONLSHP 53 (CanLII), <http://canlii.ca/t/fqw8k> (Law Society Hearing Panel); *Commissioner of Competition v. Sears Canada Inc.*, 2003 CACT 27 (CanLII), <http://canlii.ca/t/1j2> (The Competition Tribunal).

be expressed in terms of a public interest in confidentiality, rather than being merely specific to AC.¹²

[13] AC’s letter is a paradigmatic example of a request that fails this test. All that it offers is a bald assertion, without more, that “is reasonable to conclude that if the list of Access Copyright affiliates is made public, it may be used in ways that are detrimental to both Access Copyright and its affiliates and that it may be made widely available online”. It does not identify any specific risk, does not provide any evidence—let alone well grounded evidence—that would allow any fact finder reasonably to conclude that such risk is real and substantial. There is simply no evidence that would allow a reviewing court to determine the adequacy of the decision to exclude the document from the public record, if the Board decides to issue such an order. A mere letter from counsel is not “evidence”, at least not in a contested context such as this.

[14] Moreover, the argument that AC does not publish its list of affiliates and treats this information as commercially-sensitive business information, is even weaker than the example of “a private company [that argues] that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests.”¹³ AC does not mention a single harm that may result from the loss of confidentiality; it simply requests confidentiality for the sake of confidentiality.

[15] A party’s own preference to keep information confidential does not qualify as “important commercial interest”, because it cannot be expressed in terms of a public interest in maintaining its confidentiality. In the present case, AC’s interest in maintaining the confidentiality of its list of affiliates is consistent with its attempts to obfuscate the true scope of its repertoire (as I have described in my letter of December 20, 2013), but this interest cannot possibly be expressed in terms of a public interest. To the contrary, the public interest clearly demands that this information shall not be kept confidential.

III. The public interest in disclosing AC’s list of affiliates

[16] In addition to the general constitutional basis for requiring the openness of the Board’s proceedings and its record, the *Copyright Act* provide additional grounds for requiring the disclosure of AC’s list of affiliates.

[17] First of all, in section 70.11 of the *Copyright Act* Parliament clearly indicated its desire to guarantee full transparency of collective societies’ repertoires. Under section 70.11, a collective society such as AC “must answer within a reasonable time all reasonable requests from the public for information about its repertoire of works”. Section 2, defines “collective society” as “a society, association or corporation that carries on the business of collective administration of copyright for the benefit of those who ... authorize it to act on their behalf in relation to that

¹² *Sierra Club*, para 55.

¹³ *Id.*

collective administration ...”. It is hard to imagine any more elementary and reasonable question than “who are those who authorize you to act on their behalf in relation to that collective administration of their works?”, and it is even more difficult to imagine on what grounds AC, would be excused from providing this information. If Parliament explicitly contemplated that this kind of information would be provided to any member of the public, it is impossible to argue that there is a public interest in maintaining it confidential.

[18] Second, the notion that the Board would certify “a licensing scheme, applicable in relation to a repertoire of works of more than one author”¹⁴ but would keep the identity of those works and authors confidential defies not only common sense, but also the basic principles of the rule of law. Under the *Interpretation Act*, a tariff is “regulation”;¹⁵ keeping this information confidential means that it would be impossible to know which are the works to which the tariff applies, or purports to apply. This would amount to a “secret law”.

[19] Lastly, if the “principle of open courts is inextricably tied to the rights guaranteed by s. 2(b) of the *Charter*,” and if “openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings”,¹⁶ and if this principle applies even in proceedings that involve disputes between two private litigants, then *a fortiori* the principle applies in proceedings such as these ones, whose outcome may potentially affect thousands of individuals and numerous institutions that are not even represented before the Board.

[20] In sum, not only has AC failed to identify any concrete and recognizable harm resulting from the disclosure of its list of affiliates that can be expressed in terms of a public interest in confidentiality, it also has failed to provide any evidence that would allow any reasonable fact finder to infer the existence of such harm. It seeks to keep confidential the very information which Parliament had decided should be made public.

IV. AC’s reliance on the Board’s 2012 Ruling

[21] AC’s attempt to rely on precedent, the Board’s Ruling of May 18, 2012 (in the provincial and territorial government tariff proceeding), should also be rejected. Although in that Ruling the Board granted Access Copyright’s application for confidential treatment of the list of affiliates, the Board did not provide any reasons for its decision, and therefore it is impossible to tell what persuaded the Board to treat the list as confidential, and whether that Ruling was based on a proper application of the *Sierra Club* test. Even if the Board had provided written reasons, which it did not, the doctrine of *stare decisis* does not apply to the Board’s rulings in the same way that courts’ decisions would be binding on it, as I am sure the Board is fully aware.

¹⁴ *Copyright Act*, section 70.1(a).

¹⁵ *Interpretation Act*, section 2(1).

¹⁶ *Sierra Club*, para 36.

[22] In any event, what matters in the current proceedings is not what had been or might have been presented and argued before the Board in the earlier case, but what has been presented and argued before the Board in the present case. That is, whether AC has identified any real, substantial, and legally cognizable harm that will result from the disclosure, and whether this harm is grounded in a “sufficient evidentiary basis [that would] permit[] a reviewing court to determine whether the evidence is capable of supporting the decision.”¹⁷ As noted above, such “sufficient evidentiary basis” should include more than generalized assertions.¹⁸ “Bald assertions, without more”, and with “no tangible proof” of the supposed serious risk, would not suffice.¹⁹

[23] All that AC has presented to the Board— in a letter from counsel devoid of any tangible proof and filed nearly four month after the supposedly confidential exhibits were filed—is nothing more than mere assertions of a non-cognizable harm. This is not sufficient to trump the principle of open adjudication.

V. Conclusion

[24] AC has never filed any request to exclude any document from the public record, despite having ample time to do that. It has only objected to the disclosure of Exhibit AC-2H in response to my explicit request to make it public, but its objection is lacking all the necessary substantive and evidentiary requirements that would allow the Board to exclude the document pursuant to the *Sierra Club* test.

[25] Therefore, there is no legal basis to exclude Exhibit AC-2H, as well as any other document that AC has filed, from the public record. They should all be placed on the public record.

Respectfully submitted,

Ariel Katz

¹⁷ *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996 CanLII 184 \(SCC\)](#), para 73.

¹⁸ *Toronto Star Newspapers Ltd. v. Ontario*, [2005 SCC 41 \(CanLII\)](#), [2005] 2 S.C.R. 188, para 9.

¹⁹ *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41 (CanLII), [2010] 2 SCR 592, <http://canlii.ca/t/2d190>, paras 92-94.