Section de première instance de
la Cour fédérale du Canada

Federal Court of Canada
Trial Division

Date: 19971029

Docket: T-1959-97

B E T W E E N :

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry pursuant to paragraph 10(1)(b) of the *Competition Act* relating to the refusal of Warner Music Group Inc. and its affiliates, WEA International Inc. and Warner Music Canada Ltd. to deal with BMG Direct Ltd.;

AND IN THE MATTER OF an Application by the Deputy Director of Investigation and Research (Civil Matters) under the *Competition Act*, for an Order requiring that The Columbia House Company or any of its affiliates within the meaning prescribed by subsection 2(2) of the *Competition Act*, produce certain records and make and deliver certain returns pursuant to paragraphs 11(1)(b), 11(1)(c) and subsection 11(2) of the *Competition Act*.

REASONS FOR ORDER
(Delivered from the Bench at Ottawa, Ontario
Tuesday, October 28, 1997)

HUGESSEN J

[1] This is an application to stay, pending an appeal therefrom, an order made by Mr. Justice Lutfy pursuant to section 11 of the *Competition Act*[1] on 9 September, 1997, and revised by him by a further order issued on 15 October, 1997. It is the latter order which is appealed. Both orders of Mr. Justice Lutfy required the present applicant, Columbia House, whom I shall call the appellant, to produce by 5h00 p.m. on October 21st, 1997, certain documents and information in the context of an inquiry being conducted by the Director pursuant to the provisions of the *Competition Act*.

[2] Other than as the recipient of the orders in question, the appellant is not a party to that inquiry or a target of it. The documents and information ordered to be produced have not been produced.

[3] I apply the classic three part test in order to determine whether or not a stay should be granted.

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[1] R.S.C. 1985, c. C-34, as amended

[4] First, with regard to the question of a serious issue, I am satisfied that there is indeed a serious issue raised in the appeal. The Director, in argument, has suggested that the principal point taken by the appellant before Mr. Justice Lutfy, and to be taken again in the Court of Appeal, namely that the Director's powers of inquiry are spent once he files, as he did on September 30, 1997, a complaint before the Competition Tribunal, has been settled against the appellant's contention. The fact is, however, that while there are some judgments to that effect, they are all at the Trial level and there is no appellate decision directly applicable which would make the appellant's appeal beyond hope and frivolous or vexatious. In short, the point is arguable.

[5] The second argument raised by the Director in this connection is that the decision of Mr. Justice Lutfy is itself not appealable. That is an interesting point and one which I suspect has some merit, but in my view it is not one which it is proper for me to decide as a judge of the Trial Division. The Director, if he wishes to take that point before the Court of Appeal, may do so in an expeditious manner and he will have his answer from the Court of Appeal which is the only proper forum, in my view, to determine whether or not it has jurisdiction over the decision of Mr. Justice Lutfy.

[6] As to the question of irreparable harm, the appellant does not raise the cost, although it is considerable, and inconvenience, also apparently considerable, of compliance with the order as being the source of irreparable harm. I may say that, in my view, that is a correct position for the appellant to take. Rather, the argument that is made is that the appellant is in the position of one who has been subjected to an illegal or improper search. It is said that the appellant's right to privacy, the right to have its own affairs kept to itself, is invaded by the order. In my view, and with respect, the argument is beside the point. These are civil proceedings not criminal proceedings. There is, in my view, no right to privacy on the part of a person who, like the appellant, is in the position of a witness in civil proceedings. In fact, I believe that the appellant's position can properly be likened to a witness who has received a subpoena together with an order *duces tecum*. The Courts have always accepted that the public interest in the administration of justice gives them the right to compel answers and productions from witnesses notwithstanding that the witnesses may well prefer that the information sought and the documents produced should remain private and confidential. I would only add, on this point, two other observations. The first is that the provisions of the *Competition Act* themselves will provide some protection to the confidentiality of the materials which the appellant is obliged to produce. The second is that, whether or not the section 11 order were

in existence, the appellant could, in the course of the proceedings before the Competition Tribunal, be obliged in the ordinary way to produce precisely the same documents and precisely the same information, although in a very much more onerous and cumbersome and time wasting manner.

[7] As to the balance of convenience, I am satisfied that the relatively unimportant cost and inconvenience to the appellant of compliance is outweighed by the public interest in the administration of justice and in the conduct of the Director's inquiry. I have in mind, when weighing the public interest, the expression of purpose contained in section 1.1 of the *Competition Act*[2].

[8] Before leaving this case, there is one comment that I wish to make on a matter which I explored with counsel but which, because of the findings I

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1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

have made on the three part test, is not strictly relevant to my decision today . The point is this; the order being appealed required the production of the information and documents by 5h00 p.m. on October 21st, this year. That is just one week ago. That order has not been complied with. The appellant does not come before the Court in the classic expression with "clean hands". In my view, when a party seeks a discretionary exercise by a Court, that party is well advised not to be in default of the performance of any obligations it may have under Court orders. I appreciate, and counsel argued, that time was short. Mr. Justice Lutfy's revised order was issued on October 15, 1997, and compliance therewith was required only six days later. However, given that the appellant was conscious and aware of the requirement to comply on the 21st of October, at 5h00 p.m., it was the appellant's duty to move this Court prior to that time to be relieved, even temporarily, of the duty of compliance. This Court is always available. An application of that sort might even be accepted *ex parte*. It could certainly be made on short notice and, indeed, I would hazard a guess at saying that it might even be the subject of a consent extension for a short period of time pending the hearing of an application to stay such as this one. As I say, the point is not critical to my decision today, but I think it is something that counsel should bear in mind, because parties who are in non-compliance with Court orders will find

considerable difficulty in persuading the Court that they should be the subject of a discretionary order in their favour.

[9] The application for stay will be dismissed.

"James K. Hugessen"

Judge