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By Email

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Dear Mr. McDougall:

Re: Discussion Paper of the Working Committee on the Operations, Procedures, and Processes of the Copyright Board

We submit these reply comments in response to the comments the Board received in respect of the Discussion Paper of the Working Committee on the Operations, Procedures and Processes of the Copyright Board (the "Comments"). The Comments were posted on the Board's website on March 9, 2015.

These comments are submitted on behalf of Bell Canada, the Canadian Cable Systems Alliance, Cogeco Cable, Eastlink, Rogers Communications, Shaw Communications, TELUS Communications, and Quebecor Media (collectively "the BDUs").

Among the various stakeholder comments, there are several proposals and comments with which the BDUs agree, and several with which the BDUs strongly disagree. These reply comments will address both. Please note that the fact the BDUs have not commented on any particular submission should not be construed as agreement with that submission.

Proposals that the Board should not accept

The Board should not comprehensively adopt the civil adversarial process

Access Copyright proposes at page 2 of its Comments that the Board introduce "more rules into the process" and more comprehensively adopt the civil adversarial process. The BDUs strongly disagree with this proposal.

Access Copyright's proposal would make the process more argumentative. It would give parties more opportunities to allege that their opponents have breached the Board's rules of procedure, and to attempt to exploit those allegations. The Board would then have to use even more of its time and resources adjudicate these allegations.

A fuller adoption of the civil adversarial process would also substantially disadvantage parties that lack the resources to retain counsel. These disadvantaged parties would disproportionately be small users or user groups; collectives typically employ in-house counsel and retain external counsel.

Administrative tribunals, such as the Board, are not courts. As the Federal Court noted in *Society of Composers, Authors and Music Publishers of Canada v. Copyright Board*,[1] the "Board's role is more administrative than judicial, in the sense that its decisions so far as they affect private rights are to be made in the public interest."[2] Its primary task is to set publicly applicable tariffs in the public interest, not to adjudicate private disputes. Thus, as it has done with other administrative tribunals, Parliament granted the Board the power to determine its own procedures.

The Board must adhere to the principle of procedural fairness.[3] As the Nova Scotia Court of Appeal has found, "court procedures are not necessarily the gold standard" in reviewing procedural fairness.[4] Procedural fairness is contextual, flexible and variable.[5] Procedural fairness depends on "the circumstances of the case, the statutory provision and the nature of the matter to be decided."[6]

The Board's resources are limited, and it must balance the costs of extensive court-like procedures with the gains to be had in the quality of decision-making:

> [S]ignificant costs will almost certainly accompany a requirement that government provide a meaningful opportunity for those interested to participate in the decision-making process.
>
> Public resources are limited, and any agency that is compelled to devote its limited resources to the conduct of hearings or other forms of participation before taking any significant decision may be deterred from pursuing its statutory mandate with the appropriate vigour. Moreover, in some contexts *the requirement that trial-like procedures be followed may not enhance the quality of decision-making. Indeed, to require such*

[1] (1993), 47 CPR (3d) 297 (FCTD) ["*SOCAN v Copyright Board*"].

[2] *SOCAN v Copyright Board* at 319-321 CPR.

[3] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; for decisions specific to the Board, see, e.g., Re:Sound v Fitness Industry Council of Canada, 2014 FCA 48.

[4] *Nova Scotia (Community Services) v N.N.M.*, 2008 NSCA 69 at para 40.

[5] Ibid; *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 SCR 653 at 682.

[6] *Syndicat des employés de production du québec et de l'acadie v. Canada (Canadian human rights commission)*, [1989] 2 SCR 879 at 895.

> *procedures may lead to inappropriate "judicialization" of the decision-making process.*[7]

Access Copyright appears to temper its proposal by saying that the civil adversarial practice rules could be varied by the Board on application by a party, but this suggestion would only add to the Board's and the parties' additional workload. The proposal would not enhance procedural efficiency; indeed, it would hamper it.

The Board should require collectives to file detailed explanations of their proposed tariffs

CCC, CMRRA, Re:Sound and SOCAN each opposed the adoption of any requirement that collectives file detailed explanations of their proposed tariffs. The basis of this opposition has nothing to do with increasing efficiency; its only purpose is to preserve a perceived strategic advantage for the collectives. The Board should not accept the collectives' opposition.

As the CAB points out in its Comments,[8] collectives exist solely to seek and administer tariffs and have years to prepare their filings, while their proposed rates are typically inordinately high (to preserve the collectives' ability to seek high rates, no matter how unrealistic those might be). The targeted users and uses are often unclear, particularly where the tariff is inaugural.

The Committee was correct in noting that detailed explanations of proposed tariffs would reduce disputes over the relevance of interrogatories, and focus the proceeding to the important issues. These explanations would also be a crucial tool to inform potential objectors about whether they truly need to participate in the tariff-setting process. Too often, a tariff with vague wording is filed, many objectors file statements of objection, and then when the tariff's actual scope is eventually clarified, objectors who are finally assured that they will not be affected withdraw from the proceeding. This is a waste of time for everyone: the potential objectors must analyze their potential liability without having enough clarity to do so accurately; the collectives must prepare interrogatories for all objectors, even the ones who are not intended targets; and the Board must process all of the unnecessary paperwork that results. This could all be avoided if collectives were to file detailed explanations at the outset.

Further, the strategic advantage that CCC, CMRRA, Re:Sound and SOCAN are trying to preserve has little value. This is because, in any event, the information that should be disclosed in preliminary explanations would be revealed during any disputes about interrogatories' relevance, which happen well before a collective files its case. Collectives are not permitted to keep their entire strategies secret until they file their cases.

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[7] Donald M. Brown, QC and The Honourable John M Evans with Christine E Deacon, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters Canada Limited, 2014), at 7:1220 (emphasis added).

[8] CAB Comments at 4.

SOCAN has gone so far as to recommend that collectives file only a general outline while objectors should file detailed objections to assist the collectives in the preparation of their statements of case.[9] This is patently unfair and there is no basis upon which the Board should impose this one-sided rule. Both collectives and objectors should file detailed explanations of their proposed tariffs and objections.

The Board should not abandon its "fairness" standard

Music Canada recommends that the Board abandon its "fairness" standard in setting tariffs in favour of market-based benchmarks.

The BDUs would first note that Music Canada's submission is inappropriate because the approach used by the Board to value rights is a substantive issue which is beyond the scope of the discussion paper which only addresses procedural issues.

Further, although this is not the proper forum in which to debate the issue (and, indeed, the issue is currently before the Federal Court of Appeal[10]), the BDUs would make the following brief points to explain why, even if the Board had the statutory jurisdiction to abandon the standard of fairness (and it does not), the Board should not do so.

The *Copyright Act* requires the Board to set "fair and equitable" tariffs.[11] The Board does not have the power to change this standard.

Further, even if the Board did have the power to change this standard, the Board would serve very little purpose if "market" rates were to be uncritically applied, for all tariffs, to all users. A collective would only need to negotiate a few agreements at consistent rates, with users who may have diverse business and contextual reasons to reach agreement. The collective could then be assured of those rates applying to all users, even users who refused to agree to those rates.

The Board would also severely fetter its discretion if it were to decide that a market-based standard would apply to every tariff rate. This is not to say that the Board should never use a market standard in setting rates; simply that the Board should retain its broad statutory discretion to decide when a market standard is and is not appropriate.

Proposals that the Board should accept

Each party should file a statement of issues prior to filing interrogatories and should link each interrogatory to a specific issue

Access Copyright recommends in its Comments[12] that each party be required to file a statement of issues prior to filing interrogatories. The BDUs agree.

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[9] SOCAN Comments at 2.

[10] *Re:Sound v. Canadian Association of Broadcasters et al.*, Docket No. A-294-14.

[11] *Copyright Act*, ss. 66.91, 83(9).

Indeed, the BDUs would further recommend that each interrogatory be explicitly linked to a particular issue in the statement of issues. Access Copyright did just that during the Board's recent proceeding to certify the Access Copyright - Elementary and Secondary School Tariffs (2010-2015). This linking of interrogatories with issues was very effective in minimizing disputes over relevance, as it clarified Access Copyright's intent to the parties at the outset. As a result, it is likely that fewer interrogatories were disputed before the Board.

Collectives, as well as users, should be required to provide information from their underlying members

The CAB recommends in its Comments that collectives be regularly required to provide information from their underlying members, just as trade associations are required to provide information from their members.

This is a very helpful suggestion. Collectives' members often possess very useful information that is relevant to the value of the rights at issue. And, as the CAB states, collectives exist solely for the purpose of seeking and administering tariffs and their members join solely for the purpose of collecting royalties. There is no reason collectives' members should be allowed to hide behind their collectives to avoid providing relevant information, especially when objector trade associations are not permitted to do the same.

For example, during the recent proceeding to certify Re:Sound Tariff 8, Re:Sound brought as evidence several agreements between record labels and Internet radio services that were not parties to the proceeding. Re:Sound had not been required to produce these agreements during the interrogatory process as they belonged to Re:Sound's members. On the other side of the hearing room, the Objectors had been required to produce any agreements they had in their possession. Had all the information been available to both Re:Sound and the Objectors at an earlier stage, the proceeding may have been more focused. Further, as a matter of fairness, the Board should not allow this informational asymmetry.

Another example is the current proceeding to certify the Television Retransmission Tariff for the years 2014-2018. In that proceeding, the Board attempted to rectify the problem by requiring collectives to produce program licence agreements that may be evidence of the market values of the programs being retransmitted.

Further, if collectives were as subject to interrogatories as objectors are, they would have an incentive to reduce the number they ask, in cooperation with the objectors. As things currently stand, collectives typically feel safe from the requirement to provide extensive information in response to interrogatories. They therefore have every incentive to bombard users with interrogatories, and then use the requirement to answer them as a

[12] Access Copyright Comments at 1.

bargaining chip. This approach, while strategically advantageous to the collectives, harms efficiency.

The Board may need to take further measures to ensure that collectives and their members comply with any requirement to produce responsive information, such as a requirement that collectives' membership agreements provide for the disclosure of information for Board proceedings, but regardless, the CAB's recommendation should be adopted.

The interrogatory process should be modified into a "CRTC-style" process

In their Comments, the BDUs submitted that the Board should consider adopting a more streamlined, "CRTC-style" interrogatory process. The following is an elaboration on the meaning of that submission.

The CRTC, in its Rules of Practice and Procedure, has flexible powers to conduct information disclosure processes among parties to telecommunications regulatory proceedings.[13] These interrogatory processes usually proceed in two main steps:

1. The parties, and the CRTC if it so chooses, ask and answer questions.[14] In their initial answers, parties may argue that the requested information is either not available or not relevant. Information can be marked confidential, as long as reasons and a redacted version are provided.[15] The CRTC has provided specific Disclosure Guidelines indicating which types of information should be marked public or confidential.[16]

2. The parties can request disclosure of confidential information[17] and can request that the CRTC order further disclosure of documents or particulars.[18] The parties who are subject to these requests for further disclosure may reply, and the CRTC determines whether further disclosure is required.[19] The CRTC may order that this step be repeated if disclosure is insufficient.

There are two major differences between the CRTC interrogatory process and the Board's process.

First, as these CRTC interrogatory processes are typically conducted, the CRTC can direct its own interrogatories to the parties if it so chooses, in addition to allowing parties to direct interrogatories at each other. In some cases, and this is becoming more common,

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[13] CRTC Rules of Practice and Procedure, SOR/2010-277 ["*CRTC Rules*"], ss. 28-29.

[14] *Guidelines on the CRTC Rules of Practice and Procedure*, Broadcasting and Telecom Information Bulletin CRTC 2010-959 ["*Guidelines*"] at para. 114.

[15] *CRTC Rules*, ss. 31-32.

[16] Disclosure Guidelines, Appendix to Broadcasting and Telecom Information Bulletin CRTC 2010-961.

[17] *CRTC Rules*, s. 33.

[18] *CRTC Rules*, s. 28.

[19] *Guidelines* at para. 114, *CRTC Rules*, ss. 33, 75, 76.

all of the interrogatories are delivered simultaneously. Further, if parties' interrogatories request the same information as the CRTC's interrogatories, only the CRTC's interrogatories must be answered.

Second, there is no separate process by which parties object to interrogatories. Any objections based on relevance, or any claims that the requested information is not available, are provided at the same time as responses are first exchanged. Then, responses to allegations of irrelevance and disputes over the sufficiency of the answers provided are provided at the same time. The objections to interrogatories and deficiency motions stages of the process are thus collapsed into one.

The Board may find some advantage in adopting these aspects of the CRTC interrogatory process. If it asked its own interrogatories, the Board would begin each oral hearing having already received any information it deems necessary and may be more prepared to ask questions of the parties. The Board would also be able to phrase interrogatories in a sensible and non-punitive manner. For example, where a large volume of information is available and relevant, the Board could ask from the beginning for a representative sample, instead of asking, as parties often do, for all of the existing information, forcing the other party to go through the objection process to get a Board order that only a sample need be provided.

Further, if the Board reduced the number of rounds in its interrogatory process, it would avoid the situation where a party that has objected to an interrogatory, and had its objection dismissed, would again refuse to answer the interrogatory when required, which necessitates another round of argument. Frustratingly, this exact situation occurred in the current Television Retransmission (2014-2018) proceeding, when the collectives CRRA, CCC, CRC, FWS, and BBI all refused to provide information that the Board had previously ruled, after *two rounds of objections*, was relevant.[20] The Board was forced, again, to rule on relevance because the division of the interrogatory process into separate objection and answering stages, in those collectives' view, provided an additional opportunity to make objections based on relevance.

The Board may also wish to examine the Ontario Energy Board's ("OEB's") interrogatory process. The OEB Rules of Practice and Procedure provide it with broad discretion to establish interrogatory processes that suit each particular proceeding.[21] In that process, similar to the CRTC process, the OEB may direct its own interrogatories at the hearing participants, and the participants may direct interrogatories at each other.

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[20] *Television Retransmission (2014-2018), Ruling of the Board Dealing with Deficiency Motions*, September 24, 2014 at 1: "The Board is of the view that its rulings were clear. If the Collectives felt that either the May 6, 2014 or the May 26, 2014 rulings were equivocal, they should have asked the Board for clarification. In any event, the Board reiterates that the Collectives shall obtain answers…".

[21] Ontario Energy Board Rules of Practice and Procedure (Revised November 16, 2006, July 14, 2008, October 13, 2011, January 9, 2012, January 17, 2013 and April 24, 2014), online: <http://www.ontarioenergyboard.ca/oeb/_Documents/Regulatory/OEB_Rules_of_Practice_and_Procedure.pdf> ["*OEB Rules*"], Rules 26-27.

Rule 26.02 of the OEB Rules of Practice and Procedure sets out several requirements of interrogatories. The most useful requirement, for the purpose of this letter, is that interrogatories in OEB proceedings must be numbered so that each interrogatory's number corresponds to the proceeding's numbered "issues list", or if there is no issues list, to the exhibit or chapter number or letter in the application that began the proceeding.[22] As mentioned above, if the Board adopted Access Copyright's proposal to require parties to file a statement of issues prior to filing interrogatories and the parties linked each interrogatory to a specific issue or issues, many debates about interrogatories' relevance would be prevented.

Rule 27.01 of the OEB Rules sets out specific requirements of interrogatory responses, which mirror the requirements of interrogatories. Further, the OEB's Practice Direction on Confidential Filings sets out uniform procedures for the filing and (possible) disclosure of confidential materials.[23] It specifically directs parties to

> [R]emain mindful that only materials that are clearly relevant to the proceeding should be filed, whether the party is filing materials at its own instance, is requesting information by way of interrogatory or is responding to an interrogatory. Parties are reminded that […] a party that is in receipt of an interrogatory that it believes is not relevant to the proceeding may file and serve a response to the interrogatory that sets out the reasons for the party's belief that the requested information is not relevant."[24]

Thus, parties are encouraged to take a restrictive view of relevance. This is, of course, much easier where there is a pre-existing list of issues to guide the parties in determining what information is relevant.

Where a party is not satisfied with the response provided, that party may bring a motion to the OEB.[25] The OEB staff may also refer a failure to respond to OEB interrogatories to the OEB.[26] Aside from these provisions, a second or third round of responses is not required or contemplated in the *OEB Rules*.

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[22] *OEB Rules*, subs. 26.02(e); OEB Rule 28 contemplates that the OEB itself will establish a single list of issues for a proceeding.

[23] OEB Practice Direction on Confidential Filings, Revised April 24, 2014, online: < http://www.ontarioenergyboard.ca/oeb/_Documents/Regulatory/Practice_Direction_on_Confidential_Filings.pdf> ["*OEB Practice Direction*"].

[24] *OEB Practice Direction* at 2.

[25] *OEB Rules*, s. 27.03.

[26] *OEB Rules*, s. 27.04.

Thus, the Board may find it useful to consider requiring parties to file lists of issues,[27] of directing its own interrogatories at the parties, and of reducing the number of rounds in its interrogatory process.

Thank you for the opportunity to submit these comments.

Yours truly,

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Ariel Thomas

AT/cp

[27] Or perhaps creating its own lists of issues after consulting with the parties; for example, see OEB Rule 28.02.