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Dear Mr. Majeau,

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

We submit these comments in response to the "Discussion Paper On Two Procedural Issues: Identification And Disclosure Of Issues to be Addressed During a Tariff Proceeding and Interrogatory Process", the first Discussion Paper of the Working Committee on the Operations, Procedures, and Processes of the Copyright Board (the "Discussion Paper"). The Board distributed the Discussion Paper to stakeholders for comment on February 5, 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"), who are often involved in Board proceedings as Objectors to proposed tariffs. The BDUs appreciate the opportunity to engage in this process.

The Introduction to the Discussion Paper states that the Board established the Working Committee "to look into the operations, procedures and processes of the Board so as to make them more efficient and more productive". The BDUs fully support this goal. They also appreciate the Committee's careful work, and understand that parties' competing interests make it difficult to streamline the process in an equitable manner. The proper balance is difficult to achieve. However, the BDUs are of the opinion that, while there is nothing inherently wrong with the recommendations in the Discussion Paper, they do not go nearly far enough to achieve the Committee's stated goals.

In this submission, the BDUs comment on the Committee's recommendations. In doing so, they make two general submissions:

i. The Board should radically streamline the interrogatory process by becoming much more involved, at the outset, in defining its scope. The Board should use a "CRTC-style" approach to interrogatories.

ii. There are a number of issues relating to the total length of time between when a tariff is proposed and when it is certified, such as the amount of time it takes for a proceeding to begin and the amount of time the Board needs to issue a decision

after a hearing has ended. The questions that were asked of the Committee did not touch on these issues, and the Board should explore them.

I. The Interrogatory Process Needs to be Radically Streamlined

The Committee describes its recommendations for modifying the interrogatory process as being made with a view to minimizing the burden of the process on parties, streamlining the process, reducing disputes concerning interrogatories, limiting the burden of the process, and addressing the fact that the existing interrogatory process is a bar to some entities' participation in Board proceedings.

Despite their support of the Board's goal in establishing the Committee and conducting this consultation process, the BDUs are of the opinion that the recommendations in the Discussion Paper would not make the interrogatory process less burdensome.While potentially helpful in some ways, it is far from clear that they will reduce the burden on parties to the Board's proceedings. This is especially so for Objectors to proposed tariffs, who have (for the last several years, at least) borne the brunt of the interrogatory process.

The BDUs' concerns with the current interrogatory process

From the BDUs' perspective, the interrogatory process demands far more in time and resources than should be necessary, especially for Objectors. The Committee notes at page 12 of the Discussion Paper that "the relevance, reliability and efficiency of the Board's current process for exchanging and responding to interrogatories have been questioned more than once."

The BDUs are of the opinion that the interrogatory process is too burdensome, and that the burden is unequally shared. This inequality provides collectives with a readily available method of discouraging Objectors or would-be Objectors from opposing tariff proposals before the Board. When presented with the prospect of providing voluminous information, much of it commercially sensitive and highly confidential, in response to intrusive interrogatories, many users would prefer to accept settlement or licensing arrangements. This cannot be the way that Parliament intended the Copyright Board system to be used.

The Board typically adheres to a very broad concept of relevance, when determining the information that parties may seek in interrogatories. The BDUs understand the reasoning behind this; it can be very difficult to know at the outset of a proceeding what will be

relevant to the parties' arguments, and to prematurely cut parties off from pursuing a theory could raise issues of procedural fairness. However, as things stand now, this broad concept of relevance allows parties (in practice, primarily collectives) to request a very wide variety of highly confidential information from, in practice, primarily Objectors.

The system by which the Board protects the confidentiality of the information that is exchanged during the interrogatory process, shared with experts and consultants and filed with the Board, works well. Despite this, though, it is easy to imagine why some users would be uncomfortable sharing their most confidential and essential information with the collectives (and their experts and consultants) with whom they have ongoing business relationships, particularly when it is difficult for them to see its relevance of the information being requested. Some would-be parties have preferred to avoid the Board altogether rather than disclose their apparently marginally relevant but highly confidential information. Thus, the downside to the broad concept of relevance is reduced participation.

The BDUs believe that users and collectives should participate in the Board process, and feel that reduced participation by users, and the subsequent lack of information before the Board, will ultimately reduce the fairness of certified tariffs. If users do not participate, the Board cannot determine what rates would be fair and equitable for them.

Therefore, the Board should take steps to streamline the interrogatory process in order to reduce the burden on Objectors.

The Board should also streamline the interrogatory process, reducing the burden of responding to interrogatories, because if it does not, it will be nearly impossible to shorten schedules of proceedings. The interrogatory process--asking interrogatories, arguing over whether they pertain to relevant information, answering them, and arguing over the sufficiency of the answers-- already takes up the bulk of the schedule in many proceedings. If the scope of the interrogatories were narrowed at the outset, the schedule for the entire proceeding could become appreciably shorter.

The Board should implement a CRTC-style interrogatory process

The Committee has made some recommendations that the BDUs support. Yet, for the most part, the Committee's recommendations, while valuable, would not streamline the process. On the contrary, many of the Committee's recommendations would add steps to the process.

The Committee has described its recommendations for modifying the process as having been made with a view to minimizing the burden of the process on parties, streamlining the process, reducing disputes concerning interrogatories, limiting the burden of the process, and addressing the fact that the existing interrogatory process is a bar to some entities' participation in Board proceedings. The BDUs disagree; while certain of the Committee's suggestions are helpful, the majority would either maintain the status quo or increase the number of steps in the interrogatory process.

The BDUs submit that the Board should take a far more radical approach. Footnote 5 to the Discussion Paper notes that "one member of the Committee, noting that in telecom proceedings, the CRTC's involvement in designing interrogatories is both early and intense, suggested that the Board may wish to look into that process as a possible model". The BDUs wholeheartedly agree. The Board should take control of the interrogatory process at the earliest stage and implement a CRTC-style process. It should take that opportunity to narrow the scope and number of interrogatories at the outset of the process.

The scope of questioning--the matters that the Board will consider relevant, interesting, and useful--should be reduced at the outset in order to prevent users from having to make enormous efforts to uncover and provide vast amounts of information that, in the end, may not even be used.

The Committee's recommendations are marginally helpful, at best

Part II of the Discussion Paper, containing recommendations 1-15, focuses on the identification and disclosure of issues. In that Part, the Committee has recommended a process by which collectives and Objectors provide early, non-binding explanations of their proposed tariffs and reasons for objection, respectively (recommendations 6-11), with requests for additional information dealt with on a case-by-case basis (recommendation 15). The BDUs support these recommendations.

In Part III of the Discussion Paper, which deals with the interrogatory process, the Committee mentions the early disclosure process that it recommended in Part II. In recommendation 20, it proposes that the Board convene a preparatory meeting between itself and the parties, after the early disclosure process has ended but before interrogatories are exchanged. The purpose of this preparatory meeting would be to "identify tentatively what the relevant issues appear to be and to discuss what information may be required in order to address those issues, with a view to helping the parties exchange interrogatories that are better focussed and more relevant". The BDUs agree that implementing this recommendation would be a positive step, but are of the

view that it does not go far enough--particularly in light of recommendation 19, which is that "parties should remain free to pursue the interrogatories they wish". If parties are still able to ask anything they want, it is difficult to see how a preparatory meeting would not just lengthen the process by adding another step.

Recommendations 21 and 22 are also very unhelpful; they would have the Board continue only to rule on the relevance of interrogatories when dealing with objections, and to exercise caution before advising parties that it does not wish to hear relevant evidence that it considers unhelpful, particularly early in the process. These recommendations would only maintain the status quo and would prevent the Board from implementing a more streamlined, efficient process.

Recommendations 23 to 25, regarding the consolidation of interrogatories, would also uphold the status quo and as such are completely unhelpful. Recommendation 26, which is that interrogatories should not be filed with the Board at the outset, is the same.

Recommendations 27 and 31, that the Board should maintain its current procedures for objecting to interrogatories and claiming that responses are deficient and add a reply phase to each, again, add an extra step to the status quo. The BDUs do not object in principle to the addition of a reply phase; however, if the number of interrogatories is not reduced at the outset, then this reply phase will only lengthen the process and make it more expensive.

Recommendations that the BDUs support

This is not to say that the BDUs do not agree with some of the Committee's recommendations. Again, there is nothing inherently wrong with any of the recommendations themselves; it is just that, taken as a whole, they do not go nearly far enough.

The BDUs agree with recommendations 16 and 17: parties should continue to be allowed to seek information from each other in advance of hearings, and interrogatories (as opposed to oral discovery) should still be used.

The BDUs also agree with recommendations 29 and 33: that objections to interrogatories and allegations that responses are deficient should be filed in a table format to enable readers to easily cross-reference claims, responses, replies and the Board's rulings. This would be a very helpful step that has already been adopted in many proceedings.

Finally, as previously stated, the BDUs support recommendations 1-15, which relate to the publication of proposed tariffs and the early identification by the parties of their positions and concerns.

The Overall Length of Board Proceedings

The committee's work is circumscribed by its mandate to examine only specific questions about the hearing procedure itself. However, considering the large volume of evidence the parties and their experts generate, the contentiousness of the legal and evidentiary issues, and the amounts typically at stake, the fact that Board hearings typically take one to two years from the setting of a schedule to the end of the oral hearing is not necessarily a cause for concern.

There are, however, two considerable periods of time that in themselves delay the certification of a tariff: i) the length of time between a collective's filing of a proposed tariff and the setting of a hearing schedule; and ii) the length of time between the conclusion of the oral hearing and the release of the Board's decision. These periods of time often each take years, and in some cases, the reason for this is not clear.

The length of time between filing and scheduling

The length of time that passes between a collective's filing of a proposed tariff and the beginning of the Board's proceeding to certify that tariff is generally, but not always, determined by the collective. When the collective decides that it is time to begin the proceeding, it generally contacts the Objectors to discuss a schedule.

The BDUs support the collaborative way in which Board proceedings are scheduled. However, when the delay between filing and scheduling stretches into multiple years, as it sometimes does, it can be difficult for users to estimate their potential liability. A long delay can also result in either a user or a collective being required to make significant retroactive payments, with interest, once a tariff is finally certified.

This is a particularly difficult situation where the tariff is inaugural. On the other hand, in some cases a collective will propose a tariff that is identical or near-identical to a past certified tariff. In these cases, there is often no urgency to the certification process, but there is also no reason it should be delayed.

Thus, the Board may wish to explore the possibility of imposing a formal deadline for scheduling proceedings to certify inaugural tariffs.

As for the length of time between the conclusion of the oral hearing and the release of the Board's decision, it is difficult for the BDUs to comment on the reasons for this as they are not privy to the Board's internal mechanisms.

They are certainly aware that the Board has a very small staff compared to some other administrative bodies such as the CRTC. They note the Chairman's observation in the Board's 2013-2014 Annual Report that "during [his] tenure, the workload of the Board has increased substantially, as evidenced by the value of all tariffs certified by the Board which is now well over $400 million, with no commensurate increase in funding." Clearly, this is an issue that needs to be addressed.

The BDUs also understand that, as the Board's decisions are so often scrutinized, it is important for the Board to carefully consider and articulate its reasons.

The BDUs, of course, submit that the Board should explore ways in which to streamline its own processes. They also submit that if the Board were to streamline the process at the "front end" in the manner that they have described above, the volume of work for the Board at the "back end" may helpfully decrease.

Indeed, the Chairman wrote at page 6 of the Board's 2013-2014 Annual Report that "the processes leading to decisions have become more complex to manage as Board staff has been called upon to deal with an increasing number of requests to settle disputes over evidentiary matters." (Emphasis added.) The BDUs assume that this is a reference to the multitude of disputes that arise during the interrogatory process. If the Board were more involved at the beginning of the interrogatory process, it would in theory be able to curtail many disputes before they arose by limiting the scope of the process at the outset. The Board's staff would then find itself less often interrupted.

Regardless, the Board's internal processes and workload are certainly issues that merit consideration by the Board and by Industry Canada.

The Governor-in-Council should establish regulations governing the Board's procedures

Finally, the BDUs find the Board's processes, on the whole, to be rather ad hoc. It is difficult for users who are not regularly before the Board to know what to expect. As a result, the BDUs submit that the Governor-in-Council should establish regulations containing guidelines for the Board's procedures to increase transparency and certainty.

Thank you for the opportunity to submit these comments. This is an important process and the BDUs hope that it will be effective. Please let us know if there is anything you would like to discuss.

Sincerely,

FASKEN MARTINEAU DuMOULIN LLP

Ariel Thomas

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