

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

**WORKING COMMITTEE ON THE OPERATIONS,  
PROCEDURES AND PROCESSES  
OF THE COPYRIGHT BOARD**

**DISCUSSION PAPER ON TWO PROCEDURAL ISSUES:**

**IDENTIFICATION AND DISCLOSURE OF ISSUES  
TO BE ADDRESSED DURING A TARIFF PROCEEDING  
and  
INTERROGATORY PROCESS**

**FEBRUARY 4, 2015**

## TABLE OF CONTENTS

<b>I- Introduction</b>	<b>2</b>
<b>II- Identification and disclosure of issues to be addressed during a tariff proceeding</b>	<b>2</b>
A- Publicizing proposed tariffs	2
B- Early explanation by collectives of the content of a proposed tariff	4
C- Early explanation by objectors of the purpose of their objection	8
D- The collective's reply	10
E- Sharing tariff explanations, objections and replies amongst participants and with the public	10
F- Requiring further explanations for a proposed tariff or an objection thereto	11
<b>III- Interrogatory process</b>	<b>11</b>
A- Is there a need for any discovery before the Board?	12
B- Are interrogatories the appropriate form of discovery before the Board?	13
C- Should interrogatories be exchanged and answered before or after issues are identified?	13
D- Should the Board participate in the interrogatory process before the date set to file objections to interrogatories and if so, how? How early should the Board provide case-specific guidance?	14
E- When should the Board rule on the relevance of a question? When, if at all, should it rule that a question, while relevant, concerns an issue that is either uninteresting or unhelpful?	16
F- In instances involving more than one collective or objector, should interrogatories be consolidated? By whom?	17
G- Who should receive a copy of the interrogatories?	17
H- Objecting to interrogatories	18
I- Who should receive responses to interrogatories?	20
J- Dealing with deficient responses to interrogatories	20
K- Are the principles the Board uses to deal with interrogatories sufficiently clear? Should they be organized and communicated in the form of guidelines? In another form?	21
L- Generating new documents in response to an interrogatory	22
M- Should discovery extend to all that may be relevant? Should the Board limit discovery to what it expects to be necessary to arrive at a fair tariff?	22
N- Should the interrogatory burden vary according to the importance of the amounts at issue? The importance of an objector's stake? The significance of a party's resources?	22
O- How should the Board deal with excessive filings of responses to interrogatories with statements of case?	23
<b>Additional note</b>	<b>25</b>

## I- Introduction

On November 26, 2012, the Board established an ad hoc committee to look into the operations, procedures and processes of the Board so as to make them more efficient and more productive: Appendix A lists the names of the members of the Committee. Terms of reference were finalized in June, 2013; they are attached as Appendix B to this Paper. Over time, the Committee will conduct a thorough review of the Board's processes in general and of the Directive on Procedure in particular. To start with, the Committee identified three areas which it found amenable to significant improvements within a fairly short time frame: the identification and disclosure of issues to be addressed during a tariff proceeding, interrogatories and the confidential treatment of information. This Paper attempts to systematically review the issues raised by the first two areas.

Members of the Committee have practised before the Board for some time, acting either for collectives or for users of collectives' repertoires. On some issues, they agree on a proposed course of action; where such a consensus exists, this Paper offers recommendations. Otherwise, it outlines the relevant issues and points of view and attempts to offer alternative courses of action.

Nothing that follows should be applied with full force in all cases, for two reasons. First, any change proposed must prove to be helpful in practice; if not, it should be reconsidered, modified or abandoned. If only for that reason, all changes the Board may make to its procedures should be monitored in order to assess their practical impact. Second, the Board should continue to adapt its process to suit particular cases or situations.

The need to re-examine the Board's procedures has been discussed for some time. The June, 2014 report of the Standing Committee of the House of Commons on Canadian Heritage entitled [Review of the Canadian Music Industry](#) reflects this. Together, the report and the proceedings before the Committee of the House document a wide consensus in two respects. First, the Board provides a valuable service to both rights holders and copyright users. By setting the royalty that a collective society can collect for the use of its repertoire, the Board ensures payment for protected uses and provides marketplace certainty. Second, it takes too long for the Board to render its decisions, largely because of a lack of resources. Issues the Board must address are getting more complex; it needs to be able to adapt to rapidly changing business models of those who use copyright as an input, especially the music industry. If not, the Board risks becoming a business barrier, not a business facilitator.

The Standing Committee's first recommendation is "that the Government of Canada examine the time that it takes for decisions to be rendered by the Copyright Board of Canada ahead of the upcoming review of the *Copyright Act* so that any changes could be considered by the Copyright Board of Canada as soon as possible." The Government [responded](#) to this recommendation as follows:

On the time it takes for the Copyright Board to issue decisions, the *Copyright Act* provides the Board with authority to set its internal procedures. I understand that the Board is currently reviewing these procedures in an effort to streamline the royalty-setting process. Changes to that end could be considered as early as fall 2014. Beyond this, the next mandated Parliamentary review of the *Copyright Act* will be an opportune moment to

consider important copyright issues, such as the broader framework in which the Copyright Board operates.

The report and the Government's response confirm that the Board's decision to review of its operations, procedures and processes was appropriate. They even heighten the urgency of addressing these issues.

## **II- Identification and disclosure of issues to be addressed during a tariff proceeding**

### **A- Publicizing proposed tariffs**

A discussion of the identification and disclosure of issues raised by a proposed tariff should start with an examination of the ways in which users are made aware of it. Users must know that a tariff exists before they can inform the Board of the issues they may wish to raise about it.

Proposed tariffs are published in the *Canada Gazette*; legally, this constitutes sufficient notice to all prospective users. In practice, however, publication in the *Gazette* is no longer functional notice to anyone, even though the *Gazette* is now available freely over the Internet. Some additional form of publicity is required to help better inform actual and prospective users of their potential liability.

The Board posts proposed tariffs on its web site. This is helpful but insufficient. Additional forms of notice should be envisaged, including one-on-one, electronic communications (email) on the assumption that they are less costly and more efficient than traditional communications (letter, newspaper advertising).

For some, there is no obvious reason why anyone among collectives, users' representatives or the Board should bear more of the burden of additional tariff publicity. To the extent possible, that burden should be borne by those most likely to deliver the information efficiently, as long as the cost of doing so, in time and money, remains reasonably low. Cooperation should be favoured where possible: for example, if the Board posts information on a proposed tariff on its website, a trade association representing potential users should only be asked to inform its members of where the information is available.

Others, especially some users, consider that collectives should bear the burden of additional publicity. They are the stakeholders who are best positioned, organized and funded to take this on. They know who their licensees are.

Some consider that mass emailing is now both easy and cost-effective. Others point to physical and legal obstacles that may complicate or prevent such wide-ranging communications. Emailing tens of thousands of users individually may be more technically challenging than it appears, even when users are known to the collective. Mass emails may require compliance with the prior consent provisions of Canadian and even foreign anti-spam legislation. Compliance with these requirements could be cumbersome and costly, and may require efforts that are out of proportion with the benefits derived from the additional publicity a mass email may provide.

In the case of tariffs of first impression, a collective could be asked to identify and contact potential users it seeks to target through the new tariff. This may not always be possible, such as if a tariff anticipates uses that are not yet occurring in Canada. However, to the extent that *some* obvious potential users can be identified, providing notice of a first tariff to those users should raise no further difficulties than those outlined in the previous paragraph.

In most instances, with sufficient prior notice of the date when a proposed tariff is published in the *Canada Gazette*, collectives should be able to put a notice on their website, with a link to the Board's site, and to communicate with industry associations so that they can inform their members. The efficiency of any notice through a third party such as a trade association will vary according to the type of potential users targeted and to how well-organized they are. Within well-established, fairly stable groups, such as television and radio stations, users may already be informed of proposed tariffs efficiently and at little or no cost. In the case of more loosely organized user groups (restaurants, fitness clubs, municipal facilities), efforts could be made to identify associations or organisations capable of communicating with members and non-members alike.

A tariff is a regulation of general and prospective application. It applies to casual copyright users, including some who do not even know that they may require a licence in the future (e.g. a couple who arranges for a wedding reception after the relevant tariffs are certified). These users, being unknown, cannot be contacted. In these instances, the Board will necessarily continue to rely on informal agents for these persons (here, the hotel's reception manager and the Hotel Association of Canada) as a source of comments on the relevant proposed tariffs.

Communication tools evolve constantly. The use of newer (social media) and not so new (RSS) forms of communication should be considered. New, more up-to-date forms of notice should be implemented progressively and monitored on an ongoing basis. The form of communication should vary according to the characteristics of the relevant markets. New forms of publicity should be developed through co-operation.

Pursuant to section 66.71 of the *Copyright Act*, the Board may cause to be distributed or published any notice that it sees fit to be distributed or published. The Board should resort to this power only if experience were to prove that this is the only means through which adequate publicity of proposed tariffs can be compelled.

### **Recommendations**

1. The Board, with the cooperation of collectives and users' representatives, should develop and implement new ways of notifying current and potential users of the filing of proposed tariffs. Electronic notice should be favoured over other forms of communication; paper notification, including letters and newspaper notices, should be used exceptionally or not at all.
2. New forms of notification should be implemented progressively, on a "best efforts" basis, according to what is technically feasible, financially reasonable and legally permissible. More should be done as technology makes more direct, personal forms of notice easier and more cost effective.

3. Consideration should be given to a variety of options (posting notice of proposed tariffs on a collective's website; notification by a collective to all known users; emailing by a trade association to its members) so as to select the form of communication which is most efficient for each user type in each situation. In this regard, the Board should attempt to identify trusted third parties through whom more loosely organized user groups could be notified that proposed tariffs have been filed.
4. The Board, with the cooperation of collectives and users' representatives, should assess the limits, if any, that anti-spam or other similar legislation may impose on communicating electronically with users about a proposed tariff. These limits should be taken into consideration in selecting additional means of publicizing proposed tariffs.
5. The Board should consider installing an RSS or other form of feed or information syndication (e.g. a Twitter account) allowing anyone to request in advance to be notified of the filing of proposed tariffs; collectives should be asked to consider doing the same or posting on their web sites links to the Board's own notices in this regard.

## **B- Early explanation by collectives of the content of a proposed tariff**

Currently, a collective is not required to explain the content of the proposed tariffs it files. Often, explanations are provided only much later, in the collective's statement of case. Potential objectors must determine on their own what the collective seeks, what or whom a tariff targets, why it is being filed now,<sup>1</sup> what are the underlying assumptions for the choice of structure or of targets, how the proposed tariff dovetails with other tariffs, or the reasons for any change proposed to an existing tariff. Providing some of this information early on would enable objectors to understand sooner, to some extent, why the proposed tariff has been filed and what it is meant to achieve. This may help reduce boilerplate objections filed as a precautionary measure, only to be withdrawn later on.

A collective should be asked to provide some information with most proposed tariffs. When filing a tariff of first impression, a collective could be asked, where appropriate and available, to provide information such as a description of the persons or uses targeted in the tariff, a broad indication of how the proposed rate was selected and the choice of proposed terms (e.g. payment frequency; use reporting). When a proposed tariff is intended to replace an existing tariff, the collective could be asked to identify and explain any proposed material change, as well as any change which, while not necessarily material, may require some explanation so as to avoid unnecessary confusion (for example, a provision dealing with the transition from one tariff formula to another).

No explanation should be required when the existing and proposed tariffs are essentially identical. Neither should a collective be required to explain spelling corrections or wording changes that plainly do not affect the meaning of the tariff. That being said, what may seem obvious to some may be ambiguous to others. Board staff already conducts a comparative analysis of existing and

---

<sup>1</sup> A consideration that may be especially relevant when a collective that is subject to the s.70.1 (or general) regime decides to file a tariff rather than to issue individual licences.

proposed tariffs; it should be allowed to seek additional explanations from the collective before a proposed tariff is published in the *Canada Gazette*. Users should be allowed to ask similar explanations, through the Board until they file a formal objection and directly to the collective thereafter.

No further consensus exists as to the extent of the information a collective should provide with a proposed tariff.

Users favour more early disclosure. Some would require information such as: the underlying premise and purpose<sup>2</sup> of the proposed tariff; the rationale for the rate and structure of a new tariff or for the revisions to an existing tariff; and the manner in which the collective arrived at the proposed tariff (for example, if a rate was derived from similar foreign rates or other existing Canadian rates). Early knowledge of the collective's thoughts behind developing a tariff would help focus the debate, especially with respect to interrogatories, irrespective of how rigorous the underpinning reasoning may be.

Collectives are willing to provide general explanations with a proposed tariff; they raise practical and legal objections to providing anything more specific until later on. They doubt that anything would be gained by disclosing at the outset why the proposed rate was selected or how it was arrived at. Too detailed an explanation may disclose a collective's case long before it files its statement of case; this may put it at an unfair strategic disadvantage. Early disclosure of some information such as how the rate was developed may deny the collective the benefit of litigation privilege. The confidentiality of underlying data may be at issue; requiring early disclosure of sensitive information that a collective could have otherwise kept to itself may pre-empt legitimate strategic choices later on.<sup>3</sup> Disclosing the choice of proposed terms and conditions, while less prejudicial, may raise similar issues. Collectives should be asked to provide a general outline of approach, not specific reasons or explanations. Users should not be entitled to detailed disclosure at this stage. Anything more may require the collective to make its case well in advance of filing its statement and evidence.

One member of the Committee wished to state expressly that knowing about proposed tariffs is a shared responsibility. By statute, collectives bear the primary responsibility for communication (through the Board) with users and potential licensees. However, tariffs target uses that are copyright infringements unless licensed. It is up to users to obtain the necessary licence. Small users and individuals, who may not even realize that they need licenses, may deserve special attention. On the other hand, sophisticated users and repeat customers know that they require a licence and from whom to get it, that tariffs must be filed by a certain date, that they must be published in the *Canada Gazette* and that they are posted on the Board's website.

---

<sup>2</sup> To the extent that a tariff may have any purpose other than to set royalty rates so as to allow a collective to collect them.

<sup>3</sup> This point, and others in this Paper, raise the issue of whether, and to what extent, proceedings before the Board should parallel classical, civil adversarial proceedings. Since any move away from the civil adversarial model would require additional resources that the Board does not have, it would be premature and unproductive to attempt to address this issue here.

In the end, explanations about proposed tariffs should be provided on terms that are suited to each case, according to the purpose for which early explanations are being sought: to help focus the debate early on, to the extent possible, and perhaps to limit unnecessary and inefficient objections, without jeopardizing the collective's right to make its case in due course. These explanations are not intended to replace the collective's statement of case, or to commit a collective to a course of action before filing that statement.

At this time, it should be unnecessary, and may be counterproductive, to set out precisely what information should be provided or the format in which this should be done (e.g. a black-lined version of the preceding tariff). An indication, in the Directive on Procedure or other document, of the sort of information the Board wishes to receive should be sufficient for the time being.

Whatever explanations are required should be provided with the proposed tariff. The Board would then have the option to publish in the *Canada Gazette*, with the tariff, either the information it received or (if the information provided is too long to accompany the notice published with the proposed tariff) an overview of the explanations with a link to where the full information could be found. If only an overview is contemplated, the Board may wish to consult the collective on the wording of the text before it is published.

We do not recommend that the production of explanations be compelled through regulations. Were this done, an objector might rely on a non-compliant disclosure to argue that the filing of the tariff was incomplete or late, with the attendant loss of rights for copyright owners. Furthermore, making regulations is a long and demanding process, which would unnecessarily delay the implementation of the measure. To date, the Board has been able to impose procedural discipline without the help of regulations. It should be possible to ensure compliance with the requirement to produce explanations with the proposed tariff through discretionary, non-regulatory means. The Board should resort to regulations only if experience were to prove that this is the only means through which the provision of adequate explanations can be compelled.

We do not recommend that the explanations be binding on the collective. It is often difficult or impossible for a collective to fully understand what a tariff should be until it knows more about the users' business model. Often, this occurs only after the collective has received answers to its interrogatories. Consequently, for the time being at least, explanations should be provided on a without prejudice basis.

The Committee discussed a number of other issues which, at first, it considered related to the question of providing explanations for proposed tariffs, including:

- whether a collective should be allowed to amend the explanations provided with the tariff;
- whether, at some stage (e.g. once interrogatories are exchanged), a collective's explanations should become binding or could only be changed with leave from the Board;
- whether it may be easier to bind a collective to explanations dealing with a proposed subsequent tariff than to explanations dealing with a tariff of first impression;



- whether requiring leave of the Board to change explanations might be unfair to collectives or contrary to the *Act*;
- whether leave to change explanations should require cogent justification, or whether it should be granted unless there is a compelling reason to refuse;
- whether changes made after the end of the interrogatory process should result in allowing further interrogatories dealing with the changes;
- what would occur if, while a proposed tariff is the subject-matter of pending hearing, a collective filed a tariff for the same use in subsequent years with a different rationale.

These issues concern something other than what we propose that collectives be asked to provide. Changing the explanations provided with a proposed tariff and making changes to that tariff itself are different things. At issue here is whether a collective should provide explanations of a proposed tariff and if so, whether it should be allowed to add to or subtract from the explanations it provided *for that proposed tariff*. Whether, to what extent, and how a collective should be allowed to change a proposed tariff itself in the course of proceedings before the Board is a different matter.

In recommending that a collective be asked to provide some explanations of a proposed tariff, we do not wish to impede the collective's pursuit of its case, but to bring some focus early in the process. The time at which a collective commits to a course of action is and should remain when it files its statement of case. The request for early explanations is not meant to displace the timing of this commitment. Experience may show whether, how, when and to what extent explanations should be allowed to change or should become binding on the collective. For the time being, the Board should manage any evolution in the position of a collective on a case by case basis.

Some questioned whether explanations provided on a totally without prejudice basis may be of limited assistance. The Board should keep this in mind in assessing how matters play out in practice.

On a related issue, and as a matter of principle, users who already pay pursuant to a tariff should be at least advised when a collective proposes significant changes to that tariff. Before imposing such a requirement, however, collectives should be consulted on the feasibility and costs of doing so. For example, notice through the mail may be too costly; it may be preferable to require that only users who supplied an email address be advised of significant changes. This matter raises issues similar to those outlined in Part II-A above.

### **Recommendations**

6. A collective should be required to provide, with the proposed tariff, information about the content of a tariff of first impression and of the nature, purpose and ambit of any proposed material change to an existing tariff. Some of the information could be published with the proposed tariff in the *Canada Gazette*; all of the information should be posted on the Board's web site. This requirement should be enforced through "soft" compliance measures.

7. Information provided with the proposed tariff should not bind the collective. The time at which a collective commits to a course of action should remain when it files its statement of case.
8. Subject to the considerations raised in Part II-A above, collectives should be asked to notify existing users when a collective asks for significant changes to an existing tariff. Any such notice should also indicate how a user may object to the tariff

### **C- Early explanation by objectors of the purpose of their objection**

Currently, objectors only are required to inform the Board that they object to a proposed tariff; they need not explain why. Sometimes, objectors file boilerplate explanations. Less often, reasons are provided that are both specific and helpful. Too often, it is only later, when objectors file their statement of case, that the issues are identified and addressed in detail. As a result, collectives may have to prepare their case largely without knowing the objectors' views. Collectives may obtain relevant data through interrogatories, but still are left to their own devices to interpret that data.

Requiring, as recommended in Part II-B above, that collectives provide explanations with the proposed tariff, also justifies requiring that reasons to object to a proposed tariff be provided early in the process. As collectives, objectors should focus their positions as early as possible.

The nature and extent of the disclosure asked of objectors is necessarily a function of the requirement imposed on collectives in this respect. Users cannot be expected to offer detailed reasons for their objections if collectives provide only a broad overview of the reasons supporting a proposed tariff.

Some collectives consider that requiring explanations from objectors if collectives must do the same makes sense, and raises similar concerns.

Some users, on the other hand, argue that there is a fundamental difference in the dynamics of a tariff-setting proceeding as they affect collectives and objectors. These users maintain that collectives exist to file tariffs and collect and distribute royalties. The core business of most users is not to deal with a collective's repertoire; they do so only as an incident of delivering some other product or service. Proposed tariffs are filed at most once a year; a collective can use the intervening time to structure a justification for its next filing. Users must file objections within 60 days of a proposed tariff being published in the *Canada Gazette*, and may not hear about the proposed tariff until later on. They learn of any changes a collective may propose to a tariff only once it is published; they cannot anticipate them. Given the time available, an objector is much less likely than a collective to obtain significant expert input before filing an objection.

One solution may be to allow objectors to file their explanations separately from their objection, at a later date. Some users think that even with the additional time, objectors should not be asked for as much information as the collectives. For example, it may be unrealistic for an objector to propose an alternative tariff amount until a collective has filed its statement of case. Some collectives, on the other hand, are concerned that any material disparity in the explanations that

parties are required to provide would exacerbate the perceived unfairness described in Part II-B above.

The intent of asking explanations for an objection is the same as for asking explanations for a proposed tariff: to bring some focus early in the process, not to move ahead the time at which a party commits to a course of action. The most that can be expected of objectors is that they provide as much as they reasonably can without prejudicing their ability to make a case later on.

To the extent possible, an objection should be accompanied with a statement of the reasons therefor, including reasons to object to the terms and conditions of the tariff. The expectation for cogent reasons could be greater when a proposed tariff is identical to the current one: objectors who challenge the *status quo* should be expected to explain why. Objectors who require more time to articulate their reasons should be accommodated as needed.

In the same vein, an objector who intends to challenge an earlier finding of the Board should advise the Board and other participants of this as early as possible. Allowing a collective to rely, tentatively, on unchallenged earlier findings will avoid the perceived need to file extensive evidence to support them. For example, an established collective may be dispensed from filing much evidence to support the extent of its repertoire unless challenged on that point. If the objector raises the issue after the collective filed its statement of case, the collective should be allowed to file reply evidence on the issue.

Objectors should be encouraged, but not required to suggest alternatives to the proposed rate, structure, royalties or other terms and conditions, recognizing that such suggestions may not be possible until users have a fuller understanding of the collective's expectations and capabilities.

For the reasons set out in Part II-B above, we do not recommend that the production of reasons to object be compelled through regulations. To impose such a requirement on small users or new objectors would be especially inappropriate: the Board should continue to assist these users and to be flexible with them. Their contribution has proven valuable in the past; it should be encouraged. Lack of cooperation should be sanctioned through "soft" means currently in use before the Board. Ultimately, the Board could sanction egregious refusals to provide reasons for an objection by deeming that an objection had been abandoned, as is often done when an objector refuses to comply with an order of the Board.

As in Part II-B above, the reasons for objection and alternative suggestions should not be binding on the objectors. It would be unfair to impose such a requirement on objectors and not on collectives. As for collectives, an objector commits to a course of action in its statement of case.

### **Recommendations**

9. Objectors should be required to state in their objection the reasons therefor, either in their notice of objection or as soon as possible thereafter. They could be encouraged to suggest, to the extent possible, alternatives to the terms they find objectionable. This requirement should be enforced through "soft" compliance measures.

10. Reasons provided pursuant to Recommendation 9 should not be binding on the objector. The time at which an objector commits to a course of action should remain when it files its statement of case.

## **D- The collective's reply**

The *Act* entitles a collective to receive copy of objections and to reply to them. If, as we propose above, the collective has provided explanations of its proposed tariff and objectors have explained why they object to it, it becomes self-evident that the collective's reply should be as informative. Allowance should be made for the fact that a full reply to objections may not be possible until a collective has gathered information through the interrogatory process, and even as late as after objectors have filed their statement of case.

### **Recommendation**

11. A collective should be asked to provide as detailed a reply as possible to the objections it receives, on the same "without prejudice" basis as in Part II-B above. The same or similar "soft" measures outlined in Part II-B above should be used to enforce compliance with this requirement.

## **E- Sharing tariff explanations, objections and replies amongst participants and with the public**

As a rule, the Board's proceedings are open to the public. Consequently, as a principle, a collective's explanations for the proposed tariff, the objections thereto, the explanations for the objections, and the collective's replies should be made available to the public. Subject to an (improbable) confidentiality claim, the principle should always be applied strictly to information provided by artificial persons, be they collectives or objectors.

Objections filed by individuals acting on their own behalf<sup>4</sup> may raise legitimate privacy concerns. Generally, private information filed in court pleadings is freely available to the public, and increasingly so via the Internet. By contrast, federal tribunals, including the Board, may be required to protect the private information of individuals who object to a proposed tariff. Recent experience before other federal tribunals confirms that these concerns are heightened when personal information is made available on the Internet. Consequently, a tiered approach to privacy concerns may be necessary depending on whether the information is to be made part of the public record or to be posted on the Internet. Furthermore, the Board should look into all possible measures (advance notice that all objections are part of the public record, redaction of personal information) that will allow the widest possible publicity of all objections filed by individuals on their own behalf.

The preceding paragraph should not concern the sharing of personal information among parties to a proceeding before the Board. Subject to any order of the Board and to any requirement of the

---

<sup>4</sup> An individual acting on behalf of an artificial person is not entitled to raise privacy concerns.

*Privacy Act*, parties should receive information filed by other parties, including personal information, unredacted.

### **Recommendations**

12. As a rule, and subject to any requirement of the *Privacy Act*, all information filed with the Board pursuant to Parts II-B to D above should be supplied to all participants.
13. All information filed with the Board pursuant to Parts II-B to D above by anyone other than individuals acting on their own behalf also should be posted on the Internet.
14. The Board should identify the ways in which it can deal with privacy issues before making available to the public, on the Internet or otherwise, objections filed by individuals acting on their own behalf, with a view to providing the widest possible public access to information filed with the Board.

### **F- Requiring further explanations for a proposed tariff or an objection thereto**

Explanations to be filed pursuant to Parts II-B to D above are not expected to be as detailed as (for example) pleadings in a civil case. Therefore, allowing a party to seek actual particulars of these explanations would be too broad and not consistent with the purpose for which explanations are being sought.

On the other hand, there may be instances where a party can be asked to add helpful, available information to the explanations it provided earlier on without forcing it to commit to a course of action too early in the process. We are unsure as to how this can be achieved or as to which test (e.g. something similar to a lack of sufficient facts to plead) may apply. Therefore, we would recommend that, for the time being, such requests be dealt with on a case-by-case basis.

### **Recommendation**

15. Any request for information in addition to the information filed pursuant to Part II-B, II-C or II-D above should be dealt with on a case-by-case basis.

### **III- Interrogatory process**

Tariff proceedings do not move forward immediately after a collective has replied to objections: a schedule is set for each tariff proceeding, in which the interrogatory process usually is the first step. In a nutshell, the current interrogatory process before the Board is as follows.

Participants who are allowed to file evidence or to cross-examine witnesses (not those who only wish to file comments) are also allowed to address written interrogatories to each other. This usually occurs early on, at the very outset of a proceeding initiated by the Board, sometime after a collective has replied to objections. Interrogatories are not filed with the Board. The Board may direct interrogatories to a participant at any time during the process.

A person who receives an interrogatory is entitled to object to it based on a number of grounds: privilege, relevance, availability, burden of responding, etc. The Board rules on objections according to the process described in Part III-H below. The Board may rule on the appropriateness or relevance of an interrogatory on its own motion at any time.

Responses are served on the person who asked the interrogatory. They are not filed with the Board. The person who receives a response that it considers unsatisfactory can ask that the Board rule on the issue, according to the process described in Part III-J below.

The relevance, reliability and efficiency of the Board's current process for exchanging and responding to interrogatories have been questioned more than once. What follows are suggestions to amend it with a view to

- minimizing the burden on parties of disputing interrogatories, responding to interrogatories or disputing responses to interrogatories,
- streamlining and shortening the process of dealing with the interrogatories,
- reducing disputes among the parties concerning interrogatories,
- keeping the burden of the interrogatory process within reasonable limits, and
- addressing the fact that the existing interrogatory process is a bar to the participation of some entities as parties in Board proceedings.

Any attempt to streamline the interrogatory process must account for two objectives or values inherent in any proceeding before the Board. First, the Board and parties must have access to a record that is comprehensive enough to dispose of the matters at hand. Second, while the Board is master of its proceedings, parties should be allowed to present the case they wish to present, as long as they remain relevant.

This section does not address whether, how or to what extent the Board may assist the parties in obtaining relevant evidence from persons who are not a party to a proceeding.

### **A- Is there a need for any discovery before the Board?**

Some form of discovery is required before the Board. Users possess much of the information a collective needs to address issues that are relevant to the Board and on which the tariff will be based; waiting until objectors file their case before providing that information to a collective is not an option. Users need to know which relevant, existing information a collective possesses in order to adequately prepare; waiting until the collective files its case before providing that information to objectors would be inefficient.

### **Recommendation**

16. Parties should continue to be allowed to seek information from each other in advance of hearings.

### **B- Are interrogatories the appropriate form of discovery before the Board?**

Discovery can be oral or in writing. Before civil courts, the two-step process occurs after statements of claim and defence have been filed. First, parties exchange affidavits listing the documents they have in their possession that are relevant to the litigation. Then, parties have the opportunity to examine each other under oath for discovery.

The Board has opted for an interrogatory process. Participants address written questions to each other. Answers are in writing. There is no oral discovery.

The Board's decision to resort to interrogatories goes back to 1989, when it designed the Directive on Procedure for the first retransmission proceedings. The reasons that led the Board to make that choice still exist. To require the production of documents is less intrusive than to compel the testimony under oath of a person. The complexity of discovery in the context of a polycentric proceeding is exponentially greater than in most civil litigation. Questions raised before the Board generally are of a technical nature. The information required is largely documentary. For these reasons, a paper process seems preferable to an oral process.

Other regulatory tribunals, including the CRTC, favour interrogatories as a form of discovery. This would tend to confirm that interrogatories are suited in a regulatory context, including before the Board.

### **Recommendation**

17. Interrogatories should remain the preferred form of discovery before the Board.

### **C- Should interrogatories be exchanged and answered before or after issues are identified?**

The interrogatory process must occur before parties exchange statements of cases for the same reasons that a discovery process is needed before the Board in the first place: see Part III-A above. Occasionally, the Board has required that the parties file preliminary statements of issues before interrogatories are exchanged in order to help to focus the debate and to help clarify what will be relevant and what will not. The purpose of the process we propose in Part II is the same. We leave it for the Board to decide whether, in some instances, preliminary statements of issues may still help.

## **Recommendation**

18. As a rule, interrogatories should be exchanged, and the responses thereto provided, after a collective has replied to objections pursuant to s. 68(1)(a) of the *Act* but before any party is required to file its statement of case.

### **D- Should the Board participate in the interrogatory process before the date set to file objections to interrogatories and if so, how? How early should the Board provide case-specific guidance?**

The number of interrogatories collectives and objectors ask of each other can be in the hundreds. The burden of answering them can be considerable. Streamlining the interrogatory process requires that the issues to be addressed be identified, at least broadly and tentatively, before the parties exchange questions. Providing some explanations about the proposed tariff and the objections thereto, as we recommend in Parts II-B to D above, should help in this respect. Some involvement of the Board early on in the schedule of proceedings, during the interrogatory process, also could be of assistance. Parties may benefit from some certainty and guidance before they decide which questions to ask or whether to object to questions being asked of them. The parties may also appreciate knowing the issues the Board may wish to raise on its own.

Any identification of issues at this stage of the process is necessarily tentative. All that would be available then would be the broad, non-binding explanations provided pursuant to Parts II-B to D above. A meeting during which issues could be further identified, discussed and framed tentatively and during which the Board would provide an indication of its initial views on the relevance of, or its interest in, such issues may bring further helpful focus to the proceedings.

The Board's involvement in the interrogatory process should comply with the two objectives or values outlined in the introduction to Part III above: the need to confect a sufficiently comprehensive record and the parties' right to present their case as they wish. According to most members of the Committee, both principles dictate that the parties be free to pursue the interrogatories they wish, informed but not restricted by the preliminary discussions that may take place among themselves or with the Board.<sup>5</sup> The Board's involvement in the interrogatory process before questions are exchanged should be informal and informative, not directive or binding. The interrogatory process is a critical aspect of any proceeding before the Board. It involves some inherently strategic aspects, as does any form of discovery. Over-managing the process may prevent the parties from obtaining relevant and important evidence. The Board should not take for granted, this early, that it knows more about the issues to be decided than the parties do. Consequently, the Board should not get involved directly in drafting the parties' questions; neither should the parties be required to explain the relevance of a question, unless and until it is objected to.

---

<sup>5</sup> 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.



Where appropriate, the Board should convene a preparatory meeting between the parties and the Board (member(s) and/or staff)<sup>6</sup> after the collective has replied to objections and before interrogatories are exchanged. The purpose of the meeting would be to identify tentatively what the relevant issues appear to be and to discuss which 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. This meeting should occur irrespective of the Board's views concerning broader case management issues; these will be addressed later on, in another document.

For the time being, we would leave it to the Board to decide precisely how the preparatory meeting would unfold; with the parties' cooperation and input, the Board should experiment with the proper format and agenda. The parties and the Board may wish to exchange views in advance of the meeting about the issues that appear relevant to the proceeding, the type of information that may help in dealing with the issues and the possible sources for such information. Other matters, including the form in which information may exist, the relevance of earlier Board rulings, and how demanding the interrogatory process may be on parties with limited means,<sup>7</sup> could be addressed at this stage, if known to arise.

At this meeting, the Board could inform the parties of any issues it might wish to raise itself and of any information it might wish to obtain of its own motion. The Board would maintain its ability to raise issues and to seek information later in the process.

We expect that no directive or order would be issued following the meeting, unless specific rulings were required. The preparation and circulation of minutes, however, would ensure a common understanding of the issues identified and of any tentative conclusion reached. This could be prepared by the Board or tasked to one of the parties. Comments should be sought of all the participants before the Board finalizes the minutes.

To the extent possible, any involvement of the Board in the flow or design of interrogatories should not create additional delays. On the other hand, it must be recognized that any attempt at providing a tentative focus entails a risk that some relevant issues may only surface later on. Where this occurs, there may be a need to obtain additional information, possibly through supplementary interrogatories, with the attendant delays. Those situations should be managed on a case-by-case basis. Our assumption is that the additional burden that may result from the need to obtain further information in a few cases will be largely compensated by the efficiencies gained if focussing takes place routinely, saving time and money.

---

<sup>6</sup> In one member's view, the meeting should only involve staff, not members, especially so if minutes are prepared and endorsed by the parties. Staff can provide guidance without being directive; the minutes from such a meeting would merely document, without prejudice, any issue that may have been identified and any tentative consensus that may have been arrived at. Involving a Board member would almost necessarily result in some form of implicit suasion that would inevitably constrain the parties' ability to pursue the interrogatories they wish.

<sup>7</sup> The principle should remain that interrogatories can be addressed to anyone who is allowed to file evidence or to cross-examine witnesses.

## **Recommendations**

19. Parties should remain free to pursue the interrogatories they wish.
20. The Board should convene a preparatory meeting between the parties and the Board after the collective has replied to objections and before interrogatories are exchanged. The purpose of the 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. Minutes of the meeting should be prepared and circulated.

### **E- When should the Board rule on the relevance of a question? When, if at all, should it rule that a question, while relevant, concerns an issue that is either uninteresting or unhelpful?**

The Board necessarily rules on the relevance of certain questions at the interrogatory stage. Currently, this occurs when the Board rules on objections. At issue is whether, and to what extent, relevance can be addressed before interrogatories are exchanged.

For some, the Board should enjoy some latitude in the matter: dealing with relevance early may avoid exchanging questions that will not be allowed in the end. Others would prefer that the Board rule on relevance only when interrogatories are being objected to: this may promote better informed rulings. According to this second view, while a general discussion about the scope and content of interrogatories may help to focus issues, parties should not be foreclosed from asking any questions they wish, subject to the questions being ruled out as improper at the objection stage, for the reasons usually relied upon to do so. This should be the Board's preferred course of action.

The Board has sometimes advised parties that it did not wish to hear evidence that while relevant, the Board considered uninteresting or unhelpful.<sup>8</sup> Caution should be exercised in making such a ruling; this caution should increase if the ruling is being contemplated earlier in the process. When setting aside courses of analysis that are otherwise relevant, the Board implies that it better understands the issues than the parties do. Early determination of what the Board considers unhelpful may result in prejudging relevance at too early a stage. It may also breach procedural fairness.

It is one thing for the Board to rule, after reviewing the statements of case and evidence of the parties, that it does not want certain evidence to be presented or certain issues to be addressed. It is another to do the same early on, before the parties have been able to fully explore the issues and understand the facts that are material to the issues. A preliminary view that an issue need not be

---

<sup>8</sup> See the Notice of September 21, 2012 in the Re:Sound Tariff 8 file, in which the Board stated at a later stage that it did not wish to hear any evidence dealing with certain issues concerning the prevention of copying of sound recordings off the Internet, as it did not intend to include terms and conditions that were meant solely to prevent or restrict unauthorised copying of sound recordings.

canvassed may change once the Board has been presented with the evidence, some of which might have been obtained during the interrogatory process.

### **Recommendations**

21. As a rule, the Board should rule on the relevance of an interrogatory only when it deals with objections to interrogatories.
22. The Board should exercise caution before advising parties that it does not wish to hear relevant evidence that the Board considers uninteresting or unhelpful. Greater caution should be exercised if a ruling is being contemplated early in the process.

### **F- In instances involving more than one collective or objector, should interrogatories be consolidated? By whom?**

In a few past instances, the Board consolidated interrogatories before the parties were allowed to object to them. This process guaranteed greater uniformity in the wording of questions and eliminated duplications and even irrelevant information. It was also very demanding on Board resources. As a rule, the Board should not consolidate interrogatories.

Parties have since then consolidated interrogatories in many instances, on their own. Involving the Board in the development of interrogatory questions, as envisaged in Part III-D above, may lead to some other forms of consolidation. In some circumstances, the Board may consider ordering parties asking similar questions of the same person to consolidate their questions to that person so as to facilitate that person's task of responding. No further measures appear to be required in this respect.

### **Recommendations**

23. The Directive on Procedure should encourage, but not require, parties to consolidate their interrogatories in a single set, irrespective of the number of parties to whom the questions are being addressed.
24. A person being asked similar questions from two or more other parties should be allowed to apply to the Board for an order requiring these parties to consolidate their interrogatories.
25. As a rule, the Board should not consolidate interrogatories.

### **G- Who should receive a copy of the interrogatories?**

Currently, interrogatories are sent by the party who asks the question to the party who answers it. Other parties are not informed of the questions, unless parties share the information voluntarily; neither is the Board, unless required to rule on a dispute.

In theory, filing interrogatories with the Board could serve two purposes: to inform the Board of the nature and extent of the evidence being sought among the parties and to allow it to rule that a

line of questioning is irrelevant even though no one objected to the questions. In practice, the Board's persistent and express requests that it not be supplied with interrogatories seems to indicate that such filing would unnecessarily encumber the Board's files with irrelevant information. Unless the Board can identify real benefits from being informed of all interrogatories, we recommend the *status quo* in this respect.

### **Recommendation**

26. Subject to the comments about consolidation in Part III-F, above, interrogatories should continue to be exchanged only between the party who asks the question and the party who answers it.

## **H- Objecting to interrogatories**

Answering interrogatories imposes a burden on the party from whom the question is being asked. The burden should be imposed only if the question is relevant, the burden is reasonable and the question is otherwise legitimate. If only for that reason, the party to whom an interrogatory is addressed should continue to be allowed to object to the question.

Currently, the party who contemplates objecting to a question must first attempt to resolve the issue with the party who addressed the interrogatory. This requirement should be maintained. Many issues have been resolved through this process without the need for the Board to intervene.

The process for dealing with objections to interrogatories raises three issues. Who should inform the Board of the need to deal with a dispute and after which steps? How should the information required to deal with the dispute be presented to the Board? In which format should the Board rule on the dispute?

Currently, the party asking the question provides to the Board and to the objector the interrogatory, the statement of objection and the grounds for asking that the question be maintained. The party being asked the question is not afforded the opportunity to reply to the reasons offered in support of the question being maintained.<sup>9</sup> This opportunity should be afforded. The proper sequence of events in dealing with an objection would then be as follows:

- A addresses an interrogatory to B;
- B informs A of objection;
- A and B attempt to resolve the issue;

---

<sup>9</sup> When the process was designed, in 1989, the Board probably expected that the parties would learn enough of each other's point of view during the attempt to resolve the issue giving rise to the objection so as to make it unnecessary to afford a right of reply. This not how things worked out in practice. Indeed, the party objecting to a question sometimes has taken it upon itself to file a reply in any event.

- if the issue remains unresolved, A prepares a formal response to the objection;
- B prepares a formal reply to A’s response.

Adding a reply stage should not extend the objection process by more than a week, while ensuring that the Board has available a full set of arguments before ruling on an objection.

The Board is not informed that a dispute exists concerning an interrogatory until all the information required to deal with it is available; this avoids the Board having to correlate documentation. In such a process, the party who creates the last element of relevant information (here, the reply) should provide the Board with all the relevant documentation. Under the process we recommend, that would be the party objecting to the question.

The Directive on Procedure does not set the format used to communicate to the Board the information required to deal with an objection to interrogatory. Sometimes it is presented sequentially, in text form. At other times, it is presented in the form of a table. This lack of uniformity adds unnecessarily to the Board’s burden in dealing with objections. During the most recent commercial radio proceedings all deficiency complaints were submitted in the form of a table, in Excel format. This approach proved easier for the parties and for the Board.

Board rulings in these matters do not include the text of the disputed interrogatories; as a result, determining the precedential value of a ruling involves some reverse engineering. This would no longer be the case if the table used to communicate the information the Board requires to deal with a disputed interrogatory contained an additional column in which the Board would enter its ruling, similar to what Ontario Form 37C provides for undertakings: see Appendix C. Ruling on disputed interrogatories in this format would be simpler for the Board and would also make it significantly easier for parties to search for relevant precedents.

### **Recommendations**

27. A party who is asked a question should continue to be allowed to object to it. The requirement that parties first attempt to resolve the issue should be maintained. The party proposing the interrogatory should continue to be required to explain the relevance of the question. The party being asked the question should be allowed to reply to the explanation.
28. The party who objects to an interrogatory should file with the Board, at the time it files its reply, the information required to deal with the objection.
29. The information required to deal with an objection should be filed in the form of a table that includes a column in which the Board will enter its ruling. Rulings on objections to interrogatories should be issued in that form; as all other rulings of the Board, they should be part of the public record and put on the Board’s web site.

## **I- Who should receive responses to interrogatories?**

Currently, responses to interrogatories are provided by the party who answers the question only to the party who asked the question.<sup>10</sup> Other parties are not informed of the responses unless parties share information voluntarily (subject to any confidentiality issues) or until (and to the extent that) they are made part of the record of the recipient; neither is the Board, unless required to rule on a dispute.

We see no reason to change this situation. Providing a response that is not required as part of the record may raise unnecessary confidentiality issues and would encumber the Board's files with irrelevant information.

One member of the Committee suggested that the Board consider requiring a responding party to swear an affidavit to the effect that the responses and documents provided represent all of the information reasonably available to them and responsive to the question. This might impose further discipline on the parties in terms of providing adequate responses at the outset of the process rather than only when compelled to provide further and better responses later on.

### **Recommendation**

30. Only the party who asked an interrogatory should receive the response to it, as is currently the case.

## **J- Dealing with deficient responses to interrogatories**

As parties should continue to be allowed to object to interrogatories, they should continue to be allowed to complain about the sufficiency of a response to an interrogatory.

The process for dealing with potentially deficient responses raises the same issues as the process for dealing with objections, discussed in Part III-H above. Who should inform the Board of the need to deal with a deficiency claim and after which steps? How should the information required to deal with the deficiency claim be presented to the Board? In which format should the Board rule on deficiencies?

The same reasoning applies here as in Part III-H above. The party who contemplates complaining about the sufficiency of a response should continue to first attempt to resolve the issue with the person who provided the answer. The person who challenges the sufficiency of a response should be afforded a right of reply. That person should then provide to the Board, in table form, the information it requires to rule on the matter. Where the response alleged to be deficient concerns a question that was objected to, this should be clearly indicated; possibly, the information needed to deal with the deficiency claim could be added to the table used to deal with the objection to the question.

---

<sup>10</sup> Responses to joint interrogatories go to all joint questioners.

### **Recommendations**

31. A party who asked a question should continue to be allowed to challenge the sufficiency of the response to that question. The requirement that parties first attempt to resolve the issue should be maintained. The party who provided the answer should continue to be required to explain why it considers the response sufficient. The party asking the question should be allowed to reply to these explanations.
32. The person who claims a response is deficient should be the person who files with the Board, at the time it files its reply, the information required to deal with the deficiency claim.
33. The information should be filed in the form of a table that includes a column in which the Board can enter its ruling. Rulings on deficiency claims should be issued in that form; as all other rulings of the Board, they should be part of the public record and put on the Board's web site.

### **K- Are the principles the Board uses to deal with interrogatories sufficiently clear? Should they be organized and communicated in the form of guidelines? In another form?**

All orders of the Board dealing with interrogatories are now posted on the Board's web site. However, the information remains difficult to search (e.g. by themes, for precedents).

The Board intends to create a database of interlocutory orders which may have value as precedents. This will help the parties to better understand the principles the Board uses in dealing with interrogatories. The same will be true if the Board decides to issue orders dealing with disputed interrogatories and deficiency claims in the form we propose in Parts III-H and III-J above.

In addition, the Board should consider developing, over time, guidelines governing the interrogatory process. These guidelines would identify, for example, the types and amount of information that would generally have to be disclosed in response to interrogatories. Guidelines may help to reduce disputes over interrogatories and may provide additional predictability in the process. Since the Board cannot constrain its own discretion through the automatic application of its earlier decisions, the guidelines would not be binding on either the Board or the parties.

### **Recommendations**

34. The Board should pursue the creation of a database of orders of precedential value, including rulings that deal with interrogatories.
35. The Board should consider developing more specific guidelines dealing with the interrogatory process.

## **L- Generating new documents in response to an interrogatory**

The Board rarely requires that new documents be created in response to an interrogatory. In principle, a responding party only need provide what it has, in the form it exists.<sup>11</sup>

The Board probably has the power to require that a party provide information in a form other than that in which it exists.<sup>12</sup> However, we see no reason to derogate from the current principle. It has served the Board and parties well. In the few instances where this appeared necessary, the Board did abandon the principle and ordered the generation of relevant information.

### **Recommendation**

36. The current principle according to which a responding party provides what it has, in the form it exists, should continue to apply.

## **M- Should discovery extend to all that may be relevant? Should the Board limit discovery to what it expects to be necessary to arrive at a fair tariff?**

The Board does not always ask that all relevant information be provided. It sometimes only requires that a reasonable amount of relevant information be provided. The underlying principle is that the Board is not the arbiter of the truth; while the record must be comprehensive enough to dispose of the matters at hand (see the introduction to Part III above), the Board only requires as much relevant information as is necessary to arrive at a fair tariff. This accords with the principle of proportionality now applied in civil proceedings. There is no reason to change this.

### **Recommendation**

37. Where appropriate, the Board should continue to limit what a party must provide in response to an interrogatory to only as much relevant information as is necessary for the Board to arrive at a fair tariff.

## **N- Should the interrogatory burden vary according to the importance of the amounts at issue? The importance of an objector's stake? The significance of a party's resources?**

The principle of proportionality now is an important factor in determining the scope of discovery

---

<sup>11</sup> Parties are free to generate new information or to compile information into a new format and to file it with their statement of case, as part of their evidence.

<sup>12</sup> See e.g. *Interprovincial Pipe Line Limited c. National Energy Board*, [1978] 1 F.C. 601 (C.A.). At issue was whether the NEB had statutory authority to order the preparation and filing of information in a documentary form that is not already in existence. (605i) Like the Copyright Board, the NEB may act of its own motion. (604a) The Court concluded that the power to determine the kinds of information it requires and the form in which it requires it was necessary to the effective exercise of the NEB's jurisdiction (606c, 606i) and that given its necessity, the power existed by necessary implication. (608b) Given the similarities that exist between approving pipeline tariffs and certifying tariffs for the protected use of a copyright subject matter, this precedent seems particularly relevant.



and production before civil courts. In some past instances, the Board has intervened in the interrogatory process to lighten the burden of parties with limited means (the so-called small users) in answering interrogatories being addressed to them. On the other hand, fairness requires that there must be sufficient evidence before the Board to allow it to arrive at a fair tariff. This applies even to small users.

One issue is whether the Directive on Procedure should expressly mention that the Board can accommodate the needs of small users at the interrogatory and other stages. Such a mention would clearly communicate that such accommodations should not be viewed as special treatment. On the other hand, such a mention may leave the impression that small users enjoy special rights and would not address the consideration that should be given to adapting proceedings to the needs of collectives with limited resources. Some members of the Committee are of the view that accommodations made available to small users should also be available to collectives with a small but growing repertoire, and with limited resources.

The Board allows anyone to file comments about a proposed tariff. Persons who file comments do not participate in the interrogatory process. Filing comments may allow sufficient participation for some potential objectors with limited means. When such an objector does have evidence and argument to present that is useful or necessary for the Board to reach a fair tariff, the Board may consider adapting the process so as to ensure participation that is both effective for the user and fair to other participants.

The process may also need to be streamlined in instances where the amounts at stake are modest. Interrogatories addressed by a small user sometimes may impose on a collective a burden that is out of proportion with the amounts at stake.

### **Recommendation**

38. Consideration should be given to how and to what extent the interrogatory process should be tailored to the importance of the amounts at stake as well as the resources of the parties involved.
39. In appropriate instances, the Board may wish to recommend to objectors with limited means that they use the comments provision of the Directive on Procedure to communicate their point of view to the Board.
40. The Board should ensure that the interrogatory burden of any party, including a collective, is not out of proportion with the amounts at stake.

### **O- How should the Board deal with excessive filings of responses to interrogatories with statements of case?**

Some parties file all the interrogatory responses they receive, whether or not they intend to rely on them. Others file some that are not required to make their case, possibly to ensure that these responses are part of the record if needed during cross-examination or argument. This evidence often ends up being irrelevant to the issues the Board has to address. The Board and the parties may

be prejudiced in having to deal with such excessive filings. Board panel and staff review all information filed with a party's statement of case. Reviewing unhelpful information takes time and can result in confusion. Involving the Board in the interrogatory process, as proposed above, could help reduce the extent of irrelevant responses by helping the parties and the Board to focus on the core issues: it will not however eliminate all such irrelevant filings. Correlating evidence with the relevant passages in the statement of case helps considerably, yet it is logically impossible for a party to correlate, with its statement, evidence on which it does not intend to rely.

Section B.9 of the Model Directive on Procedure may have encouraged this practice, by providing that the filing of documents during a hearing be kept to a strict minimum. Even the addition of a paragraph to section B.9 of the Directive, specifying that participants were authorized to refer to a response that was not filed as part of their evidence if this became necessary as a result of the testimony of an opposing witness, for the purposes of cross-examination or rebuttal, did not stop the filing of irrelevant responses to interrogatories.

One way to ensure that the record contains only interrogatory responses that are relevant to the parties' case may be to modify the Model Directive on Procedure with respect to the filing of cases and filing of evidence during a hearing. These modifications would provide greater assurance with respect to the possibility of filing evidence with the Board, even during the hearing.

Members of the Committee were unable to agree on the extent to which a party should be allowed to rely on interrogatory responses that were not filed with a party's statement of case. Some members would insist that all responses likely to be referred to, even in cross-examination, ought to be filed in advance. Others consider that a party should be allowed to file a response to an interrogatory at any time in evidence or argument: a person should expect that anything she provided may be used to contradict that person's later statements. One member would not accept recommendations 41 and 42 unless that were true.

Having said this, any flexibility so afforded should be limited in such way as not to cause prejudice to other parties. Parties should still be expected to file all evidence on which they reasonably expected to rely during the hearings; parties should not withhold evidence from their statements of case or surprise other parties later in the proceeding. The requirement that the statement of case be relatively exhaustive as to the case the party intends to make and as to the evidence on which it intends to rely in doing so should remain in full force.

Parties cannot be expected to comply with any request about the extent to which responses to interrogatories should be made part of the evidence unless the Board's ruling on the issue are consistent. Generally speaking, the Board has been quite generous in allowing additional evidence to be filed during a hearing. In one recent instance, however, a collective was not allowed to rely during argument on a response that had not been made part of the record.

In the end, parties should be admonished to file with their statement of case all the evidence on which they expect to rely, and only that evidence. To the extent that this is not already the case, the Board may wish to insist that parties fully correlate the evidence they file with their statement of case.

## **Recommendations**

41. Parties should file with their statement of case all the responses to interrogatories on which they expect to rely, and only those responses.
42. Parties should fully correlate the responses they file with their statement of case.
43. The Directive on Procedure should clarify that the extent to which a party is authorized to rely on a response that was not filed with its statement of case during the course of a hearing. However, the Committee was unable to agree on what that extent ought to be.

## **Additional note**

One member of the Committee, while appreciating the need for caution in reforming the process, expressed concern about whether the report's recommendations will truly assist the Board in having more efficient and more productive procedures and processes. In particular, the member was uncertain that the recommendations with respect to interrogatories fulfill its objectives: to minimize the burden on parties, to streamline the process, to reduce disputes among parties or to remove potentials bar to participation. Half the recommendations propose keeping the status quo. Others (e.g. who files disputes with the Board, adding a right of reply), while reasonable, may not contribute to the stated objectives of Part III of the report, and in particular "the fact that the existing interrogatory process is a bar to the participation of some entities as parties in Board proceedings."

Another member was of the view that the discussion paper, even if implemented fully, will have a minimal effect on the problems the Committee was asked to address. The recommendations, taken as a whole, do not really address the expressed need to streamline the Board process in order to shorten the time to get tariff matters completed. In fact, as a result of some recommendations (requiring non-binding explanations, meetings with Board staff at an early stage, addition of a reply stage for interrogatory objections), the process may be lengthened and may become more expensive. The interrogatory process has not been changed in any meaningful way, the recommendations will do little or nothing to reduce the size, scope or burden of interrogatories. In this member's view, while members of the Committee invested much time and skill in the process leading to this discussion paper, perhaps the nature of the collaborative process inherent in such Committee work necessarily meant that bold initiatives were unlikely or impossible.

**APPENDIX A**

**MEMBERS OF THE WORKING COMMITTEE ON THE OPERATIONS,  
PROCEDURES AND PROCESSES OF THE COPYRIGHT BOARD**

Mr. Glen Bloom  
Senior counsel, Osler (Ottawa)

Mr. Casey Chisick  
Partner, Cassels Brock (Toronto)

Mr. Mark Hayes  
Hayes eLaw (Toronto)

Mr. David Kent  
Partner, McMillan (Toronto)

Mr. Gerald (Jay) Kerr-Wilson  
Partner, Fasken Martineau (Ottawa)

Ms. Colette Matteau  
Matteau Poirier avocats (Montreal)

Mr. Marek Nitoslawski  
Partner, Fasken Martineau (Montreal)

Ms. D. Lynne Watt  
Partner, Gowlings (Ottawa)

Facilitator: Mr. Mario Bouchard  
(Ottawa)

## **APPENDIX B**

**June 13, 2013**

### **WORKING COMMITTEE ON THE OPERATIONS, PROCEDURES AND PROCESSES OF THE COPYRIGHT BOARD**

#### **Terms of reference**

An ad hoc Committee has been established, with the participation of a representative number of senior counsel who appear regularly before the Board.

Viewed generally, the mandate of the Committee is to act as a forum through which the Board, collectives and copyright users can exchange on the operations, procedures and processes of the Board, so as to make the Board's work, and the participation of collectives and users in Board proceedings, more efficient and more productive.

Without limitation, the Committee is asked to review the various steps of proceedings before the Board so as to determine how they can be made more efficient and productive, and to propose how these new, more efficient approaches should be implemented and communicated.

The Committee is also asked to suggest tools (e.g., database of precedential and other important rulings) that could be made available to the public so as to improve access to Board decisions and help focus applications based on earlier rulings in similar matters.

The Committee may also be asked to address any other matter.

The members of the Committee will work with Board staff and will consult with other counsel and participants in Board proceedings, as necessary, to formulate recommendations for improving the hearing processes of the Board.

The manner of exchange usually will be the presentation of written recommendations to the Vice-Chairman and CEO, generally in the format: issue; considerations; recommendation; proposed timelines.

#### **First identification of issues to be addressed by the Committee**

As a starting point, the Committee has identified a number of issues it intends to address. This list is not meant to be exhaustive. Issues are presented in no particular order as to their relative importance.

#### *Publicizing proposed tariffs*

Currently, tariffs are only published in the *Canada Gazette* and on the Board's website. Is this sufficient? Which other forms of publicity could be used? Who should pay for this?

*Early explanation by collectives of the content of a proposed tariff*

Currently, proposed tariffs are published without any explanation of what the proposed tariff (or changes from the previous tariff) is meant to achieve, whom / what it targets, how the rate was arrived at, why the proposed terms are useful / important / necessary. Is it possible to require collectives to provide such information? At the gazetting stage? After gazetting but early in the process? How much can a collective be asked to provide on a first tariff, on subsequent tariffs? Should these explanations be binding on the collectives, and to what extent?

*Early explanation by a collective of the content of a proposed licence*

When a collective asks the Board to arbitrate the terms of a licence, is the information that collectives currently provide on the proposed licence sufficient? Should more detailed information be provided when the licence application is filed? How much can a collective be asked to provide on a first licence, on subsequent licences? Should these explanations be binding on the collective, and to what extent?

*Objectors (including users targeted in a licence arbitration application)*

Currently, objectors only are required to inform the Board that they object to a proposed tariff or licence. Should objectors state their reasons to object when they file their objection? After they filed their objection but early in the process? Should these reasons be binding on the objectors, and to what extent?

Should objectors be required to suggest alternatives to the proposed tariff / licence structure, royalties, other terms and conditions early in the process? Should these suggestions be binding on the objectors, and to what extent?

Some objectors file objections as a matter of course, only to withdraw them at a later stage (e.g., interrogatories). Should these objectors be identified early in the process and if so, for what purpose?

Should the Board deal differently with small users? With users (large or small) whose stakes are low?

*Interventions, letters of comment*

Should the Board continue to allow the participation of intervenors? Should the participation of intervenors be allowed in arbitrations? How should their participation be framed? Should such participation be facilitated or extended?

What are the advantages and disadvantages of allowing interventions only with full participatory rights? Of allowing other forms of participation?

How should the Board deal with letters of comment?

### *Interim tariffs*

The Board has established a series of principles for dealing with applications for interim tariffs and licences. Are these principles adequate? Sufficient?

Currently, the Board rarely, if ever, sets an interim tariff / licence in inaugural proceedings. What would be the advantages and disadvantages of setting such tariffs / licences? Would it allow collectives to develop relationships with users at an early date? Eliminate some difficulties of enforcing tariffs / licences retroactively? Alert users to the existence of the proposed tariff earlier? If such tariffs / licences were set, should they be nominal?

### *Dealing with proposed tariffs that are unopposed or agreed upon*

Currently, the certification of tariffs that are unopposed or agreed upon can take considerable time. Can the process be streamlined? Should the Board consult widely on tariffs that are unopposed or agreed upon? Should it consult at all? Should the timelines for analysis and consultation be clearly framed?

### *Consolidation of proceedings*

Are the Board's policies on the consolidation of proceedings adequate? Are they sufficiently clear?

### *Scheduling*

Currently, proceedings are triggered by the Board, usually at the request of one or more parties. The schedule and order of proceedings is the subject of some discussions before the Board finalizes it. Should the process to perfect the file be separate from scheduling the hearing? Should the timetable to perfect the file be automatically triggered by an event (e.g. the date set to file objections)? Alternatively, should the Board adopt a schedule template for tariff proceedings? For arbitrations?

Currently, a year or more may elapse between the scheduling of a matter and the hearing. Should timelines be shortened? Can they be? Note that the goal of the Federal Court is to schedule trials in IP matters within two years of the commencement of an action. The Court is at present meeting that goal.

### *Focussing early on core issues*

Should the Board help the parties identify core issues and if so, how early in the process? Should this be done by Board staff? By a Board member (and if so, should this impact the ability of the member to sit on the decision making panel)? By the decision making panel?

Should the Board engage in case management, flow management or issue management? Should pre-hearing conferences be used more systematically? For what purpose?

### *Interrogatories*

Are interrogatories the appropriate form of discovery before the Board? Is there a need for any discovery before the Board?

Should the Board get involved in the interrogatory process before the date set to file objections to interrogatories and if so, how? How early should the Board provide case-specific guidance?

Is it possible to reduce the interrogatory burden while keeping the process fair and providing the parties and the Board with enough information to arrive at fair tariff / licence?

Should the interrogatory burden vary according to the importance of the amounts at issue? The importance of an objector's stake? The importance of an objector's resources?

Are the principles the Board uses to deal with interrogatories sufficiently clear? Should they be organized and communicated in the form of guidelines? In another form?

Should discovery extend to all that may be relevant, or should it be limited to what the Board expects to be useful?

Is the amount of responses to interrogatories currently filed with statements of case excessive? If so, how should the Board deal with this?

In instances involving more than one collective or objector, should interrogatories be consolidated? By whom?

### *Confidentiality issues*

Confidential information is filed as a matter of course in Board proceedings. Is the current confidentiality order adequate? Should the Board establish a set of principles for dealing with confidentiality issues before, during and after a hearing?

Currently, information received in response to an interrogatory is treated as confidential as soon as the person supplying the information claims it is. Is this appropriate? How should the Board deal with confidential interrogatory responses that are then put on the record?

### *Privilege (Solicitor/Client; Litigation)*

Are the principles the Board applies to claims of privilege clear? Are they appropriate? Should they be consolidated in a single document?

Should the Board apply the law on privilege strictly in all cases? In some cases?

### *Expert witnesses*

Is the Board's policy not to qualify witnesses appropriate?



Is the manner in which the Board deals with expert testimony / hearsay evidence from people “in the know” adequate?

Should the Board experiment with hearing expert evidence concurrently (“hot-tubbing”)?

*Other Procedural Issues*

Are statements of case sufficiently detailed?

Are witness statements sufficiently detailed?

Are the Board’s policies concerning the order in which parties present their case adequate? Are they clear?

Is the current format (case in chief, response, reply) appropriate? Are there instances where another presentation format (e.g., all cases in chief filed at the same time, with one right to respond) ought to be used?

Should final arguments be delivered orally or in writing?

*Legal issues*

Is the manner in which the Board deals with legal issues adequate? Should parties be required systematically to identify potential legal issues in advance of a hearing? Should they be required to file a legal brief separately, or should legal issues be dealt with in the statement of case?

*Consultations on administrative provisions*

Is the process used to deal with administrative provisions adequate? Is it timely?

*Directive on procedure*

Is the standard directive on procedure adequate? Is it sufficient? Should it be supplemented by other guides, procedural or otherwise?

*Rulings database*

Would a database of Board rulings on interlocutory matters (scheduling, interrogatories, applications to intervene) be useful? If so, how should it be organized? By whom (participation of the private bar)?

**APPENDIX C**

**ONTARIO FORM 37C**

FORM 37C

*Courts of Justice Act*

**REFUSALS AND UNDERTAKINGS CHART**

*(General heading)*

**REFUSALS AND UNDERTAKINGS CHART**

<b>REFUSALS</b>					
Refusals to answer questions on the examination of ....., dated .....					
<b>Issue &amp; relationship to pleadings or affidavit</b> <i>(Group the questions by issues.)</i>	<b>Question No.</b>	<b>Page No.</b>	<b>Specific question</b>	<b>Answer or precise basis for refusal</b>	<b>Disposition by the Court</b>
1.					
2.					
3.					

<b>UNDERTAKINGS</b>					
Outstanding undertakings given on the examination of ....., dated .....					
<b>Issue &amp; relationship to pleadings or affidavit</b> <i>(Group the undertakings by issues.)</i>	<b>Question No.</b>	<b>Page No.</b>	<b>Specific undertaking</b>	<b>Date answered or precise reason for not doing so</b>	<b>Disposition by the Court</b>
1.					
2.					
3.					

*(Date)*

*(Name, address and telephone and fax numbers of the party filing the refusals and undertakings chart)*