



March 3, 2015

*[CB-CDA 2015-008]*

**File: Television retransmission (2014-2018)**

### **RULING OF THE BOARD DEALING WITH DEFICIENCY MOTIONS**

**FWS3:** With respect to the issue pertaining to the sample, the BDUs' motion is dismissed. FWS provided an explanation. With respect to the identification of the programming, the motion is sustained. The interrogatory asked for total annual revenues with respect to each member in the sample. The parties were unable to agree on a sample. Had they been able to, the identity of the member league (and that of its programming) would have been known. The fact that FWS provided revenues which it claims are associated with programs that generate 70 per cent of FWS's members distant viewing is beside the point. FWS shall break down by member the revenue information it provided to the BDUs.

These motions pertain to the fact that the parties could not agree on a sample. The parties should have alerted the Board to this fact. As it often has in the past, the Board would have resolved the issue and these deficiency motions would likely not have been necessary.

**CCC3, CCC4, CCC5, CCC8, CCC9:** The motion is dismissed. CCC provided what it had. That being said, the Board is not surprised that CCC's affiliates did not provide any information. Contrary to what CCC asserts, the letters that CCC sent to its affiliates did not require that they provide the information sought by the BDUs. Rather, the letters indicated that providing the information was voluntary. In the future, the Board will expect that CCC be more compelling in its approach with its affiliates and that the threshold for CCC to conclude that significant efforts have been made will be much higher.

**BBI4, BBI5, BBI7, BBI11, BBI12, BBI14, BBI15:** The motion is dismissed. BBI has made reasonable efforts. The interrogatories have been answered.

**BBI6, BBI13:** The motions are dismissed. BBI has made reasonable efforts. With respect to providing the next best available information, the motion is also dismissed. The interrogatories have been answered.

**BBI10:** With respect to the sample of stations that provided responses, the motion is dismissed. BBI made reasonable efforts; the interrogatory has been answered.

With respect to the fact that in some cases only a sample of agreements were provided, the motion is sustained. BBI was ordered to provide a copy of the agreements that authorized the sample stations to broadcast the programs; it was not ordered to provide a sample of those agreements. BBI shall provide a copy of all agreements related to the programs broadcast on the sample stations during the sample periods.

With respect to the BDUs' motion regarding confidentiality, the motion is sustained. BBI shall provide the BDUs with a copy of the agreements that have been withheld on the basis that they are confidential. BBI has deliberately chosen to ignore section B.2 of the Directive on Procedure – which the Collectives were reminded of on January 7, 2015. The Directive provides that the fact that information is claimed to be confidential is not a reason for refusing to answer an interrogatory. What is feared is the harm that could be caused by the disclosure of commercially sensitive information. This is a legitimate reason for designating the information as confidential or highly confidential, thereby making its disclosure governed by a confidentiality order, not for retaining the information. The Confidentiality Order issued on August 12, 2014 provides the appropriate safeguards against the misuse of commercially sensitive information.

**CRC5:** With respect to the sample, the motion is dismissed. CCC made reasonable efforts; the interrogatory has been answered.

With respect to information that has been redacted, the motion is sustained. CRC shall provide forthwith unredacted documents for the reasons that follow.

In its ruling of May 6, 2014, the Board stated, with respect to, *inter alia*, CRC5, that:

“Confidentiality is not a reason to object to an interrogatory; Collectives shall refer to the Directive on Procedure. The Board fails to see in what manner the requested information is proprietary information. Collectives shall provide a reasonable sample of agreements from a variety of markets across Canada”.

On January 7, 2015, the parties were again reminded of section B.2 of the Directive, which provides that the fact that information is claimed to be confidential is not a reason for refusing to answer an interrogatory. The Confidentiality Order issued on August 12, 2014 provides the appropriate safeguards against the misuse of commercially sensitive information.

Moreover, CRC relies on the rulings of the Board in the context of objections to interrogatories. They argue that the Board ruled that the information sought in CRC2, on which CRC5 is premised, is irrelevant. Apart from the fact that this is not the place to reargue the objections to interrogatories, which have been disposed of, this is inaccurate. CRC5 is clear. It requires that a sample of agreements be provided, not that the identity of affiliates is irrelevant.

Finally, the BDUs are not seeking to expand the scope of the interrogatories. This is not a situation where a party is seeking through motions for deficiencies to rephrase or add to an interrogatory that should have been better phrased initially. Rather, this is the case where it was reasonable to expect that the agreements, which contain information on affiliates and their programming, would not have been redacted. The Board agrees with the BDUs that the redaction makes it difficult to conduct a meaningful analysis of the value of programming on each of the various platforms covered by the interrogatory.

**CRC8, CRC9, CRC10:** The motion is sustained.

First, the fact that the BDUs did not accept CRC's proposal on the manner to respond to the interrogatories and instead made a counter-proposal, which was accepted by CRC, is irrelevant.

Second, the reasons why responses were not provided for 8 of the 12 programs are twofold, namely the fact that some titles were not in CRC's repertoire and the fact that some of the titles were not aired during the sample periods. As for the former, while the Board understands that the repertoire is not final until the research process is complete (hence the “disclaimer”), it fails to see

why the consequences of this should be borne by the BDUs. As for the latter, CRC6 asked for a list of programs represented by CRC that were aired during two sample periods. The fact that CRC did not provide information on the basis that those titles were not aired during the sample periods is a result of CRC not providing an accurate answer in response to CRC6, on which CRC8, CRC9 and CRC10 are premised. Again, the Board fails to see why the BDUs should bear the consequences of CRC's inaccurate answers.

Consequently, CRC shall replace the eight programs for which it did not provide responses with an equivalent number of programs that are part of its repertoire and that have been aired during the sample periods, and shall provide responses to the interrogatories in respect of those programs. The BDUs and CRC shall agree on such eight programs, to be selected from the list provided in response to CRC6.



Gilles McDougall  
Secretary General