

February 5, 2016

[CB-CDA 2016-011]

NOTICE OF THE BOARD

The Board acknowledges receipt of the correspondence from Mr. Kent dated February 1, 2016 and accepts the parties' proposed timing and format for the written submissions in this matter.

The parties should also provide the Board with an outline (of no more than 3 pages) of the issues as they will be addressed during oral arguments.

The Board requests the parties to file stand-alone legal briefs by no later than **Friday, February 26, 2016**. Reply submissions may be filed no later than **Tuesday, March 15, 2016**.

In particular, the briefs should address the following issues:

1. Whether the principle of *non ultra petita* finds any application in this case, as a result of the change in the proposed royalty rates during the process of the case. Furthermore, Parties should explain whether or not the change in proposed royalty rates raises issues of procedural fairness, particularly for non-participants who may nonetheless be affected by the tariff. In the event procedural fairness is an issue, how can the Board proceed to remedy the situation?
2. The *Retransmission Royalties Criteria Regulations* (SOR/91-690) were enacted pursuant to former section 70.63 of the *Copyright Act* which read in part as follows:

70.63 (1) Certification

On the conclusion of its consideration of the statements of royalties, the Board shall

(a) establish, having regard amongst others to the criteria established under subsection (4),

(i) a manner of determining the amount of the royalties to be paid by each class of retransmitter, and

(ii) such terms and conditions related to those royalties as the Board considers appropriate;

(b) determine what portion of the royalties referred to in paragraph (a) is to be paid to each collecting body;

(c) vary the statement accordingly; and

(d) certify the statements as the approved statements, whereupon those statements become for the purposes of this Act the approved statements.

[...]

70.63 (4) Criteria

The Governor in Council may make regulations establishing criteria to which the Board must have regard in establishing under paragraph (1)(a) a manner for determining royalties that are fair and equitable.

Section 70.63 has been repealed and replaced in the statute in 1997 by a much broader regulatory power under section 66.91, which reads:

66.91 The Governor in Council may make regulations issuing policy directions to the Board and establishing general criteria to be applied by the Board or to which the Board must have regard

(a) in establishing fair and equitable royalties to be paid pursuant to this Act; and

(b) in rendering its decisions in any matter within its jurisdiction.

It is the Board's preliminary view that by application of the *Interpretation Act*, the *Retransmission Royalties Criteria Regulations* are still in force.

Parties should indicate whether they agree or not with the Board's preliminary view. Parties should also make submissions on how the Board should deal with section 2 of the Regulations, which reads as such:

The criteria to which the Board must have regard in establishing under paragraph 70.63(1)(a) of the *Copyright Act* a manner of determining royalties that are fair and equitable are the following:

(a) royalties paid for the retransmission of distant signals in the United States under the retransmission regime in the United States;

(b) the effects on the retransmission of distant signals in Canada of the application of the *Broadcasting Act* and regulations made thereunder; and

(c) royalties and related terms and conditions stipulated in written agreements in respect of royalties for the retransmission of distant signals in Canada that have been reached between collecting bodies and retransmitters and that are submitted to the Board in their entirety.

3. Whether the Board, in its decision of the present case, should account for *Broadcasting Regulatory Policy CRTC 2015-96* set to come into force in March 2016 and if so, how.