



May 4, 2017

[*CB-CDA 2017-037*]

**File: SODRAC v. CBC Licences [Redetermination (2008-2012); Determination (2012-2018); Interactive kiosks (2011)]**

## **RULING OF THE BOARD**

On April 13, 2017 CBC filed with the Board a request to strike some of SODRAC's expert reports in their entirety, and to strike passages from certain other expert reports also adduced by SODRAC.

CBC's grounds for striking evidence comprised of or in exhibits SODRAC-27, paras 150-173, 49.A, 49.B, 49.C, 59 (paras 15-21), 60.A and 60.B from the record are, essentially, the following:

- The relevant targeted reports or passages of reports originate from other proceedings;
- They are not self-standing, in the sense that they refer back to information that is not part of this record;
- They are duplicative and, as such, burden unnecessarily the record;
- They are entirely or in part subject to a Board's confidentiality order; and
- They delve into legal arguments by non-legal experts.

In its April 20, 2017 response, SODRAC offered to withdraw from the record exhibits SODRAC-49.B, 60.A, and 60.B. SODRAC argues that exhibits 49.A and 49.C – which originate from the most recent commercial radio file – are relevant for the purpose of showing that copies made and processes implemented by CBC television, radio and Internet services, are common to or identical to commercial radio services. In its view, they are also necessary to challenge CBC's anticipated reliance on the application of s. 30.71 of the *Copyright Act* (the "Act") – an exception for temporary reproductions for technological processes – to the case. SODRAC undertakes to substitute a public version of 49.A and submits that 49.C does not contain any confidential information. As far as the alleged legal opinion by non-legal experts is concerned, SODRAC submits that the balance of convenience favours maintaining the impugned paragraphs whereas the Board can ultimately decide on whether they are admissible or not.

In its April 21, 2017 reply, CBC accepts the withdrawal of exhibits SODRAC-49.B, 60.A, and 60.B. CBC submits that exhibits SODRAC-49.A and 49.C are not needed to make legal arguments on the application of s. 30.71 of the *Act*. CBC contends that these reports are redundant with exhibit SODRAC-48 and are prejudicial because they include underlying evidence to which CBC does not have access, either because SODRAC has not provided it or cannot provide it as a result of the Board's February 20, 2013 Confidentiality Order in the

*Commercial Radio* matter. CBC reiterates at length that SODRAC-27, paras 150-173, and SODRAC-59, paras 15-21, constitute legal arguments that only counsel should make.

On April 21, 2017, counsel for the Canadian Association of Broadcasters (CAB) requested that the Board strike all reports containing information deemed confidential pursuant to a prior confidentiality order, compel all parties in the current proceeding to provide the Board with any details relating to the dissemination of such information, and inform CAB of any details regarding the dissemination of such information.

The Parties confirmed to the Board and to CAB in writing that no third-party confidential information had been disseminated in the present matter.

After having considered the parties' submissions, the Board rules as follows:

1. Exhibits SODRAC-49.A, 49.B, 60.A, and 60.B are struck from the record;
2. SODRAC is granted leave to file exhibit 49.A in its public version;
3. Exhibit SODRAC-49.C does not contain any confidential information;
4. The Parties shall ensure that none of their evidence contains any third-party confidential information subject to any confidentiality order of the Board;

The foregoing addresses CAB's April 21, 2017 request. In addition,

5. Exhibits SODRAC-49.A and 49.C shall not be considered expert reports for the purpose of these proceedings, unless SODRAC files an acknowledgement by their respective author that they are providing the reports as an expert witness for use as evidence in the present proceedings. Furthermore, to the extent that exhibits 49.A and 49.C refer to underlying evidence that is not part of the record of the present proceedings, including information that potentially cannot be part of the record because it is subject to a confidentiality order in another proceeding or to the implied undertaking rule, the weight accorded to these exhibits in terms of persuasiveness and reliability may be assessed by the Board, as appropriate; and
6. Regarding exhibits SODRAC-27, paras 150-173, and SODRAC-59, paras 15-21, at this point, the Board is of the view that SODRAC's experts are working within their understanding of the Supreme Court's framework set out in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57. Whether the experts' understanding is correct is another issue. The Board can only determine whether the impugned paragraphs usurp legal opinion once it has heard the parties' arguments on the interpretation and application of the said framework. Rather than striking some portions of the document, on the basis of their being beyond the proper scope of an expert opinion, they will be considered in assessing the weight to be given to the experts' opinion.

  
Gilles McDougall  
Secretary General