

Copyright Board
Canada



Commission du droit d'auteur
Canada

[CB-CDA 2016-025]

RULING OF THE BOARD

Proceeding: 70.2-2008-01 and 70.2-2012-01 SODRAC v. CBC/SRC Licence 2008-2012 [Redetermination] and Licence 2012-2016 [Determination]

March 10, 2016

[1] Further to the parties' submissions in response to the Board's Notice dated February 4, 2016 [CB-CDA 2016-010], the Board rules as follows:

1. Considering that the parties agree on this point, the redetermination of the 2008-2012 licence and the determination of the 2012-2016 licence will be merged. The parties agree on a schedule of proceedings (attached) leading to a hearing that will begin on **Tuesday, June 20, 2017**.

Redetermination of the 2008-2012 licence

2. The redetermination of the 2008-2012 licence shall focus on the royalties and their terms and conditions for television and Internet broadcast-incidental copies. The scope of the Board's decision-making power in this case was defined as such by the Supreme Court (SCC).¹ The SCC did not authorize the Board to reconsider, for example, the synchronization licence for the 2008-2012 period.²

3. As for the Internet broadcast-incidental copies, neither the SCC nor the parties clearly indicated whether the redetermination should involve audiovisual content copies. The Board considers that with regard to Internet broadcasting, only the incidental copies of audiovisual works shall be redetermined.³ Therefore, incidental copies of audio content will not be subject to redetermination. If they disagree with this position, the parties must submit their responses and replies, where relevant, according to the deadlines set out in paragraph 14 of this ruling.

¹ Supreme Court decision in *Canadian Broadcasting Corporation v. SODRAC 2003 Inc.*, 2015 SCC 57 at paras 96 and 114. [SCC Decision]

² See *Bernard v. Canada (Attorney General)*, 2012 FCA 92 (CanLII), <http://canlii.ca/t/fs8pk>, affirmed in 2014 SCC 13.

³ See paras 7 and 26 of the *SCC Decision*; paras 146 *et seq* of the Board's decision dated November 12, 2012, and paras 11 and 29 of the CBC's factum in the appeal to the Supreme Court (http://scc-csc.ca/WebDocuments-DocumentsWeb/35918/FM010_Appellant_Canadian-Broadcasting-Corporation.pdf).

4. The parties raised the issue of the composition of the panel with reference to the administrative law principle that “he who hears must decide”. When the Court does not specify whether the redetermination is to be conducted by the same panel or a different panel, the redetermination may be submitted to any quorum of the administrative tribunal.⁴ However, if it is a different panel, the evidence and arguments must be presented again unless the parties agree otherwise.⁵

5. Chaired by Justice Blair, succeeding to Justice Vancise, the panel shall reconsider the evidence received at the first hearing and shall hear the new evidence in relation to the applicable criteria and factors.⁶

6. The corollary is that the parties will have to specifically identify and re-submit the evidence already on file that they intend to rely on during the redetermination.

7. The Board takes notice of the agreement between the parties according to which the transcript of the June 2010 hearing (licence 2008-2012) shall serve as testimony in the redetermination,⁷ knowing that this will not prevent additional evidence from being submitted in respect of the issues under reconsideration.

8. Regarding the new evidence, the parties may submit any relevant evidence with regard to all the factors and criteria defined by the SCC. The Board notes that the Supreme Court stated that these criteria are not exhaustive.⁸ Moreover, the Board may consider the availability of suitable proxies and any other relevant factors.⁹

Determination of the 2012-2016 licence

9. Regarding the determination of the licence for the 2012-2016 period, in light of the parties’ submissions, the Board is seized of the following issues:

- a. Starting November 7, 2012, the application of new exceptions that came into force on that day;
- b. The royalties for conventional and specialized television broadcast-incidentals

⁴ Blake, Sara, *Administrative Law in Canada*, 5th edition, LexisNexis, 2011 at p. 230, citing *Re Canada (Public Service Staff Relations Board)*, [1978] F.C.J. No. 180 (FCA): “I should say that I am in agreement with the view, apparently held by Mr. O’Shea, that the reference back under section 52(d) of the Federal Court Act, by this Court’s judgment of January 17, 1978 (*Attorney General v. Sant P. Singh*) may be acted upon by any member of the Board ‘assigned’ to act as adjudicator in the matter.”

⁵ *Re Webb and Ontario Securities Commission*, 58 O.R. (2d) 704: “The proceeding was commenced by the Commission, and even though a new panel of the Commission proposes to hear it, it is still the same proceeding. Unfortunately, for both parties, the rules of natural justice require that the evidence and argument will have to be presented again, unless agreement can be reached otherwise”. Decision cited in Macaulay, *Practice and Procedure Before Administrative Tribunals*, vol. 3, Carswell, looseleaf at para 22.2(b)(iv).

⁶ *Floris v. Nova Scotia (Director of Livestock Services)*, [1987] N.S.J. No. 106 (N.S.S.C. – T.D.).

⁷ “One might agree, for example, to the decision-maker review transcripts of past proceedings. This latter course may be socially laudable where the delays and expenses inherent in rehearings can be avoided in cases where they serve no practical purpose” in Macaulay, *Practice and Procedure Before Administrative Tribunals*, vol. 3, Carswell, looseleaf at para 22.2(b)(v).

⁸ *SCC Decision* at para 75.

⁹ *SCC Decision* at para 93.

reproductions, including ARTV as of August 25, 2015, and Explora as of March 28, 2012;

c. The royalties for Internet video broadcast-incidental reproductions including video-on-demand offers such as *Tou.tv Extra*;

d. The royalties for radio broadcast-incidental reproductions;

e. The royalties for Internet audio broadcast-incidental reproductions;

f. The royalties for the sale or licensing of a program;

g. The royalties for sales of physical media;

h. The royalties for online sales of digital files of audiovisual works until December 31, 2014 (date preceding the coming into force of SODRAC Tariff 7 – Reproduction of Musical Works Embedded in Audiovisual Works for Transmission by a Service, *Canada Gazette*, June 7, 2014);

i. The royalties for the *bornes interactives*.

[2] If they disagree with this statement of seizure, particularly regarding paragraphs (b) and (h), the parties must submit their responses and replies according to the deadlines noted in paragraph 14 of this ruling.

[3] Notwithstanding any preliminary agreement between the parties and considering their submissions, the Board understands that it must also address the issue of synchronization activities, but solely with regard to the quantum for synchronization reproductions carried out by CBC, knowing that the quantum is based on the quantity of reproductions actually carried out by CBC and the “standard” SODRAC rates. If they disagree with this position, the parties must submit their responses and replies according to the deadlines noted in paragraph 14 of this ruling.

[4] The Board takes notice that the parties accept that the evidence already on file for the 2008-2012 licence can also be used for the determination of the 2012-2016 licence and that the transcript of the June 2010 hearing (2008-2012 licence) shall serve as testimony for the determination of the 2012-2016 licence, knowing that this will not prevent additional evidence from being submitted regarding the issues under consideration. The parties must specifically identify and resubmit the evidence already on file that they intend to rely on during the determination.

[5] Since they are potentially relevant for the purposes of the 2012-2016 licence, the Board reiterates the points noted at paragraph 8 of this ruling.

[6] For the cases cited at paragraphs 3, 10 and 11 of this ruling, the parties must respond no later than **Thursday, March 17, 2016**, and reply no later than **Wednesday, March 23, 2016**.

The Secretary General
Gilles McDougall

ANNEX – SCHEDULE OF PROCEEDING

Steps	Deadline (at the latest)
Filing of SODRAC's statement of issues in dispute re: the activities and royalties rate it challenges compared with the 2008-2012 file	Friday, April 1, 2016
Filing of CBC's response to SODRAC's statement of issues in dispute	Friday, May 6, 2016
Exchange of interrogatories	Friday, June 3, 2016
Exchange of objections to interrogatories	Friday, June 24, 2016
Filing of motions re: objections to interrogatories	Friday, July 15, 2016
Filing of responses to motions re: objections to interrogatories	Friday, July 22, 2016
[Board Ruling]	
Responses to interrogatories	Friday, September 2, 2016
Exchange of motions re: incomplete/unsatisfactory responses to interrogatories	Friday, October 14, 2016
Exchange of replies to requests re: incomplete/unsatisfactory responses to interrogatories	Friday, October 28, 2016
[Board Ruling]	
Complete/satisfactory responses to interrogatories	Friday, December 2, 2016
Filing of SODRAC's statement of case and expert reports	Friday, February 24, 2017
Filing of CBC's statement of case and expert reports	Friday, April 24, 2017
Filing of SODRAC's reply to CBC's statement of case and expert reports	Friday, May 26, 2017
[Pre-hearing conference, if required]	
Filing of Legal Briefs (on request)	Friday, June 16, 2017
Beginning of hearing	Tuesday, June 20, 2017, at 10:00 a.m. , in the Board hearing room