

Copyright Board
Canada



Commission du droit d'auteur
Canada

[CB-CDA 2016-078]

ORDER OF THE BOARD OF THE BOARD DEALING WITH OBJECTIONS TO INTERROGATORIES

**Proceeding: 70.2-2008-01, 70.2-2012-01 and 70.2-2016-01 SODRAC v. CBC Licences
[Redetermination (2008-2012); Determination (2012-2017)]; 70.2-2011-03 SODRAC v. CBC:
Interactive kiosks**

August 17, 2016

PART I

I. QUESTIONS FROM SODRAC TO CBC

[1] CBC filed objections of a general nature to the questions asked by SODRAC, as well as objections to specific questions. There is also a third type of objection. This involves interrogatories that the parties grouped into three categories, each dealing with questions of the same nature, with a view to identifying the type of information that would be provided by CBC to answer the questions asked by SODRAC.

[2] Category A includes questions about the description of broadcasting technologies used by CBC, Category B, the types of copies made by CBC, and Category C, questions of an economic, financial or corporate nature.

[3] The questions are dealt with in that order.

A. OBJECTIONS OF A GENERAL NATURE

1. Creating new documents

[4] SODRAC is asking CBC not only to provide it with existing documents, but also to generate documents and provide it in writing “any information to the knowledge of CBC/SRC” that could answer the questions asked. It is also asking CBC to complete questionnaires.

[5] CBC objects to the types of information sought by SODRAC. It is willing to provide existing documents to SODRAC, but it does not believe that it has to generate new documents or complete questionnaires. It maintains that the Board has concluded on many occasions that the party answering the questions is not a research service and does not have to generate documents, unless it has agreed to do so, as sometimes happens, including in the instant case. It can, in fact,

sometimes be easier to provide a description that answers a question rather than provide a series of documents that does not offer a satisfactory answer.

[6] In response to this objection, SODRAC replies that it is erroneous to claim that the interrogatories only require the production of existing documents. It believes that the obligation to answer cannot be avoided on the grounds that no document exists.

[7] SODRAC is wrong. The Board has often asserted that the party answering the interrogatories does not have to create documents or generate answers that otherwise would not exist. For example, see the Ruling of the Board dated February 19, 2016, in the file of SODRAC Tariff 5 (Reproduction of Musical Works in Cinematographic Works for Theatrical Exhibition or Private Use), 2009-2016.

[8] Therefore, the Board sustains CBC's objection. CBC only has to provide what already exists, in the form in which this information exists, unless it has offered to generate this information, as is the case for many of the questions, or where the Board orders doing so because it believes that this information would be useful to it. Beyond these circumstances, it does not have to create documents, provide descriptions or explanations, or answer questionnaires.

[9] This is sufficient to dispose of the matter. However, one additional comment is required. CBC asserted that the number of questions SODRAC is asking it to answer is unreasonable and constitutes an excessive burden. It maintains that, if the sub-questions to the questions are included, there are more than 2,000 questions it must answer.

[10] CBC is right. There are far too many questions. The Board would like to remind SODRAC that the burden imposed on the party answering the interrogatories must be reasonable and that the goal sought is to obtain a reasonable quantity of information.

[11] In this context, what corresponds to a reasonable quantity of information must be determined by weighing the burden placed on the person answering the question in order to obtain the information against the benefits that the answer to this question is likely to procure for the party asking it. This is the principle the Board used to decide on the interrogatories. In other words, when two proposals are equivalent, the Board ruled in favour of CBC, given the unreasonable quantity of questions with which it is faced and the usefulness of the information sought.

2. Period covered by the questions

[12] At the outset, CBC objected to the questions in which SODRAC asked for information for years not covered by the licence periods. SODRAC maintained that this was necessary to comply with the Supreme Court decision. For example, to compare the value that the user draws from the use of a new technology, it believes questions must be asked about the technologies used over time.

[13] CBC then acknowledged the basis of SODRAC's position. In its document dated July 21, 2016, entitled "CBC's Proposed Resolution of Objections," CBC agreed for the questions not to be limited to the periods covered (2008-2012 and 2012-2017).

[14] In fact, carrying out the comparison exercise prescribed by the Supreme Court and comparing such things as the differences resulting from the use of new technologies in relation to old technologies implies that the information provided by CBC cannot be limited to the years covered by the licence periods.

[15] Therefore, it is understood that the answers shall not be limited to only the target licence periods, when the context or question so requires, and unless otherwise indicated. This goes for the 2008-2012 period, as well as the 2012-2017 period, although this issue mainly focuses on the questions for the 2008-2012 period. This principle goes not only for the questions grouped into the three categories, listed in SODRAC's document A or CBC's document "CBC's Proposed Resolution of Objections," but for all questions involved in the interrogatories from SODRAC to CBC.

B. OBJECTIONS TO SPECIFIC QUESTIONS

1. Redetermination, 2008-2012

[16] **Q1, Q2, Q3, Q4, Q5, Q7:** CBC's objection is sustained. The question is irrelevant. It falls outside the framework of the object of the redetermination, namely the value of incidental reproductions on television and those on the Internet with audiovisual content.

[17] **Q28, Q50:** objection sustained. CBC does not have to provide documents when these are available to the public.

[18] **Q27, Q31:** the issue was resolved in the section on objections of a general nature. If such a document exists, CBC must provide it. Otherwise, CBC does not have to create documents.

2. Determination, 2012-2017

[19] **Q21, Q23(e, f), Q131, Q208, Q213, Q224, Q305(b), Q310, Q313, Q326, Q330, Q331, Q332, Q333, Q334, Q335, Q336, Q338, Q340, Q341, Q342, Q343, Q344, Q345, Q347:** objection sustained. The question is irrelevant. Moreover, the level of detail requested and the number of sub-questions are unreasonable.

[20] **Q306(a):** given what CBC offered in Q305 (title and date of release) and given what the Board decided on Q305(b), CBC must answer Q306(a) only with respect to the title and date of production, but not with respect to the length.

[21] **Q56, Q57, Q185, Q209, Q272:** the issue was resolved in the section on objections of a general nature. If such a document exists, CBC must provide it. Otherwise, CBC does not have to create documents.

[22] **Q85, Q86, Q89, Q90, Q268, Q269, Q275, Q276:** objection withdrawn (letter from CBC dated July 21, 2016). CBC agrees to answer these questions.

[23] **Q111, Q297:** objection sustained. CBC does not have to provide documents when these are available to the public.

[24] **Q117, Q193, Q304**: although CBC is correct in saying that this is not an appropriate question in the framework of an exchange of information, the Board believes that this information could prove useful, as CBC also appears to recognize in its objection. CBC must thus provide the requested information. That said, CBC is right to point out that these questions underlie methodological issues. Therefore, the parties must reach an agreement to resolve these issues. If the two parties cannot reach an agreement, they should request the Board's intervention. In any case, the parties must inform the Board of the methodological framework they plan to use with respect to these questions.

[25] **Q303**: SODRAC withdrew this question. No need to answer it.

[26] **Q307**: objection sustained. CBC must answer as offered.

[27] **Q309, Q348**: objection sustained. This question appears to deal with information whose nature, in this case strategy and analysis elements, is not consistent with the type of information sought by the interrogatories, namely factual information.

C. OBJECTIONS TO INTERROGATORIES GROUPED BY CATEGORY

[28] The parties agreed to group questions of the same nature into three separate categories to determine a method for answering the questions in each category. That said, the parties have not reached an agreement on the method for answering the questions in each category. They each submitted proposals to the Board.

[29] Not only is there no agreement on how to answer the questions in each category, but there is not even agreement on the questions that are supposed to comprise each category. This last point involves only the interrogatories related to the determination for 2012-2017. For example, SODRAC believes that question 28, ("Describe and particularize the Costs associated with the ingestion of tracks and radio programs by and/or for CBC/SRC radio services") is a financial question that should appear in category C, while CBC believes that this question is related to broadcasting technology and should belong to category A.

[30] The issue is as follows: the information required to answer a question will differ depending on the category to which one believes the question belongs. The Board must thus intervene at two levels. First, it must determine the method for answering the questions based on whether they fall into category A, B or C. Second, it must determine, for the contentious issues, in which category the questions should appear.

[31] To add to the complexity, the parties made many mistakes in their assignment of the questions. In their documents dated July 21 and 29, 2016, CBC and SODRAC each placed many questions in two categories at once.

[32] These errors are most numerous with respect to the interrogatories for the 2012-2017 determination. Following are some examples. CBC asked for questions 28, 35, 77, 136, 143, 154, 166, 168, 229, 235 and 242 to be under category A (SODRAC believes that these questions should be under category C). However, these same questions also appear among the questions in category B of CBC's document. The same goes for questions 92, 94, 96 and 98, which CBC included in both category B and C, while questions 17, 18, 19, 31, 38, 43, 46, 49, 52, 55, 105 and

106 appear in both category A and C. One has to wonder how the Board is supposed to make sense of this when the parties themselves cannot figure it out.

[33] Finally, there is a question about a type of copy (e.g. ingest copies) that is included in category A, while the same question, this time about another type of copy (e.g. main automation system copies) is under B. Thus, the reasoning behind the categorization of questions is not always easy to follow. In any event, we selected the categorization that appeared to us the most likely to generate the answers sought.

1. Category A questions

[34] Q16, Q34, Q35, Q38, Q44, Q45, Q47, Q53, Q54, Q57, Q58 (Redetermination, 2008-2012); Q16, Q17, Q18, Q19, Q22, Q24, Q25, Q26, Q27, Q28, Q29, Q30, Q31, Q32, Q33, Q34, Q35, Q36, Q37, Q38, Q39, Q40, Q41, Q42, Q43, Q44, Q45, Q46, Q46.1, Q47, Q48, Q49, Q50, Q51, Q52, Q53, Q54, Q55, Q58, Q59, Q60, Q61, Q62, Q63, Q64, Q65, Q66, Q67, Q68, Q69, Q70, Q71, Q72, Q73, Q74, Q75, Q76, Q77, Q78, Q79, Q80, Q81, Q82, Q126, Q127, Q128, Q129, Q132, Q133, Q134, Q135, Q136, Q137, Q138, Q139, Q140, Q141, Q142, Q143, Q144, Q145, Q146, Q147, Q148, Q149, Q150, Q151, Q152, Q153, Q154, Q155, Q156, Q157, Q158, Q159, Q160, Q161, Q162, Q163, Q164, Q165, Q166, Q167, Q168, Q169, Q206, Q219, Q220, Q221, Q222, Q225, Q226, Q227, Q228, Q229, Q230, Q231, Q232, Q233, Q234, Q235, Q236, Q237, Q238, Q239, Q240, Q241, Q242, Q243, Q244, Q245, Q250, Q251, Q252, Q253, Q254, Q255, Q256, Q257, Q258, Q259, Q260, Q262, Q263, Q264, Q291, Q292, Q294 (Determination, 2012-2017): CBC must answer as offered in its document “CBC’s Proposed Resolution of Objections” dated July 21, 2016. The descriptions provided must be detailed.

[35] Q225, Q261 (Determination, 2012-2017): the Excel file indicates “settled” under the heading CBC’s Reply. This contradicts the fact that this question still appears in the SODRAC and CBC documents about the contentious questions. If it turns out that this question is not settled, it should appear in category A and receive an answer accordingly.

2. Category B questions

Q36, Q37, Q55, Q56 (Redetermination, 2008-2012); Q83, Q84, Q87, Q88, Q91, Q92, Q93, Q94, Q95, Q96, Q97, Q98, Q170, Q171, Q172, Q173, Q174, Q175, Q176, Q177, Q178, Q179, Q180, Q181, Q182, Q183, Q184, Q266, Q267, Q270, Q271, Q273, Q274, Q277, Q278, Q279, Q280, Q281, Q282, Q283, Q284, Q285, Q286 (Determination, 2012-2017): CBC must answer in accordance with the proposal described by SODRAC in its Document A dated July 19, 2016, except with respect to paragraph 8, which should read as follows: “The cost of making that category of copy, to the extent such information is specifically attributed and, if not, why it is not attributed.”

3. Category C questions

[36] Q11, Q12, Q13, Q14, Q15, Q17, Q18, Q22, Q25, Q29, Q32, Q33, Q39, Q40, Q41, Q42, Q43, Q46, Q48, Q49, Q51, Q52, Q59 (Redetermination, 2008-2012); Q20, Q100, Q101, Q102, Q103, Q104, Q105, Q106, Q107, Q108, Q109, Q110, Q112, Q113, Q114, Q115, Q116, Q130, Q186, Q189, Q190, Q191, Q192, Q223, Q287, Q288, Q289, Q290, Q293, Q295, Q296, Q298, Q299, Q300, Q301, Q302 (Determination, 2012-2017): CBC must answer as offered in

its document “CBC’s Proposed Resolution of Objections” dated July 21, 2016. CBC shall indicate which documents answer which questions. If no document exists to answer a question, CBC shall indicate that it does not have any documents that answer the question.

[37] SODRAC asks that, if CBC does not provide an answer on a specific point, but later, after the period for answering the interrogatories, finds this information, it be time-barred from presenting evidence on this point at a later date, except with the Board’s permission. It justified its request as follows:

[TRANSLATION] “This statement is essential and SODRAC shall not offer this compromise if it does not appear. As explained [...], SODRAC insists on receiving all information available on these relevant questions so not to be caught off guard and to prevent CBC/SRC from being able to include or exclude what it wants from the file.”

[38] This request is superfluous. In fact, there is no agreement between the parties on any of the proposed answers for categories A, B or C, or on the questions that comprise these categories. Thus there can be no compromise and as a result no withdrawal of compromise. The Board’s role is to decide how CBC must answer the question. It either chooses SODRAC’s proposal, CBC’s proposal or imposes a third method of answering. SODRAC’s claim that its “compromise offer” will be withdrawn is inconsequential, and the Board does not have to take these considerations into account.

[39] This request is also premature. On the one hand, good faith is presumed. On the other hand, if SODRAC is not satisfied with an answer, it will be able to present its case later in the requests with respect to deficiency in interrogatory answers.

II. QUESTIONS FROM CBC TO SODRAC

[40] The period targeted by CBC’s interrogatories is not clear. These questions appear to involve only the determination for 2012-2017. In fact, in its Excel file, which groups together the questions that CBC is asking SODRAC, CBC designates under the heading “Files” the files 70.2-2012-01 and 70.2-2016-01. Thus this excludes the redetermination for 2008-2012 (file 70.2-2008-01). However, in some cases, CBC asks questions for a period that it does not specify. For example, see question 14. In view of the above, this question should thus apply to the 2012-2017 period. That is the conclusion reached by SODRAC, which, in its objection, explained that if it has to answer the question, it will do so only for the years 2012-2017. In response, CBC stated that it is seeking answers for the years prior to 2012, in fact since 2005. However, the question did not specify the applicable years and the file containing these questions does not refer to the 2008-2012 period. See also questions 27, 33 and 34, where CBC does not specify the target period in its question, such that it is presumed that it involves the period related to the files mentioned at the start of its document, i.e. 2012-2017. In response to SODRAC’s objection, it then specified that it is seeking answers starting from 2006. In these cases, SODRAC agreed to provide information since 2009. The issue of the period is thus difficult to follow, and CBC did not provide any general explanation on this issue at the start of the document. It thus follows that, unless otherwise indicated, the target period is the years 2012 to 2017.

[41] **Q2**: SODRAC must answer as offered in reply, for 2012-2017. SODRAC must provide what exists, in the form in which this information exists. It does not have to provide an explanation or description.

[42] **Q10, Q27, Q29, Q33, Q34, Q39, Q40, Q41, Q42**: SODRAC must answer as offered in reply.

[43] **Q11**: SODRAC must answer as offered in its objection, for 2012-2017. Moreover, SODRAC must also answer with respect to the waivers, as requested by CBC.

[44] **Q12, Q16, Q58, Q63, Q64, Q78, Q79, Q85, Q92, Q93, Q95**: objection sustained. The question is irrelevant.

[45] **Q14, Q51, Q65, Q96**: SODRAC must answer the question, for 2012-2017. It must provide the existing information in its possession, in the form in which this information exists.

[46] **Q17**: SODRAC must answer as offered in reply, for 2012-2017. It does not have to provide draft agreements or grounds for which agreements would not have been concluded.

[47] **Q45**: objection sustained. SODRAC does not have to substantiate its evidence prior to its statement of case. SODRAC must answer as offered in reply.

[48] **Q47, Q48**: the objection is dismissed, on the grounds cited by CBC. The information requested is not of a nature that it requires SODRAC to reveal its strategy before the time intended for so doing, i.e. in its statement of case. Moreover, the argument related to the litigation privilege is premature. SODRAC must provide the information that exists, in the form in which this information exists.

[49] **Q46, Q49, Q50**: objection sustained. SODRAC does not have to substantiate its evidence prior to its statement of case.

[50] **Q62, Q91**: SODRAC must answer as offered in its objection.

[51] **Q69**: SODRAC must answer as offered in reply, for the period of 2008-2012. For the 2012-2017 period, it must provide all the agreements mentioned, including the Loto-Québec agreement, and including those that might have been signed before 2012, but that applied during a part of this period.

[52] **Q84**: it appears that SODRAC misunderstood the question. In any event, it must provide the existing information in its possession, in the form in which this information exists.

[53] **Q83, Q86, Q87**: the objection is sustained. The question is irrelevant. Relevant investments and risks are those that involve the reproduction of musical works, not those related to the adoption of any technology whatsoever.

PART II

INTERACTIVE KIOSKS

i. QUESTIONS FROM SODRAC TO CBC

[54] **Q2:** insofar as CBC is answering question 4(e) – and we presume that this will be the case since this question is not contested – CBC must answer as offered in its objection.

[55] **Q7:** CBC must answer as offered, for the reasons cited in both its objection and reply.

[56] **Q9, Q10:** The objection is sustained. In this case, the situation is different from the usual situations with respect to which the parties cite privilege matters in the interrogatory files, where it is most often in relation to documents prepared in view of filing a tariff proposal or a hearing before the Board. In this case, it involves an out-of-court settlement; the context and facts behind this agreement are well known, as are the reasons for CBC’s objection to this question. Therefore, CBC does not have to provide the information requested. Moreover, in its question, SODRAC requests “any documents related to an agreement,” while in response, it asks for the agreement itself; that is not the same thing.