

Copyright Board
Canada



Commission du droit d'auteur
Canada

[CB-CDA 2018-126]

RULING OF THE BOARD

**Proceeding: CBC – Radio and Simulcasts (2009-2020); and
SOCAN – Internet – CBC (2012-2018) and Artisti – CBC – Webradio (2015-2020)**

June 11, 2018

I. BACKGROUND

[1] On August 10, 2017, ADISQ filed a statement of objection to the *Artisti-CBC Tariff, 2018-2020* (the “Tariff”), seeking objector status or, in the alternative, intervenor status.

[2] Consideration of the Tariff was subsequently split among two proceedings: the *CBC – Radio and Simulcasts (2009-2020)* proceeding (“*CBC Radio*”), and the joint *SOCAN – Internet – CBC (2012-2018)* and *Artisti – CBC – Webradio (2015-2020)* proceeding (“*CBC Internet*”).

[3] In the *CBC Internet* proceeding, no party had initially objected to ADISQ’s participation as an objector, and it confirmed its participation in that proceeding.

[4] In the *CBC Radio* proceeding, ADISQ failed to confirm participation, and was deemed to have withdrawn. On April 24, 2018, in the context of the that proceeding, ADISQ wrote to seek this deemed withdrawal to be removed, and its status as objector to be reinstated.

[5] In Notice 2018-091, the Board stated that it would grant ADISQ’s request in that proceeding unless parties objected. Specifically, the Board stated that “[ADISQ] will be reinstated as an objector to the Artisti – CBC Tariff for 2018-2020.”

[6] In its response to Notice 2018-09, Artisti made submissions not only on the status of ADISQ in the *CBC Radio* proceeding, but in relation to the Tariff itself. It submitted that since only CBC can be considered a user or potential user of the Tariff, a requirement of the *Copyright Act* to file an objection, ADISQ cannot therefore be an objector thereto.

[7] In Notice 2018-094, the Board said that the question of ADISQ’s status is one that concerns both the *CBC Radio* and *CBC Internet* proceedings, and asked ADISQ and any other party to provide comments on Artisti’s request regarding ADISQ’s status, to which Artisti would be able to reply.

II. SUBMISSIONS

[8] ADISQ submitted that it should be granted intervenor status with full participatory rights and obligations in relation to the Tariff. It submits that an ongoing legal dispute under arbitration may have a direct impact on the scope of the Tariff. It argues that ADISQ is in the best position to provide the Board with evidence as to the limitations of Artisti's repertoire. Lastly, it submits that allowing ADISQ to intervene would not have any negative impact on the timetable of the proceedings

[9] On May 18, 2018, CBC made submissions in favour of ADISQ receiving intervenor status with full participatory rights in the Board's consideration of the Tariff. It argues that ADISQ must be present so that the Board can render a decision "which will bind all parties." Furthermore, ADISQ can provide useful information to the Board as an intervenor, and its status will ensure that all parties "have access to relevant documents and information held by ADISQ."

[10] Artisti opposes ADISQ's participation. It argues that since a request for intervention should be made as soon as possible, ADISQ should have sought leave to intervene sooner, given that the proposed tariff for the years 2015 to 2017 was filed in March 2014. Furthermore, since neither ADISQ nor SOPROQ had previously challenged its repertoire in the context of previously filed similar tariffs, it does not make sense that ADISQ disputes its repertoire now. It also argues that ADISQ does not have a direct interest in the outcome of these proceedings, and may be pleading SOPROQ's case, rather than its own. Lastly, it submits that granting ADISQ full participatory rights will result in substantial additional costs.

III. CONCLUSION

[11] It appears that, to the extent ADISQ has relevant information regarding Artisti's repertoire, much of it could likely be led by CBC. Additionally, any relevant information in Artisti's possession, which is a proper subject of an interrogatory, can be obtained by CBC through the usual interrogatory process. As such, it does not appear to be the case that granting ADISQ intervenor status with full participatory rights will significantly improve the scope of possible information on which the Board can base eventual decisions. As such, ADISQ's full participation is not as essential as ADISQ and CBC argue.

[12] However, we also do not agree with Artisti that, by virtue of ADISQ's previous inaction, it should be prevented from intervening. First, while the Board has on occasion granted intervenor status in relation to an entire tariff, it is more appropriate to seek and consider intervenor status in the context of a particular proceeding. Second, the Board has historically permitted parties who objected or intervened in relation to a proposed tariff to act as if they had objected or intervened in relation to all years of that proposed tariff under consideration in a given proceeding. Last, the fact that a party has previously acquiesced or otherwise chosen not to object to a particular tariff or some aspect thereof does not deprive it of the possibility to do so in subsequent years.

[13] Given the potential importance of Artisti's repertoire as an issue in either of the proceedings, it is appropriate to grant ADISQ intervenor status. What remains to decide is the scope of rights and obligations to grant therewith.

[14] We agree with Artisti that it is difficult to characterize ADISQ as having a direct interest in the outcome of the consideration of the Tariff. While there may be practical effects that flow from the manner in which the Board concludes its consideration of the Tariff that may touch on ADISQ, there may be much more immediate effects of the Board's eventual decision on SOPROQ, who has made no attempt to object or request to intervene to the Tariff—and it is arguable that even these effects are not direct.

[15] As such, it is not appropriate to grant full participatory rights to ADISQ. Rather, ADISQ is granted the right to make legal submissions on the issue of Artisti's repertoire. Furthermore, in order to address situations where ADISQ may be uniquely placed to add useful information to these proceedings, or to clarify a particular point, it is granted the right to, with leave from the Board, adduce and challenge evidence on the issue of Artisti's repertoire.

The Board rules therefore as follows:

1. ADISQ did not file a valid objection to the Tariff, within the requirements of the *Copyright Act*, as it is not a user or potential user;
2. ADISQ is granted intervenor status in the *CBC Radio* and *CBC Internet* proceedings, with only the following rights:
 - i. Make legal submissions on the issue of Artisti's repertoire;
 - ii. Lead evidence in chief, documentary or oral, with leave of the Board. The Board expects that this will be sought only in relation to evidence that CBC could not have reasonably adduced itself. Any such evidence could be challenged by any party to the proceedings; and
 - iii. Challenge evidence led by other parties on the issue of Artisti's repertoire, with leave of the Board.

[16] The Board may subsequently clarify or modify Part 2 of this Ruling if required as a result of developments in either of the proceedings.

Gilles McDougall
Secretary General