



[CB-CDA 2024-016]

ORDER OF THE BOARD

Matter: 71-2023-01 Totem v. Connect

February 23, 2024

I. OVERVIEW

[1] I held a Case Management Conference on February 9, 2024. The general topic of the conference was the appropriate procedural steps for this proceeding. Within this context, several issues arose.

[2] This order addresses those issues and establishes a Schedule of Proceedings, contained in the Annex.

II. ISSUES

A. SHOULD ONE PARTY BE REQUIRED TO FILE FIRST?

[3] CONNECT argued that there are two reasons why Totem should file any required documents first. First, it is Totem that made the s. 71 application. Second, there is a “*status quo*” that Totem is attempting to challenge.

[4] For the reasons that follow, in this proceeding, unless I order otherwise, parties will file their documents at the same time. This is reflected in the Schedule of Proceedings.

[5] Unlike proceedings before a court, which have relatively clear roles for an “applicant” and “respondent”, there is no default sequence in which filings are to be made in a s. 71 application. This is reflected in subrule 35(1): it is up to the Board to determine, in each case, the most appropriate sequence.

[6] In Board proceedings pertaining to s. 71 applications, there is no established formal burden on one party or another to prove their case. It is not sufficient for the “responding” party to merely rebut the case of the party that made the s. 71 application. Because the Board does not have to accept the Respondent’s case if it is not convinced by the Applicant, a mere rebuttal of the Applicant’s case does not automatically resolve the issues before the Board: the Board still

has to fix royalty rates, and any related terms and conditions that are fair and equitable. These may be rates, terms and conditions that are advanced by neither party.

[7] Moreover, in this proceeding, the *status quo* to which CONNECT refers is not one that has ever been tested by the Board, nor based on a rate or related terms and conditions approved by the Board (e.g., an adjusted tariff rate). This rate is not presumptively fair and equitable. Accordingly, the asserted “*status quo*” should not be privileged in any procedural way.

[8] Last, the simultaneous filing of documents will likely reduce the total duration of the proceeding.

B. FEATURES OF THE PROCEEDING: EXPERT EVIDENCE, CROSS-EXAMINATIONS, AND INTERROGATORIES

[9] In each s. 71 proceeding, the Board is to determine, on a case-by-case basis, its features. This includes whether parties

- will have an opportunity to cross-examine witnesses (and the parameters of any cross-examination);
- will be able to put interrogatories to other parties (and the parameters of those interrogatories); and
- will be able to adduce expert-witness evidence (and the parameters of any such evidence).

[10] Given the considerations below, I will permit expert-witness evidence, cross-examinations, and interrogatories only on leave, as indicated in the Schedule of Proceedings.

i. Past Board practice

[11] During the Case Management Conference, the parties occasionally referred to the Board’s past practices, in both tariff and s.71 proceedings.

[12] I recognize that, in the past, the Board has made significant use of the above-mentioned features in its larger, contested proceedings. Where used, such features have often increased the overall costs and length of the proceedings.

[13] Both the Government (see *e.g.*, *Copyright Act*, s. 66.502) and the Board (see *e.g.*, *Copyright Board Rules of Practice and Procedure*, Rule 22) have signaled an intent to make Board proceedings more efficient and proportional.

[14] As this is the first s. 71 proceeding to establish a schedule since the 2019 amendments to *the Copyright Act*, and the Board's *Rules of Practice and Procedure*, the conduct of this proceeding will deviate from past practice.

ii. Proportionality to the value of the matter

[15] During the Case Management Conference, I put to the parties that the value of the matter before the Board is relatively modest (in this case, the royalties). They agreed.

[16] That being said, CONNECT stated that I should consider the potential consequences of a decision in this proceeding that go beyond this particular matter: whatever rate the Board fixes may significantly influence future negotiations between CONNECT and certain other users, with background music suppliers in particular. For this reason, CONNECT argued, it may be appropriate to expend more money (e.g., including for the retention of an expert witness) on this proceeding than the value thereof.

[17] I reject this approach here for the following reasons.

[18] First, such an approach will tend to be asymmetric: since collective societies are in the business of issuing licences, a decision of the Board will have more significant effects on them than on the user. The possibility that a user's participation in a s. 71 proceeding may cost them more than the value of the matter would discourage the use of this provision altogether.

[19] Second, a similar argument will be available to the collective society party in many—if not most—s. 71 applications. A decision of the Board can be expected to have an impact on negotiations between the collective societies and users that perform the same or similar activities as those that are the subject of the s. 71 application.

[20] Such an approach would be contrary to the Board's overarching requirement that all matters before it “be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit” and, to some extent, to the existence of the individual-cases regime in the *Act*.

[21] Therefore, I evaluate the proportionality of each step in relation to the value of the matter immediately before me.

iii. Expert evidence not required

[22] To date, the Parties have not raised any issues novel to the Board, nor is the kind of evidence that was discussed at the Case Management Conference of a nature that Board Members would not be able to understand.

[23] Nevertheless, I leave open the possibility that this may change, and parties may seek leave to file expert witness evidence on specific issues.

[24] Any such motion for leave must describe why the expert-witness evidence is necessary for the Board to understand the fact evidence.

C. OTHER DIRECTIONS

i. Form of Hearing

[25] Unless ordered otherwise, all submissions will be made in writing.

ii. Phased consideration of issues

[26] I raised with the Parties the possibility of hearing the matter in two phases: the first to determine the appropriate proxy, the second to determine whether any adjustments to the proxy are appropriate.

[27] Given the limited features of this proceeding, and the circumscribed amount of evidence that I expect will be filed, I am of the view that it will be more expeditious and efficient to hear both issues together.

iii. Case Record

[28] Each party's Case Record, and Response to Case Record, will include:

- a statement of case setting out the party's position and how they intend to support it; (Rule 35(3)(a))
- the documentary exhibits on which the party intends to rely, including any sworn statements or solemn declarations of lay witnesses, if applicable (Rule 35(3)(b)); and
- a list of the documentary exhibits, if applicable (Rule 35(3)(c)).

iv. Cross-Examination and Interrogatories

[29] The Motion for Leave to cross-examine a witness should include the issues on which the cross-examination will be held, and the expected time required.

[30] The Motion for Leave to pose interrogatories should demonstrate the necessity to the party's case of the information sought, including to what issues the proposed interrogatories relate.

[31] If permitted, the cross-examination of witnesses and the posing of interrogatory questions may require additional direction. I will provide such direction at the appropriate time.

v. Modification to Schedule

[32] I am open to making reasonable modifications to the schedule that will nevertheless allow the resolution of the matter as efficiently and expeditiously as possible. If possible, Parties should file any such requests no fewer than five business days in advance of the relevant deadline.

vi. Panel

[33] This matter will be heard by a single-member Panel. I will be the sole Member.

Luc Martineau
Case Manager

ANNEX: SCHEDULE OF PROCEEDINGS

Step	Date
Each Party files a Case Record	March 27, 2024
Questions from the Board, if any	TBD
Each Party files a Response to a Case Record	April 16, 2024
Each Party may file Motion(s) for Leave to: cross-examine a witness, pose interrogatory questions, or to file expert evidence	May 1, 2024
Each Party may respond to the Motion(s)	May 8, 2024
Ruling on Motion(s) on further evidence	May 29, 2024
Each Party may file expert witness evidence, if permitted	July 2, 2024
Cross-examination of expert witness and cross-examination of fact witnesses and interrogatory questions , if permitted	Completed by July 22, 2024
Each Party files Final Submissions	August 22, 2024
Questions from the Board, if any	TBD
Each Party files a Reply to Final Submissions	September 10, 2024