

Comments on A Consultation on Options for Reform to the Copyright Board of Canada

by

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INTRODUCTION

These comments address the August 9, 2017 document entitled A Consultation on Options for Reform to the Copyright Board of Canada. [Consultation Paper]

It is generally agreed that the Board takes too long to get to hearings and to issue decisions. Explanations vary: lack of resources, court-imposed constraints, overly complex process. The

Consultation Paper does not address the possible lack of resources; if this is causing some delays, expectations of what can be accomplished through procedural, regulatory and legislative reforms may be too high.

I detail what could be done in very few cases below. The resulting document would have been much longer. It would have also required getting into specifics that cannot usefully be proposed without knowing the specific objectives the government and the Board intend to pursue and the general approach they intend to take and without the input of stakeholders.

GENERAL REMARKS

Comparisons must be approached with caution

Comparisons with Canadian regulatory and foreign copyright tribunals can be both helpful and fraught with difficulties. They require a thorough understanding of the other institution: the US Copyright Royalty Board [CRB] takes more time to reach decisions than some may think. Workload is a factor: the CRB delivers roughly one substantive decision per year; the Board rendered 10 such decisions between May and September 2017. Culture and resources come into play: the CRB imposes deadlines that many consider brutal on parties that can afford to spend more than Canadian stakeholders ever could. The starting date of a tariff-setting process (gazetting) is unknown in Canada; it is set in law in the US. It may be easier to render a decision that can be revisited at any time than one for a definite period; this should be kept in mind when assessing the achievements of the UK Copyright Tribunal in shortening deadlines and streamlining the process.

Only the true consequences of delay need be addressed

The fear that some businesses may decide not to enter the Canadian cultural market because of delays in certifying tariffs may be overstated. Collectives and users can reach private licensing deals. Businesses often start operations with imperfect copyright pricing information in markets that the Board does not supervise. The absence of tariffs cannot explain why Pandora is unavailable in Canada: its tariffs have been in place for several years.

The consequences of delays are real; there is no need to invent some to justify the issue being addressed. More importantly, focussing on actual consequences helps ensure that reforms are properly targeted.

Absent exceptional circumstances, the Board should decide based on the parties' record

The Board sometimes sets tariffs based on evidence, arguments or pricing models that were not advanced by the parties during hearings. Fairness is not the issue: doing so, even fairly, adds to the time it takes to render a decision.

The Board may hesitate to rely on the evidence as presented if it suspects that an incomplete

record may cause prejudice to absent, targeted users or to the public interest. Still, resort to evidence, approaches or pricing models that were not advanced by the parties at the hearing should be the exception, not the norm. The rule should be applied rigidly in arbitration matters: decisions only bind parties to the proceedings. In tariffs involving a constituency that did not participate in the hearings, the Board should explain why it wishes to add to the record before doing so. Parties should be allowed to speak to the new evidence or model. This should happen as a matter of policy, not by amending the *Act* or making regulations, so as not to add to the judicial review burden on Board decisions.

Greater reliance on the parties' record may render decisions less responsive to the legitimate expectations of absent users. This risk can be addressed in two ways. First, it should be easier to reopen (on the Board's own motion if necessary), and eventually vary, decisions of first impression and in markets where facts evolve rapidly. Second, the Board should be more willing to derogate from its earlier decisions. Even though these have no precedential value, it has been difficult to date to get the Board to adopt new approaches where tariffs already exist.

On a related issue, the *Act* should make it clear that the Board is always able, but never required, to reopen the record. Court decisions that have required the Board to add to the record under certain circumstances should be reassessed.

Framing discretion and granting expressly powers that are otherwise implied may have unintended effects

Care must be exercised in framing the Board's discretion and in granting it expressly powers that are implied, for example because the Board is master of its own procedures. Rules frame discretion and create certainty. They also create legitimate expectations that may constrain the Board's ability to deal with specific situations. More importantly, by specifying in the *Act* powers that are normally implied, Parliament may invite the courts to infer that other normally implied powers are not conferred: see *Society of Composers, Authors and Music Publishers of Canada v. Canada (Copyright Board)* (1993), 61 F.T.R. 141, 47 C.P.R. (3d) 297.

Rules are more easily changed than laws

Unless stated otherwise, the recommendations made in this note should be implemented through changes in internal Board policy, rules of procedure or government directives. Most of the current procedural requirements found in the *Act* (delay to object, forwarding objections to a collective) should be moved to rules of procedure.

The role of courts in creating delay should not be underestimated

Courts have contributed in creating delays in decision-making. Possible causes include a lack of understanding of the Board's work, a lack of deference in matters of process and substance and an attending increase in the parties' inclination to resort to judicial review. The government may wish to consider the following amendments to the *Act*: adding a privative or preclusive clause;

specifying that Parts VII and VIII of the *Act* are the Board's "core statute"; allowing the Board to participate as of right in all judicial review proceedings from its own decisions (success on judicial review is significantly lower in instances where Board counsel was allowed to appear).

SPECIFIC PROPOSITIONS IN THE CONSULTATION PAPER

1. EXPLICITLY REQUIRE OR AUTHORIZE THE BOARD TO ADVANCE PROCEEDINGS EXPEDITIOUSLY.

Some statutes allow or require federal tribunals to deal with matters informally and expeditiously or to vary procedural rules as required. Before extending such provisions to the Board, it would be helpful to know whether they have had any effect on delays or any unintended consequences.

2. CREATE NEW DEADLINES OR SHORTEN EXISTING ONES.

Tariff proceedings involve four different timelines: from filing to inception, from inception to perfection of the record, from perfection to start of hearing and from end of hearing to decision-making.

Delay from filing to inception can be shortened in two ways. First, the time it takes for a proposed tariff to be published in the *Canada Gazette* could be shortened, or the gazetting requirement replaced by a form of publicity that is more attuned to our connected environment. Second, the *Act* or regulations should identify an event that triggers the process without the Board's intervention. Currently, proceedings truly start only after the Board issues a schedule of proceedings from that moment until hearings start. Before most decision-makers, some action (filing initiating documents) automatically triggers a sequence of events (response, reply, disclosure, evidence) leading to the record being perfected within a certain time; only then is a hearing scheduled. The same should be done at the Board.

Identifying a triggering event naturally calls for setting out in advance, in rules of procedure, a timetable and sequence of events leading to the *perfection of the record*. The Federal Court Rules probably are a good starting point, especially if parties disclose more information at the outset than is currently the case: see 5 below. The Rules also show that it is possible to build flexibility into the rules themselves. The delay to object should be shorter than 60 days and should be set in rules of procedure, not in the *Act*. Also, if publication in the *Gazette* is maintained, the deadline to object for known users could run from the time they are notified of a proposed tariff. In those many instances where all the players are known, this would shorten the process by several weeks.

With proper case management and tighter control of interrogatories, it should be possible to reduce the time it takes to perfect the record by anything from a few to several months.

A set process then requires, if only to account for the Board's limited human resources, some mechanism to set a *date for hearing* once the record has been perfected. This task could be performed by the case manager.

Framing timelines for the process leading to the start of hearings is one thing; prescribing the *timelines within which a decision must be then issued* is another. This is rare but is not unheard of. It requires in turn to decide what the delay is, when it starts, what happens if additional information is required, any sanction that may attach to not making a decision within the deadline and whether a late decision is nevertheless valid (e.g. *NEB Act*, ss. 52, 6 and 55). Knowing more about the NEB's experience in this matter might help. I note in passing that the maximum delay before the NEB is 15 months, that it run from the time the applicant's record is perfected and that it can be extended.

The Board's practice is to discuss terms and conditions with the parties before rendering a decision, resulting in further delays. The UK Copyright Tribunal appears to issue partial orders that set the scope and price of the licence and a deadline within which parties are expected to agree on licensing terms and conditions. This approach may accelerate the process significantly; it may require legislative changes, given that the tariff comes into force when published in the *Canada Gazette*.

3. IMPLEMENT CASE MANAGEMENT.

Case management focuses issues and tightens processes. All matter should be case-managed unless the Board decides otherwise. Case management can be implemented without amending the *Act* or making rules of procedure, though rules would help frame the process. Amending the *Act* would be helpful in allowing a single member to act as case manager and in allowing that member to sit at the hearing, and necessary to allow a designated member of staff to do so.

Allowing a case manager to consolidate proceedings may create difficulties, unless the same person manages all relevant cases. Otherwise, consolidation of proceedings should not be limited to tariffs and should be for the Board or the Chairman to decide.

4. EMPOWER THE BOARD TO AWARD COSTS BETWEEN PARTIES.

Empowering the Board to award costs has been discussed for the last quarter century. Though the measure is attractive at first glance, it has been systematically rejected when considered: the reasons for this should be addressed. Better understanding the impact of cost awards before other regulatory tribunals would be helpful, especially in identifying any unforeseen consequences. Also, cost awards would have to be significant if they are to deter unnecessarily lengthy proceedings.

5. REQUIRE PARTIES TO PROVIDE MORE INFORMATION AT THE START.

Requiring parties to put their best foot forward at the outset is essential if matters before the Board are to be better focussed. The Board's Discussion Paper on Two Procedural Issues addressed the matter fairly thoroughly, and the Consultation Paper appears to largely reflect its recommendations. I will only add a few comments.

Collectives should file explanations with any proposed tariff, not later. The Board should be allowed to seek clarifications within a short, set timeframe (15 days), and clarifications be provided within a similar delay. Explanations should be attached to the proposed tariff.

Rules of procedure could set out which explanations are required as a minimum. Care should be exercised not to confuse explanations and terms that are inherent in the tariff. It should be possible to cure a defective explanation; it is impossible to “make whole” a proposed tariff that lacks some essential element.

The requirement to notify users would be helpful if it is not overly demanding. An email with a link to the proposed tariff should suffice. This could be done under the *Act* as it currently reads.

The statutory requirement to send copies of objections to collective societies is antiquated, redundant and should be removed. The rules should require that both collectives and other objectors receive copy of objections. The process used before other regulatory tribunals (e.g. the CRTC) may be a useful start.

Similar requirements should be applied in arbitration proceedings.

6. PERMIT ALL COLLECTIVES TO ENTER INTO LICENSING AGREEMENTS OF OVERRIDING EFFECT.

Collectives already enter into licensing agreements which, in law or practice, trump tariffs. The legal, overriding effect of these agreements should be extended to collectives in all regimes.

The statement that “All collectives could be permitted to choose whether to file proposed tariffs or to establish licences independently” is confusing. Agreements cannot trump tariffs unless they co-exist with tariffs. This is the current state of affairs under the general regime, and should continue to be so: collectives should be allowed to file proposed tariffs even if they have signed, or seek to sign, licences with some of the users targeted in the proposed tariff.

In some instances (SOCAN, RE:Sound, retransmission), collectives could still be required to file tariffs unless they have licensed all potential users from whom they intend to collect royalties. The reasons justifying this requirement probably still exist, and enforceability could be a problem absent a tariff.

Allowing all collectives to strike licensing deals may not reduce the Board’s workload as much some think. Such a deal targets one user. Scale licensing agreements, whereby a collective undertakes to extend to all members of an industry terms that were agreed upon with a trade association, may help but are not a watertight solution: the scale agreement is enforceable only against users who take advantage of it. In practice, the application of such an agreement to a whole industry may require a tariff reflecting the terms of the scale agreement: the proposed tariff could be subject to a simplified certification procedure.

Broadening the ability of parties to request individual dispute resolution by the Board will serve

no useful purpose unless the *Act* makes it clear that users targeted in a licence or tariff set by the Board are bound by its terms *if they perform the targeted uses and they cannot otherwise obtain a licence, from the collective or from a third party*. This may be needed to account for the recent declaration by the Supreme Court of Canada that the user who participates in an arbitration process “will not be liable as a licensee unless it affirmatively assumes the benefits and burdens of the licence.” (*CBC v. SODRAC*, para. 108) The alternative is a costly, lengthy process that achieves nothing.

Currently, the general regime allows users who are targeted in a certified tariff to seek a separate licensing deal, but does not provide clearly whether they are allowed to seek arbitration if the collective insists on applying the tariff. Allowing this, with no form of control, would risk exposing collectives and the Board to multiple additional proceedings. At a minimum, if users targeted in a tariff are to be allowed to seek arbitration of a separate licensing deal, they should be required to seek leave of the Board, thereby treating such a request as a motion to vary the attending tariff.

Currently, a collective decides whether to use tariffs, licences or a combination of both. The Consultation Paper seems to imply that the Board could request that a tariff be filed in lieu of multiple arbitration requests. Such a significant change in legislative policy appears unnecessary; the power to consolidate proceedings where appropriate should suffice.

Precisely how the existing scheme for filing negotiated licensing agreements could be expanded is difficult to understand. No reason is offered to require parties who strike private deals to be more transparent in this market than in others, or to allow the Commissioner of Competition to gain easier access to those deals. Examining potentially thousands of agreements before notifying the Commissioner of Competition of the possible need to investigate matters pursuant to the *Competition Act* would mobilize significant Board resources and would change the nature of the current process in which the matter is settled before the Board, not the Competition Tribunal. No explanation is offered why providing these agreements as benchmarks would facilitate more free market-based negotiations or require less Board intervention.

7. CHANGE THE TIME FOR FILING PROPOSED TARIFFS.

It would be possible to require that proposed tariffs be effective for more than one calendar year: by statute, decisions of the US CRB are effective for five years. Yet given the Board’s current practice in consolidating proceedings for the same tariff over multiple years, I doubt that stipulating a longer minimum effective period for proposed tariffs would free up time and resources. In those few instances where a collective has proposed short-lived tariffs so as to challenge a recent change in royalty structure, the Board used a process akin to show-cause to limit the length and burden of the process. Furthermore, a general requirement to that effect could complicate matters of first impression and in markets where facts change rapidly.

A better way to prevent negative effects from proposing short-lived tariffs would be either to allow the Board to make regulations requiring that certain tariffs be filed for longer periods or to

empower the Board to declare that a tariff currently under examination will apply for more years than what the collective proposed.

Any measure taken for tariffs should also be considered for arbitration decisions.

8. REQUIRE PROPOSED TARIFFS TO BE FILED LONGER IN ADVANCE OF THEIR EFFECTIVE DATES.

If the gazetting requirement is maintained, the date for filing proposed tariff should be changed so as to avoid the apparent bottleneck at the *Canada Gazette* at the beginning of the Government's fiscal year. The date should allow enough time for the Board to ask and receive clarifications on a collective's explanations for its tariff. The time it takes to process a proposed tariff before sending it for publication should be examined and taken into account.

The requirement to file in advance of effective date should not be too long, especially if a collective seeks a new tariff in a rapidly emerging market or seeks to respond to changing circumstances in an existing market. On the other hand, the Board could be allowed to prescribe by regulations that certain tariffs in stable markets be filed by a date that is earlier than what the *Act* provides.

Consideration could also be given to changing the Canadian regime from tariffs that have a limited lifespan to tariffs that remain in force until a collective or a user asks that it be changed, as is the case in the UK and in some other Commonwealth jurisdictions.

9. ALLOW USES AND ROYALTY COLLECTION PENDING THE APPROVAL IN ALL CASES.

Allowing uses and royalty collections pending a final tariff is a matter for interim measures. The issues of interim measures and retroactivity are intertwined to a large extent.

Retroactive decisions raise practical difficulties (though maybe not as many as are mentioned in the Consultation Paper), yet as a matter of legal policy, retroactivity is largely a red herring. A decision that is not retroactive would either expropriate some owners' rights (interim price non-existent or lower than final price) or impose on users a price that is excessive (interim price higher than final price). Some form of retroactivity is common, and possibly the norm, before foreign copyright tribunals, before Canadian tribunals, before courts (civil litigation is largely declaratory, and therefore essentially retroactive) and in all private copyright licensing deals that are reached before royalties are set. Issues of retroactivity should be tackled not by looking at retroactivity itself, but by addressing its underlying causes (delays) and inherent effects. One way to address its effect is to ensure that interim measures are in place.

Where a tariff already is in place, and subject to the Board ruling otherwise, the existing tariff should continue to apply on an interim basis until the final tariff is certified. However, the statement that "the previous tariff applies until the new tariff is approved" creates confusion. An interim tariff cannot finally settle rights and liabilities. If it did, either the user would be denied a lower price or the collective an otherwise fair amount of royalties; it may even encourage those

who expect to fare worse in the end than in the interim to prolong proceedings unnecessarily (something that may have been attempted at least once under the private copying regime). Providing legal and financial certainty should not be done at the expense of fairness.

The Board's own policies have made it difficult to obtain an interim tariff in matters of first impression. What is needed is a change in policy, not in the law.

I see no benefit in granting the Board the power to make interim decisions on its own initiative, since a single request is sufficient to allow the Board to make such a decision.

10. CODIFY AND CLARIFY SPECIFIC BOARD PROCEDURES THROUGH REGULATION.

The current Directive model was set up when the Board was created in 1989. It was designed in a context where only a few decisions would be rendered each year, and only in public performance of music and retransmission. Given the volume and variety of matters the Board now addresses, this way of proceeding no longer makes sense. The Board needs rules of procedure that set out the process leading to hearings, with specific timelines starting with the publication of proposed tariffs (if the gazetting requirement is maintained).

Commenting on this aspect of the Consultation Paper is difficult for several reasons. First, the proposed approaches do not provide a complete template. Second, the proposed measures sometimes are difficult to understand: providing that parties who cannot agree on a joint statement may file separate statements only by leave of the Board seems incompatible with basic administrative fairness. Third, no explanation is provided as to why the approaches outlined in the paper were chosen, or how they dovetail with one another. Fourth, the Paper appears to suggest that rules eventually go into such detail as to be unnecessary or even counterproductive.

Having said this, I have the following comments.

Everything concerning the Board's processes, with the exception of the date by which to file a proposed tariff and the requirement that the proposed and certified tariffs be gazetted, should be left to rules of procedure. If need be, the government should use its existing (or extended) power to issue directives to set parameters or require that they be set.

I would not provide in the rules that parties are allowed to *propose schedules*. The process should be set out in regulations and adapted where circumstances require. It may be necessary to draw a distinction between existing tariffs and matters of first impression: it is more difficult to identify discoverable issues in advance of interrogatories in the second than in the first.

Most of what the Consultation Paper says about the *interrogatory process* is common sense and reflects the Board's practice. In some respects, proposed solutions may be overly simple. If responses are to be asked only from a representative sample, who will decide the sample, and according to which criteria? What happens if the Board thinks that the number of members is small enough to justify answers from all? Could the sample be representative on some issues but

not on all? What will be the remedy when, as has happened before, the responding party refuses to provide answers according to the specified sample?

One aspect of the interrogatory process could be clarified. The Board has ruled that users who are not objectors cannot be compelled to respond to interrogatories even if they are members of an objecting trade association. Implied in that ruling is that such users can be required to testify during hearings, as any other third party who can offer relevant evidence. It should be made clear in the rules (if this is a procedural matter) or in the *Act* (if this is a substantive matter) that members of an objecting trade association can be compelled to answer interrogatories.

The Consultation Paper suggest that a party's responses could be provided at the same time as its objections to other interrogatories, so motions regarding the sufficiency of responses and objections may be heard at the same time. The intent behind this is unclear. At first glance, either the party would prepare full responses that may not be required in the end, or this would push back the time by which responses need to be provided.

On all aspects of the interrogatory process, a closer look at the practice of the UK Copyright Tribunal and of the US CRB would be helpful.

A simplified procedure would be welcome in most of the circumstances described in the Consultation Paper; it could be extended to proposed tariffs that reflect a scale licensing agreement: see 6 above.

Expert evidence is especially important at the Board. Dealings with such evidence would gain by being codified. Allowing the Board to appoint independent experts would be possible only if the parties can be made to bear the cost of such experts, unless resource issues are addressed. The practice of the UK Copyright Tribunal in dealing with expert witnesses is especially worth a further examination.

The Consultation Paper's treatment of confidentiality appears to merely restate the Board's policy in the matter. The rules of procedure of other Canadian regulatory tribunals codify confidentiality rules, and to that extent, doing the same for the Board may be justified. However, the root of the problem may not be the lack of guidance on confidentiality, but the extent to which the Board does not apply its own rules. Rejecting a confidentiality claim requires more time and resources than allowing it unexamined, especially if the other side fails to object to the claim.

11. STIPULATE A MANDATE FOR THE BOARD IN THE *ACT*.

Stipulating the general parameters of the Board's mandate in the *Act* could be helpful. Confusion about the Board's mandate can foster delay in decision-making. It can prevent parties and the Board from focussing on core issues. It can encourage judicial review.

Stating the mandate of the Board in the *Act* may result in a loss of flexibility. As the Consultation

Paper notes, the Board's functions evolved over time. It is the Board who decided, in 1993, that its mandate should evolve from preventing monopoly abuses on the part of collective societies to regulating the balance of market power between rights holders and users. That approach has been approved by Canadian courts and adopted in many other Commonwealth jurisdictions. Had the Board's mandate been rigidly defined in the *Act*, this (arguably necessary) evolution may not have been possible.

Too specific a mandate may create an unfair advantage: detailed directions as to which markets to consider in setting royalties may allow stakeholders to "game" test markets so as to weigh certain criteria in their favour. Different, specific directions in different regimes may require that the Board approach similar matters differently, creating market to market distortions. On both aspects, the experience of the US CRB should be examined.

Adding certain elements to the Board's statutory mandate may come with unintended consequences, including an increase in workload with little or no benefit in the form of better outputs. For example, formalizing in the *Act*, either specifically or through some overriding statutory public interest criteria, the Board's policy of considering written comments from anyone on any aspect of its proceedings could require the Board to address comments more formally, thereby requiring more resources.

12. SPECIFY DECISION-MAKING CRITERIA THAT THE BOARD IS TO CONSIDER.

The overarching factors that the Board must take into consideration in all royalty-setting decisions could be specified in legislation or in regulation. The *Act* already contains statutory directions: some (single payment) may be necessary, while others (consider objections before certifying tariffs) are antiquated and redundant.

Section 66.91 empowers the government to issue policy directions and to establish general criteria. The power has never been invoked, though an earlier, similar power was exercised once. The ambit of the power should be examined and possibly clarified, if only because it may not be as wide-ranging as some appear to think.

To the extent that the criteria established incrementally by decisions of the Board and reviewing courts are indeed too diffuse, stipulating criteria that the Board is to consider may guide participants, reviewing courts and the Board itself. The *Act* should only contain directions that are general in nature (e.g. balance of market power) or that prescribe specific outcomes (single payment, special tariff for small systems). Everything else should be left to government directives. The experience of other copyright fora should be examined.

Board decisions have no precedential value. Allowing the Board to make regulations setting its own criteria on issues that have been addressed repeatedly in earlier decisions (e.g. value of copyright in music vs value of remuneration right in sound recordings) would help focus the debate in subsequent proceedings.

13. HARMONIZE THE TARIFF-SETTING REGIMES OF THE ACT.

The tariff-setting regimes are already greatly harmonized. Further harmonization is possible by allowing existing tariffs to continue as interim measures, and to allow all collectives to conclude licensing deals that trump tariffs.

CONCLUSION

The proposed changes to the Board's powers and processes should help expedite its decision making. Most of what is proposed will either require changes in the *Act* or be made easier and more transparent through rules of procedure. This being said, the Board should not wait for the several months or few years until new rules are in place to effect changes. In the interim, and to the extent possible, the directive on procedure should be adapted to reflect whichever approach the Board decides to take in the matter.

It should be kept in mind that in making such an important transition, the better may be the enemy of the good. The Board should be thanked if it decides to move forward with some measure on an experimental basis and to adapt as things go: insisting on getting it just right the first time around would come at too high a price.