

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

**Date** 2022-03-25

**Citation** *CSI Online Music Services Tariff (2014-2018)*, 2022 CB 3

**Member** The Honourable Luc Martineau

**Proposed Tariffs** CSI Online Music Services Tariff, 2014  
CSI Online Music Services Tariff, 2015

**Considered** CSI Online Music Services Tariff, 2016  
CSI Online Music Services Tariff, 2017  
CSI Online Music Services Tariff, 2018

## **Application to Withdraw Proposed Tariffs**

### **REASONS FOR DECISION**

#### **I. OVERVIEW**

[1] On February 18, 2022, CMRRA-SODRAC Inc. (“CSI”) filed an application under section 69 of the *Copyright Act* (“the Act”) to withdraw the following proposed tariffs: *CSI – Online Music Services* for the years 2014, 2015, 2016, 2017 and 2018 (the “Proposed Tariffs”).

[2] The Proposed Tariffs are currently under consideration in the *Online Music Services (2014-2018)* proceeding (“the OMS proceeding”).

[3] Upon review of CSI’s arguments and supporting information, I am of the view that CSI meets the requirements of the Act and, therefore, I approve the application to withdraw the Proposed Tariffs.

#### **II. PROCEDURAL HISTORY**

[4] On October 27, 2017, CSI advised the Board that it wished to withdraw the Proposed Tariff for the year 2018.<sup>1</sup>

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<sup>1</sup> Letter from CSI for the Withdrawal of *CSI Online Music Services Tariff, 2018* (October 27, 2017).

[5] In Ruling [CB-CDA 2018-071] dated April 13, 2018,<sup>2</sup> the Board rejected CSI's request and stated that the Board would continue to consider the Proposed Tariff for the year 2018 (the "2018 Decision"). In that decision, the Board noted that the ability of a collective society to withdraw a proposed tariff was "not contemplated" by the Act.

[6] On January 14, 2022, CSI informed the Board that it intended to file, under s. 69 of the Act, an application to withdraw the proposed tariffs under consideration in this proceeding during the week of February 14, 2022.<sup>3</sup> CSI requested that this proceeding be stayed as it relates to the CSI Proposed Tariffs, pending the determination of the application to withdraw.

[7] In Ruling [CB-CDA 2022-001],<sup>4</sup> the Board stayed provisionally the timetable set out in Notice [CB-CDA 2021-057] until the Board rules on this withdrawal application, and only as far as it concerns CSI.

[8] In Order [CB-CDA 2022-013],<sup>5</sup> the Board asked CSI to confirm that the list of those who paid royalties in relation to the proposed tariff period that it had stated in its application was exhaustive.

[9] CSI confirmed on February 28, 2022, that the list of payors was exhaustive and that, in particular, CSI had not received any other royalties, including from non-commercial entities, under the Proposed Tariffs.

### III. ISSUES

[10] Section 69 of the Act came into force in 2019. It permits a collective society that has filed a proposed tariff to make an application requesting that the proposed tariff be withdrawn, in whole or in part.

[11] The Board must grant such an application if it is satisfied that the conditions enumerated in paragraphs 69.1(1)(a)–(c) are met.

[12] However, paragraph 69.1(1)(c) does not apply in respect of this application, since it only applies in cases where the application is made with respect to a portion of the proposed effective period. Here, CSI has applied to withdraw the Proposed Tariffs for their entire effective period.

[13] As such, the Board only needs to consider the requirements in paragraphs 69.1(1)(a) and (b). Namely:

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<sup>2</sup> Ruling of the Copyright Board [CB-CDA 2018-071], (April 13, 2018) [2018 Decision], online : <https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/487995/index.do?q=CB-CDA+2018-071>.

<sup>3</sup> Email from Eric Mayzel informing the Board that CSI intends to file an application to withdraw the Proposed Tariffs *CSI – Online Music Services*, (2014, 2015, 2016, 2017, 2018) under consideration, pursuant to section 69 of the *Copyright Act*, (January 14, 2022).

<sup>4</sup> Ruling of the Copyright Board [CB-CDA 2022-001], (January 18, 2022).

<sup>5</sup> Order of the Board [CB-CDA 2022-013], (February 25, 2022).

1. Has CSI provided sufficient notice?
2. Have all persons who paid royalties been addressed?

[14] A final issue is the following: Is the Board estopped from considering this application as a result of the 2018 Decision?

[15] I consider each of these in turn.

#### **A. HAS CSI PROVIDED SUFFICIENT NOTICE?**

[16] Paragraph 69.1(1)(a) requires that the Board be satisfied that the collective society has provided sufficient public notice of its intention to make the application.

[17] I am of the view that CSI has provided sufficient notice.

[18] First, according to CSI, on January 14, 2022, CSI posted the notice, in both English and French, on the CSI website<sup>6</sup>, the CMRRA website<sup>7</sup> and the SODRAC website.<sup>8</sup>

[19] At the request of CSI, the Board posted the English and French versions of the notice on its website on January 21, 2022.<sup>9</sup>

[20] Second, CSI states<sup>10</sup> that it provided the notice to all current participants in the OMS proceeding and to all persons who CSI understands to be former participants who have withdrawn from the OMS proceeding.

[21] Last, CSI states that it has not received any comments or objections to the notice.<sup>11</sup>

[22] The Board's previous decisions on applications to withdraw a proposed tariff have held that the posting of a notice on a collective society's and the Board's website is an adequate means of providing public notice. Furthermore, these decisions have held that doing so for 30 days or more was a sufficient period of time.<sup>12</sup>

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<sup>6</sup> Notice of Intent to Withdraw Proposed Tariffs *Statement of Royalties to Be Collected by CMRRA-SODRAC Inc. for the Reproduction of Musical Works, In Canada, by Online Music Services* for the Years 2014 to 2018 (January 14, 2022), online : *CMRRA-SODRAC Inc. (CSI)* <[www.cmrrasodrac.ca/2022/01/14/notice/](http://www.cmrrasodrac.ca/2022/01/14/notice/)>.

<sup>7</sup> Notice of Intent to Withdraw Proposed Tariffs *Statement of Royalties to Be Collected by CMRRA-SODRAC Inc. for the Reproduction of Musical Works, In Canada, by Online Music Services* for the Years 2014 to 2018 (January 14, 2022), online : *CMRRA-SODRAC Inc. (CSI)* <[www.cmrra.ca/notice-2/](http://www.cmrra.ca/notice-2/)>.

<sup>8</sup> Notice of Intent to Withdraw Proposed Tariffs *Statement of Royalties to Be Collected by CMRRA-SODRAC Inc. for the Reproduction of Musical Works, In Canada, by Online Music Services* for the Years 2014 to 2018 (January 14, 2022), online : *CMRRA-SODRAC Inc. (CSI)* <<https://sodrac.ca/en/notice/>>.

<sup>9</sup> *Supra* note 6,7 and 8. Online : <<https://cb-cda.gc.ca/en>> and <<https://cb-cda.gc.ca/sites/default/files/inline-files/NOT%20-%202022-01-18%20CSI%20Notice%20of%20Withdrawal-Avis%20de%20retrait-BIL.pdf>>

<sup>10</sup> *Supra* note 3.

<sup>11</sup> *Ibid.*

<sup>12</sup> See *Artisti - Tariffs for Online Music Services and Phonograms, 2016-2021* (December 11, 2019), CB-CDA

[23] In particular, in its first decision under section 69, *Artisti (2019)*,<sup>13</sup> the Board reasoned that if a certain kind and duration of notice was sufficient to constitute adequate notice for the proposal of a tariff, it would also be adequate for the withdrawal of a proposed tariff. And since the publication of a proposed tariff on the Board's website for 30 days is sufficient notice under subsection 68.3(2) of the Act, then publication of a notice of intention to withdraw a proposed tariff on the Board's website for 30 days should be sufficient notice under paragraph 69.1(1)(a).

[24] The same approach can apply in this case.

[25] CSI filed its application to withdraw the Proposed Tariffs on February 18, 2022. This means that, on its own website and that of SODRAC and CMRRA, a public notice was available for more than thirty days at the time CSI made its application. The notice was available on the Board's website for twenty-nine days.

[26] Based on the foregoing, I consider that adequate public notice has been provided. The fact that the notice was posted on 3 different collectives' websites and was forwarded to all current or prior participants in this proceeding makes up for the twenty-nine-days publication period on the Board's website.

**B. HAVE ALL PERSONS WHO PAID ROYALTIES BEEN ADDRESSED?**

[27] Paragraph 69.1(1)(b) of the Act requires that the Board be satisfied that

every person who, in respect of the proposed effective period, has paid royalties that would not be payable if the application were approved has:

- (i) consented to the application,
- (ii) received a refund of the royalties, or
- (iii) entered into an agreement under subsection 67(3) that covers the act, repertoire or proposed effective period that is the subject of the application.

[28] I am of the view that the requirements under paragraph 69.1(1)(b) have been met.

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2019-085 (Board Decision) [*Artisti (2019)*], online : Copyright Board <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/481695/index.do>>; *Artisti - CBC Tariff, 2015-2020* (June 26, 2021), 2020 CB 002 (Board Decision), online : Copyright Board <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/481685/index.do?q=2020+CB+002+>> ; *CMRRA Online Music Services Tariff (Music Videos), 2014-2018* (February 3, 2022), 2022 CB 1 (Board Decision), online : Copyright Board <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/520900/index.do>>.

<sup>13</sup> *Artisti (2019)*, *supra* note 12.

[29] CSI's Statement of Case<sup>14</sup> confirmed that the royalties that CSI collected from users for the majority of services operated in the tariff period were collected under direct agreements between CSI and users. That includes the royalties paid by users for all hybrid services, on-demand streaming services, non-interactive and semi-interactive webcast services, limited download services, and music cloud services, and many permanent download services. CSI states that each of the direct agreements referred to above is an agreement under section 67(3) of the Act.

[30] The agreements were filed with the Board as per the applicable confidentiality order [CB-CDA 2018-061].<sup>15</sup>

[31] Since the filing of CSI's Statement of Case, with respect to the remainder of services that paid royalties to CSI, CSI stated that it either entered into agreements with them, obtained consent to the withdrawal application, or refunded royalties.

[32] Consent and refund cover letters were filed with the Board. In terms of additional direct agreements with three users, CSI did not file the actual agreements, but offered to do so upon request.

[33] In three cases, the entities that operated a service having paid interim royalties had been dissolved at the time of the withdrawal application. In support of this assertion, CSI provided a corporate search report from the British Columbia *Registry Services*, the *Registraire des Entreprises Québec*, and a foreign corporation Certificate of Surrender, filed with the California Secretary of State.

[34] CSI submits that these users, as dissolved entities, are not capable of consenting to this application, entering into a direct licence with CSI, or receiving a refund. As a result, they ought not to factor into the determination of this application.

[35] As a result, CSI considers that paragraph 69.1(1)(b) of the Act is satisfied in respect of all of the users and services from whom CSI received royalties.

[36] As a matter of general principle, I wish to underscore the notion that the Board retains its discretion when assessing whether the criteria set out in paragraph 69.1(1)(b) are met.<sup>16</sup> Where those criteria are met, the Board does not have any discretion with regards to approving the withdrawal application.

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<sup>14</sup> CSI Statement of Case (Highly Confidential) filed with the Board on November 15, 2021.

<sup>15</sup> Confidentiality Order [CB-CDA 2018-061], (March 27, 2018).

<sup>16</sup> *See*, by analogy, *Canada (Attorney General) v Jencan Ltd.*, 1997 CanLII 6354 (FCA), [1998] 1 FC 187, online: <<https://canlii.ca/t/4n3z>>: "The words "if the Minister of National Revenue is satisfied" contained in subparagraph 3(2)(c)(ii) confer upon the Minister the authority to exercise an administrative discretion to make the type of decision contemplated by the subparagraph."

[37] Moreover, the Board retains broad discretion in terms of admissibility of evidence relating to the statutory criteria.<sup>17</sup> The flexibility afforded to the Board is reinforced by the objective served by the provisions on tariff withdrawal, namely to free administrative resources and allow for unregulated transactions.<sup>18</sup>

[38] Based on the foregoing, a good-faith declaration, confirmation or attestation – for example – of a fact that supports the conclusion that the criteria have been met may be relied upon by the Board to make its assessment. In other words, the Board retains flexibility in admitting evidence of criteria compliance.

[39] I have reviewed the list of users provided by CSI in its withdrawal application and their status vis-à-vis the withdrawal application.

[40] I accept CSI's list of users as factual.

[41] With respect to agreements in existence prior to the withdrawal application, royalties under such agreements are typically payable regardless of the status of a proposed tariff covering the same uses as that agreement. The agreements would take precedence over any approved tariff (s. 74), and the related royalties would be payable even if the withdrawal application were approved. Such royalties therefore do not fall under paragraph 69.1(1)(b).

[42] With respect to the remainder of users, these have either entered direct agreements with CSI, been sent refunds, or consented to the application withdrawal.

[43] In terms of the new agreements, they would either (i) not fall under paragraph 69.1(1)(b) in the sense that the related royalties would be payable even if the withdrawal application were approved; or (ii) satisfy sub-paragraph 69.1(1)(b)(iii).

[44] I accept these additional agreements as factual based on CSI's good faith declaration.

[45] In terms of refunds, the refunds cover letters should also be accepted as sufficient evidence of receipt of refunds.

[46] In terms of entities that have been dissolved, in light of the Board's flexibility in admitting evidence, I accept the various corporate search reports as evidence of dissolution, and, on that basis, follow CSI's approach: as dissolved entities, they ought not to factor into the determination of this application.

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<sup>17</sup> See *Canadian Recording Industry Association v Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 322 (CanLII), online: <<https://canlii.ca/t/2dsw7>> at paras 20-21.

<sup>18</sup> See Innovation, Science and Economic Development Canada (ISED), Factsheet: Copyright Board Reform (available online : <<http://www.ic.gc.ca/eic/site/693.nsf/eng/00168.html>>: "By allowing more direct agreements and withdrawal of proposed tariffs that are no longer required, these reforms would ensure that the Board is only adjudicating matters when needed, freeing resources for more complex and contested proceedings."

[47] While dissolved entities cannot enter into an agreement, give consent, or receive refunds, there would be no reason to keep an approved tariff for them, since they cannot participate in the covered uses. In other words, it would be absurd to approve a tariff solely for non-existing users.

### **C. IS THE BOARD *FUNCTUS OFFICIO*?**

[48] In the interest of completeness, CSI notes that the 2018 Decision does not preclude the approval of this application. CSI submits that where an earlier decision is made in the absence of governing legislation or based on legislation that is subsequently amended, it does not preclude a party to that decision from obtaining relief under the new or amended legislation. No estoppel arises because the latter proceeding raises a different question than the earlier proceeding.<sup>19</sup>

[49] I agree with CSI's reasoning: The questions raised in the 2018 Decision were whether CSI was entitled to unilaterally withdraw the Proposed Tariffs for 2018 and, if not, whether the Board should permit the withdrawal in circumstances where there was "nothing in the Act that explicitly permits or even appears to contemplate" the withdrawal of a proposed tariff.<sup>20</sup> In the present case, the issue is whether CSI meets the newly enacted criteria under subsection 69.1(1) of the Act. The cited authorities clearly support the notion that "[B]eing new legislation incorporating a new right [i.e., to apply for tariff withdrawal], no question of issue estoppel or cause of action estoppel can arise."<sup>21</sup>

### **IV. CONCLUSION**

[50] The requirements in subsection 69.1(1) have been met. I therefore approve the application to withdraw the Proposed Tariffs. The Registry shall mark the Proposed Tariffs as withdrawn as of the date this decision is issued.

[51] As such, the Proposed Tariffs are no longer under consideration in the *Online Music Services (2014-2018)* proceeding.

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<sup>19</sup> Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed (Canada: LexisNexis Canada Inc, 2015) at 57; *Re Bagaric and Juric et al.*, 1984 CanLII 2133 (ONCA), online: <<https://canlii.ca/t/g144m>>.

<sup>20</sup> 2018 Decision, *supra* note 2, para 31. **See also** paras 2, 32-33 and 41.

<sup>21</sup> *Supra* note 19.