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

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Department of Innovation, Science and Economic Development

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Copyright Board of Canada

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Overview

With the explosive growth of media and related technologies worldwide, demand is swelling among Canadians for copyrighted content and services that can provide it. This demand presents an enormous opportunity for the creators of such content and for the businesses supplying it to end-users. The Copyright Board of Canada (the “Board”) stands at the interface of these interests. It establishes the value for the use of copyrighted content by setting tariffs and licences in a broad range of areas, including music played in public places, music streaming, educational copying and retransmission of television signals. As innovative technologies have emerged and legislative reforms affecting copyright have been enacted, the Board has evolved to perform these functions in an increasingly dynamic landscape. As such, the Board has been and continues to be at the forefront of cases interpreting new provisions of the *Copyright Act* (the “Act”) and applying them to changing uses and technologies relating to such issues as peer-to-peer file sharing, Internet service provider liability, levies upon digital audio recording media, cloud computing and digital interactive services, among many others. In performing its functions, the Board facilitates the development and growth of copyright-based markets in Canada, resolves disputes between market actors and protects the public interest. More specifically, the Board sets tariffs and licences for uses of copyrighted content by which creators and rights holders may receive fair compensation, users pay fair prices and the Canadian public receives broad access. Successful functioning of this system also benefits the Canadian economy more generally through the development and launch of businesses in Canada that rely upon the use of copyrighted content, including through foreign investment.

The success of this system is based largely upon the timeliness of decision-making processes relating to the Board. Given the technological and legal trends noted above, many stakeholders and commentators have suggested that this framework requires retooling to fulfill its purpose. The Board, in particular, has embarked on a multi-year agenda to research and identify potential mechanisms to improve its efficiency and effectiveness. Following several consultations, research and other initiatives that have identified challenges on these fronts, the Department of Innovation, Science and Economic Development (“ISED”), the Department of Canadian Heritage (“PCH”) and the Board have jointly launched this consultation to seek views on a range of potential changes to the legislative and regulatory framework of the Board’s powers and procedures as well as the tariff-setting regimes more generally. The aim of this consultation is to develop a package of reforms that would minimize the amount of time taken by those processes while maintaining the Board’s ability to fulfill its purpose and render sound decisions in accordance with the principles of procedural fairness and the reasonable expectations of stakeholders and the public. More immediately, the goal is to gather input from stakeholders and Canadians regarding options to ground legislative and regulatory reforms, including procedural reforms, that could better position the Board to fulfill its critical purpose efficiently and effectively in an evolving economic and cultural context.

1. Context of Potential Reforms

1.1 The Functions and Importance of the Board

The Board is an administrative tribunal created by the Act that is empowered to establish, through tariffs or individual licences, the royalties to be paid in certain cases for the use of content that is subject to copyright. In almost all cases, the jurisdiction of the Board is limited to rights that are collectively managed by organizations referred to in Canada as collective societies.¹ Although the Board was established in 1989, its predecessor tribunal performed these basic functions to varying degrees since 1936.² At that time, this precursor reviewed and certified proposed tariffs for the public performance of music. The tribunal was the first of its kind in the world, and many countries would later adopt similar models. Since then, and following technological advancements affecting the creation and use of copyright as well as several comprehensive reforms to the Act, the jurisdiction of the Board has expanded to include many additional rights and subject-matters. Its procedures now also include multiple tariff-setting regimes, a mechanism for reviewing independently established licensing agreements between collective societies and users, a scheme for fixing licences between specific parties that cannot independently reach agreements and a system for granting licences in respect of copyright belonging to owners who cannot be located.

Although the Act does not specify an overarching mandate for the Board, its functions have evolved over time to encompass several broad policy goals:

- (a) To facilitate the development and growth of markets in Canada that rely upon copyright: The Board establishes the fair value for the use of copyrighted content by setting royalty rates and related terms and conditions where they cannot, by law or circumstance, be independently established. For users of such content, the Board provides certainty regarding their costs and legal liability and thus enables them to structure business models that can flourish in Canada. For rights holders, the Board establishes schemes by which they can be fairly and effectively remunerated for the use of their content. The Board estimates that in 2015 the royalties generated by tariffs it approved amounted to \$435-million. The Board's processes also facilitate the disclosure of information fundamental to the valuation of the use of copyrighted content, which informs and stimulates market-based negotiation of licences between rights holders and users.
- (b) To serve as a specialized, independent administrative decision-maker: The Board is an adjudicator often of first instance, which requires it to interpret and apply many provisions of the Act. As a matter of course, the Board hears and rules upon complex disputes of fact and law relating to copyright and related rights between rights holders and users based on evidence and a highly specialized understanding of relevant legal and economic principles. As with other adjudicative bodies in Canada, it exercises its specialized decision-making functions at arm's-length from government.

For instance, the Board currently has broad discretion over the specific procedures it follows when considering a proposed tariff and objections thereto, which it has set out in its Model Directive on Procedure (“Model Directive”).³

- (c) To safeguard the public interest: In performing the foregoing duties, the Board also considers the broader public interest. For instance, in addition to submissions and evidence filed by parties and relevant legal and economic principles, the Board considers written comments from anyone, including members of the public, on any aspect of its proceedings. More generally, the Board regulates the balance of market power between rights holders and users to ensure that the value of the use of copyrighted content is fair to all parties and end-users. This function includes limiting market actors’ exercise of monopolistic powers, which was a core motivation for the creation of the precursor of the Board in the 1930s. In doing so, the Board also increases the availability of copyrighted content to the public, including Canadian cultural content.

1.2 Previous Consultations and Research Regarding the Board

Given the importance of the Board and its ongoing commitment to improvement, the Government as well as the Board have each engaged in several consultations and other research regarding its performance. Recent consultations have led to a report by the Standing Committee on Banking, Trade and Commerce in 2016 concerning the operation and practices of the Board⁴ and a discussion paper by a working group of the Board in 2015 regarding several of its adjudicative processes.⁵ It was in discussions related to that 2015 study that the Board set out a commitment to investigate and improve the efficiency and effectiveness of its decision-making processes which now underpins this consultation. The Government has also commissioned research into the Board, including a 2016 paper by Professor Paul Daly then of the University of Montreal suggesting best practices that the Board might adopt⁶ and a 2015 paper by Professor Jeremy de Beer of the University of Ottawa quantifying the issue of delays concerning the Board.⁷ Related consultations in which issues with the Board have also been noted include public consultations regarding a national Innovation Agenda led by ISED in 2016,⁸ consultations regarding Canadian Content in a Digital Era led by PCH in 2016,⁹ a 2014 report by the Standing Committee on Canadian Heritage regarding the Canadian music industry,¹⁰ public consultations on the state of copyright led by ISED and PCH in 2009 and several reports by the Standing Committee on Canadian Heritage in 2004 and 2002 concerning broader copyright reform.¹¹ The Board has also been the subject of numerous articles and discussions by private-sector stakeholders.

These and other initiatives have identified several issues with the decision-making processes involving the Board. The chief concern is that they take too long. Indeed, it routinely takes several years for tariffs to be certified,¹² such that many apply retroactively. These delays pose significant consequences. For instance, they may create uncertainty in the marketplace by preventing users from knowing what uses will be covered by a given tariff or

licence set by the Board and at what cost. Making such uses before the Board has set a tariff or licence thus exposes users to the possibility of infringement proceedings or retroactive payment of yet-unknown royalties that could be different from what the users were expecting or had been paying previously. Prospective users may therefore decide not to make use of such copyrighted content, which would limit the development and growth of businesses in Canada that rely upon it. Rights holders could similarly be harmed both through an undeveloped market for copyrighted content in Canada and because delays prevent them from receiving their owed royalties when the corresponding uses are made or from receiving what they are fully owed because of difficulties with retroactive payment collection and distribution. These potential obstacles could further discourage the creation and dissemination of copyrighted content, which would harm the Canadian public more generally. Delays in proceedings also result in significant additional costs upon parties in terms of legal fees, time and energy. As a result, these processes may be inaccessible to many would-be participants.

A number of factors may contribute to delays in Board decision-making. For instance, the framework of the Board may be too permissive of contributions to delays from both the Board itself as well as parties and thereby insufficiently enable the Board to deal with matters expeditiously. In addition, the number of matters coming before the Board each year may be more than is necessary in the circumstances and in any event simply too many for it to dispose of in a timely manner. Moreover, a lack of clarity regarding specific Board procedures or its mandate, in either the Act or its Model Directive, could create confusion among participants and result in further inefficiencies. A lack of clarity regarding the Board's mandate may also affect the judicial review of Board decisions by courts. Being within the control of Parliament and the Board, these factors may be the proper focus of reform. Other factors of more transitory effect (e.g., the time needed to consider amendments to the Act or new court decisions relating to copyright) or outside the immediate control of Parliament and the Board (e.g., the emergence of complex technologies drawing upon copyright and a growing number of participants in Board proceedings) cannot be addressed directly through procedural reforms but should be considered as challenges that the Board can be better equipped to address.

1.3 Goals and Scope of Potential Reforms in this Consultation

Having firmly established the issues facing the Board through previous initiatives, the focus of this consultation is to engage stakeholders and the public on how best to resolve those issues by making the decision-making processes relating to the Board more efficient without limiting its ability to fulfil its policy goals described above. Accordingly, reforms should seek to minimize the amount of time taken by those processes, including the length of time between the commencement of proceedings and hearings as well as between hearings and the issuance of decisions, while still enabling the Board to render sound decisions in accordance with the principles of procedural fairness and the reasonable expectations of stakeholders and the public. Ultimately, the goal is to develop reforms to the framework of the Board that

strengthen overall stakeholder and public confidence in its decision-making processes. The success of any reforms to the Board must be judged by the extent to which they accomplish these objectives.

There are many potential ways in which the Board's framework could be reformed in line with these objectives. The present consultation focuses on the legislative and regulatory framework of the powers and procedures of the Board. In particular, stakeholder and public commentary is sought on the degree to which the options described in the sections below, as well as any additional suggestions within this scope, could facilitate the achievement of the desired objectives and the Board's critical role more generally. Any required changes in funding to the Board or its number of appointees is beyond the scope of this particular consultation and will be assessed at a later time when the appropriate reforms to the Board's powers and procedures have been identified. Potential changes to the governance of collective societies more generally and the existing system for granting licences in respect of copyright belonging to owners who cannot be located are also beyond the scope of this consultation. However, as significant issues in their own right, they may arise in the discussions in the upcoming five-year Parliamentary review of the Act.

2. Discussion of Potential Options for Reform

2.1 Enabling the Board to Deal with Matters More Expeditiously

A general challenge facing the Board in rendering timely decisions may be the legislative and regulatory support it has to deal with matters expeditiously. Enhancing these tools could enable the Board to deal with matters more efficiently, which could not only reduce delays where the tools are applied but also free up resources that the Board could redirect to other priorities. In this regard, one option could be to streamline certain aspects of the Board's decision-making framework, such as establishing as an overarching principle that the Board is required or authorized to advance proceedings expeditiously or specifying new or shortened deadlines in respect of Board proceedings. Another option could be to strengthen the Board's ability to limit potential contributions of parties to delays, such as by implementing case management, empowering the Board to award costs between parties or requiring parties to Board proceedings to include additional information with their preliminary filings.

2.1.1 Streamlining the Decision-Making Frameworks of the Board

1. Explicitly require or authorize the Board to advance proceedings expeditiously.

In conjunction with other reforms enabling it to do so, the Board could be explicitly required or authorized to advance proceedings expeditiously. This principle could be modeled on similar legislative and regulatory provisions in place for other administrative tribunals in Canada. For instance, adapting the "requirement" model of the Competition Tribunal,¹³ the

National Energy Board¹⁴ and the Patented Medicine Prices Review Board,¹⁵ a provision could be enacted in the Act requiring all proceedings before the Board to be dealt with as informally and expeditiously as the circumstances and considerations of fairness and the public interest permit. As an alternative or complement to such a provision, the “authorization” model of the Canadian Radio-television and Telecommunications Commission (the “CRTC”)¹⁶ could be adapted. In this regard, a regulatory provision could be enacted authorizing the Board to dispense with or vary any or some of its procedural rules for the purpose of ensuring the expeditious conduct of any proceeding where the circumstances and considerations of fairness and the public interest permit. Such directions could yield a culture of greater efficiency at the Board as well as greater latitude among parties and reviewing courts for measures it takes to that effect.

2. Create new deadlines or shorten existing deadlines in respect of Board proceedings.

At present, the Act stipulates few deadlines by which certain steps within Board proceedings must be completed. Although flexibility in Board procedures is desirable given the broad variability in the complexity of cases that the Board must consider and the tendency of parties to pause proceedings to engage in settlement discussions, it may be more efficient and nevertheless fair to specify additional deadlines or to shorten existing deadlines. For example, the Board could be required to render decisions within a fixed timeframe following a certain pre-established procedural step (e.g. within 12 months from the conclusion of hearings). Alternatively, the Board could be required to determine a particular timeframe for each case before it, having regard to factors such as the nature and complexity of the case, its procedural steps and the number of participants involved. To encourage accountability to such timeframes, the Board could also be required to track and make public the length of time it takes to render decisions following hearings. For instance, this information could be included in the Board's annual report submitted to the Governor in Council through the Minister of ISED, which is subsequently made available on the Board's website and tabled in Parliament. The Board's compliance with these deadlines would facilitate the evaluation of the performance of the Board and its appointees and the need for any further action. Another option could be to shorten the period of time following publication of proposed tariffs from which objections may be filed (e.g., 28 days, as it was prior to amendments to the Act made in 1997). Input regarding these or other deadlines that may be created or shortened is welcome.

2.1.2 Limiting the Contributions of Parties to Delays

3. Implement case management of Board proceedings.

To streamline its processes, case management could be implemented in respect of Board proceedings. By this model, a designated Board representative would, at the request of a party or the direction of the Board, supervise the progression of a given proceeding. In

practice, the case manager would convene and lead pre-hearing case management conferences between the parties in order to address such issues as:

- the clarification, simplification or elimination of issues in dispute, including the potential resolution of the matter through pre-hearing mediation;
- the scheduling of the various steps of the proceeding, including when interrogatories are to be exchanged and completed, when pleadings and evidence are to be filed and when and for how long the hearing, if any, is to occur;
- the identification of information and documents in the possession of any party that it ought to produce in order to address issues in dispute, including the resolution of related confidentiality concerns;
- the advisability of seeking a pre-hearing determination of a question of law;
- the evidence sought to be filed, including both fact and expert evidence; and
- in respect of a tariff proceeding, whether it ought to be consolidated with another tariff proceeding involving the same or similar uses, including hearing the cases together or consecutively, having regard to considerations of efficiency and fairness.

In order to codify agreements between the parties on such issues or otherwise to assist in the fair, expeditious and least expensive disposition of the proceeding, the Board could be formally empowered to issue orders following case management conferences. These orders would be binding upon the parties, but the Board could be permitted to vary them for compelling reasons on the request of a party or at its own initiative. Case management conferences could be convened at the request of a party or at checkpoints fixed by the case manager. The case manager could be a current Member of the Board or the holder of a newly created position.

4. Empower the Board to award costs between parties.

In order to foster a culture of greater efficiency in Board proceedings, the Act could be amended to give the Board explicit legislative authority to award costs between parties. The exercise of such a power could be left to the Board's discretion or subject to certain criteria. For instance, one option could be to limit this power to cases where the Board determines that a party's conduct has unnecessarily lengthened the duration of a proceeding and thereby contributed to an inefficient decision-making process. By such a model, the Board might not award costs in every case or even most cases, unlike in adversarial court proceedings, which could risk prejudicing parties that come before the Board more regularly than others. The use of such a power in such circumstances would nevertheless be fair even in this administrative context because undue slowdowns of the decision-making process impose compensable losses on regulated entities as well as the public generally. Another consideration is whether to leave the possible quanta of cost awards to the Board's discretion or to specify possible ranges of awards prospectively in a schedule, akin to Tariff B of the *Federal Courts Rules*.

5. Require parties to provide more information at the commencement of tariff proceedings.

(a) Require collective societies to include additional explanations with proposed tariffs.

At present, proposed tariffs that collective societies file with the Board need only specify the royalties to be collected, their related terms and conditions and their proposed effective periods. In order to provide greater clarity earlier in tariff proceedings, collective societies could be required to include additional information regarding their proposed tariffs, including:

- the reasons for filing the proposed tariffs at the particular times they are filed;
- the practical uses or activities that are targeted;
- the types of users known to the collective society that are targeted;
- the proposed royalty rate and its related terms and conditions specific to each use or activity targeted;
- the grounds on which the proposed royalty rates, terms and conditions and effective periods have been determined;
- how the proposed tariffs substantially differ from any previously certified tariffs that the proposed tariffs are sought to renew;
- how the proposed tariffs relate to other certified tariffs, if any; and
- how information reported by users pursuant to the proposed tariffs will be used.

This information could be included in a notice that would be filed with the Board at the same time as or shortly after a proposed tariff is filed. The Board could then be permitted to seek clarification from the collective society regarding any information that the Board considers to be unclear or deficient. Once satisfied, the Board could make the notice publicly available (e.g., by publishing it in conjunction with the proposed tariff in the *Canada Gazette*). Alternatively, the collective society could be required to serve the notice along with the proposed tariff to known users that would be targeted by the proposed tariff or that otherwise have paid royalties pursuant to a previously certified tariff that the proposed tariff is sought to renew.

The additional information sought from collective societies would not be an intrusive or definitive reveal of their confidential strategies or yet-undeveloped arguments. Rather, the level of information required could be similar to that of originating documents in court proceedings: sufficient for prospective users or other interested persons to understand the implications and basic rationales of proposed tariffs and thus to make informed decisions about whether to object, intervene or comment in the attendant proceedings. For example, a notice need not provide information about the evidence that would be relied upon by the collective society in a proceeding. Greater transparency at this stage could lead to greater efficiencies by limiting the filing of unnecessary or vague objections and interventions, narrowing the issues examined through interrogatories, limiting the need for

Board intervention and curbing any tendency of some collective societies to propose unreasonably high tariffs as opening gambits. In any event, to ensure that collective societies are not unfairly constrained, notices could be made without prejudice to any arguments the collective societies might advance later in proceedings.

(b) Require objectors to include additional information with objections.

Objectors are currently not required to provide any information regarding their objections to proposed tariffs before filing their statements of case. In order to provide greater clarity earlier in tariff proceedings, objectors could be required to include with their filed statements of objection certain related information, including the grounds on which the objector, as appropriate:

- submits that a proposed tariff is inapplicable to the objector;
- objects to the proposed royalty rates, terms and conditions or effective periods; or
- objects to how information reported by users pursuant to the proposed tariff will be used.

As already the case, the Board would be required to send copies of these more detailed objections to the relevant collective societies.

As with the notices proposed to be required of collective societies (see Option 5(a), above), the additional information sought would be less than that required later in objectors' statements of case. For example, a notice need not provide information about the evidence that would be relied upon by the objector in a proceeding. In any event, objectors could be assisted in developing this information by the broader explanations to be provided by collective societies. Greater transparency at this stage could lead to greater efficiencies by narrowing the issues examined by interrogatories and limiting the need for Board intervention. To ensure that objectors are not unfairly constrained, notices could be made without prejudice to any arguments the objectors might advance later in proceedings.

2.2 Reducing the Number of Matters Coming Before the Board Annually

Another challenge restraining the timeliness of the Board's decisions may be the volume of matters coming before it each year. Reducing the number of matters it must consider could provide the Board with more time to consider each, resulting in faster decision-making. Such a goal could be accomplished by permitting all collective societies to enter into licensing agreements of overriding effect with users and without Board involvement or extending the timeframes following which previously certified tariffs would need to be renewed.

6. Permit all collective societies to enter into licensing agreements of overriding effect with users independently of the Board.

The Act currently requires certain collective societies to file proposed tariffs with the Board and permits other collective societies to choose whether to do the same or to establish individual licences with prospective users. Notwithstanding the Board's role in guarding the public interest by scrutinizing proposed tariffs, tariff proceedings required by the Act strain the time and resources of the Board and may not be necessary in all cases. To alleviate these demands upon the Board and to provide greater flexibility, all collective societies could be permitted to choose whether to file proposed tariffs with the Board or to establish licences independently with prospective users that would take precedence over any tariff approved or licence fixed by the Board in respect of overlapping uses, parties and effective periods. Nevertheless, in respect of at least some uses and the statutory rights to remuneration,¹⁷ it is likely that certain collective societies would continue to seek Board-certified tariffs because of the difficulty of concluding and enforcing private agreements with many different prospective users.

In order to assist parties newly enabled by such a system to establish private licensing agreements where they would prefer to do so rather than engage in more costly and time-consuming tariff proceedings, the existing statutory scheme whereby some parties may instead request individual dispute resolution by the Board could be broadened to include all collective societies.¹⁸ However, if collective societies continue to file proposed tariffs and many additional parties seek such individual dispute resolution, it is possible that the Board would be required to consider just as many or more matters compared to the current system and the efficiency gains of the proposed system would be moot. That said, the fact that the Board receives very few requests per year for individual dispute resolution in cases where that option is already available indicates that it would not be a significant additional burden in the proposed framework. Nevertheless, where multiple requests for such individual dispute resolution are filed pertaining to the same or similar rights or uses, it may be helpful to permit the Board to notify all affected parties that a proposed tariff of overriding effect ought to be filed instead. Input is welcome regarding these or other measures that could reduce the number of matters coming before the Board under the proposed system whereby all collective societies and users are permitted to conclude such private agreements and seek individual dispute resolution.

In order to maintain the Board's role in protecting the public interest, the existing statutory scheme by which collective societies or users may file negotiated licensing agreements with the Board could also be expanded to include all such agreements under the system proposed above.¹⁹ Other adjustments to this filing scheme could also be made in order to better serve the public interest. For instance, parties could be required to file their agreements with the Board or at least be more incentivized to do so in some way.²⁰ In addition, given its familiarity with the relevant markets, the Board could be required to examine agreements at first instance rather than at the request of the Commissioner of

Competition, as is presently the case. As part of this examination, the Board could notify the Commissioner if it believes there are public interest concerns related to competition that the Commissioner may wish to investigate pursuant to the *Competition Act*. It could also be clarified that agreements filed with the Board will be made publicly available. Although many parties may wish to keep the terms of their agreements confidential, opening them to the public would provide benchmarks that could facilitate more free market-based negotiations requiring less Board intervention going forward. By requiring or incentivizing greater filing of agreements, the Board would also develop a catalogue of agreements that could be used as benchmarks in its own evaluations of proposed tariffs or individual disputes.

7. Change the time requirements for the filing of proposed tariffs.

At present, proposed tariffs filed with the Board must specify that their royalties are to be effective for periods of one or more calendar years. However, the appropriate length of a tariff's effective period depends greatly upon the uses it encompasses, and in many cases could be longer than one year. It may therefore be desirable to stipulate a longer minimum effective period for proposed tariffs (e.g., three years). Lengthening tariffs' effective periods in this way could reduce the number of proposed tariffs that are filed with the Board annually, freeing up its time and resources for redirection to other matters.

2.3 Preventing Tariff Retroactivity or Limiting Its Impact by Other Means

In addition to enhancing the tools that enable the Board to deal with matters expeditiously and reducing the number of matters that the Board must consider each year, other options could be pursued to more directly prevent the certification of tariffs having retroactive effect or at least limit the impact of such tariffs upon parties. For instance, collective societies could be required to file their proposed tariffs longer in advance of their proposed effective dates, which would allow the Board more time to adjudicate. Existing statutory frameworks could also be amended to allow for the use of the copyrighted content at issue and the collection of royalties pending the approval of tariffs in all Board proceedings rather than just some, as is presently the case.

8. Require proposed tariffs to be filed longer in advance of their effective dates.

The Act currently requires a proposed tariff to be filed on or before the March 31 immediately prior to the expiry date of a previous tariff sought to be renewed or the proposed effective date where there is no previous tariff, as applicable. As such, in every case, the Board has less than 12 months to complete all necessary steps and approve a tariff before the previous tariff expires or the proposed tariff is to become effective. In conjunction with other reforms targeting the timeliness of the Board's decision-making processes, collective societies could be required to file their proposed tariffs longer in advance of the applicable expiry or effective dates. The precise window of time could be selected and codified for all cases (e.g., the January 31 immediately before the applicable

expiry or effective dates, which could pre-empt the limited capacity of the *Canada Gazette* at the beginning of the Government's fiscal year on April 1). The Board would then have more time to consider the proposed tariffs, which would lessen the possibility of it approving tariffs having retroactive effect.

9. Allow for the use of the copyrighted content at issue and the collection of royalties pending the approval of tariffs in all Board proceedings.

Statutory provisions currently applicable in only certain tariff-setting regimes allow prospective licensees to make the uses at issue and collective societies to collect royalties pending the Board's approval of a tariff. In order to limit the impact of tariff retroactivity, these measures could be broadened to all cases. For instance, it could be established that in all cases involving a previously certified tariff that a proposed tariff is sought to renew the previous tariff applies until the new tariff is approved.²¹ The Board could also be granted the power to make interim decisions on its own initiative and not merely when parties request it do so, as at present.²² Such a power could yield more efficient proceedings and encourage parties desiring tariffs or licences that are more fully set on their terms to initiate action sooner, through either continued Board proceedings or independent negotiations. Either option would also provide a greater degree of legal and financial certainty to parties during tariff proceedings.

2.4 Further Clarifying the Board Decision-Making Processes

An additional challenge to the timeliness of Board decision-making could be the clarity of its procedures and its mandate among participants and courts. Whereas the Board and experienced participants are no doubt familiar with its operations, newcomers and courts conducting judicial review of Board decisions may benefit from resolution of apparent gaps or inconsistencies in its explicit framework. One solution to this issue could be to codify specific Board procedures through regulations in order to clarify and elaborate upon those procedures to a greater extent than is presently the case in the Board's Model Directive or is desirable through the Act. Another solution could be to stipulate the overarching criteria that the Board is to consider in its decision-making so as to guide participants, reviewing courts and the Board itself. In addition, to provide broader clarity, the Act could be amended to include a mandate for the Board in line with the policy goals identified in the introductory section above. Lastly, the tariff-setting regimes of the Act could be harmonized to a greater degree so as to increase their consistency and clarity.

10. Codify and clarify specific Board procedures through regulation.

As noted in the introductory section above, the Board currently has broad discretion over its specific procedures and has set out many of them in its Model Directive. However, in order to improve the timeliness and clarity of the Board's decision-making processes, it could be helpful to codify at least some Board procedures through regulation rather than the Model

Directive or parts of the Act. Doing so could allow for greater detail than is presently included in the Model Directive or is desirable in the Act. It would also allow for more flexibility than possible through the Act. Significantly, a number of other administrative tribunals in Canada have their procedures codified by regulation, including the Competition Tribunal²³ and the CRTC.²⁴ As appropriate, the Board could provide additional guidance through the issuance of practice notices.

Additional detail added through regulation could include the following measures, subject to an overriding ability of the Board to dispense with or vary any or some of its procedural rules for the purpose of ensuring the expeditious conduct of any proceeding where the circumstances and considerations of fairness and the public interest permit (see Option 1, above):

- (a) Statement of issues: So as to provide greater clarity earlier in opposed tariff proceedings, parties could be required to file joint statements of issues that set out the relevant and material facts and points of law on which they agree, disagree or are uncertain. As part of these statements, parties could also be required to propose schedules for the proceedings and to identify any related proceedings with which they could be consolidated. If the parties cannot agree upon these issues following good-faith efforts, they could be permitted, with leave of the Board, to file separate statements for those issues on which they disagree. The parties could be required to file these statements by a certain deadline (e.g., 90 days after the period in which an objection may be filed or in any event before interrogatories may be exchanged). Parties could be allowed to amend their statements with leave of the Board in exceptional circumstances, such as where relevant issues are discovered that were not otherwise reasonably discoverable.
- (b) Interrogatory process: So as to create a more efficient interrogatory process with less involvement required of the Board to resolve disputes, it could be:
- clarified that parties may only make and need only respond to requests that are proportionate to the nature and complexity of their disputes and their respective positions and relevant and material to the resolution of disputed issues;
 - required in cases involving multiple collective societies or objectors that generally aligned parties must consolidate their interrogatories into a single set or satisfy the Board as to why it would be unjust or inefficient to do so;
 - required that parties must explicitly link their interrogatories to specific issues identified in their statements of issues (see above) and that parties must include in their replies to objections to interrogatories explanations as to how the information sought is relevant to specific issues identified in their statements;
 - clarified that interrogatories are to be exchanged after collective societies' replies to objections have been sent to the objectors;

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- clarified that responses to interrogatories need only be gathered from a representative sample of an association's members, rather than from all members;
 - required that a party's responses to interrogatories be provided at the same time as its objections to other interrogatories posed, if any, so motions regarding the sufficiency of the party's responses and objections to interrogatories may be heard at the same time; and
 - required that parties use a standardized format for communicating interrogatories, responses thereto, objections thereto, replies to objections, etc., such as a table that enables readers to cross-reference the foregoing.

(c) Simplified procedure: Further to Option 1, above, a simplified procedure could be developed for use in certain circumstances, either automatically or by order of the Board upon the request of one or more of the parties. Circumstances in which such a procedure could be made to apply automatically could include where no objection has been filed in respect of a proposed tariff and it is not substantially different from a previously certified tariff that the proposed tariff is sought to renew. Circumstances in which the Board may grant a request for use of the simplified procedure could include where the requesting party demonstrates that the issues in dispute are relatively simple or the monetary value at stake to the parties is reasonably likely to be below some threshold value. The additional information to be provided by parties (see Option 5, above, as well as the suggestion further above under this Option regarding statements of issues) would help the Board to make these assessments. Where the simplified procedure applies, the Board could be required to certify the tariff as soon as practicable and no later than the day before it is proposed to take effect unless circumstances require otherwise. Specific efficiencies could include proceeding with more limited interrogatories or written evidence and submissions only, among more case-by-case changes decided through case management (see Option 3, above). Input is welcome regarding what the threshold value mentioned above should be, if one is appropriate, as well as other efficiencies that could be incorporated into the simplified procedure framework.

(d) Evidence: To ensure that the Board receives the information it requires to render fair decisions, additional clarity could be provided regarding evidence. For instance, where it considers more efficient and nevertheless just, the Board could require parties to file combined evidence (e.g., surveys, statistical analyses, expert reports) or expert evidence in chief to be limited to written reports only. Expert evidence could more generally be limited to issues that have been raised already in the proceedings and subject to certain content requirements, including: a statement of the relevant issues addressed in the report; a description of the expert's qualifications with respect to those issues; an indication of the points of agreement and disagreement with another expert's opinion to which the expert is responding; and the bases of the expert's opinions, including facts and assumptions, explanations of methodologies followed

and copies of any documents relied upon. Parties could also be required to ensure that their experts are available for examination and cross-examination at any oral hearings scheduled. The Board could also be permitted, where it believes it would be of assistance, to appoint independent experts to enquire into and report on any issue relevant to the proceeding.

- (e) Confidentiality: In order to encourage full and frank engagement with the Board while preserving its role as a guardian of the public interest, it could be codified that documents filed with the Board and matters relating to them are to be open to the public unless the Board orders otherwise at the request of a party. In considering such a request, the Board could be required to consider whether disclosure of a document would cause specific, direct harm to a person and whether that harm would outweigh the public interest in the document's disclosure. This framework would renew the current practice whereby parties, on their own initiative, redact parts of documents filed or mark them as confidential. The Board could also issue a practice notice setting out more detailed guidance regarding its approach to confidentiality, which could provide further clarity and lower the risk of the Board being inundated with requests for confidentiality orders.

To varying degrees, some of these measures could also be implemented through case management of Board proceedings (see Option 3, above).

11. Stipulate a mandate for the Board in the Act.

The decision-making obligations of the Board are currently founded in its legislated duties and the judicial principles of procedural fairness rather than an explicit mandate. Including such a mandate in the Act could clarify and provide guidance to the Board, parties and reviewing courts regarding the purposes of the Board's work, which in turn could inform the development of measures aimed at improving the timeliness of the Board's decision-making processes as well as evaluative criteria for such measures. The mandate could be expressed simply, such as to ensure that royalty rates and their related terms and conditions are fair and to do so in the most efficient manner possible. Alternatively, more detailed guiding principles could be codified reflecting the particular policy goals of the Board described in the introductory section above. In the latter option, the mandate of the Board could follow the model of the Copyright Royalty Board of the U.S.²⁵ or similar tribunals elsewhere. Relatedly, the principle of proportionality as adopted by the Federal Courts could also be codified in relation to Board proceedings generally, whereby the Board would be required to ensure that the time and cost requirements of its procedures upon parties are proportionate to the nature and complexity of their disputes and their respective positions.

12. Specify decision-making criteria that the Board is to consider.

In setting royalty rates and their related terms and conditions, the Board is required to consider certain criteria set out explicitly in the Act (e.g., to set “fair and equitable” royalty rates and related terms and conditions, as set out for one of the current tariff-setting regimes)²⁶ and established by jurisprudence (e.g., the principle of technological neutrality).²⁷ The Board also follows, where appropriate, certain self-imposed guiding principles.²⁸ Further to Option 11, above, this system may result in decision-making processes that to some seem unclear. For instance, the criteria set out in the Act are sparse and somewhat inconsistent across different frameworks despite the Board’s practice of applying the same broad principles in all cases.²⁹ Moreover, the criteria established incrementally by decisions of the Board and reviewing courts are diffuse across multiple sources. In order to clarify the decision-making process for all prospective participants and the public generally, the overarching factors that the Board must take into consideration in all royalty-setting decisions could be specified in legislation or regulation. In this regard, the Board could follow the model of the Copyright Tribunal of the U.K.³⁰ or similar tribunals elsewhere. Input is welcome regarding the merits of setting out such a list of factors in addition to what other factors ought to be included in it, if any. These factors could apply in addition to any other specific considerations required in certain cases.³¹

Although at least some of these factors in such a list would follow the Board’s current practice, such increased clarity could provide a more coherent framework for the submission of arguments and evidence by participants to Board proceedings as well as the structuring of the Board’s reasoning in its decisions. In turn, the Board may come to enjoy more efficient and effective participation during its proceedings, particularly from newcomers, and greater deference on judicial review. Alternatively, introducing such criteria may result in some degree of uncertainty as to the precise scope of each could be subject to litigation.

13. Harmonize the tariff-setting regimes of the Act.

The Act currently specifies a number of tariff-setting regimes: the “mandatory” regime,³² the “optional” or “general” regime,³³ the “retransmission” regime³⁴ and the “private copying” regime.³⁵ These schemes follow generally similar procedures but encompass different subject-matter and statutory rights. Elsewhere in this paper, it has been suggested that these regimes be harmonized to a greater degree by establishing in respect of all, rather than just some: that collective societies and users be allowed to enter into agreements of overriding effect without Board involvement, seek Board resolution of their disputes in attempting to do so and file with the Board their agreements for its review (see Option 6, above); that the arrangements established by a previously certified tariff continue to apply until a new tariff is approved (see Option 9, above); and that an overarching mandate and a common set of decision-making criteria for the Board be adopted (see Options 11 and 12, above). Beyond these proposed changes, all or some of these regimes could be merged into a single tariff-

setting procedure or at least harmonized to an even greater degree. Doing so could result in more consistent decision-making processes across different cases, easier consolidation of proceedings and other efficiencies. Certain other elements unique to one or more of the current regimes could be maintained and applied broadly, such as the limitation upon statutory damages in the mandatory regime.³⁶ Other elements unique to one or more of the current regimes could be preserved and limited to certain subject-matter or rights, as at present, such as the stipulation of specific considerations in certain regimes.³⁷ More generally, such harmonization would also clarify and simplify the Act, which has been an overarching goal of copyright reform since at least 2002.³⁸ Input is welcome regarding these suggestions generally as well as any other particular considerations that ought to be accounted for in such a merged or harmonized scheme.

3. Conclusion

All comments regarding potential reforms to the legislative and regulatory framework relating to Board decision-making are welcome, including the specific options and considerations discussed above or others, aside from the issues of funding, collective management generally or the system for granting licences in respect of copyright belonging to owners who cannot be located. Except where specifically noted, the potential reforms discussed above could be implemented through amendments to the Act or the creation of new regulations pursuant to the Act.³⁹ In addition to substantive commentary on these and other potential reforms and considerations, recommendations regarding the appropriate enacting instrument for each proposal are also welcome. Considerations could include, on the one hand, a desire to incorporate certain reforms into the underlying framework of the Board in the Act and, on the other hand, the relative ease and speed of enacting and amending certain reforms by regulation or Model Directive as compared to legislation.

All comments should be sent to cbconsultations@canada.ca prior to September 29 2017. Comments received will be made public following the close of the consultation.

¹ See *Copyright Act*, RSC 1985, c C-4 [*Copyright Act*], s 2 (definition of “collective society”).

² Prior to the establishment of the Copyright Appeal Board in 1936, the relevant minister through Cabinet performed a roughly equivalent function of reviewing and certifying proposed tariffs. This system existed from 1931 to 1936.

³ Copyright Board of Canada, *Model Directive on Procedure*, online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/about-apropos/directive-e.html>>.

⁴ Senate of Canada, Standing Committee on Banking, Trade and Commerce, *Copyright Board: A Rationale for Urgent Review* (November 2016) (Chair: David Tkachuk), online: Senate of Canada <https://sencanada.ca/content/sen/committee/421/BANC/Reports/FINALVERSIONCopyright_e.pdf>.

⁵ Working Committee on the Operations, Procedures and Processes of the Copyright Board, *Discussion Paper on Two Procedural Issues: Identification and Disclosure of Issues to be Addressed During a Tariff Proceeding and Interrogatory Process* (4 February 2015), online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/about-apropos/pdf/discussion-paper.pdf>>.

⁶ Paul Daly, “Best Practices in Administrative Decision-Making: Viewing the Copyright Board of Canada in a Comparative Light” (2016), online: Government of Canada <<http://canada.pch.gc.ca/eng/1478727977707?=&=&>>.

⁷ Jeremy de Beer, “Canada’s Copyright Tariff Setting Process: An Empirical Review”, online: Government of Canada <http://publications.gc.ca/collections/collection_2015/pc-ch/CH44-155-2015-eng.pdf> [de Beer, “Empirical Review”].

⁸ See Innovation, Science and Economic Development, *Positioning Canada to Lead: An Inclusive Innovation Agenda*, online: Innovation, Science and Economic Development <https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00009.html>.

⁹ See Government of Canada, *Canadian Content in a Digital World*, online: Government of Canada <<https://www.canada.ca/en/services/culture/consultations.html>>.

¹⁰ House of Commons, Standing Committee on Canadian Heritage, *Review of the Canadian Music Industry* (June 2014) (chair: Gordon Brown), online: House of Commons <<https://www.ourcommons.ca/DocumentViewer/en/41-2/CHPC/report-5/>>.

¹¹ House of Commons, Standing Committee on Canadian Heritage, *Interim Report on Copyright Reform* (May 2004) (Chair: Sarmite Bulte), as approved by House of Commons, Committee on Canadian Heritage, *Second Report on Copyright Reform* (4 November 2004) (chair: Marlene Catterall); House of Commons, Standing Committee on Canadian Heritage, *Status Report on Copyright Reform* (24 March 2004); and House of Commons, Standing Committee on Canadian Heritage, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (3 October 2002) [Section 92 Report].

¹² See de Beer, “Empirical Review”, *supra* note 7.

¹³ See *Competition Tribunal Act*, RSC 1985, c 19 (2d Supp), s 9(2) (“[a]ll proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit”).

¹⁴ See *National Energy Board Act*, RSC 1985, c N-7 [*National Energy Board Act*], s 11(4) (“[s]ubject to subsections 6(2.1) and (2.2), all applications and proceedings before the Board are to be dealt with as expeditiously as the circumstances and considerations of fairness permit, but, in any case, within the time limit provided for under this Act, if there is one”).

¹⁵ See *Patent Act*, RSC 1985, c P-4, s 97(1) (“[a]ll proceedings before the Board shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit”).

¹⁶ See *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, SOR/2010-277 [CRTC Rules], r 7 (“[i]f the Commission is of the opinion that considerations of public interest or fairness permit, it may dispense with or vary these Rules”).

¹⁷ See *Copyright Act*, *supra* note 1, ss 19 & 81.

¹⁸ *Ibid*, ss 70.2-70.4. Extending this scheme to the statutory remuneration rights would also prevent them from approximating the effect of the broader “exclusive” rights in the Act whereby collective societies administering these rights could unilaterally set remuneration rates to be paid for the use of the underlying content. Such a legislative change is beyond the scope of this consultation. In the suggested model, affected users would retain access to a neutral arbiter in negotiations with collective societies.

¹⁹ *Ibid*, ss 70.5-70.6 (current scheme for the examination of agreements by the Board).

²⁰ Currently, parties filing their agreements with the Board are exempted from section 45 of the *Competition Act*: *ibid*, s 70.5(3).

²¹ *Ibid*, ss 68.2(3) & 70.18.

²² *Ibid*, s 66.51.

²³ See *Competition Tribunal Rules*, SOR/2008-141.

²⁴ See *CRTC Rules*, *supra* note 16.

²⁵ See USC 17 § 801.

²⁶ In all tariff-setting regimes, the Board is required by the Act to consider the proposed tariffs and any objections thereto: see *Copyright Act*, *supra* note 1, ss 68(1), 68(3)(a), 70.14, 70.15(1), 72(2) & 83(7). In several tariff-setting regimes, the Act also requires the Board to consider certain additional matters: *ibid*, ss 68(2), 68(3)(b), 68.1, 69(2)-69(3), 73-74 & 83(8)-83(9). Otherwise, the Act permits the Board in all regimes to establish tariffs in accordance with what it considers to be "necessary" and/or "appropriate", phrased differently depending on the regime: *ibid*, ss 68(2)(b), 68(3), 70.15(1), 73(1)(a)(ii) & 83(8)(a)(ii). By contrast, the Act does not require the Board to consider any substantive criteria in the schemes for individual dispute resolution or the examination of negotiated licensing agreements filed with the Board: *ibid*, ss 70.2-70.6. Although the Board attempts more generally to set royalty rates and related terms and conditions that are "fair and equitable", the Act explicitly requires this standard in respect of only one tariff-setting regime and the phrase otherwise only appears in the Act as a criterion for the Governor in Council to make regulations issuing policy directions to the Board: *ibid*, s 83(9) & 66.91.

²⁷ See e.g. *Canadian Broadcasting Corporation v SODRAC 2003*, 2015 SCC 57, [2015] 3 SCR 615, Rothstein J (identifying technological neutrality as a factor that the Board must consider and enumerating factors that the Board must consider in setting licences pursuant to section 70.2 of the Act).

²⁸ See e.g. Copyright Board of Canada, *Annual Report* (Ottawa: Copyright Board of Canada, 2016), online: Copyright Board of Canada <<http://www.cb-cda.gc.ca/about-apropos/annual-annuel/annual-2015-2016-e.pdf>> at 9-10 ("the coherence between the various elements of the public performance of music tariffs; the practicality of the administration to avoid tariff structures that make it difficult to administer the tariff in a given market; the search for non-discriminatory practices; the relative use of protected works; the taking into account of the Canadian environment; the stability in the setting of tariffs that minimizes disruption to users; as well as the comparisons with 'proxy' markets and comparisons with similar prices in foreign markets").

²⁹ See EN 26, above.

³⁰ See *Copyright, Designs and Patents Act 1988* (UK), c 48, ss 129-135.

³¹ See EN 26, above.

³² See *Copyright Act*, *supra* note 1 ss 67-69.

³³ *Ibid*, ss 70.1-70.191.

³⁴ *Ibid*, ss 71-76.

³⁵ *Ibid*, s 83.

³⁶ *Ibid*, s 38.1(4).

³⁷ See EN 26, above.

³⁸ See Section 92 Report, *supra* note 11.

³⁹ See *Copyright Act*, *supra* note 1, ss 62(1)(e), 66.6 & 66.91.