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**Re: A Consultation on Options for Reform to the Copyright Board of Canada
Attention: CBconsultations@canada.ca**

A. INTRODUCTION

Canadian Retransmission Collective (CRC) is pleased to respond to the Government of Canada's request for submissions of August 9, 2017 to all Copyright Board stakeholders, requesting commentary on the matters raised in the Consultation on Options for Reform to the Copyright Board of Canada (the "**Discussion Paper**").

CRC is a copyright collective representing thousands of program rights holders. Its affiliates include independent Canadian program producers, the National Film Board of Canada, producers of programs shown on Public Broadcasting Service (PBS) and Réseau France Outremer (RFO), educational TV producers in Canada (except Télé-Québec), all foreign producers and broadcasters outside North America, and producers of music videos used in Canadian programs. CRC's mandate is to ensure that distant signal royalties reflect an equitable market value and are flowed through to program rightsholders in a timely and efficient manner. Achieving these goals is essential to promoting a copyright ecosystem that encourages the creation and dissemination of new content.

CRC fully supports the Government of Canada's and the Copyright Board's policy goals in reviewing the legislative and regulatory framework of the powers and procedures of

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the Board. All stakeholders – copyright owners, intermediaries, and users alike – will benefit from a more efficient Copyright Board process.

As the Discussion Paper notes, Canada’s copyright tribunal system is the oldest in the world. It serves a vital role in circumstances where individual copyright licence negotiations cannot practicably take place.¹ The goal of the Copyright Board process is to accord “fair and equitable” compensation for uses of copyright works.² However, whenever the certification of a tariff is delayed, all stakeholders suffer. Creators are denied a timely “just reward” and users are left uncertain as to the full nature of their obligations.³ Legal and administrative costs escalate for all. Further, as the Discussion Paper suggests, in an increasingly dynamic landscape, a delayed certification process may slow or frustrate the dissemination of content via innovative technologies. Put bluntly, delay disrupts the copyright balance and denies justice for stakeholders.⁴

CRC believes that all stakeholders will benefit from a more focused and efficient process at the Copyright Board. Its responses below are dedicated to achieving these goals.

B. SPECIFIC RESPONSES TO POTENTIAL REFORMS

Potential Reform #1: Explicitly require or authorize the Copyright Board to advance proceedings expeditiously

Of the models raised by the Discussion Paper, CRC is of the view that the “requirement” model of the Competition Tribunal, the National Energy Board and the Patented

¹ See, e.g., *A Broadcasting Policy for Canada*, Standing Committee on Communications and Culture (June 1988), at 96 (explaining the compulsory licence for retransmissions on the basis that “it would be impractical to negotiate remuneration in respect of every program on a retransmitted station’s schedule”), *Copyright in Canada: Proposals for a Revision of the Law*, Consumer and Corporate Affairs Canada (April 1977) at 140 (explaining that a private right to exclude in the retransmissions setting was “an unnecessarily costly technique to guarantee financial reward and that it should be replaced by compulsory licensing whereby public access and private compensation would both be secured”). *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012 SCC 68](#) at ¶69, 74-75 (“*Cogeco SCC*”) (explaining why the compulsory retransmissions licence promotes both sides of the copyright balance).

² *Copyright Act*, [RSC 1985, c C-42](#) (the “Act”), s. 66.91.

³ Whenever a tariff is certified retroactively, there are significant costs and complexity required to calculate and collect retroactive tariff adjustments. Delay also requires collectives, pending certification of the tariff, to estimate and maintain reserves when distributing royalties to address potentially adverse tariff rulings. Delays in approving tariffs penalize retransmission rights holders, because they do not receive royalties until years after they are due. Likewise, users are left in doubt as to their royalty and reporting obligations until late in a tariff period or beyond a tariff period.

⁴ *Whitam v. Hill*, (1759) 94 ER 851 “Delaying justice and denying justice are considered as the same thing in [the] Magna C[on]arta.” *Cogeco SCC*, [2012 SCC 68](#) at ¶36, 64-76 (describing the goals of the copyright balance in detail).



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Medicine Prices Review Board is most suitable.⁵ In particular, the National Energy Board model demands accountability, as the requirement to deal with all applications and proceedings “as expeditiously as the circumstances and considerations of fairness permit” is anchored in specific time limits that cannot be exceeded.⁶ This model encourages efficiencies wherever they may be found, while ensuring predictability through the ultimate statutory time limits. By contrast, the “authorization” model permits deviations that could be harmful to all stakeholders.

Importing a similar standard to the National Energy Board model would require the Copyright Board to appropriately scale its processes to the magnitude and novelty of the case before it, and provides it with the mandate to find efficiencies wherever possible. This standard echoes the increasing reminders from the Supreme Court of Canada that proportionality, efficiency and timeliness are necessary to ensure access to justice in the civil system:

Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

A shift in culture is required. The proportionality principle is now reflected in many of the provinces’ rules and can act as a touchstone for access to civil justice. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure. Summary judgment motions provide an opportunity to simplify pre-trial procedures and move the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. Summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.⁷

In particular, explicitly requiring the Copyright Board to apply “proportional procedures tailored to the needs of the particular case” is essential to creating a real culture shift for all Board stakeholders. This is not a one-size-fits-all issue, but should be considered and

⁵ See, e.g., s. 124.2(4) of the *Competition Act*: “The Tribunal shall decide the questions referred to it informally and expeditiously, in accordance with any rules on references made under section 16 of the *Competition Tribunal Act*.”

⁶ *National Energy Board Act*, [R.S.C. 1985, c N-7](#), ss. 11(4), 58.16(4)-(5).⁷ *Hryniak v. Mauldin*, [2014 SCC 7](#) (official headnotes).

⁷ *Hryniak v. Mauldin*, [2014 SCC 7](#) (official headnotes).



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applied in all proceedings with reference to the number, nature and complexity of all live issues between the parties.

Potential Reform #2: Create new deadlines or shorten existing deadlines in respect of Copyright Board proceedings

As the Discussion Paper suggests, there may be many means to find efficiencies within even a hotly contested Copyright Board proceeding. These should be supported by firm deadlines that are applicable both to parties and to the Copyright Board itself.

(a) Deadlines applicable to Parties

This topic is intimately interrelated with Potential Reform #3 (Implementation of Case Management). In CRC's view, an early and mandatory case management conference that sets hard but achievable deadlines will promote the timely narrowing of live issues and the concentrated resolution of interrogatory disputes without introducing additional unnecessary steps in the Copyright Board process. A part of the case management process should be to institute deadlines that are aggressive as possible in the circumstances, while remaining appropriate to the complexity of the case.⁸

Although certain participants may be reluctant to accept hard but achievable deadlines for complex cases, it must be remembered that in the federal setting, there are similar successful models that support important economic engines for Canada. In particular, the PM(NOC) regime institutes a hard 24-month time limit for the complete resolution of a prohibition application, including all settlement negotiations, discoveries, cross-examinations, expert reports, and the issuance of often lengthy decisions.⁹ The rationale for this hard time limit is the imperative to resolve quickly whether a generic pharmaceutical product should or should not be able to go to market. In the copyright setting, the comparable imperative is to promote cost certainty for users and owners alike, allowing new and innovative services to be launched into the Canadian market and avoiding the costly and complicated reconciliations that are necessary whenever a tariff is certified deep into its term or even beyond its term.¹⁰ While a 24-month ultimate time

⁸ In the Copyright Board process, in terms of stating hard but *achievable* deadlines, it must be remembered that collectives and objectors often act in a representative capacity and must reach out to numerous parties for information. In CRC's case, it represents thousands of affiliates, some with quite minor interests in a retransmissions royalty, who may require time to provide information germane to a Board proceeding. Other collective or user associations have similar difficulties. A case management conference can take specific information-gathering issues into account.

⁹ *Patented Medicines (Notice of Compliance) Regulations*, [SOR/93-133](#), s. 7(e).

¹⁰ The Supreme Court of Canada expressed its concerns relating to the "increasingly retroactive character" of the Board's statutory licence decisions in *CBC v. SODRAC 2003 Inc.*, [2015 SCC 57](#) at ¶109-11.



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limit may be too ambitious given that many tariffs involve large classes of rightsholders and users, CRC believes that a 36-month time limit is achievable in contested matters so long as other complementary efficiency reforms are enacted pursuant to this review. Uncontested or settled tariffs should be accelerated even more rapidly.¹¹

Certain regulatory deadlines could be prescribed pursuant to ss. 66.91 and 66.6(1) of the *Copyright Act*, though care should be taken that those deadlines do not disrupt the core principle of proportionality, in which care must be taken to ensure that the procedure in a given case closely reflects the importance and complexity of the contested issues.

In terms of statutory deadlines, CRC supports both the January 31 tariff proposal deadline and a much tighter turnaround for objections to proposed tariffs. In doing so, it should be made clear that a collective or collectives may file earlier proposals and have them considered farther in advance of their tariff period. In terms of the timeline for objection, CRC's view is that the 28-day period of the pre-1997 Act should be reinstated. CRC's rationale for these reforms is described at length in its response to Potential Reform #8.

(b) Deadlines applicable to the Copyright Board

On average, tariffs have a period of retroactivity of 2.2 years. For tariffs in which there is a hearing, the average time from hearing to decision is 1.3 years.¹² This trend-line may be moving to more significant delays: in recent years, eight significant tariff proposals were awaiting resolution between 20 and 45 months after their hearing date.¹³ Post-hearing delays have major impacts on rightsholders and users.

CRC agrees with the concept of imposing a fixed deadline post-hearing for the rendering of a decision. A six-month deadline is provided for by the Canadian Judicial Council and by the Quebec Code of Civil Procedure, even in respect of factually complex adversarial matters.¹⁴ CRC favours an ambitious timeline in the copyright tariff setting given the

¹¹ In uncontested matters, a shorter ultimate time limit should be set. In negotiated settlements, a 60-day time limit for certification should apply once the Board has received a joint submission notifying it that a given tariff has been settled (see Potential Reform #6).

¹² Jeremy de Beer, "[Canada's Copyright Tariff Setting Process: an Empirical Review](#)" (April 16, 2015) at 471.

¹³ Howard Knopf, "[The Canadian Copyright Board: To Be or Not To Be – That Is A Question – ALAI Conference, May 25, 2016](#)" (June 28, 2016). The specific cases include Commercial Radio = ~ 30 months; K-12 I = ~ 24 months; K-12 II = ~ 20 months; Fitness = ~ 26 months; Re:Sound Tariff 8 ("Pandora") = ~ 18 months; SODRAC Tariff 5 = ~ 30 months and has now been remitted by SCC; Access Copyright Provincial Tariff = ~ 30 months; CMRRA/SODRAC Inc. (CSI) Tariff (2011-2013), SOCAN Tariff 22.A (2011-2013), and SODRAC Tariff 6 (2010-2013) = 45 months. A judicial review application has been served by CSI in the last case alleging procedural unfairness based on the issue of delay.

¹⁴ [Canadian Judicial Council](#) Resolution, September 1985; *Code of Civil Procedure*, [CQLR c C-25.01](#), s. 324.



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substantial negative ramifications of retroactivity, and given the possibility of lengthy judicial reviews from Copyright Board decisions. CRC thereby supports adopting a six-month post-hearing time limit, which could, at worst, be pushed out to nine months in extraordinary circumstances.

However, fixed deadlines cannot solve all problems, particularly without assessing the funding mechanism for the Copyright Board and the judicial environment in which it operates. As Professor Daly has written,

. . . the delays before the Copyright Board may well be caused, at the very least in part, by a prevailing culture that tends to drag out decision-making processes, and that the Copyright Board should be given the tools to shift the prevailing culture.¹⁵

Part of this cultural context is the downstream impact upon the Copyright Board of the number and intensity of judicial reviews from its legal, factual, and discretionary decisions. As the Government will appreciate, the Copyright Board's decisions have routinely been judicially reviewed at the Federal Court of Appeal and, on seven different occasions, made subject to a further appeal to the Supreme Court of Canada. In certain cases, courts explicitly applying a reasonableness standard have overturned Board decisions.¹⁶

In testimony before the Senate, Member Majeau made the following relevant commentary when asked why a fixed timeline could not be applied to Copyright Board decision-making:

Also, why do we go back to the parties? Because we have been asked repeatedly by the Federal Court of Appeal to make sure that we have all evidence we need in order to render a solid, thorough decisions. If we don't have it, we have to go back to the parties.

If you don't understand what they found or if some piece of evidence is missing, you have to go back to the parties in order to have good reasons. If not, we're going to tell you it was a bad decision and you should have asked the parties to complete.

¹⁵ P. Daly, "[Best Practices in Administrative Decision-Making: Viewing the Copyright Board of Canada in a Comparative Light](#)" (2016) at p. 39.

¹⁶ See, e.g., *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012 SCC 37](#) at ¶11, 37, 41-44, 59-60. In this case, in dissent, Justice Rothstein commented that "I do not think it is open on a deferential review, where a tribunal's decision is multifaceted and complex, to seize upon a few arguable statements or intermediate findings to conclude that the overall decision is unreasonable. This is especially the case where the issues are fact-based, as in the case of a fair dealing analysis" (¶59).



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It's not like before an ordinary tribunal where a judge has position A and position B, and during the hearing, he will question the expert report, but he will usually not go back after. He will decide A, B or C.

It's not the way we operate, and it's not the way we have been asked to operate...

So there are two things here: There are the reasons and the evidence that need to support the reasons – call them the decisions, if you prefer – and the tariff, which is something else. The two together – what do you do if we have a one year deadline and we have to go back to the parties because we don't understand a piece of evidence? The clock is running. Does it mean at some point that we have to stop the clock and say, "That's enough. We have a deadline and we're going to render a decision"? But they will be the first one going for judicial review.

Intimately related to this issue is the increasing length and complexity of decisions at the Copyright Board,¹⁷ all of which are translated before they are handed down.¹⁸ The delays associated with handing down decisions of this length and complexity can be very substantial.¹⁹ It is possible that the search for perfection in decision-making – the quixotic aim to draft an appeal-proof decision – has become “the enemy of the good”.²⁰

The Government may wish to consider whether it would be advisable to adopt a fixed standard of review clause within the Act to give the Copyright Board more comfort that its discretionary, legal and factual findings would be accorded stronger deference upon judicial review,²¹ particularly if the legislative history indicates that the goal of the

¹⁷ Decisions handed down between 2015 and 2017 include [Provincial and Territorial Governments](#) (184 pages); [Commercial Radio](#) (153 pages); and [Online Music Services](#) (2017) (143 pages).

¹⁸ The Government might consider adopting the Federal Court model, in which many decisions are rendered in one official language to enable the earliest possible release, but then translated into the other official language in a timely fashion. The criteria for non-simultaneous translation are set out in ss. 20(1)-(2) of the [Official Languages Act](#), which allows for early release if “the court is of the opinion that to make the decision, order or judgment, including any reasons given therefor, available simultaneously in both official languages would occasion a delay prejudicial to the public interest or resulting in injustice or hardship to any party to the proceedings”.

¹⁹ Professor de Beer notes that while the historical average time to certify a tariff was 3.5 years, as of March 31, 2015, this average had increased to 5.3 years. Jeremy de Beer, “[Canada's Copyright Tariff Setting Process: an Empirical Review](#)” (April 16, 2015), at 471, 503. Also see footnote 13.

²⁰ The comments of the Supreme Court in [Hyrniak](#) regarding transforming the summary judgment process “from a means to weed out unmeritorious claims to a significant alternative model of adjudication” may be considered in streamlining even the most fiercely contested tariff proceedings.

²¹ See, e.g., s. 58 of the *Administrative Tribunals Act*, [SBC 2004, c 45](#), which specifies the applicable standard of review for “expert tribunal decisions” and provides direction as to the content of a reasonableness assessment. In particular, a discretionary decision will stand unless it is “based entirely or predominantly on irrelevant factors”. While in certain settings, an expert tribunal is given deference on legal questions within its



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standard of review reform is in reaction to recent appellate decisions overturning discretionary or factual decisions of the Copyright Board.²² Such a clause might also limit the number of judicial reviews to the Federal Court of Appeal to the most compelling cases, thus creating better prospects of finality for all stakeholders.

Last, in certain hotly contested proceedings, the Copyright Board has engaged in independent research and fact gathering that has created additional delays for parties to a tariff.²³ There is no reason to permit independent research in an adversarial proceeding with sophisticated litigants, as such research can lead to overturning of a decision on procedural fairness grounds,²⁴ or may stray beyond the proper bounds of the Copyright Board's role.²⁵ The Government should consider addressing this issue pursuant to Potential Reforms #10(d) and 11-12 by making it clear that the Copyright Board is to certify tariffs based on the record before it. Such an approach would further the Discussion Paper's stated goal of "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".

home statute, this is not the case for the Copyright Board in situations where it shares jurisdiction with the courts: *Re:Sound v. Canadian Association of Broadcasters*, [2017 FCA 138](#) at ¶23. Presumably, a direction from Parliament could displace or at least influence this state of affairs in order to ensure that the Board's legal findings receive more deference from appellate courts.

²² In his [paper](#), at footnote 80, Professor Daly identifies a rift between deferential and intrusive reviews of the Board's discretionary decisions. Likewise, in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012 SCC 37](#), the Supreme Court of Canada split 5-4 over whether its review of the Board's factual findings was sufficiently deferential (see ¶59, per Rothstein J. in dissent, at footnote 16).

²³ In the current retransmissions hearings, the Board engaged in independent research and information gathering from the United States, causing further steps to be taken and costs to be incurred *after* the close of the evidentiary phase of the proceeding: see Notice CB-CDA [2016-088](#), [2016-089](#) and [2016-094](#).

²⁴ *Canadian Cable Television Assn. v. American College Sports Collective of Canada, Inc.*, [\[1991\] 3 FCR 626](#) at ¶34 (FCA) ("A showing either of actual prejudice or of the possibility of prejudice is sufficient to constitute a violation of *audi alteram partem*."); *Re:Sound v. Fitness Industry Council of Canada*, [2014 FCA 48](#) at ¶77-83.

²⁵ In *R. v. Spence*, [2005 SCC 71](#) at ¶48-69, the Supreme Court expressed concerns with respect to the taking of judicial notice, particularly when the fact in issue closely "approaches the dispositive issue", especially when expert testimony is available on the issue. Such facts must be "(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy" to avoid disrupting the adversarial process and fair trial considerations. Independent fact-finding raises similar issues in comparison to other available techniques (such as asking questions of an expert witness testifying at a hearing or asking the parties to submit supplemental evidence on a given question). See also *Gosselin v. Canada (Attorney General)*, [2006 FCA 405](#) at ¶16 (applying a similar test to an administrative tribunal).



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Potential Reform #3: Implement case management of Copyright Board proceedings

CRC supports Potential Reform #3. Case management should take place before the exchange of interrogatories and be focused solely on questions that are likely to simplify or accelerate the matter. A possible model exists in s. 37 of the *CRTC Rules of Practice and Procedure*, [SOR/2010-277](#), which focuses case management conferences on:

- (a) the simplification of the issues;
- (b) the necessity or desirability of amending the application, answer, intervention or reply;
- (c) the making of admissions of certain facts, the proof of certain facts by affidavit or the use by a party of matters of public record;
- (d) the procedure to be followed at the hearing;
- (e) the mutual exchange by the parties of documents and exhibits that the parties intend to submit at the hearing; and
- (f) any other matters that might aid in the simplification of the evidence and disposition of the proceedings.

To avoid placing an unnecessary strain on Copyright Board resources, such case management should be provided via a dedicated Board official with a role and mandate comparable to a prothonotary within the Federal Court system. To promote candid discussions and to diminish the fear of prejudice by the parties, the case management conference should be confidential and without prejudice and the Board official should not participate in any later hearing on the merits. To avoid an impermissible sub-delegation of authority in vesting this power in a dedicated Board official, CRC suggests that the Government expressly add a clause to the *Copyright Act* akin to that found in the *National Energy Board Act*.²⁶

Prior to the case management conference, there should also be a mandatory “meet and confer” or “discovery management” obligation as outlined in the paper of Professor Daly.²⁷ Such a meeting should improve the efficiency of the subsequent case

²⁶ *National Energy Board Act*, s. 14: “(1) The Chairperson may authorize one or more members, either jointly or severally, to exercise any of the Board’s powers or to perform any of the Board’s duties and functions under this Act, except those under [various sections]. (2) Any power exercised or any duty or function performed by a member or members under the authorization is considered to have been exercised or performed by the Board.”

²⁷ [Daly](#), p. 34.



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management conference by impelling the parties to make efforts toward reducing the number of live issues before the Copyright Board and working collaboratively toward a viable litigation plan. Issues addressed at such a meeting could include the scope of documents to be preserved, the possibility of settlement of or simplification of any or all of the issues in the proceeding, simplification of the issues in the proceeding, agreements on specific interrogatories, number of experts and timing of delivery of expert reports, and the potential of getting the experts to confer with one another in advance of trial in order to narrow the issues and identify the points on which their views differ.²⁸

Potential Reform #4: Empower the Copyright Board to award costs

CRC advocates for a restrictive costs discretion for the Copyright Board, not to be exercised in the ordinary course, but only when a participant has significantly obstructed a proceeding (such as by refusing to produce materials in its possession, power or control that are responsive to a valid interrogatory) or has improperly delayed the timely conduct of the proceeding. In certain circumstances, it may also be proper to award costs against intervenors whose late and substantial interventions disrupt the conduct of a matter, as has happened in two recent tariff proceedings.²⁹

However, such costs should be awarded only when the Copyright Board is of the view that there is no legitimate explanation for the course of behaviour, lest sanctions be imposed against participants for *bona fide* tactical decisions that may appear unwise in retrospect. Such a costs regime (with its express limitations) must also be provided for within the *Copyright Act* itself to avoid limits on pecuniary burdens being imposed absent “clear and distinct legal authority”.³⁰

CRC suggests having the quantum of costs mirror developments within the Federal Courts system, where lump sum awards have “found increasing favour with courts, and for good reason” because they “save the parties time and money[,] further the objective of the *Federal Courts Rules* of securing ‘the just, most expeditious and least expensive determination’ of proceedings [and] may be appropriate in circumstances ranging from relatively simple matters to particularly complex matters where a precise calculation of costs would be unnecessarily complicated and burdensome”.³¹

Finally, as the tariff system is not one that has clear-cut “winners and losers” in terms of the result obtained, costs should never be awarded based on the substantive outcome of

²⁸ A number of these ideas are addressed in [Rule 263](#) of the *Federal Courts Rules* and in [Rule 29.1](#) of the *Ontario Rules of Civil Procedure*.

²⁹ 2014-2018 Retransmission of Distant Signals ([intervention of CCSA](#)); Tariff 22.D.1 ([intervention of Netflix](#)).

³⁰ *CBC v. SODRAC 2003 Inc.*, [2015 SCC 57](#) at ¶107.

³¹ *Nova Chemicals Corporation v. Dow Chemical Company*, [2017 FCA 25](#) at ¶10-13.



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the proceeding, as this could deter legitimate participation in a tariff matter by objectors even though they are certain that a rate at some level will be certified.

Potential Reform #5: Require parties to provide more information at the commencement of tariff proceedings

CRC supports the aims of this reform, but does not agree that the information should be provided at the commencement of proceedings.

When a tariff proposal is made, collectives are often faced with significant information asymmetries pertaining to a given use of a copyright work, with key economic and technological information solely in the hands of users and not in the public domain. It would be impossible for retransmission (and other) collectives to provide detailed pleadings supported by evidence at the time of filing their tariffs. Such information becomes fully available only when interrogatory responses are reviewed by the collectives, often if not always requiring assistance from experts in economics and technology. Likewise, users may become aware of their full case only after receipt of interrogatory responses.

Requiring the too-early disclosure of information – with an opportunity to cause delays by objecting to the sufficiency of an information disclosure – has the potential to create an additional ground for skirmishes between the parties without providing meaningful insight as to the basis for a tariff or the reason for objections. CRC instead proposes that the better time for initial explanations would be the “meet and confer”/“case management conference” phase of a proceeding described in CRC’s response to Potential Reform #3. With the assistance of the meet-and-confer, by the time of the case management conference, the parties should have a more developed theory of the case and more refined sense of the classes of documentary information they require. Disproportionate requests or obstructive behaviours can be immediately be addressed by the case management officer during the case management conference with the deterrence of a costs remedy. Such a procedure would be far more efficient and just than creating a brand-new process at the outset of a proceeding contemplating serial exchanges of correspondence between the parties, followed by motions for further and better responses. A case management conference can provide a far better springboard to a focused interrogatory process. Expediting the clarification of issues in a tariff proceeding should also expedite prospects for settlement. Finally, it should reduce overall litigation and consultants’ costs, which generally correlate with the length of the proceedings.

Connecting informational disclosures to the case management process avoids the cat and mouse game presently pursued before the Copyright Board. Under the current process, the Copyright Board deals with written motions and must rule on the relevance and



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proportionality of interrogatory questions in the absence of any information on the reasons for a proposed tariff, or the reasons for objections to it. While the Copyright Board and its staff do their best to look at issues in past cases (more than 20 years ago for retransmission) to try to determine what the issues will be in a current case, the Copyright Board must make heroic assumptions about relevance and proportionality in order to rule on objections.

In these circumstances, the Copyright Board is being asked to make accurate rulings on relevance and proportionality before it understands the key issues within a case. Vast amounts of time and resources are expended by the parties and the Copyright Board on the interrogatory process to resolve issues that could be resolved at a case management conference if counsel had a better sense of the issues in a case. Neither the current process nor its results are as efficient or productive as they should be.

CRC also submits that it would be impossible for most collectives or users to provide detailed, *binding* pleadings, supported by evidence, at any point prior to the filing of interrogatories. For collectives, most of the relevant evidence is in the hands of users; users may not have relevant knowledge about the repertoires of collectives. For this reason, the aim of the exchange at the meet-and-confer should be for the parties to summarize general information about the nature, purpose and ambit of the tariff and the basis for the objections thereto. Both would, and should, be exchanged on a non-binding basis, subject to amendment as the proceeding evolves and the evidence emerges. While these information exchanges would not be binding, they will provide some basis for the Copyright Board to rule on questions of relevance at the interrogatory stage to ensure a more efficient and fair discovery process.

Potential Reform #6: Permit collective societies to enter into licensing agreements with users

CRC agrees with the underlying goals of this recommendation. In the retransmission setting and other important tariff settings, users are highly sophisticated businesses with millions of dollars in annual revenues.³² They often pool their resources and are represented by effective industry associations (such as the Canadian Association of Broadcasters or the Entertainment Software Association). There is no market failure, imbalance in power or public policy imperative that should require the Copyright Board to interfere with a negotiated agreement arrived at by sophisticated parties, even in a compulsory licence regime such as the retransmissions regime or the SOCAN regime.

³² The small users under the retransmissions tariff pay a nominal royalty of \$100 per year.



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Numerous other countries have built in support for similar market-based solutions. In Switzerland, the copyright legislation specifically recognizes that agreements with user associations need not be reviewed by the copyright commission.³³ In many other countries, copyright tribunals are called in to resolve a dispute only where a private agreement cannot be reached.³⁴ Facilitating negotiated resolutions to tariff disputes would avoid the historically significant delays before the Copyright Board in which negotiated or uncontested tariffs await approval for years.³⁵

However, even when licences are negotiated, the Copyright Board still has a vital role to play in confirming the application of a negotiated agreement to the marketplace as a whole. The reason is that tariffs are binding against all users of copyright works in Canada, not simply the parties to a given agreement. When there is a broad-based agreement to settle a tariff proceeding, CRC supports creating an expedited certification process with a firm regulatory deadline.³⁶ The expedited process should trigger upon the submission of a joint certification request to the Copyright Board, with the Board able to solicit comments from any objectors who are not party to the joint request. In such cases, the Board should certify the tariff as soon as is practicable, and in no event more than 60 days following the submission of the joint request.

CRC wishes to be clear that facilitating such settlements will not convert compulsory licensing regimes into exclusive rights regimes. In the event that a compulsory licence collective cannot settle with all its users, that collective still exists in a regime where terms and conditions for the use of copyrighted content “cannot, by law or circumstance, be independently established” (Discussion Paper, § 1.1(a)). The Copyright Board will

³³ *Ordonnance sur le droit d’auteur et les droits voisins*, [231.11](#), s. 10(3): “S’il ressort nettement de la demande d’approbation que les négociations avec les associations représentatives des utilisateurs... ont abouti à un accord, il n’est pas nécessaire de requérir des observations.” (“If it is clear from the request for approval that negotiations with users’ associations... have resulted in an agreement, it is not necessary [for the Commission] to request comments.”)

³⁴ UK *Copyright, Designs and Patents Act 1988*, [1988 c. 48](#), s. 118 (permitting users’ associations to refer a proposed tariff to the Copyright Tribunal in the event of failure of private negotiations). Similar schemes are operated in numerous other countries: see Barry Sookman, [Reimagining the Copyright Board](#) (ALAI presentation, at p. 5).

³⁵ According to [Professor de Beer](#) (pp. 500-501), 71.6% of tariffs are certified without a hearing, yet these proceedings still have an average lifetime of 3.2 years. Asked to explain this timeline, Member Majeau testified before the [Standing Senate Committee on Banking, Trade and Commerce](#): “We have the choice between putting our priorities with these big files for which there have been long public hearings or with uncontested tariffs. Between the two, we felt we should go with the big files. It means that these uncontested tariffs are not being certified as expeditiously as we would like, but at the end of the day, it doesn’t change the fact that the previous tariff continues to apply.” Secretary-General McDougall then added that, even for settled or uncontested agreements, “we have to do the analysis that we mentioned before of representativeness or not of the parties to the agreement”.

³⁶ The deadline and factors can be implemented via regulation pursuant to ss. 66.91 and 66.6(1) of the Act.



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still have a vital role in certifying a tariff that applies generally to all users across a marketplace. In all compulsory settings, without a confirmatory certification, there will be a harmful asymmetry where rightsholders are compelled to enter into the tariff process, but users are free to ignore the result of a broad-based negotiation to settle a given tariff proceeding.³⁷

CRC does not agree with the potential reform of requiring the filing of negotiated licensing agreements with commercially sensitive terms with the Copyright Board, with either the goal or the possibility of making them public. A very common practice in settlements on tariff issues is for the parties to agree that an agreement for a given tariff term – including the detailed resolution of contested legal or valuation issues – shall be without prejudice for future tariff proceedings. This practice permits sophisticated parties to resolve issues for a limited term without incurring prejudice for future terms, especially in respect of new or evolving technologies. Making it mandatory to file such agreements with the Copyright Board will have the unintended result of making it far less likely for the parties to reach settlements for fear of revealing sensitive confidential business information or prejudicing their rights in the longer term, and thus deter the early resolution of tariff proposals. The downstream implication would be more, not fewer, Copyright Board proceedings.

Potential Reform #7: Change the time requirements for the filing of proposed tariffs

In the retransmissions setting, CRC and other program rightsholder collectives have long maintained a practice of filing for the maximum allowable term of a tariff. While this is an efficient solution in the retransmissions setting, it may not be the case in other settings involving emerging technologies, where a longer tariff period may not be reflective of a rapidly involving technology if longer-term tariffs are mandated.

The Government should also give thought to accepting longer settlement periods in other tariff settings. In various regimes, circumstances may be stable enough for a collective and user to agree on a 10-year tariff arrangement premised on CPI adjustments from tariff year to tariff year. Forcing the parties to launch new proceedings in order to obtain a status quo certification seems unnecessarily intrusive and inefficient.

Potential Reform #8: Require proposed tariffs to be filed longer in advance of their effective dates

CRC supports both the January 31 tariff proposal deadline and a much tighter turnaround for objections to proposed tariffs.

³⁷ This topic is dealt with at length in CRC's response to Potential Reform #13.



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At a minimum, CRC's view is that the 28-day period of the pre-1997 Act should be reinstated. As CRC supports a streamlined objection notice (akin to a Rule 305 Notice of Appearance under the *Federal Courts Rules*), there should be no harm to users arising from a truncated objection period, as their only responsibility will be to identify themselves as an objector to a tariff proposal.

Consideration should also be given as to whether publication in the *Canada Gazette* still provides necessary or meaningful notice to potential users of a tariff. As the Discussion Paper notes, the *Canada Gazette* has a limited capacity at the beginning of the Government's fiscal year on April 1. The result is that tariff proposals that are filed on or before March 31 are not made public until as late as the end of June. This means that certain collectives face a close to three-month delay simply because of a *Canada Gazette* bottleneck. Given the importance of a timely certification to collectives and users alike, the Government should consider a consolidated release of tariff proposals on the Copyright Board's website to allow users to see all potentially relevant proposals for a given tariff year via a single visit.

User associations and representatives, and, indeed individual copyright users, can readily obtain information on new tariffs from the Copyright Board website. CRC submits that the Board website is the best single source of electronic information on all proposed new tariffs and tariff-related developments.³⁸ It is far more efficient and productive to use the Board website as a comprehensive source of information on tariff proposals and related developments rather than forcing users to search out information on the web sites of individual collectives. Imposition of further notification requirements, such as requiring collectives to send tariff notifications to individual users, would be inefficient and unproductive. Representatives of users, such as the CAB and counsel for the BDUs, are far better positioned to identify the trade association members or users they routinely represent and to notify them of tariff changes that affect them. There are also other potential obstacles to imposing notification burdens on collectives.³⁹

³⁸ The Board website may be supplemented as appropriate by employing efficient posting technologies used by other similarly situated agencies. By way of example only, the Canadian Radio-television and Telecommunications Commission (CRTC) sends out releases and decisions to interested members of the public through [e-mail subscriptions](#), [RSS feeds](#), and [social media postings](#).

³⁹ The CRTC does not licence all broadcasting distribution undertakings, which means that there is no one definitive source of user identification or contact information in the retransmission setting. The impediments are even more profound in other settings: a background music tariff potentially affects thousands or hundreds of thousands of Canadian businesses. Further, when new copyright uses come into play, the associated user population can be incredibly dynamic, with new services coming on board with great frequency, including from foreign locations.



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Further to these comments, CRC suggests that the Government remove the specific *Canada Gazette* requirement from ss. 67.1 and 72(1) as part of the harmonization process discussed at Potential Reform #13 with a technologically neutral requirement for the Copyright Board to publish all proposed tariffs filed in a given year by February 28 of that year. This should be achievable given that tariff proposals are provided to the Copyright Board in both official languages, thus requiring only minimal formatting for a website-based notice regime.

Although funding of the Copyright Board is not a subject of this consultation, CRC notes that if deadlines in different proceedings are carried out in lockstep, there may be bottlenecks at the hearing stage for a given year's tariff. Such hearing bottlenecks will not be easy to overcome if there are too few Copyright Board members and too many of those working on a part-time basis.⁴⁰

Potential Reform #9: Allow for the use of the copyrighted content at issue and the collection of royalties pending the approval of tariffs in all Copyright Board proceedings

This continuation of rights principle is already a feature of the retransmissions regime and other licensing regimes whenever a prior tariff has been certified.⁴¹ This feature should remain in force.

However, CRC does not support granting the Copyright Board the power to make interim rate decisions *sua sponte* and absent a request from a rightsholder or a user. Prior to hearing parties' interim or final cases for a rate increase, the Copyright Board simply lacks the necessary information to depart from the status quo of the continuation tariff principle. If rightsholders or users believe a departure from the status quo is warranted, they can always seek a different rate or new terms and conditions through the existing ss. 66.51 or 66.52 interim decision process, which applies to all Copyright Board regimes (and which has traditionally resulted in timely decisions from the Copyright Board).

⁴⁰ In the [Senate Report](#) (pp. 5-6) and in the [Standing Senate Committee on Banking, Trade and Commerce](#) hearings, the Committee explored the extent to which the Board composition (one full-time vice-chair, two part-time positions and two vacant posts) may be contributing to its lack of timely decision making, particularly since the Board chair was also a full-time judge at the Ontario Court of Appeal. This particular issue was identified as one requiring further review. The U.S. Act also requires that “the Librarian of Congress **shall** act expeditiously to fill [a] vacancy” (U.S. *Copyright Act*, [17 USC §802\(d\)\(1\)](#)), an easy reform that could be implemented under the Canadian Act. If such a funding review is undertaken in future, it might be beneficial to considering whether s. 66 of the Act should adopt the U.S. model of requiring an “attorney [with] significant knowledge of economics” to be placed on each Panel deciding a case ([17 USC §802\(a\)\(1\)](#)).

⁴¹ See ss. 68.2(3) and 70.18, continuing the effect of the rates and terms of the last certified tariff.



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CRC offers no comment on the desirability of introducing a continuation tariff principle into other tariff regimes.

Potential Reform #10: Codify and clarify specific Copyright Board procedures through regulation

CRC agrees with the concept of codifying and clarifying specific Copyright Board procedures through regulation, subject to an overriding ability of the Board to dispense with certain procedural rules to expedite proceedings.

Part of this regulatory framework should involve fixed deadlines for key stages in a tariff proceeding, specifically the meet-and-confer and the case management conference stages that allow for the Copyright Board to set firm but achievable time limits for interrogatories. As discussed above, the framework should also include a maximum time limit for the rendering of a decision following a hearing. Further to CRC's commentary to Proposed Reform #1, any fixed deadlines can be complemented by the "requirement" model present at the National Energy Board, which obliges that Board to deal with all applications and proceedings as expeditiously as the circumstances and considerations of fairness permit, but, in all cases, within the time limits provided for under the *National Energy Board Act*.

As another general principle, the amount of effort required at any given stage of the proceeding should closely relate to the importance of the amounts at stake and the resources of the parties. As an example, discovery obligations should reflect the probative value of the information sought, and its relevance to the issues, insofar as they can be ascertained.

CRC makes the following comments with respect to the specific procedures identified under Potential Reform #10:

(a) *Statement of Issues:* As noted above, CRC supports the exchange of a Statement of Issues setting out, at a high level, the factual and legal components of a party's case, in order to allow the Copyright Board to better determine whether a given interrogatory request is relevant and proportionate. CRC believes that a joint Statement of Issues (or separate statements where necessary) should be discussed in the meet-and-confer session and the case management conference.

However, CRC does not agree with the "extraordinary circumstances" test for amendment raised within the Discussion Paper. CRC strongly urges that any test for amendment should be aligned with civil litigation norms, where pleadings may be amended at any stage of the proceeding so long as the amendment serves the interests of



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justice and do not result in an injustice that is not compensable in costs.⁴² Otherwise, information asymmetries inherent in the earlier stages of the process could lead to vast prejudice to collectives or users. Such prejudice is particularly possible if the Statement of Issues is created prior to interrogatory exchanges and expert reports giving rightsholders and users access for the first time to key economic, technological, and repertoire-based information.

CRC wishes to make clear that the proposed Statement of Issues should not replace the delivery of detailed Statements of Case and accompanying expert reports *after* the exchange of interrogatories. While a Statement of Issues will focus the interrogatory process, the Statements of Case and expert reports serve the important purpose of crystallizing the most important facts and legal arguments for the Copyright Board's consideration, and serve as a valuable resource for the Copyright Board both during and after an oral hearing.

(b) *Interrogatory Process:* CRC supports a proportionate and effective interrogatory process supported by an extraordinary costs power when a party is obstructing the process or ignoring Copyright Board orders with respect to interrogatories.⁴³ The Copyright Board should also be able to draw adverse inferences against parties who refuse to comply meaningfully with the interrogatory process.⁴⁴

However, as opposed to a scenario in which the Copyright Board is *less* involved, CRC submits that the Board can be meaningfully and efficiently involved in this process through its case management functionality, particularly via the first case management conference. In the current practice, the objections process leads to considerable delays because all objections are delivered in writing with subsequent responses and replies leading up to a written Copyright Board decision. If this stage remains a serial written submissions process, the additional “explanations as to how the information sought is

⁴² See, e.g., *Canderel Ltd. v. Canada*, [1994] 1 FCR 3 at ¶12-13; *Haikola v. Arsenau* (1996), 27 O.R. (3d) 576 (C.A.).

⁴³ This protection against obstruction is crucial because economic information about the value of certain uses of copyright works is often highly confidential in nature and under the complete control of users. Without a robust interrogatory process, collectives cannot adduce compelling evidence of value, thereby unfairly depressing a tariff rate or (as has happened on multiple occasions) denying rightsholders tariff protections altogether.

⁴⁴ Adverse inferences apply within the summary judgment process in Ontario, where Rule 20.02 provides that, on the hearing of a summary judgment motion, “the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.” Likewise, as the Supreme Court has commented, the *Criminal Code* “is replete with provisions which, for the sake of doing justice, reverse the evidentiary burden of proof upon the accused where the Crown has proved minimal elements of an offence and the accused, because of his singular position, has knowledge which is peculiar to him-or herself”: *R. v. Noble*, [1997] 1 SCR 874 at ¶30 (per Lamer CJC in dissent).



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relevant to specific issues identified in their statements” could make interrogatory disputes longer and more adversarial.

CRC submits that it would be far more efficient for the parties to first discuss interrogatory scope and provide supporting explanations at the meet-and-confer or discovery management conference, then resolve any lingering scope-of-interrogatory issues through oral submissions at a case management conference, with the Copyright Board determining if necessary whether given interrogatory requests are proportionate and relevant with a view to their likely importance to the determination of live issues within the case. If subsequent discovery issues arise, either party should be able to request a further case management conference to address them.

The Discussion Paper also raises the possibility of clarifying that “responses to interrogatories need only be gathered from a representative sample of an association’s members, rather than from all members”. This could be a positive development, but if and only if:

- the sample is truly representative
- proportionality – the burden of the request and the materiality of the request to a party’s case – is carefully taken into account.

The benefit of sampling is that it can place a lighter burden on parties to a Copyright Board hearing, particularly when sampling does not adversely impact a party’s case, or when sampling is necessary to account for a highly diverse number of members of a rightsholder collective or user association.⁴⁵

The obvious danger of sampling relates to a user or a collective selecting only those members that best fit into its theory of the case. For example, in many settings there may be one or a few users who make substantially lighter uses of copyright materials or who do not extract profits to the same degree as other users within an association. If those kinds of users are the only ones sampled, the answers will not be representative. On the other side, collectives could provide details of their most favourable licensing arrangements without disclosing other arrangements that might lower the value of their repertoire.

Permitting too restrictive a sample or giving a party sole autonomy to decide what is “representative” could lead to tactical manoeuvres reducing the likelihood of the

⁴⁵ CRC has more than 7,000 affiliates; objector or intervener organizations like the CCSA, the Retail Council of Canada, Restaurants Canada and the Hotel Association of Canada represent vast numbers of users.



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Copyright Board certifying a “fair and equitable” royalty. Parties should try to resolve the question of representativeness and proportionality in the discovery management conference. Should they be unable to agree, in the case management conference, the Copyright Board should err on the side of deterring unilateral attempts by a rightsholder or user association to determine the participants in the sample. One possibility that might lessen the likelihood of gamesmanship is for the parties to agree on sample size, and then permitting the party issuing the interrogatory questions to identify which parties it considers representative within that sample size.

However, except in extraordinary circumstances, a party should not be obligated to either create new documents or to try to compel or otherwise seek documents or information from third parties in order to respond to interrogatories. In the past, the Copyright Board has compelled some parties to try to obtain information from third parties, and has not compelled others. This approach leads to spotty and unrepresentative responses, and puts undue pressure on the resources of collectives or user associations who must rely on goodwill to attempt to extract information from third parties whom they do not control.⁴⁶

(c) Simplified Procedure: CRC is of the view that simplifying procedure should be considered at the case management stage in every case, not simply those cases that fall below a certain monetary threshold. Where appropriate, a simplified procedure might:

- provide for a paper record alone⁴⁷
- reduce or eliminate the number of hearing days
- expedite or focus interrogatories
- provide for page limits on the length of written reports or arguments with regard to the number and complexity of the issues being actively contested by the parties
- set an accelerated decision date, particularly for simpler tariffs or tariffs of low monetary value.

⁴⁶ Board rulings that require collectives to obtain information from rightsholders have different practical implications for different collectives. CRC currently represents more than 7,000 rightsholders from 32 countries. Many entities to which CRC distributes retransmission royalties are agents or administrators, who frequently do not have the type of information about programs that is requested in interrogatories. The time and resources that must be expended by a collective like CRC to obtain information from rights holders thus often far exceeds the probative value of any such information. Such considerations should be examined closely by the Board in making proportionality decisions at the interrogatories stage of a proceeding.

⁴⁷ For example, Federal Court applications – including originating applications – proceed on a paper record alone, with affiants subject to cross-examination to ensure the evidence is properly tested.



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(d) Evidence: If the Government is to foster efficiencies through various streamlined procedures, including the choice of a representative sample of rightsholders or users in relation to interrogatories, safeguards are required.

In particular, the Government should ensure that the Copyright Board is certifying tariffs for uses of copyright material on the best evidence available, even if that evidence is relatively scant for newly emerging uses, in order to reflect the remedial principle that “[f]rom the moment the right is engaged, licence fees will necessarily follow.”⁴⁸ This used to be the norm,⁴⁹ but in recent years, on a number of occasions, the Copyright Board has applied an extremely strict standard to novel tariff situations, including by refusing to certify uses despite expert evidence as to the *future market* for a given use.⁵⁰

In such situations, the Copyright Board’s refusal to certify has two unwelcome implications.

The first is a fairness implication. Tariffs are proposed not for past infringements but future uses. The Copyright Board therefore must look at whatever historical evidence is available to project a reasonable rate for a future market.⁵¹ In certain cases, users are in control of all of the probative information but refuse to meaningfully participate in providing disclosures that could solidify the soundness of a rate for a given use. Failure to certify compounds this problem because the novel use will not be the subject of reporting obligations within the tariff, thus leaving collectives in a blinded state through the start of the next tariff period.

Applying an evidentiary standard more applicable to an infringement action is unfair to rightsholders, particularly given the Copyright Board’s s. 66.52 power to vary a rate that no longer reflects the activities of a given marketplace as well as the Board’s historical practice of phasing in rates with year-by-year increases in nascent markets.⁵² Taking an aggressive approach to a representative sample without ensuring that future uses are

⁴⁸ *CBC v. SODRAC 2003 Inc.*, [2015 SCC 57](#) at ¶77.

⁴⁹ See [Tariff No. 22.A \(Internet – Online Music Services 1996-2006\)](#) at ¶125, with the Board holding: “If there is a **potentially protected** use of SOCAN’s repertoire, SOCAN is entitled to a tariff. The lack of evidence may affect the amount of the tariff, but not its existence. It is just as incorrect to advance that *de minimis* uses do not justify the certification of a tariff. The absence of a tariff deprives SOCAN of a recourse.”

⁵⁰ See, e.g., [Online Music Services \(CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013\)](#) at ¶144-55; [Access Copyright \(Elementary and Secondary Schools – 2010- 2015\)](#) at ¶34, 110-12, 495-96.

⁵¹ For example, in the present retransmission proceeding, the year 2013 is serving as a test year for the 2014-18 tariff. Other proceedings have much more distant test years, particularly when parties agree that an old usage study is representative of current use patterns.

⁵² For example, the Board explained its reasons for phasing in a rate in the inaugural [Satellite Radio Services decision](#) at ¶219-24.



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fairly and equitably compensated will unfairly prejudice rights holders, particularly in compulsory licence settings.

The second unwelcome implication is a gap that may cause prejudice to users. If a given use is certified, a user has certainty that it will not be sued for infringement for engaging in the use. By contrast, if that use is not certified because the Copyright Board applies a too-strict evidentiary standard, the tariff will not serve as a permission for the marketplace as a whole to engage in the activity. Each and every user engaging in the non-certified use will face the risk of an infringement claim from a numerous individual rightsholders. Such an outcome is costly for rightsholders and users alike, places pressures on the court system, and threatens to cause a “chill” in users launching innovative services. The Government should therefore give strong consideration to clarifying within the Act that the Copyright Board must certify on the best evidence available to it, even if that evidence is necessarily scant because of the future-facing nature of a tariff based on evidence gathered long before the end of a tariff term.

CRC also supports reminding experts of their duties to the Copyright Board by binding them to an expert acknowledgment comparable to that required under Rule 52.2 of the [Federal Courts Rules](#), with the Copyright Board empowered to exclude some or all of an expert report or statement in circumstances in which the expert has failed to comply with that Court’s [Code of Conduct for Expert Witnesses](#).

While CRC supports the potential (in appropriate circumstances) of having experts conferring in order to identify points of agreement and disagreement and thereby simplify the preparation and delivery of expert evidence, CRC does not support permitting the Copyright Board to appoint experts to enquire into and report on any issues it deems relevant. Such an appointment increases the likelihood of parties being left uncertain as to the case they have to meet, or such experts derailing or complicating proceedings by introducing issues that participants have not elected to raise.

(e) Confidentiality: CRC acknowledges the concerns of users that much of the most essential information used to value a copyright use is highly competitively sensitive in nature. As only one example, individual users in many industries fiercely guard wholesale rates and profit margins as amongst their most important trade secrets. The longstanding “sensitive confidential”/“confidential” structure maintained by the Copyright Board in its protective order regime is essential for fostering candid disclosures and participation by users of copyrights. With respect, CRC views there as being no compelling countervailing “public interest” in the open disclosure of such information, and supports there being full autonomy of parties to mark parts of documents as being “sensitive confidential” (and therefore not viewable by business competitors) or “confidential” in nature (and therefore not viewable by the general



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public). Such protections foster the more important public interest in having users participate fully in the tariff process to permit the Copyright Board the best information possible to assist in certifying a rate. So long as these principles are preserved, the CRC supports having rules or practice notices reflecting this approach to confidentiality.

Potential Reform #11: Stipulate a mandate for the Copyright Board in the Act

Potential Reform #12: Specify decision-making criteria that the Copyright Board is to consider

CRC will address these two related areas together.

The unpredictability of Copyright Board decisions based on the “fair and equitable” standard has the undesirable effect of forcing parties to deliver evidence on matters far beyond the market value of a given copyright use. This unpredictability is likely increased by the Supreme Court’s *CBC v. SODRAC* decision, in which the majority inferred – without reference to any valuation standard in the *Copyright Act* itself – that the court-made principles of technological neutrality and the copyright balance necessitated consideration of “the relative contributions made by the use of copyright-protected works and the risk and investment by the user in its digital technology”. The minority observed that the effect of such a factor was “to tie copyright holder compensation to actions of the user that are unrelated and irrelevant to the rights held in the protected works”.⁵³ In the first post-*CBC v. SODRAC* proceeding before the Copyright Board, *both sides jointly* refused to apply this complicated new factor to online music uses.⁵⁴

To cut through the apparent confusion and to simplify the consideration of tariff royalties, CRC strongly advocates for the adoption of specific, mandatory rate-setting criteria. In order to promote the dissemination of copyright works and a just reward for creators, these criteria should reflect to the greatest extent possible the price that a functioning market would yield based on a willing buyer, willing seller standard.⁵⁵ This

⁵³ [CBC v. SODRAC](#) at ¶92, 180.

⁵⁴ [Online Music Services](#) (2017) at ¶13, 285. In this proceeding, the Board sought commentary on how it should address the issues of 1) technological neutrality, and 2) balance between user and right-holder rights, with relevant factors to include the risks taken by the user, the extent of the investment made by the user in the new technology, and the nature of the copyright protected work’s use in the new technology. Collectives and users *jointly* responded, “The Parties do not wish to adopt either option as described in the Notice. The Parties do not wish to make further submissions, nor do they wish to add to the evidentiary record. The Parties submit that the Board should issue a decision in the Tariff Proceeding without further evidence or argument to address the impact of *CBC v. SODRAC*.”

⁵⁵ Guidance for the criteria could be taken from *Re Phonographic Performance Company of Australia Limited* (July 10, 2007, [ACN 000 680 704](#)) at ¶11, which describes the full range of approaches available to establish market rates or close approximations thereof.



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approach ensures that there will be neither an undersupply nor oversupply of copyright works; it will provide predictability for users and rightsholders who will no longer have to speculate as to what the Copyright Board will find “fair” or “equitable” in the circumstances; it will reduce the complexity and expense of proceedings before the Copyright Board relating to arguments or evidence that do not have a bearing on a willing buyer, willing seller standard; it will align the Copyright Board’s criteria with those criteria applied by copyright tribunals elsewhere;⁵⁶ it will ensure that Canada does not fall afoul of its treaty commitments relating to copyright.⁵⁷

Potential Reform #13: Harmonize the tariff-setting regimes of the Act

CRC agrees that the tariff-setting regimes of the Act should be significantly harmonized. There are inconsistencies between the various regimes that have no rational policy basis, such as the differences between the continuation of rights provisions in ss. 68.2 and 70.18 of the Act.

Of particular note is the significant difference in the statutory damages multiplier between different compulsory licence regimes. The SOCAN regime permits a three-to-ten times multiplier for unpaid royalties (s. 38.1(4)), and the private copying regime provides for an up-to-five times multiplier for unpaid royalties (s. 88(2)), but the retransmissions regime does not provide for a multiplier at all. Given the compulsory nature of the regime, this appears to be an oversight that could be addressed through a harmonization of the tariff-setting regime.

To avoid unintended consequences of uniting the compulsory licence regime with other regimes where tariffs are practically necessary because of very large pools of rightsholders and users, CRC also submits that the Government should confirm the mandatory nature of tariffs within this harmonization process. This has become necessary because certain scholars have suggested that users can unilaterally “opt out” of a tariff

⁵⁶ See, e.g., U.S., 17 USC §112(e)(4), 114(f)(2)(B); [EU Collective Management Directive](#), Art. 16(2); *Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE)*, [ECLI:EU:C:2005:475](#) at ¶50; UK *Copyright, Designs and Patents Act 1988*, s. 129; *British Phonographic Industry Ltd. v. Mechanical Copyright Protection Society Ltd.* (July 2007; [UK Copyright Tribunal Dec. No. CT84-90/05](#) at ¶49: “This is a classic test in this jurisdiction whose present applicability has been expressly endorsed by all concerned. In assessing a reasonable tariff, the Tribunal has frequently addressed the matter on the basis that the proper rate is that which would be negotiated between a willing licensee and a willing licensee of the copyright repertoire.”); *Re Phonographic Performance Company of Australia Limited* at ¶11.

⁵⁷ See, e.g., [TRIPs Agreement](#), Art. 13; [North American Free Trade Agreement](#), Art. 1705(5); [Canada-US Free Trade Agreement](#), Art. 2006, requiring Canada to “confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder” (TRIPs formulation).



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after its certification.⁵⁸ The CRC and other rightsholders are captive to a compulsory licence process; there is no policy rationale for forcing them to submit to a lengthy, expensive and compulsory process, only for some or all users to take the position that they have “opted out” of the tariff following certification.⁵⁹ The inefficiency of such an interpretation is palpable, as it would require thousands of individual rights holders to sue each and every user who opts out on an infringement theory. This would create limitations issues and clog up the courts with infringement actions, at great prejudice to rightsholders who are already compelled by law or circumstance to resort to the Copyright Board regime.

To give a drastic example of the harsh consequences of the “voluntary tariff” theory, SOCAN Tariff 22 was filed in 1995, and was not [certified by the Copyright Board until 2007](#) and [2008](#). The Copyright Board’s preliminary and final decisions were appealed up to the Supreme Court of Canada, with decisions rendered in 2004 and 2012.⁶⁰

Recognizing (as the Discussion Paper does) that the Board exists to “establish[] 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” while providing users with “certainty regarding their costs and legal liability and thus enables them to structure business models that can flourish in Canada”, it would be a remarkably poor policy to allow active users to unilaterally repudiate the result of a tariff process spanning 17 years and two rounds of litigation to the Supreme Court of Canada, thereby spawning further, highly individualized infringement lawsuits.⁶¹

In harmonizing the tariff regime, the Government should make it clear that all copyright tariffs are mandatory – and always have been mandatory⁶² – to put an end to this destructive theory and maintain the vitality of the tariff system.

⁵⁸ See, e.g., Ariel Katz, “Spectre: Canadian Copyright and the Mandatory Tariff - Part I” (2015) 27 I.P.J. 151 and “Spectre: Canadian Copyright and the Mandatory Tariff - Part II” (2015) 28 I.P.J. 39, attacking the concept that tariffs are mandatory under the Act, even for compulsory licence regimes. While the “voluntary” theory was rejected in *Canadian Copyright Licensing Agency v. York University*, [2017 FC 669](#) at ¶206-220, that case is still active and thus there is great uncertainty for all collectives.

⁵⁹ This is already happening in the reprographic setting for universities and school boards.

⁶⁰ *SOCAN v. CAIP*, [2004 SCC 45](#); *ESA v. SOCAN*, [2012 SCC 34](#); *Rogers Communications Inc. v. SOCAN*, [2012 SCC 35](#); *SOCAN v. Bell Canada*, [2012 SCC 36](#).

⁶¹ The Act contains a three-year limitations period in s. 43.1, making it possible for users to raise limitations defences to infringement claims *after* fighting tariffs at the Copyright Board level and in judicial reviews to the Federal Court of Appeal and Supreme Court of Canada, by “opting out” of the result, even though compulsory licence rightsholders have no choice but to take the tariff route. This feature alone establishes why the “voluntary” or “opt out” theory makes no sense as an interpretive theory or policy objective.

⁶² Clarifying that tariffs have always been mandatory will deter speculative litigation under the existing Act.



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COMBINED EFFECT OF CRC'S RECOMMENDATIONS

In summary, CRC's recommended positions would require the following changes to the Copyright Board's statutory and regulatory framework:

Time Limits

1. Through an amendment to the Act, the Government should require the Copyright Board to deal with all applications and proceedings as expeditiously as the circumstances and considerations of fairness permit, and with proportional procedures tailored to the needs of the particular case, but, in all cases, within the time limits provided for by or under the Act. (**Potential Reform #1**)
2. A January 31 tariff proposal deadline and a maximum 28-day objection time limit should be instituted within the Act. The requirement to publish in the *Canada Gazette* should be removed in favour of centralized notice through the Copyright Board website. There should be no further burden on the parties to provide further information at this time and objectors should be permitted simply to identify themselves as an objector to a tariff proposal (**Potential Reforms #2, 5, 8**)
3. Case management conferences should set further firm deadlines appropriate to the needs of the particular case. (**Potential Reform #3**)
4. Provided that other complementary efficiency reforms are enacted pursuant to this review, a 36-month time limit for contested matters should apply. Shorter deadlines should apply for uncontested matters. (**Potential Reform #2**)
5. A maximum nine-month post-hearing time limit for decisions should be instituted into the Act. To assist with the timing, the criteria for non-simultaneous translation of decisions in ss. 20(1)-(2) of the [Official Languages Act](#) should be followed. (**Potential Reform #2**)
6. A 60-day time limit for certification should apply once the Board has received a joint submission notifying it that a given tariff has been settled between the collective society and objectors. Parties should be able to settle for longer terms where a status quo has been established. (**Potential Reforms #2, 6, 7**)

Case Management During a Proceeding

7. The parties should be required to engage in a "meet and confer" or "discovery management" meeting prior to a case management conference. This session should



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include the provision of a Statement of Issues to facilitate agreement regarding interrogatories, including a theory of the case and a more refined sense of the classes of documentary information required. The parties' Statements of Issues should be provided on a non-binding basis, subject to amendment as the proceeding evolves and the evidence emerges. **(Potential Reforms #3, 5, 10)**

8. Case management conferences should set further firm deadlines, narrow the issues or simplify procedures whenever possible, and resolve disputes with respect to relevance of interrogatories or the effectiveness of sampling for interrogatories. The Act should be amended to permit the conferences to be overseen provided by a dedicated Board official with a role and mandate comparable to a prothonotary within the Federal Court system. **(Potential Reforms #3, 10)**

9. The Copyright Board should be able to award costs, but only when a participant has significantly obstructed a proceeding or has improperly delayed its timely conduct. The quantum should be at the discretion of the Copyright Board. The Copyright Board should also be able to draw adverse inferences against parties who refuse to comply meaningfully with the interrogatory process. **(Potential Reforms #4, 10)**

10. All experts before the Copyright Board should be bound by an expert acknowledgment comparable to that required under Rule 52.2 of the [Federal Courts Rules](#). A meet-and-confer and case management conference should explore the potential of getting experts to confer with one another in advance of trial to narrow the issues and identify points on which their views differ. **(Potential Reforms #3, 10)**

Standard of Review

11. The Act should include a standard of review provision to give the Copyright Board more comfort that its discretionary, legal and factual findings will be accorded stronger deference upon judicial review. **(Potential Reform #2)**

Mandate and Criteria for Rate-Setting

12. The Copyright Board should be required to certify on the best evidence within the record before it, even if the evidence is necessarily scant because of the future-facing nature of a tariff. The Copyright Board should not engage in independent fact-finding because of the associated risks and delays. **(Potential Reforms #2, 10, 11, 12)**

13. Specific, mandatory rate-setting criteria should be adopted. In order to promote the dissemination of copyright works and a just reward for creators, these criteria should reflect to the greatest extent possible the price that a functioning market would yield based on a willing buyer, willing seller standard. **(Potential Reforms #11, 12)**



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Harmonization

14. The various tariff-setting regimes should be significantly harmonized. As part of this process, all compulsory licence collectives should be given access to a statutory damages multiplier for unpaid tariff fees. Further, the Government should revise the Act to confirm that general tariffs have always been mandatory in nature. (**Potential Reforms #6, 13**)

CONCLUSION

In conclusion, CRC thanks the Government for this opportunity to provide its comments on the Discussion Paper. CRC also wishes to thank the Copyright Board for its initiatives to attempt to improve the efficiency and productiveness of its operations and procedures, which should ultimately benefit all stakeholders.

Yours sincerely,

Carol Cooper
President and Chief Executive Officer