



September 28, 2017

The Honourable Navdeep Bains  
Minister of Innovation, Science and Economic Development  
House of Commons  
Ottawa, Ontario K1A 0A6

[Navdeep.Bains@parl.gc.ca](mailto:Navdeep.Bains@parl.gc.ca)

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

Dear Honourable Bains,

**Introduction**

The Canadian School Boards Association represents over 250 school boards across Canada serving more than three million elementary and secondary school students.

The school boards represented by CSBA's provincial affiliates are both directly and indirectly impacted by decisions made by the Copyright Board of Canada. CSBA believes that the Copyright Act currently grants the Copyright Board a system of checks and balances that allows rightholders to exercise their rights while ensuring the rights of users are duly protected. CSBA opposes any changes to public policy that inhibit the powers of the Copyright Board to maintain this important system of checks and balances. Frequently, changes to public policy result in unintended consequences and CSBA is concerned that extremely short timelines allowed in this consultation process does not allowed for adequate time to carefully consider what the outcome of these options might be.

CSBA is happy to provide the following selected comments on the Discussion Paper on Options for Reform to the Copyright Board of Canada. In particular, our comments will focus on the Discussion Paper's proposed options.

**OPTION 1: Explicitly require or authorize the Copyright Board to advance proceedings expeditiously.**

This option suggests that the Copyright Board is not managing its proceedings expeditiously. Nothing in CSBA's experience supports this suggestion, nor is there anything currently preventing the Copyright Board from managing its proceedings expeditiously. While Copyright Board decisions do take a long time from start to fin-

ish, many of the reasons lie outside of the Copyright Board itself. CSBA would rather see a long process that results in a thorough, fair and considered ruling, than a rushed process that results in the Board's inability to fully consider all issues that may arise.

The Copyright Board is governed by the general principals of administrative law and is already "master" of its own procedures. It is common for the board to impose and enforce deadlines on parties appearing before it. Further, the Copyright Board has, in the past, used its powers to consolidate proposed tariffs into a single hearing. Doing so, where appropriate, demonstrates the Board's existing practices value administering its business expeditiously.

**OPTION 2: Create new deadlines or shorten existing deadlines in respect of Copyright Board proceedings**

No two tariff proceedings are alike, and Copyright Board tariff proceedings are complex and variable. Even a proceeding to renew an existing tariff encounters new and unexpected complications. The Copyright Board of Canada takes the time to consult affected parties on many unforeseen issues that arise in the course of a proceeding. This practice benefits both rightholders and copyright users because they are able to express their views as issues arise. This is a particularly valuable practice when the Copyright Board is dealing with inaugural tariffs or when proposed tariffs seek significant increases. If, due to arbitrary deadlines, the Copyright Board is unable to take the necessary time to properly adjudicate issues that arise between the parties as part of the Board proceeding, these issues are more likely to end up at the Federal Court of Appeal on judicial review.

CSBA believes that the Copyright Board itself best deals with the issues that arise in a proceeding, as its role is primarily to adjudicate on issues of fairness between the parties, and it has the expertise to assess complex economic evidence. If a set of legislated deadlines resulted in the Board's inability to consider all of the issues that arise during a proceeding, there may be an increase in judicial review applications. Judicial review applications are costly and time consuming, and frequently send issues back to the Copyright Board for reconsideration. It seems to us to be more procedurally fair to have the Copyright Board examining all issues that arise during its proceeding, without having to worry about to arbitrary deadlines. The judicial review process should not be used to have the Federal Court of Appeal review matters that the Copyright Board was unable to consider due to legislated deadlines in the *Copyright Act* or its regulations.

**OPTION3: Implement case management of Board proceedings.**

At first glance, case management could reduce workload and expedite efficiencies. However, the proposal presented in the discussion paper appears to be more of a Copyright-Board sanctioned mediation process than it does a case management process. CSBA is concerned that this is a policy shift that could result in directing

parties about what evidence they can include in their case before the Board. CSBA is doubtful that parties to Copyright Board proceedings would welcome such a policy shift. CSBA suggests taking the time for a full analysis of case management systems would provide clarity about how such systems could be appropriately used in Board proceedings.

**OPTION 4: Empower the Board to award costs between parties.**

The role of the Copyright Board is to set a fair tariff based on evidence provided by both rightholders and users. CSBA is unclear how awarding costs in a tariff proceeding would make that process fairer or more efficient. The ability to award costs could deter parties from filing objections to tariff proposals, or deter collectives from filing proposed tariffs. Any power that could deter a party from exercising their rights to participate in a tariff proceeding is unacceptable. CSBA opposes this option.

**OPTION 5: Require parties to provide more information at the commencement of the tariff proceeding.**

As long as parties are not being requested to reveal their case strategy, CSBA sees no objection in this proposal, and in fact, sees some merit. CSBA's member-Associations' have experienced the burdensome and costly interrogatory process, and if this proposal could provide clarity with respect to relevance and context, disputes and disagreements could be avoided.

Additionally, having more upfront information might help a party decide whether or not to proceed with an objection rather than filing an objection "just in case" there is something unexpected in the collective's case.

However, CSBA strongly submits that any new obligation to provide more information at the beginning of a proceeding must apply to both the collective AND the objector, not one or the other.

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

Allowing all collective societies to enter into private licensing agreements instead of copyright board certified tariffs does not appear, on the surface, to be an objectionable practice.

What CSBA is concerned about in this option is the proposed "overriding affect" such licensing agreements might have. No one user group should be bound by a licence negotiated by another user group, regardless of the similarities between the two groups. Through its provincial affiliates, CSBA works with several hundred school boards and can say with certainty that a "one-size-fits-all" philosophy of policy implementation simply does not work. Our members would be vocally opposed to hav-

ing one jurisdictions negotiated agreement have overriding affect on their own jurisdiction.

**OPTION 7: Change the time requirements for the filing of proposed tariffs.**

CSBA has no objection to this proposal.

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

CSBA has no objection to this proposal, but does not believe that filing a proposed tariff in January rather than in March will have a significant impact on the Board's efficiency EXCEPT in those cases where it is a simple tariff renewal without changes to royalty or terms and without objection.

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

CSBA supports the concept that previously-certified tariffs apply until such time as a new tariff is approved.

**OPTION 10: Codify and clarify specific Board procedures through regulation.**

CSBA is unclear how putting the Board's procedures into regulation would improve efficiencies. If the intended outcome is greater detail in the procedures, this can be achieved without codifying them into regulation.

With respect to the detailed procedures outlined in the Discussion Paper, CSBA submits that other national education organizations such as the Council of Ministers of Education Canada have more direct experience with Copyright Board procedures and can better address the specifics outlined in this option.

**OPTION 11: Stipulate a mandate for the Copyright Board in the Copyright Act.**

CSBA believes that the mandate of the Copyright Board is already sufficiently understood by collectives and users of copyright-protected material, and such an amendment would do nothing to make the Copyright Board more efficient or expedient. If such an amendment were to be made, the mandate must be kept simple and succinct so as not to impinge on the Board's independence. For example: "to establish fair and reasonable tariffs".

**OPTION 12: Specify decision-making criteria that the Board is to consider**

CSBA has never considered the Copyright Boards' decision-making process or criteria to be "unclear", as suggested in the Discussion Paper. The Copyright Board shows unique and specific expertise when considering the abundance of evidence

and arguments presented during tariff proceedings. Its rationale for its decisions is concise and well articulated. CSBA is concerned that a list of decision-making criteria intended to educate “prospective participants and the public generally” could turn into a check list of factors the Board is compelled address in every ruling, regardless of whether or not each factor is relevant to that particular case.

**OPTION 13: Harmonize the tariff setting regimes of the Act.**

CSBA is unclear how harmonizing the tariff setting regimes in the Act would improve the efficiency of the Copyright Board. This proposal has significant implications for both rightholders and users and needs to be more carefully considered over a greater timeline than is allowed in this Discussion Paper.

**Conclusion**

CSBA is unconvinced that many of the proposals in this Discussion Paper will serve to make the Copyright Board more efficient. In fact, in some cases, we believe the opposite could occur and the Board could become bogged down with arguments over criteria and mandate.

Thank you for your consideration,

Floyd Martens



President  
Canadian School Boards Association



September 28, 2017

The Honourable Mélanie Joly  
Minister of Canadian Heritage  
House of Commons  
Ottawa, Ontario K1A 0A6

[Melanie.Joly@parl.gc.ca](mailto:Melanie.Joly@parl.gc.ca)

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