Consultation on Options for Reform to the Copyright Board of Canada

Joint Submission of CONNECT Music Licensing Service Inc. and Société de gestion collective des droits de producteurs de phonogrammes et de vidéogrammes du Québec (SOPROQ)

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CONNECT Music Licensing Service Inc. ("CONNECT") and Société de gestion collective des droits de producteurs de phonogrammes et de vidéogrammes du Québec ("SOPROQ") applaud the Minister of Canadian Heritage and the Minister of Innovation, Science, and Economic Development for initiating this vital consultation on the reform of the Copyright Board of Canada (the "Board").

I. Introduction

CONNECT and SOPROQ are copyright collective societies that administer, on behalf of makers of sound recordings, the exclusive right to reproduce sound recordings (and, in most cases, the performers' performances embodied in those sound recordings) and to authorize such reproduction. Together, CONNECT and SOPROQ represent the vast majority of sound recordings – both English and French – that are used in Canada by radio stations, online music services, and other commercial users of music.

As collective societies, CONNECT and SOPROQ rely on the Board for the certification of tariffs for the use of their repertoire, notably by commercial radio stations. The first CONNECT/SOPROQ Commercial Radio Tariff, for the years 2008 to 2011, was certified by the Board in July 2010,[1] with the second iteration of that tariff, for the years 2012 to 2017, certified in April 2016.[2] Indeed, in the 29 years since it was established, the Board has come to play an increasingly important role in the Canadian copyright ecosystem.

Unfortunately, the Board's effectiveness has been undermined in recent years by the inefficiency, delay, and unpredictability that now characterize both its proceedings and its decisions. The economic and legal significance of its role is such that stakeholders simply cannot afford to wait years at a time for tariffs that, when finally certified, have mostly retroactive effect and often fail to reflect the realities of the marketplace in which they operate, much less the true value of the music or other material to which they apply. While the Board deliberates, new services avoid launching in Canada, fearful of the uncertain costs of doing so, and record labels, music publishers, and others think twice before investing in the creation of new Canadian works. In many ways, the Board has come to inhibit, rather than promote, the growth of business and the dissemination of creative works.

Simply put, this must change. For collective societies, and the rightsholders they represent, meaningful reform of the Board cannot come quickly enough. CONNECT and SOPROQ urge the government to use all available means, including the power to enact regulations under

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[1] *Commercial Radio: SOCAN (2008-2010); Re:Sound (2008-2011); CSI (2008-2012); AVLA/SOPROQ (2008-2011); Artisti (2009-2011)*, Decision of the Board, July 9, 2011. Online: http://www.cb-cda.gc/decisions/2010/20100709.pdf.

[2] *Commercial Radio: SOCAN (2011-2013); Re:Sound (2012-2014); CSI (2012-2013); AVLA/SOPROQ (2012-2017); Artisti (2012-2014)*, Decision of the Board, April 21, 2016. Online: http://www.cb-cda.gc/decisions/2016/DEC-2016-04-21.pdf.

sections 66.91 and 66.6(1) of the *Copyright Act*, to introduce changes that will have an immediate impact.

In this submission, CONNECT and SOPROQ comment on the various detailed options for reform that are canvassed in the consultation paper released by the Ministers on August 9, 2017 (the "Consultation Paper"). Our focus is on the recommendations that have the most direct impact on collective societies and others who participate regularly in proceedings before the Board and are therefore directly affected by the fairness and efficiency of its processes and the timeliness and predictability of its decisions.

II. Options for Reform

Recommendation 1: Explicitly require or authorize the Board to advance proceedings expeditiously

In recent years, proceedings before the Board have been marred by multiple layers of delay. It often takes several years from the time a tariff is proposed before the Board initiates a proceeding to examine it. Once a proceeding is triggered, it can take a year or more to complete the necessary pre-hearing steps, at which point it routinely takes the Board two to three years to render a decision. All too often, the result is a tariff with significant retroactive effect – and frequently one that has expired even before it is certified.[3]

The uncertainty created by this state of affairs can be crippling for a collective society: even if royalties are being paid on an interim basis pursuant to the previous certified tariff, the collective is often compelled to hold royalties in abeyance in case the rates certified in the next tariff are lower. It is obvious that this deprives rightsholders of payment for the use of their works. What may be less obvious is that it also deprives collectives of the ability to realize commissions that are often the only source of financing for their day-to-day operations.

For this reason, CONNECT and SOPROQ strongly support the introduction, through regulation under sections 66.91 and 66.6(1) of the *Copyright Act*, of mandatory timelines for all proceedings before the Board. With respect, it would not be sufficient merely to "authorize" the Board to advance proceedings expeditiously; it should be *required* to do so, and to meet explicit deadlines, established by regulation, to render decisions and certify tariffs. We comment further on possible deadlines in response to Recommendation 2.

As for the suggestion in the Consultation Paper that the Board might be required to conduct all proceedings as *informally* as the circumstances permit, CONNECT and SOPROQ acknowledge that a degree of informality – for example, dispensing with the need for formal motion records where appropriate – can at times be effective in the administrative context. However, it is important that any informal procedure take place within the framework of a strict regulatory timetable for the conduct of proceedings. In other words, if the Board is permitted to dispense with the formality of any particular procedure, it should be permitted to do so only in the pursuit

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[3] For example, the *Online Music Services Tariff (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2010-2013)*, which applies to downloads, streams, and webcasts of music, was certified on August 25, 2017, nearly 44 months after its expiration. The tariffs in question were first proposed in March 2009, in the case of SODRAC, and in March 2010, in the case of CSI and SOCAN, but the Board did not initiate its examination of the proposals until November 2012. The result is a tariff with nearly seven years' retroactive impact as of the date of its certification.

of greater efficiency and only where considerations of procedural fairness permit. Any other approach would only serve to exacerbate the unpredictability and inefficiency of the status quo.

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

The longer it takes to examine and certify a tariff, the greater the cost to the stakeholders. That cost includes not only the direct costs of participation in a proceeding, which tend to increase as the duration of the proceeding expands, but also the indirect costs of delay, including among other things the heightened transaction costs of attempting to do business in an uncertain marketplace.

To ensure that tariffs are certified within a reasonable time, CONNECT and SOPROQ recommend that regulations be enacted to require the Board to examine and certify tariffs by no later than a specified deadline.

(a) Contested tariffs

When faced with a contested tariff proposal, the Board should be required to:

- Conduct the proceeding in accordance with explicit timelines for the completion of interrogatories, the exchange of statements of case, and other procedural steps that precede a hearing, all of which should be established by regulation; and
- Certify the approved tariff as soon as practicable and, in any event, 24 months from the time the proceeding is initiated, and no more than six months after the end of the hearing.

CONNECT and SOPROQ agree with Re:Sound Music Licensing Company ("Re:Sound") that, in order to facilitate settlement discussions, reduce the number and frequency of tariff proceedings, and avoid the wasteful expenditure of resources on unnecessary proceedings, parties should continue to be allowed to determine amongst themselves when to initiate a hearing. As Re:Sound points out, this flexibility allows parties and the Board to combine proposed tariffs, initiate proceedings for multiple years, and consolidate hearings with other similar proceedings where appropriate, among other things.

That said, CONNECT and SOPROQ suggest that the flexibility in allowing the parties to initiate the proceeding should not be unlimited. If a proceeding has not been initiated within one year of the filing of a tariff proposal, a case management conference[4] should be convened to determine the status of the matter and determine next steps. After two years, the Board should have the discretion to initiate a hearing on its own motion if it believes that considerations of fairness and the public interest so require.

In addition, CONNECT and SOPROQ support Re:Sound in calling for expedited rulings by the Board on interim steps. For instance, where Board rulings are required to address procedural matters, such rulings must be issued expeditiously or they result in the schedule having to be adjusted with either the hearing having to be delayed or the timelines shortened, prejudicing the parties' ability to prepare their evidence and fully present their case. Board rulings on procedural matters should be issued as soon as practicable, and no later than 2 weeks after being heard.

[4] See CONNECT-SOPROQ comments on Recommendation 3.

(b) Tariffs settled by agreement

Where a tariff is settled by agreement between the collective that proposes it and the users who object to it, certification can be achieved even more expeditiously. In fact, it should not be necessary for the Board to conduct a hearing at all. Instead, the Board should be required to consider the tariff in an expedited manner, based on the written submissions of the parties, and certify the tariff on the terms and conditions proposed in those submissions, subject only to any alterations that the Board considers necessary to address the submissions of objectors or permitted interveners who are not parties to the agreement or to satisfy the rate-setting criteria established by regulation.[5]

In these cases, the Board might also be required to certify the tariff no more than three months after the date of the joint submission, thus requiring an expedited but fair process to conduct the limited examination just described.

(c) Uncontested tariffs

Finally, where a proposed tariff is entirely uncontested – that is, where no objections to it are filed within the statutory objection period – the Board should be required to conduct any necessary examination in an expedited fashion and certify the tariff within no more than six months after it is proposed.

(d) Additional comments

The importance of the recommendations concerning settled and uncontested tariffs cannot be overstated. At present, the Board takes an exceedingly cautious and rigorous approach even to the examination of tariffs settled by agreement. It routinely requires detailed submissions from the parties as to the rationale for the settlement and often poses extensive questions to the parties as part of its examination. This can lead to substantial costs and unnecessary delay. Mandating an expedited and simplified approach to the approval of uncontested matters will both contribute to the efficiency of these processes and provide a powerful incentive to stakeholders to pursue early settlement discussions with a view to avoiding the cost and delay of contested proceedings.

The timelines proposed above may appear ambitious, especially by comparison to the status quo. However, as the efficiency of the Board improves as a result of other meaningful reforms, and especially if all collectives are empowered to negotiate agreements of overriding effect rather than relying on the Board as a tribunal of first resort, it is reasonable to expect the necessary resources to become available to deal with all proposed tariffs, contested and otherwise, in a timely fashion.

Recommendation 3: Implement case management of Board proceedings

Properly implemented, and coupled with defined timelines as outlined above, case management would help promote both a more efficient pre-hearing process and the resolution of disputed issues or even the settlement of the tariff in its entirety.

To that end, CONNECT and SOPROQ recommend not only that case management be introduced as a mandatory feature of all contested proceedings before the Board, but also that

[5] See CONNECT-SOPROQ comments on Recommendation 12.

an initial case management conference be convened within no more than 45 days after the statutory deadline for filing objections. This would create an early opportunity for the case manager to assist the parties in clarifying, simplifying, or eliminating issues in dispute as well as to canvass the availability of counsel for a hearing and establish a timeline for other steps in the proceeding.

CONNECT and SOPROQ also support the suggestion by Music Canada that, rather than burdening Board members with case management responsibilities, a new position be created with the Board that is devoted primarily or entirely to the efficient management of proceedings.

Recommendation 4: Empower the Board to award costs between parties

Given that one of the ultimate goals of Board reform is to improve the efficiency of tariff and other proceedings, CONNECT and SOPROQ believe that it might be useful to empower the Board to award costs in certain limited circumstances. However, to ensure that the risk of costs awards does not become a deterrent to participation in Board proceedings, this power should be limited to truly egregious cases, where a party's conduct is clearly responsible for unreasonable delay or has otherwise impeded the efficiency of a proceeding.

Put differently, costs awards should be a rare exception, not the rule, and should be made only against the very worst offenders. The cost of participating in proceedings before the Board is already substantial, especially for collective societies who have little alternative but to do so on a regular basis. It would be counterproductive to increase that cost by introducing costs awards as a regular feature of these proceedings.

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

To the extent that providing more information at the outset of a proceeding would promote the overall efficiency of the process, CONNECT and SOPROQ support this recommendation. However, its implementation must be approached with caution, with a view to ensuring that the interests of the parties are not unduly prejudiced and that information provided at an early stage, before the parties have had an opportunity to develop their positions after analyzing the available evidence, does not create confusion rather than clarity.

If a collective society is required to provide additional information when a tariff is filed, that information should be factual, not strategic, in nature. For example, elaborating on the known uses and/or users that are targeted might help avoid unnecessary or vague objections and interventions, as suggested in the Consultation Paper. Similarly, highlighting the differences, if any, from previously certified tariffs could well be constructive. On the other hand, requiring a collective to comment on its reasons for proposing the tariff, or the grounds on which the proposed rates and terms have been determined, would be an unwarranted intrusion upon the collective's confidential strategy. It is unclear what purpose, if any, such an unusual requirement would serve.

Recommendation 6: Permit all collective societies to enter into licensing agreements of overriding effect with users

As collective societies that operate under the so-called "general regime",[6] CONNECT and SOPROQ enjoy the flexibility to choose between filing proposed tariffs of royalties with the Board or entering into agreements with users.[7] Where agreements are concluded, they take precedence over any certified tariff.[8] Having that flexibility has allowed CONNECT and SOPROQ to negotiate voluntary agreements with a variety of different types of users, from disc jockey pools to online music services, without having to endure the cost, inconvenience, and delay of contested tariff proceedings. This has been key to securing prompt and fair compensation for the rightsholders we represent.

Unfortunately, not all collectives enjoy the same flexibility: collectives under the performing rights regime, including SOCAN and Re:Sound, have no alternative but to file tariffs for approval by the Board.[9] As a result, it is sometimes the case that users who are able to obtain valid reproduction licences from collectives like CONNECT, SOPROQ, and CSI nevertheless delay their entry into the Canadian market because of uncertainty over the rates that will eventually be payable to SOCAN or Re:Sound when and if tariffs are certified for the same uses. This stands as a further unnecessary impediment to the growth and development of the Canadian music industry.

CONNECT and SOPROQ will leave it to other stakeholders to comment on the policy rationale for allowing all collectives to enter into negotiated agreements with users. It is sufficient here to observe that a change of this nature would have the dual benefit of freeing up more of the scarce resources of the Board to deal with matters that legitimately require adjudication and simultaneously allowing well-functioning markets to develop where business conditions so permit. That would represent a major step forward for the efficiency of the collective administration process in Canada.

Recommendation 7: Change the time requirements for the filing of proposed tariffs

CONNECT and SOPROQ recognize that, where tariffs are proposed for relatively short terms, the proliferation of tariff proposals in a given year may tax the ability of the Board to meet statutory deadlines of the type outlined above. Taken in isolation, that reality may stand as an argument in favour of longer minimum effective periods for tariffs generally.

However, a tariff of longer duration is not always desirable. For example, the first time a tariff is proposed for a particular use, the collective may not wish to make a long-term commitment to particular rates, a particular tariff structure, or even to tariff-based licensing at all. If the tariff once certified appears inadequate, the collective may want the flexibility to rethink its approach, whether by proposing a different tariff for future years or by forgoing a tariff and instead licensing by negotiated agreement where possible. Making a long-term commitment to a tariff structure that the Board rejects can be a costly error. Similarly, in industries where business models evolve rapidly (for example, online music services), it may be in the interests of

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[6] *Copyright Act*, s. 70.1.

[7] *Copyright Act*, s. 70.12.

[8] *Copyright Act*, s. 70.191.

[9] *Copyright Act*, s. 67.1(1).

rightsholders and users alike for a collective to restructure its proposed tariffs from one year to the next.

As it is, collective societies already have powerful incentives to file tariffs of longer duration where circumstances permit: longer tariff both promote predictability and allow collectives to amortize the costs of contested hearings over a longer period. In other words, where longer tariffs are warranted, collectives will file them. Where they are not, the law should not require them to do so.[10]

CONNECT and SOPROQ also agree with Music Canada that, in the current environment, the length of delays at the Board and the unpredictable nature of the decision-making process make it difficult for collectives to commit to longer tariff periods. Indeed, these dynamics seem to have caused some collectives to retreat from their previous practice of filing for longer tariff periods. That may change as the efficiency and predictability of the Board process improves. To mandate longer effective periods, however, would be an unwarranted intrusion on the ability of collective societies to promote the best interests of the rightsholders they represent.

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

In the view of CONNECT and SOPROQ, while requiring tariffs to be filed before March 31 might be a minor process improvement, especially if the capacity of the Canada Gazette in April is an issue, this seems unlikely to have a significant impact on overall efficiency or the timeliness of Board decisions. Nevertheless, CONNECT and SOPROQ do not object to this proposal if the Board believes it would be of assistance.

Another alternative would be to introduce staggered filing dates for different tariff regimes. Not only might this help balance the demand on the Board's resources at the time tariffs are filed (i.e., by not overwhelming Board staff around a single filing date), it could also be a valuable process improvement if, as suggested above, fixed timelines are introduced for the initiation and conduct of Board proceedings.

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

CONNECT and SOPROQ operate under the "general regime", in which expired tariffs already remain in effect on an interim basis until a new tariff is approved. Given the current pace of Board decision-making, this seems almost a practical necessity. Especially for collectives who rely on a small number of tariffs for the bulk of their revenue, the inability to collect under an expired tariff, while the Board deliberates for years before certifying a new one, would be devastating.

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[10] In any event, while certain collectives have chosen under the current regime to file tariffs for one year at a time, both the Board and the parties typically prefer to have tariffs for multiple years examined in a single hearing. See, for example, *SOCAN Tariff 19 – Physical Exercise and Dance Instruction (2013-2017)* (online: http://www.cb-cda.gc.ca/decisions/2017/DEC-2017-19.pdf), certified June 3, 2017, which combines multiple tariffs filed by SOCAN for shorter durations, and the hearing conducted in May 2017 to examine the separate background music services tariffs filed by SOCAN and Re:Sound for multiple different periods spanning the years 2007 to 2016.

It is important to recognize, however, that interim tariffs are at best an incomplete solution. As noted above, when royalties are collected under an interim tariff, collectives usually consider it necessary to refrain from distributing at least a portion of those royalties in case the rates certified under the new tariff are lower than under the previous one. In practice, this means that rightsholders are forced to make do with only a portion of the compensation to which they are entitled, while the collective, unable to charge commission on the deferred royalties, is deprived of revenue that would otherwise be used to fund its operations.

In other words, especially in the current environment, in which the Board has recently reduced the rates payable under a number of relatively longstanding tariff schemes, interim tariffs do relatively little to limit the impact of tariff retroactivity. The only truly effective solution to the problem is to eliminate retroactivity through the adoption of fixed timelines and more efficient procedures.

On a related note, CONNECT and SOPROQ do not support the suggestion that the Board be empowered to make interim decisions on its own initiative and not merely when parties ask it to do so. Doing so seems likely to exacerbate the unpredictability of the Board's process, which would be undesirable, and it is not clear what useful purpose would be served by doing so.

Recommendation 10: Codify and clarify specific Board procedures

CONNECT and SOPROQ strongly support the replacement of the Board's current Model Directive on Procedure with detailed rules of procedure enacted by regulation. The lack of consistent rules for Board proceedings is arguably the single greatest source of confusion and inconsistency in the tariff-setting process, while the lack of fixed timelines for the completion of the various steps in that process contributes significantly to the Board's delay. Adopting clear rules of procedure would go a long way toward promoting predictability and efficiency in Board proceedings.

As a general comment, CONNECT and SOPROQ emphasize that the codification of procedural requirements will be effective only if each requirement is subject to a fixed deadline. As for the specific measures discussed in the Consultation Paper, CONNECT and SOPROQ would offer the following observations.

(a) Statement of issues

Requiring the parties to a proceeding to file joint statements of issues, as described in the Consultation Paper, would be a useful way to promote early discussions among the parties and could well reduce the scope and duration of the proceeding. While it might be ambitious to require these statements to be filed within 90 days after the deadline for tariff objections, CONNECT and SOPROQ agree that they should be filed before interrogatories are exchanged. Defining the issues in advance could contribute to a more streamlined and efficient interrogatory process.

(b) Interrogatory process

From the perspective of a collective society, the interrogatory process is often the only way to gather the information that is necessary to support a tariff proposal, since that information is usually entirely in the possession and control of users. While CONNECT and SOPROQ acknowledge the importance of proportionality and efficiency in the interrogatory process, it is

crucial that the ability of collectives to obtain relevant evidence is not sacrificed in the name of efficiency.

CONNECT and SOPROQ generally agree with the specific process suggestions canvassed in the Consultation Paper, most of which reflect current practice before the Board. The following two matters, however, are worthy of note:

- Requiring parties to explicitly link their interrogatories to specific issues identified in their statements of issues would be an unwarranted intrusion upon confidential litigation strategy. While it may be necessary or appropriate for a party to explain the relevancy of a particular question when responding to an objection, requiring parties to divulge in advance their reasons for asking particular questions would not promote a full and frank exchange of information. If anything, it could limit the quality of evidence available to the Board.

- It is well-established practice before the Board that responses to interrogatories need only be gathered from a representative sample of an association's members, rather than from all members. However, what is a truly "representative" sample is often the subject of disagreement between parties. Any codification of this standard should provide that, if parties are unable to agree on how a representative sample is to be structured or drawn, the Board is empowered to make that determination.

(c) Simplified procedure

CONNECT and SOPROQ agree that the introduction of a simplified procedure in appropriate cases would go a long way toward expediting the tariff-setting process.

Specific features of a simplified procedure might include the following:

- Written evidence, with limitations on the scope and length of witness statements and expert reports and cross-examinations to be conducted on written transcripts rather than *viva voce*;

- Limitations on the scope and number of interrogatories that may be posed by each party and, in the discretion of the Board, on the size and composition of a "representative sample" of association members;

- Authority for the Board to conduct "mini-hearings" on specific issues where appropriate, such as where it appears necessary to test the competing views of expert witnesses, or the credibility of certain fact witnesses, through oral questioning; and

- A requirement that the tariff be certified as soon as practicable and, in any event, not later than the day before the proposed tariff is to take effect.

As a general proposition, the simplified procedure should be employed by default where no objection has been filed to a proposed tariff. In other cases, it could be invoked on the consent of the parties or imposed by the Board, in its discretion, at the request of a party, where the issues in dispute are relatively simple and the monetary value at issue appears likely to be below a threshold of $100,000.

(d) Evidence

In the view of CONNECT and SOPROQ, the treatment of expert evidence by the Board is one of the most serious issues faced by participants in its proceedings. Parties invest enormous amounts of time and effort in the preparation of expert evidence, economic and otherwise. Collectives like CONNECT, SOPROQ, Re:Sound and CSI routinely review international best practices and build sophisticated economic analyses that build upon well-accepted economic principles and theorems, which are generally presented to the Board by economists and other expert witnesses who are recognized worldwide as leaders in their fields. Tariff objectors conduct similar analysis and present their own valuation theories and other expert evidence.

Nevertheless, the Board frequently discards all of that evidence and analysis in favour of valuation methodologies of its own device, without giving the parties notice of its intentions or the opportunity to make submissions on the merits of its preferred approach. Extensive evidence that has been accepted by tribunals in other jurisdictions as meeting rigorous international standards is rejected or ignored, often with a request by the Board that the parties submit better evidence at the next hearing, which will not be conducted, much less determined, for years to come.

No single factor contributes more to the uncertainty of outcomes before the Board than the knowledge that, even when faced with detailed positions developed by the parties through volumes of evidence and weeks of hearings, the Board is most likely to simply devise its own approach, which the parties learn about only when they read its reasons for decision. At times, it almost seems pointless for the parties to present any economic analysis at all.

- It should be stipulated by regulation that the Board is required to base its decisions on the best evidence provided by the parties, not on additional information that it may gather through other means or on rate-setting methodologies devised by its internal economists and legal staff. Procedural fairness demands that the parties know the case they have to meet, which is not the case when the Board relies on information and analysis generated behind the scenes and without notice to the parties.

- The *Copyright Act* should be amended to make it clear that the Board has a duty, rather than simply a power, to certify a tariff that has been properly filed and is supported by some evidence demonstrating a potential protected use of its repertoire. While the Board would retain the authority to set the applicable royalty rates based on its assessment of the record before it, subject always to applicable rate-setting criteria,[11] the Board should be required to certify *some* tariff, in recognition of the rightsholders' legitimate entitlement to compensation.

  As the Board itself has acknowledged, failure to certify a tariff in such circumstances deprives rightsholders of due recourse.[12] The problem is compounded because, in the absence of a tariff, collective societies are also deprived of the opportunity to collect any

[11] See CONNECT-SOPROQ comments on Recommendation 12.

[12] See, e.g., *SOCAN Tariff 22.A (Internet – Online Music Services), 1996-2006*, Decision of the Board, October 18, 2007, at para. 125. ("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 recourse."

information about the target use, which the collectives would otherwise be able to use in support of future tariff proceedings. The lack of evidence therefore becomes a self-perpetuating void, the impact of which is borne entirely by rightsholders.

- The Board should not be permitted to appoint independent experts to address issues that it considers relevant to a proceeding. While this is suggested in the Consultation Paper, CONNECT and SOPROQ believe that it would be precisely the wrong approach. Instead, if the Board believes that it lacks the necessary evidence to address a matter in issue in a proceeding, it should direct the parties to adduce additional evidence on that subject and give them the opportunity to test that evidence through cross-examination.

(e) Confidentiality

CONNECT and SOPROQ do not support the suggestion in the Consultation Paper that documents filed with the Board be open to the public unless the Board orders otherwise.

The nature of proceedings before the Board is such that a great deal of relevant evidence consists of commercial agreements and financial information that the parties consider to be highly sensitive and confidential. Faced with the knowledge that, if filed with the Board, that evidence would become public knowledge, parties would very likely take steps to avoid producing it at all. This would have a highly negative impact on the quality of information available to the Board when examining tariffs and valuing rights. The quality of the Board's analysis would be similarly affected.

While CONNECT and SOPROQ recognize and respect the open court principle and the role of the Board as a guardian of the public interest, those factors need to be weighed carefully against the importance of ensuring that the Board continues to have access to as much relevant information as possible to inform its decisions. Moreover, the approach proposed in the Consultation Paper appears likely to require an increased commitment of resources by the Board, which would be required to adjudicate a substantially greater number of confidentiality issues. That seems counterproductive to the goal of promoting greater efficiency in the processes of the Board.

For these reasons, CONNECT and SOPROQ believe it would be preferable to codify the current practice of the Board, in which parties are entitled to designate information as confidential and their decision to do so is subject to review by the Board only when challenged by another party. That practice has served Board participants well over many years and there seems to be no compelling reason to depart from it as part of the current reform process.

Recommendation 11: Stipulate a mandate for the Board in the Act

CONNECT and SOPROQ believe that the lack of a specific statutory mandate for the Board contributes greatly to the cost, inefficiency, and uncertainty of tariff proceedings. Without clear direction as to the objectives that the Board must pursue in certifying tariffs, parties are left to theorize and speculate as to the considerations that might animate its decision-making in individual cases. As a result, enormous amounts of time and money are spent generating expert evidence and analysis that, as often as not, end up missing the mark from the Board's point of view. This state of affairs is simply not conducive to effective or efficient rate-setting.

Establishing a clear statutory mandate for the Board would provide an invaluable guidepost for parties when formulating tariffs and presenting their cases. The Board would benefit from

evidence that is tailored more specifically to its statutory obligations, as defined, while the parties would benefit from a much clearer sense of what the Board expects – and, for that matter, what it will be required to consider. All stakeholders, including the general public, would benefit from more predictable outcomes, which would promote business growth rather than inhibit it.

CONNECT and SOPROQ support the recommendation of Music Canada that, in codifying a mandate for the Board, the following guiding principles should be considered:

- that the Board certify tariffs in a manner that serves to safeguard, enrich, and strengthen the cultural, social, and economic fabric of Canada;
- that the Board certify tariffs in a timely, efficient, and predictable manner, and ensure that the expenditure of resources in all proceedings before it is proportionate to the nature and complexity of the parties' disputes and respective positions; and
- that the Board ensure that royalty rates and their related terms and conditions are fair, inasmuch as they reflect the rates that would have been negotiated in the marketplace between a willing buyer and a willing seller, based on an assessment of the economic, competitive, and other information presented by the parties.

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

In a similar vein, the absence of explicit criteria to be applied by the Board in setting royalty rates, and their related terms and conditions, is responsible in large part for the unpredictability and inefficiency of the current tariff-setting process. As with the absence of a statutory mandate for the Board, the lack of decision-making criteria leaves parties guessing as to the factors that the Board might apply in any particular case. The problem is exacerbated by the Board's demonstrated willingness to deviate from its own previous decisions, leading to an inconsistent jurisprudence that provides little useful guidance to parties when designing new tariffs or preparing for future proceedings. Moreover, the wide margin of appreciation afforded to the Board in the judicial review of its rate-setting decisions[13] leaves parties with very little recourse even when a decision appears inconsistent with the evidence or with previous decisions of the Board itself.

The impact on collective societies cannot be overstated. Increasingly, it appears that each successive tariff hearing means going back to the drawing board, attempting to frame the issues in ways that will appeal to the Board without the benefit of any predictable framework whatsoever for the ultimate decision. Most collectives operate on a cost-recovery basis. They simply cannot afford to spend millions of dollars throwing darts at an invisible board.

To address this situation, CONNECT and SOPROQ recommend adopting a rate-setting standard that reflects market-based factors, such as the amount that would be paid by a willing buyer to a willing seller. While even standards like these can be difficult to apply in practice, and are susceptible to different interpretations in individual cases, they are nevertheless well-understood by economists and can therefore serve as useful and reasonably predictable benchmarks. They also form the basis for comparable standards that have been adopted by copyright royalty tribunals in other jurisdictions, including Australia, New Zealand, the United

[13] *Re:Sound Music Licensing Company v. Canadian Association of Broadcasters*, 2017 FCA 138.

Kingdom, and the United States, which can therefore serve as useful reference points for the government in formulating a standard that is appropriate for Canada.

To be clear, CONNECT and SOPROQ believe that whatever standard or criteria are chosen must be implemented through a mandatory regulation that requires the Board to apply them consistently, in all cases, and on the basis of the best evidence available in the proceeding. Only then will the goals of predictability and efficiency be met.

III. Additional Recommendations: Composition of the Board

Although the *Copyright Act* provides for the Board to consist of up to five full-time members,[14] it has operated shorthanded for nearly seven years. Since 2010, the Board has consisted of a part-time Chair, who is a sitting judge; a full-time Chair, who is also the CEO of the agency; and a third part-time member. Until recently, no attempt has been made to fill the remaining positions.

CONNECT and SOPROQ urge the government to act immediately to fill all five positions on the Board, each with a full-time appointee. For any reform that emerges from the current consultation process to be effective, it must be tackled by a Board that is operating at full strength, capable of acting nimbly and consistently to meet deadlines set by statute or regulation, conduct efficient hearings where necessary, and render timely decisions in all cases.

The qualifications and subject-matter expertise of the members of the Board should also be re-examined. The Board is called upon on a regular basis to determine key questions of copyright law, often as matters of first impression, and to analyze sophisticated economic issues related to the valuation of rights. As the current Vice-Chair of the Board, Claude Majeau, recently testified, "decisions must be based on solid legal and economic principles [and] reflect a solid understanding of constantly evolving technologies."[15] It may be unreasonable to expect the Board to discharge those responsibilities effectively without the background and expertise to do so.

To that end, CONNECT and SOPROQ recommend that the *Act* be amended to require that all members of the Board possess significant knowledge of copyright law, economics, or both, and that it be further prescribed by regulation that the panel established to hear any matter include at least one member with knowledge of copyright law and one with knowledge of economics. These requirements, which mirror the statutory composition of the U.S. Copyright Royalty Board,[16] would ensure that the Board approach each hearing with the experience and expertise necessary to analyze and determine the complex issues of law and economics that inevitably

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[14] *Copyright Act*, ss. 66(1) and (2).

[15] Copyright Board of Canada, *Presentation delivered by Mr. Claude Majeau, Vice Chairman and Chief Executive Officer* (Presentation to the Standing Senate Committee on Banking, Trade and Commerce) (Ottawa, November 3, 2016) (online: http://www.cb-cda.gc.ca/about-apropos/speeches-discours/PRE-2016-11-03-EN.pdf).

[16] 17 U.S.C. § 801 prescribes that "[e]ach Copyright Royalty Judge shall be an attorney who has at least 7 years of legal experience. The Chief Copyright Royalty Judge shall have at least 5 years of experience in adjudications, arbitrations, or court trials. Of the other 2 Copyright Royalty Judges, *1 shall have significant knowledge of copyright law, and the other shall have significant knowledge of economics*" (emphasis added).

arise. It might also serve to reduce the Board's reliance on staff economists and in-house lawyers, freeing up those individuals to deal with other matters.

IV. Conclusion

By initiating this consultation, the government has taken a critical first step toward reforming an institution that has come to play an outsized role in the cultural and innovation economies of Canada. While consensus among Copyright Board stakeholders can be hard to come by, it is the universal view of those who rely on the Board that the tariff-setting process is in dire need of reform. The thoughtful analysis and options set out in the Consultation Paper represent meaningful progress toward that goal.

It is now time to finish the job. While it is true that certain reforms may require amendments to the *Copyright Act*, the majority of the proposals outlined in this submission can and should be accomplished expeditiously through regulation under sections 66.91 and 66.6(1) of the *Copyright Act*. The recent history of copyright reform in Canada shows that legislative change takes years at best. Unfortunately, collective societies like CONNECT and SOPROQ, and the rightsholders they represent, cannot afford any further delay. We urge the government to take immediate and decisive action through regulatory enactment with a view to achieving meaningful and lasting change to the processes and outcomes of the Board.

CONNECT and SOPROQ would be pleased to respond to any questions that the government may have in relation to these submissions. We would be equally pleased to continue participating in the process of reform, including by assisting where appropriate in the development of regulations and/or legislation to implement the necessary reforms.

Thank you for the opportunity to take part in this consultation.