Fasken Martineau DuMoulin LLP
Barristers and Solicitors
Patent and Trade-mark Agents

55 Metcalfe Street, Suite 1300
Ottawa, Ontario K1P 6L5
Canada

+1 613 236 3882 General
+1 613 230 6423 Fax
1 877 609 5685 Toll-free

fasken.com

FASKEN MARTINEAU

J. Aidan O'Neill
Direct +1 613 696 6878
aoneill@fasken.com

BY EMAIL

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Government of Canada
Copyright Board Consultations
cbconsultations@canada.ca

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

To Whom It May Concern,

Introduction

The purpose of this letter is to provide my personal comments in response to the government's discussion paper entitled "A Consultation on Options for Reform to the Copyright Board of Canada" that was issued on August 9, 2017. The views expressed in this letter are my own alone, and do not represent those of any other person or party.

I am a copyright lawyer, based in Ottawa, and have participated in more than 20 separate tariff proceedings before the Copyright Board (the "Board") since its establishment in 1989. In 1987, prior to the Board's creation, I appeared as legal counsel before the Board's predecessor tariff-setting tribunal, the Copyright Appeal Board.

In all of these proceedings before the Board, I have acted for "user" groups that have objected to various aspects of different proposed tariffs filed by collective societies such as the Society of Composers, Authors and Music Publishers of Canada ("SOCAN"), Re:Sound Music Licensing Company ("Re:Sound"), the Canadian Musical Reproduction Rights Agency Ltd. ("CMRRA"), and the Canadian Copyright Licensing Agency ("Access Copyright").

I have long been interested in the question of the Board's hearing procedures. I have spoken publicly about these issues and, in 2009, co-authored a paper with Gilles M. Daigle (at the time, a partner with the Ottawa-based law firm, Gowlings) relating to the Board's procedures entitled "The Evidentiary Procedures of the Copyright Board of Canada". Furthermore, I participated in the Board's consultation process in response to the Board's request for comments with

respect to the "Discussion Paper of the Working Committee on the Operations, Procedures and Processes of the Copyright Board" dated February 4, 2015.

In view of my professional background and practical experience appearing before the Board for close to 30 years, I consider myself well placed to comment on the 13 different options presented in the August 9, 2017 discussion paper relating to possible legislative and regulatory reforms affecting the Board's operations.

A Preliminary Issue – The Board's Resources

As a preliminary matter, any discussion of the longstanding difficulties faced by the Board in terms of its ability to issue timely decisions in response to tariff proposals made by the various collective societies must acknowledge the question of the Board's level of funding and its access to the necessary resources to fulfil adequately its statutory mandate under the *Copyright Act*.

While I understand that the government's discussion paper is quite clear in stating that the scope of the consultation does not extend to the Board's funding, in my opinion, if this issue is not dealt with by the government, any legislative and regulatory changes that may arise from this consultation will have limited, if any, positive effect. In other words, the problems of the Board are not primarily legislative, regulatory, or procedural; they are financial, and relate to the Board's ability to be properly staffed. Unless this is recognized by the government, and addressed in a satisfactory manner, it is difficult to imagine that the timeliness of the Board's decision-making process can be significantly improved, regardless of the outcome of the current consultation process.

This fact was highlighted in a discussion paper of the Working Committee on the Operations, Procedures, and Processes of the Copyright Board, dated February 4, 2015. This discussion paper referred to the recommendations contained in the June, 2014 report of the Standing Committee of the House of Commons on Canadian Heritage entitled *Review of the Canadian Music Industry*, noting "It takes too long for the Board to render its decisions, largely because of a lack of resources."

In a speech made by former Board Vice-Chairman Michel Hétu when he retired in 1999 after completing the maximum of two five-year terms in his position, he noted that the Board had recently been given significant additional statutory responsibilities, including the legislative recognition of the new optional licensing regime that applies to many of the copyright collectives (such as CMRRA, SODRAC, and Access Copyright), as well as the neighbouring rights and private copying regimes, but had not received the necessary financial resources to deal with them. Whatever additional funding may have been provided to the Board, it was clearly insufficient to support the level of operations the Board required with respect to its new responsibilities.

Furthermore, soon after he was appointed Board Chairman in 2004, Justice William J. Vancise expressed his intention to shorten the length of time it took for the Board to release its decisions. In a speech given at a copyright conference in Toronto in August, 2006, he noted that if "the Supreme Court of Canada can render a decision within six months of a hearing, there is no reason why this Board cannot do the same. My goal is to see that this occurs."

Notwithstanding this very public statement made by the Board's then Chairman, and the Board's best efforts, this did not occur. This failure cannot possibly be due to lack of good faith or willingness to do so on the part of the Board members or staff. Instead, one must recognize that, if the Board cannot issue its decisions on a timely basis, it is largely because it does not have the financial and human resources to do so.

Finally, in the Board's 2013-2014 annual report to Parliament pursuant to section 66.9 of the *Copyright Act*, and on the occasion of his retirement, Justice Vancise noted that, during his tenure, the workload of the Board had increased substantially without any attendant increase in government funding. In this regard, he reported to Parliament as follows:

"During my tenure, the workload of the Board has increased substantially, as evidenced by the value of all tariffs certified by the Board which is now well over $400 million, with no commensurate increase in funding. The processes leading to decisions have become more complex to manage as Board staff has been called upon to deal with an increasing number of requests to settle disputes over evidentiary matters."

Justice Vancise then directly linked this lack of government funding with the issue of the length of time it takes for the Board to render its decisions.

"We as a Board strived to render decisions in a timely manner in a context of an ever-increasing number and complexity, both economic and legal, of the issues that come before it. This has become a challenge given the Board's lack of resources, recognized by many stakeholders, that has prevented us from hiring additional personnel to deal with the issues."

In light of the above statements made by former Board Chairman Justice Vancise, it is obvious that the Board fully recognizes that it has a systemic problem with its ability to issue its decisions in a timely fashion and that this significantly affects all those groups that appear before it in tariff-setting proceedings. Even so, the Board has been powerless to resolve the issue due to the absence of sufficient government funding to support its operations and which would allow it to fulfill its statutory mandate properly under the *Copyright Act*.

In sum, regardless of the public comment that the government receives in response to its August 9 discussion paper, if the question of the Board's funding is not addressed, nothing will likely come of any legislative or regulatory changes

that are eventually made to the Board's mandate or operations. This issue is the proverbial "elephant in the room" in the context of any attempt to ameliorate the Board's tariff-setting processes and to shorten the length of time it typically takes the Board to issue its decisions.

The 13 Options Presented in the Discussion Paper

Having made this preliminary but, in my view, essential, statement in response to the discussion paper, I will respond to each of the 13 options set out in the discussion paper that are designed to improve the Board's tariff-setting processes.

At this point, I would note that some of the options, whose intended purpose it is to streamline and render more efficient the Board's hearing processes, could actually, if implemented, make the Board's processes much longer, more complex, and more procedurally cumbersome than is currently the case. This is because several of the options are designed to make the Board's hearing processes more efficient and streamlined by the counterintuitive mechanism of adding new procedural requirements, rather than reducing or eliminating those that currently exist.

As the old saying goes, "a short cut is sometimes the long way home". In trying to find ways in which to improve the Board's procedures, there is a serious concern that the government may identify possible solutions that, when put into practice, contribute to the problems they are intended to resolve. This possibility should be kept in mind by the government in its consideration of any comments received in response to the August 9 discussion paper.

Some of the options outlined in the discussion paper represent an important first step in the possible improvement of the Board's current procedures, in making them more efficient, and in reducing the burden on parties that wish to participate in Board hearings. This being said, it must also be noted that some of the options, if acted upon by the government, also represent a significant danger that they may easily worsen the existing situation.

This is why this consultation should only be the first, preliminary step in a continuing "conversation" with the public and the various stakeholders that regularly appear before the Board with respect to the Board's hearing processes. As such, I would urge the government not to act immediately upon receiving comments further to the August 9 discussion paper but, rather, to move on to a second phase of public consultation, once it has developed more specific and precise proposals relating to the Board.

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

The Copyright Board is, like all other administrative bodies fulfilling a quasi-judicial function, responsible for its own procedures. In this regard, I do not believe that a specific requirement imposed on the Board, whether by legislative or regulatory means, that it deal with its various proceedings as informally and expeditiously as circumstances, the requirements of fairness, and the public interest allow, would actually change the current *status quo* before the Board. This is because the Board is already able to amend its procedures in response to the specific tariff matters that are before it. As such, if circumstances dictate that the Board proceed with a particular tariff item (or any other matter within its mandate) expeditiously, the Board is already free to do so.

In response to this option, I would also note that there is an implication throughout the August 9 discussion paper that the longstanding problem of the timeliness of the Board's decision-making process is almost entirely the Board's fault. This suggestion, if actually held by the government, is simply not true.

While the Board can take an inordinate amount of time to render a decision after the conclusion of a hearing and the submission of final arguments by the parties, this represents only a portion of the overall problem. There is also the question of the time it takes for the parties themselves to get organized, agree on a schedule of proceedings, complete the interrogatory process, prepare their evidence, file their respective statements of case, and go through the Board hearing itself with the *viva voce* examination of witnesses.

It also often happens that the parties to a Board tariff proceeding request the Board to suspend temporarily a previously agreed upon schedule in order for them to undertake private settlement negotiations. These negotiations can go on for months and months, with the parties returning to the Board time after time to request an extension to the timetable pursuant to which they are supposed to inform the Board of the success, or failure, of their discussions. While this occurs, all the Board can do is wait patiently while the parties themselves use up the precious time that might otherwise be devoted to preparing for a possible Board hearing.

There is also the issue of the various procedural motions and Board interlocutory rulings that unavoidably occur in the context of a Board hearing that have very little, if anything, to do with the Board's willingness to advance its hearing processes on an expeditious basis. A Board hearing is, quite appropriately, adversarial, and adversaries do, from time to time, engage in both procedural and evidentiary disputes that take time for the Board to sort out. This is not the fault of the Board and it is not an issue that can be miraculously cured by imposing an obligation on the Board to "advance proceedings expeditiously".

Before the Board, as before other administrative bodies that have to consider evidence and legal arguments, sometimes a fair and open process takes the inevitable amount of time that it takes.

Within this framework, and in response to this proposed option, I would argue that the Board has no lack of the necessary legislative, regulatory or procedural tools necessary to move hearings along if this is what the circumstances that are before it require and, most importantly, the parties actually cooperate with the Board in this endeavour.

2. Create new deadlines or shorten existing deadlines

As noted above on page 3 of this letter, when Justice Vancise was first appointed Chairman of the Board, he announced that the Board should be able to issue its decisions within six months of the conclusion of a hearing. He was wrong. In the face of an increasing and highly complex work load, as well as the lack of sufficient financial and human resources, the Board was unable to meet the requirements of this self-imposed, and quite artificial, deadline.

In fact, the requirement that certain steps of the Board's hearing be completed within set and pre-determined deadlines, regardless of the particular circumstances and fact situations before the Board, would not be helpful as it would presumably force the Board to complete these steps, "ready or not". This would represent a direct attack on the Board's tariff-setting independence, its quasi-judicial role, and its ability to proceed at the speed that the obligations of fairness and the public interest require. This would likely result in an increase in the reviewable legal errors that would make the Board's various decisions susceptible to reversal by the Federal Court of Appeal on judicial review, which would delay the issuance of "final" decisions even more than is currently the case.

In a nutshell, the "tail" of more timely decision-making on the part of the Board should not take precedence and "wag the dog" of the more important requirement that the Board receive and weigh all relevant evidence and issue reasonably derived decisions establishing objectively defensible fair and equitable tariff rates. Simply put, the Board's statutory function is far too important to have imposed on it this kind of a Procrustean standard with arbitrary and pre-set deadlines.

This is not to say, however, that there might be other time periods that could be shortened and which would not relate directly to, or undermine, the Board's statutory role. For example, as suggested in the discussion paper, the existing statutory objection period of 60 days could be shortened to 28 days. Similarly, the collective societies could be required to file their tariff proposals (or renewals)

with the Board earlier than the current March 31 deadline immediately prior to the calendar year in which the proposals are intended to go into effect.

3. Implement case management of Board proceedings

The proposed option of some form of a case management process before the Board is a good one, provided that there are strict limits to the Board's powers to "manage" what is, in fact, an adversarial process within a traditional evidence-gathering and judicial context. In other words, case management cannot be allowed to devolve into a means by which the Board can improperly control the rights of the parties to prepare and argue the cases that they choose in the manner that they see fit.

In many court processes, of course, the parties participate in case management meetings with judges, prothonotaries, and other judicial officers with the goal of streamlining the proceedings, resolving procedural disputes, and focusing on the legal issues that are most important to the parties. The case management process does not transform itself, however, into the principal forum in which the conflict between the parties is addressed.

As such, while I support the notion that the Board should take a more active role in managing its various proceedings before they come to a hearing, the line should never be crossed that separates the legitimate function of case management and Board control of the parties' hearing preparations.

For example, in the list of possible issues to be addressed by a case manager, the discussion paper mentions "the evidence sought to be filed, including both fact and expert evidence". In my view, matters relating to the selection and preparation of evidence are, and should remain, the sole purview of the parties. As such, the Board has no business, as the ultimate decision-maker with respect to the evidence it hears, to become, through the case management process, a quasi-party with a say in what evidence is chosen and how it should be prepared by the parties.

Having said this, I believe it would be a positive development if the Board could develop a case management process that could be implemented on a trial or experimental basis. I would add, however, that to the extent that a case management process of this nature represents a new time-consuming, procedural role for the Board, without additional funding from the government, the Board's existing resources, already stretched thin, would obviously come under further pressure.

4. Empower the Board to award costs between the parties

Based on my experience before the Board, I do not believe any purpose would be served by amending the *Copyright Act* in order to give the Board the explicit legislative power to award costs.

For one thing, the Board, as an economic tariff-setting tribunal that is required to establish fair and equitable tariffs in the public interest, is not in the same position as a civil court that must resolve disputes between private parties. At the conclusion of a Board hearing, there is no one to "punish" through the awarding of costs, as both the collective societies and the user groups that may object to a particular tariff proposal have an equal and legitimate interest in the outcome of the Board's hearing. One side is not recklessly suing the other and should accordingly be made to pay the consequences of its poor behavior. This is not what happens at the Board's tariff hearings.

Second, although either a collective society and a user group may see its evidence and arguments rejected by the Board, this does not mean that it should have costs awarded against it. If this were to occur, I believe there might develop some form of "tariff chill" in terms of the range of the evidence and arguments presented to the Board at its hearings, which would not be in the public interest and would undermine the Board's ability to fulfil its statutory mandate.

In summary, I believe that providing the Board with the necessary legislative power to award costs is a solution to a non-existent problem. There is no reason why the Board should wish to award costs between the parties. Finally, it would not remedy any of the issues identified in the August 9 discussion paper relating to the Board's ability to issue its decisions on a timely basis.

5. Require parties to provide more information

Option 5(a) of the August 9 discussion paper would require the collective societies to include additional explanations with their tariff proposals, while Option 5(b) would require the objectors to include additional information with their objections. Similar recommendations to these were made as part of the Discussion Paper of the Working Committee on the Operations, Procedures and Processes of the Copyright Board dated February 4, 2015 (see Recommendations 6-10 of the 2015 Discussion Paper).

The idea for Option 5(a) is that a collective society should be required to explain, to some degree, the underlying rationale of a tariff proposal at the time it files its proposed tariff. The information could be included in a notice that would accompany the proposed tariff, or could be separately filed soon thereafter. Similarly, further to Option 5(b), the objectors would be required to explain the

basis of their objections with similar notices at the time they file their statements of objection with the Board.

The theory behind these suggested changes to the current tariff proposal and objection process is that relevant issues between the parties would be identified and engaged at an earlier stage of the proceedings, possible misunderstandings about the scope of a tariff (or an objection) could be resolved, and the issues relevant to the interrogatory process could be narrowed ─ which should reduce the number of interrogatories asked. This should result in a more efficient tariff proceeding.

The difficulty with these two options that support the early disclosure of information from both the collective societies and the objectors is that, at such a preliminary stage of a tariff proceeding, the parties usually don't have access to the scope of the information proposed in the discussion paper.

From the perspective of the collective societies, particularly in the case of inaugural tariffs, they often have limited information at such an early stage upon which to justify their proposed rates, or upon which to base the structure of the tariff. In order to have this information, they must first go through the Board's interrogatory process. This is undoubtedly why the collective societies have, in the past, proposed excessive tariff rates in their initial tariff proposals, knowing that they can later settle for less when they file their statements of case in reliance on the so-called *ultra petita* rule. This practice, however, contributes to the adversarial nature of a typical Board proceeding and provokes more opposition to a tariff application than may otherwise have been the case.

As for the objectors, they are often in a similar position as the collective societies and, other than objecting to proposed rates they find too high, they have little else to say in the absence of more detailed information from the collective societies. It is a Catch-22 situation. The collective societies cannot provide much information in explanation of a proposed inaugural tariff in the absence of interrogatory responses and, similarly, the objectors cannot provide much information without understanding, at least in general terms, the basis of the proposed tariff. It is for this reason that Options 5(a) and (b) in the August 9 discussion paper stress that the notices filed by the collective societies and the objectors be made "without prejudice to any arguments" they "might advance later in proceedings".

All of this being said, to the extent that the collective societies and the objectors are actually able to provide some additional information at the time the collective societies file their proposed tariffs and the objectors file their objections, or as soon as possible thereafter, Options 5(a) and (b) should be supported.

There seems to be little doubt that potential objectors would benefit from understanding the scope of a proposed tariff and its underlying rationale prior to the statutory deadline for filing their objections with the Board. Similarly, the collective societies would benefit from understanding the reasons that particular users have objected to their tariff proposals – although in the case of some proposed rates, these reasons are usually quite obvious. In any case, the objectors could probably provide some additional information as to the specific terms and conditions of a proposed tariff to which they object.

If all of this can be done, it would likely allow the parties to focus the tariff dispute between them at an earlier stage of the proceeding and, in conjunction with the case management process contemplated by Option 3, deal with some of the longstanding problems arising from the Board's interrogatory process. In a nutshell, if these options relating to the early disclosure of relevant information can assist in any way whatsoever in resolving some of the problems associated with the interrogatory process – which is one of the most important issues that needs to be addressed as a result of the August 9 discussion paper – some progress may have been achieved with respect to making the Board's tariff proceedings more efficient and productive.

6. Permit all collective societies to enter into licensing agreements

Although the idea of amending the *Copyright Act* to create a single copyright regime pursuant to which all of the collective societies are treated equally and can choose to either file a proposed tariff for review and certification by the Copyright Board or alternatively, enter into a private licensing agreement (with overriding effect) with user groups is, on its face, quite attractive, my concern about such a proposal is that the greater public interest may be sacrificed for the purpose of reducing the Copyright Board's tariff-setting workload.

The problem with this proposal is that one might easily imagine a number of cases in which a collective society like SOCAN might wish to enter into a private licensing agreement with a specific and limited user, that raises absolutely no public policy issues and which might, accordingly, be concluded without any Board oversight. On the other hand, this would not always be true. One could also imagine a situation in which SOCAN might want to enter into a private licensing agreement with a particular user group that would have any number of unintended, and important, consequences for other third-party users, as well as for the broader public interest.

This is therefore not a proposed option that has a single unequivocal answer. Everything depends on the specific circumstances of the particular licensing agreement that the collective society has negotiated with the particular user or user group.

Although it sounds like a reasonable idea to extend to "public performance" collective societies like SOCAN and Re:Sound the same rights as those enjoyed by "reproduction" collecting societies such as CMRRA, SODRAC or Access Copyright to conclude private licensing agreements that take precedence over any Board tariffs, one must also recognize that this proposal raises the very real possibility of the potential abuse of the monopoly powers controlled by these societies. As between the collective societies and certain users and user groups, there can be a great imbalance of negotiating power and a "playing field" that is not at all level.

For these reasons, while I support the ability of all of the collective societies to negotiate private licensing agreements with users and user groups, I also believe that all of these agreements, and the rates, terms and conditions that they include, should be filed with the Copyright Board for its review.

In this regard, if the Board is of the view that a particular licensing agreement does not raise any public policy concerns or otherwise affect the greater public interest, the parties can be so informed and the agreement can have the overriding effect contemplated by Option 6. Conversely, if the Board does identify any public policy concerns or challenges to the public interest in an agreement, the Board should have the clear statutory power to request further information from the parties to the agreement and, if it considers it necessary, to initiate some form of public process ─ possibly including a public hearing ─ before the terms of the agreement could go into effect.

But, again, as is the situation with respect to the proposed new case management process under Option 3 above, whenever the Copyright Board is asked to fulfil some new procedural role, the question of its access to the necessary financial and human resources to perform its work must be addressed by the government.

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

For the reasons set out in Option 7 of the discussion paper, I would support an amendment to the *Copyright Act* that would require the various collective societies to file proposed tariffs that would be in effect for a minimum of three calendar years.

8. Require proposed tariffs to be filed earlier in advance

As I have already noted in response to Option 2 above, I agree that "collective societies could be required to file their tariff proposals (or renewals) with the Board earlier than the current March 31 deadline immediately prior to the calendar year in which the proposals are intended to go into effect".

This being said, I would point out that, depending on the precise filing date to be selected, it is doubtful that such a change would have any meaningful impact on either the Board's ability to issue its decisions on a more timely basis, or on the instances of approved tariffs having significant retroactive effect. For example, moving the filing date back two months to January 31, rather than the current March 31, would likely be more of a symbolic change, rather than a substantive one, in terms of recovering any of the "lost time" in processing tariff proposals before the Board.

9. Allow for the use of copyrighted content pending the approval of tariffs

I am not sure I understand what is being proposed in Option 9 of the August 9 discussion paper as sections 68.2(3)(b) and 70.18 of the *Copyright Act* already provide for the continuation of rights of previously certified Board tariffs and that "where a collective society files a proposed tariff ... (b) the collective society may collect the royalties in accordance with the previous tariff, until the proposed tariff is approved".

However, if what is meant is that this provision be extended to all copyright regimes, and that this is not already the case, I would support the proposal as sections 68.2(3)(b) and 70.18(b) provide a necessary bridge between previously approved tariffs and future ones. Nonetheless, they still all do require a reconciliation of royalty payments on a retroactive basis once a replacement tariff for a previously approved tariff has been certified by the Board.

Notwithstanding the above, if what Option 9 actually contemplates is that previously certified tariffs should continue in full force and effect until the date upon which they are replaced by a new tariff ─ which would only operate from that date forward ─ I would strongly oppose such a suggestion.

The reason for this is that Board-certified tariffs can be both reduced or increased. In the case of a reduction, users and user groups should not be denied the benefit of a reduction, adjusted on a retroactive basis, merely because the collective society did not pursue the tariff replacement process in a timely manner, or because the Board could not issue its decision any sooner.

For example, in the case of the *Access Copyright (Elementary and Secondary School Tariff) 2010-2015*, the annual $4.81 "per student" tariff rate approved for the 2005-2009 tariff period was reduced by the Board to $2.46 and $2.41 respectively for the 2010-2012 and 2013-2015 tariff periods. Because the tariff was based on approximately 3.8 million K-12 students in Canada, the difference between the rates approved for the tariff periods of 2005-2009 and 2010-2015 was in the range of $9 million per year. This is the value of the annual tariff rate that Access Copyright would be required to return to the K-12 schools (through

the various ministries of education) affected by the tariff as part of the normal tariff reconciliation process.

However, the Board decision establishing the $2.46 and $2.41 tariff rates for 2010-2012 and 2013-2015 was only issued on February 19, 2016. In other words, if what Option 9 is proposing is that tariffs only run from the date they are certified, without the possibility of any payment adjustments on a retroactive basis, the K-12 schools would have forgone approximately $54 million in tariff overpayments for the six-year period of 2010-2015 during which a replacement had not been certified by the Board. Such a situation would, I believe, be unacceptable to all users and user groups.

Certainly, if tariffs are allowed to run forward until the specific date upon which they are replaced by another, without any retroactive effect, there would be an increasing and clear incentive for either the collective societies or the users to attempt to "game the system" by delaying the Board's decision-making processes, not hurrying them up.

10. Codify and clarify specific Board procedures through regulation

Based on my experience before the Copyright Board, I believe that the Board, alone, is best placed to adopt its own rules of procedure, whether through its standard *Model Directive on Procedure*, or through other directions or notices that the Board may issue from time to time.

The Board is, of course, "master of its own procedure" and may have to modify its *Directive* on a case-by-case basis, as circumstances require, in whatever tariff proceeding is before it. The Board needs this flexibility to modify or "bend" its procedures to suit the specific matters that it is considering. A single "procedure" as set out in some government-mandated regulation would likely be entirely inappropriate for any particular tariff that the Board is reviewing.

The rigorous adherence to some artificially-imposed rules of procedure may therefore be unfair to the parties and make the Board's proceedings less efficient, rather than more. When it comes to proceedings before the Board, "one size cannot possibly fit all", and I would be very concerned about the imposition on the Board of any kind of manufactured list of procedures that cannot be adopted freely by the Board as it sees fit in any particular case.

The Board's *Model Directive on Procedure* is already available for all to see, and the Board is invariably open to any suggestions from the different parties that appear before it to modify the *Directive* in any number of ways with respect to the procedures that are meant to apply to a specific proceeding. The *Directive* is not iron-clad in any way, the parties understand this, and this is a good thing in terms of the Board's ability to respond to the different procedural requirements of

different proceedings. In my view, therefore, using the *Model Directive on Procedure* as a template of the Board's standard rules of procedures, the parties and the Board can, working together, agree on a set of procedures that are the most fair and suitable for a particular proceeding.

At pages 15-17 of the August 9 discussion paper, there is a long list of procedural features ranging from a) statement of issues to e) confidentiality. While this list contains a number of excellent suggestions as to how the Board's standard procedures might be improved and the typical hearing process made more efficient, I believe that these matters should be left to the Board, which has the experience of a countless number of different hearing processes "under its belt" dating back to 1989. In this regard, I do not think that any real benefit could come from the imposition of any of these procedures on the Board.

The Board is a part of this consultative process, has seen the suggested procedures set out on pages 15-17, and may now wish, in cooperation with the parties appearing in its different proceedings, to develop broad rules of procedure that should apply to its hearings. The Board needs this freedom, and it would be a disservice to the proper functioning of the Board's various hearing processes to have any kind of "cookie cutter" procedures established by regulation that the Board would be required to implement against its own best judgment.

I would like it to be made very clear that I believe all questions of procedure should be dealt with by the Board alone, and I do not believe that the August 9 discussion paper provides an appropriate forum in which to have a fruitful discussion of the Board's various decision-making processes.

This being said, of all the issues raised under Option 10 of the discussion paper, the one that I consider the most in need of reform by the Board relates to the interrogatory process.

The Labour Intensive "Cost" of the Interrogatory Process

As I have previously submitted to the Board in the context of its 2015 consultation process and the Discussion Paper prepared by the Working Committee (referred to on page 2 above), the Board's interrogatory process, from the perspective of users, is undoubtedly the most unwieldy, lengthy, intrusive, and expensive aspect to a Board proceeding. Because of this fact, the interrogatory process itself can represent a significant barrier to greater participation in Board hearings by many users that might otherwise wish to appear before the Board as parties. The Board's interrogatory process has become a "cost" to participate in a Board hearing, and it is a cost that many users find too high to pay.

Furthermore, it regularly occurs that much of the information obtained from the various users ─ at significant disruption to them and their overall operations ─ is not even filed as evidence by the collective societies in accordance with the Board's *Model Directive on Procedure*.

In other words, the interrogatory process often represents to users "much pain with very little gain" in terms of the evidence that is eventually filed by the collective societies before the Board. In these circumstances, many users are left to wonder if the interrogatory process, and the heavy burden it imposes on them, is utilized by some of the collective societies for strategic reasons completely unrelated to the legitimate purpose of obtaining from them relevant information for use in a Board hearing.

The Situations of the Users and the Collective Societies Are Not Comparable

It must be understood that, as between the collective societies and the users in a particular tariff proceeding, their situations with respect to the Board's interrogatory process are not at all comparable. It is certainly not a level playing field between relative "equals".

There may be only one (or two) collective societies in a proceeding. Such a collective society fully understands the process and the issues before the Board, and can usually produce responses to any interrogatories asked of it by the objectors from within its own administrative structure. Seen from this perspective, when it comes to answering interrogatories, the collective societies are sophisticated "one-stop shops". Moreover, only that single collective society (or two) is normally required to answer the interrogatories directed at it. This is because the collective societies are not normally required to obtain responses to interrogatories from their rightsholder members.

Conversely, there may be a very large number of individual users that are represented by a single umbrella group before the Board, to which they may belong as underlying members. These individual users, who are often directly identified as the respondents to the interrogatories addressed by the collective societies, are rarely well informed (relative to the collective societies) about the Board's hearing process, the purpose of the interrogatories, and the level of information that may be required of them. They often constitute a "second tier" of users below the representative group that may appear before the Board as the formal objector in the Board's tariff proceedings.

In addition, the interrogatories may be directed to individuals within an organization for response who are even further removed from the "circle of information" relating to the Board's hearing. These individuals consequently have to be properly informed by outside legal counsel as to the legitimacy of the

Board's process, the protections afforded by the Board's standard Confidentiality Order, as well as to obtain their own internal authorizations that are necessary to permit the release of the kind of information sought by the interrogatories — which is often of a highly confidential and competitive nature. This is particularly the case, of course, with respect to users from the private sector. This entire process entails a very steep "learning curve" on the part of many individuals, which is inevitably extremely time-consuming and expensive.

In some proceedings, unless a fairly limited representative sample of users is selected for receipt of the interrogatories, there can easily be more than a hundred respondents to a collective society's various interrogatories.

An Excessive Number of Interrogatories

Furthermore, it is often the case that a clearly excessive number of interrogatories, many of which appear to the objectors to be *prima facie* irrelevant to the tariff issue before the Board, are asked by some of the collective societies to the user groups. The number of interrogatories directed at users, like the number of respondents, can easily cross into the hundreds. In this regard, some of the collective societies appear to believe that the users are the custodians of a veritable "treasure trove" of information that must be sought out in support of their various tariff applications.

In these circumstances, no question is left unasked, and the objectors are quickly overwhelmed by the total volume of interrogatories addressed to them. This alone sets into motion the entire dispute mechanism provided for by the Board's interrogatory process with the formulation of objections and replies to the interrogatories, all of which is eventually brought before the Board for resolution. All of this results in a virtually unmanageable process for some user groups. The entire interrogatory process becomes long, drawn out, bogged down, tedious, adversarial, expensive, and generally painful to both the collective societies and users alike.

The Consolidation of Interrogatories

Whenever there are multiple collective societies and/or multiple objectors to a Board proceeding, the issue of the consolidation of interrogatories arises. It has happened before that two or three collective societies may participate in a single proceeding, but fail to coordinate the preparation of the interrogatories addressed to the objectors into a joint set of consolidated interrogatories. Similarly, the objectors may fail to do so. The end result is the same. Each party receives multiple interrogatories from different parties that ask similar, but not identical, questions. This results in a confusing overlap of interrogatories.

In some Board proceedings, the Board, on its own initiative, has proceeded to require the consolidation of the various interrogatories. Moreover, in at least another case, due a lack of coordination in the preparation of interrogatories, the Board required one collective society to accept, as its own, the interrogatories asked of objectors by two other collective societies.

In the circumstances, it is clear that the consolidation of interrogatories, to the extent possible, would make the interrogatory process more efficient. It would be anticipated that, if the Board adopts a case management process, as proposed in Option 3, and met the opposing parties before the exchange of interrogatories, it could use that opportunity to address the question of the possible consolidation of interrogatories, and to strongly encourage this practice.

The Board's Involvement in the Interrogatory Process

Moreover, to the extent that the Board adopts a case management process as noted above, the parties could meet with the Board before the exchange of interrogatories to tentatively identify the relevant issues to be considered and the information in the possession of either "side" to be obtained through the interrogatory process. Such a process should serve to narrow the focus and the number of the interrogatories that are eventually exchanged. This should ideally reduce the disputes that could arise on the basis of relevance — if not the burden.

It often occurs that the parties to a Board hearing use a "shotgun" approach in the preparation of their interrogatories. Particularly in the case of an inaugural tariff, each party knows little about the other or the information the other party possesses that may be supportive of their eventual arguments before the Board — which they usually have not yet been in a position to develop. As such, they ask whatever questions they can possibly imagine with the result that disputes over relevance become virtually inevitable. Because their respective cases have not been entirely thought through, they often do not even know what may ultimately be relevant or not. This is one of the problems that has contributed to the length and adversarial nature of the interrogatory process.

The convening of a relatively formal meeting with a Board representative (as part of the case management process) early on in a tariff proceeding, and prior to the exchange of interrogatories — in conjunction with the provision of information by a collective society in support of its proposed tariff and the reasons why a user objects to the tariff, as contemplated by Options 5(a) and (b) — should result in a helpful discussion with the Board that would serve to focus the scope of the interrogatories. This could reduce their overall number and ensure that they deal with matters that are directly relevant to the proposed tariff. This, in turn, would lighten the burden on all parties in terms of responding to the interrogatories.

In order for this to work, however, the Board has to play a meaningful and significant role in terms of being an "honest broker" as between the parties with respect to the identification of the relevant issues that will likely be considered at the eventual hearing, which would thereby narrow the focus of the interrogatories. As such, the Board must be more than the mere host of such a meeting – it must be vigorously and actively involved. Although the Board should not pre-judge issues or make any rulings as to the ultimate relevance of one issue or another, its overall leadership and guidance with respect to the interrogatory process would be very helpful.

In order to improve the existing interrogatory process, matters cannot simply be left to the parties, as this has not worked in past proceedings. The purpose of a meeting with the Board within the context of the proposed case management process would be for the Board to use its influence in order to encourage the parties to reduce the scope and the number of interrogatories that they exchange.

But, again, this would be a labour- and time-consuming exercise for both the Board and the parties.

A Need for the Board to Reform the Interrogatory Process

While there is no doubt that the interrogatory process is essential for the production of evidence relating to a proposed tariff, the existing process should be improved upon so that it is shorter, more efficient, and can be traversed with less effort and contention by the various parties – all without a loss of the information that is necessary for a Board hearing and the setting of fair and equitable tariff rates. In other words, the Board's interrogatory process is desperately in need of reform.

The Board has already heard from me, as well as from many other individuals and parties, with respect to this and other aspects of its hearing procedures that should be improved with the goal of making the Board's proceedings more efficient, user-friendly, and allow the Board to issue its decisions on a more timely basis.

The Board has these suggestions, along with those set out in the August 9 discussion paper. It only needs to act on these recommendations and to develop, in conjunction with interested parties, fair and stream-lined procedures. But, again, as noted above, this should be a responsibility that is left exclusively in the Board's hands for it to manage as it deems most appropriate. Regulations relating to the Board's procedures should not be imposed on it "from above" in the form of government-mandated policies. Instead, the Board should be left to establish its own procedures.

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

In response to Option 11, I do not have any objection for there to be included in the *Copyright Act* some form of a simple "mission statement" relating to the Copyright Board's mandate to establish fair and equitable tariffs – which already is, of course, the Board's statutory role. This could also include a statement to the effect that the Board should try to establish these tariffs in the most efficient and cost-effective way practicable.

What I would strongly object to, however, would be transforming what should be a neutral and non-controversial mission statement into more "fodder" for dispute between the collective societies on one hand, and the users and user groups on the other, relating to the specific tariff rates the Board should certify and the terms and conditions it should approve in the context of its tariff decisions. In other words, the mission statement should not be utilized as an indirect way to lead the Board to a particular tariff decision in the matters that are brought before it.

The specific "mission" set out in the Board's mission statement cannot be a stalking horse for the vested interests, financial or otherwise, of the collective societies and user groups. The very nature of tariff proceedings before the Board consists largely of a continuous struggle between the collective societies and the user groups for some form of advantage that may "shift the winds", in terms of the Board's eventual tariff decision, in their general direction. Each of these two groups is invariably trying to gain the upper hand over the other. My principal concern is that the development of a neutral and mutually acceptable statutory mission statement not be turned into another theatre for never-ending conflicts between these adversarial parties.

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

Of all the proposals made in the August 9 discussion paper, Option 12 is the one I find the most controversial.

In this regard, I strongly oppose the suggestion that there should be an enumerated list of decision-making criteria that the Board should be required to take into account in reaching its tariff decisions. Not only would a list of such criteria be absolutely unnecessary, the public process that would be initiated for the purpose of drawing up the list would lend itself to an unseemly competition among the different copyright stakeholders, who would all try to obtain an advantage over the others as to which specific criteria should "make it" to the list.

The Copyright Board has a long record of case law, going back to its creation in 1989, that explains in fairly precise detail the different considerations that the Board uses to reach its different tariff decisions in different circumstances.

These considerations, or criteria, are well known to the legal counsel who regularly appear before the Board. There is no mystery to any of them.

This does not mean, of course, that the outcome of a specific tariff proceeding can be predicted from the outset. Much depends on the quality of the evidence advanced by the opposing parties and the particular circumstances of the tariff matter that is being considered by the Board.

All tariff proceedings tend to be unique in some way. As such, as is the case in many aspects of life, there is no absolute certainty in Board hearings. Invariably, one party — the collective society — argues that the evidence supports a higher tariff rate, and the other party — the user groups — argues the evidence supports a lower tariff rate. The Board's role is to take all of this evidence, give it the weight the Board believes it deserves and, having heard the different arguments of opposing legal counsel as to how this evidence supports their respective positions, make a final decision that sets the most "fair and equitable" tariff that the evidence, in its totality, allows.

In its different tariff proceedings, the Copyright Board is always open to all relevant evidence, and will consider all the arguments made by the parties that are derived from this evidence. What this means is that the Board already takes into account all the necessary considerations, or criteria, supported by the evidence and, as the statutory decision-maker identified in the *Copyright Act*, renders its decisions. In performing this statutory function, there are no relevant criteria that are "out of bounds" and which the Board is not prepared to consider. It is already the case that the existing criteria imposed by the *Copyright Act*, as well as by various judicial decisions, including decisions of the Supreme Court of Canada, relating to such matters as technological neutrality, the scope of fair dealing rights, the balance that should exist between the rights of copyright creators and users, and many others, are considered by the Board as part of its normal decision-making functions.

What occurs, however, is that once the Board issues a particular tariff decision, the party whose evidence and arguments were inevitably either discounted or rejected by the Board — all for reasons painstakingly explained by the Board in its decision — will loudly complain that the Board "ignored" its evidence and will often seek judicial review of the Board's decision before the Federal Court of Appeal, as is its legal right.

But, in truth, the Board does not ignore any party's evidence. The Board, instead, has to assess all of the evidence and arguments brought before it by the opposing parties and, based on its knowledge and expertise, reach a reasonable decision. Sometimes one party is disappointed and unhappy with the Board's decision, and sometimes all the parties to a proceeding are. But this does not

mean that a party's evidence and arguments have not been given the appropriate weight and due consideration they deserve by the Board.

Within this context, I believe that it would be highly unfortunate if, by the imposition of specific decision-making criteria, the Board's "freedom to decide", based on the evidence it has heard, were to be curtailed or limited in any way. As things currently stand, the Board has a wide discretion to consider all relevant evidence and considerations in reaching its different decisions. This is the way it should be, and the Board's independence to act as it sees fit should not be undermined or influenced in the manner suggested by Option 12 of the discussion paper.

I would therefore strongly oppose the creation of an approved list of factors that would supposedly be more important than other factors the Board might wish to consider, regardless of the specific circumstances before it, and that the Board would have to mechanically "tick off" and explain in its decisions. In my view, such a list would be entirely unnecessary and might be used by the different parties in Board proceedings to have the tariff matter pre-judged and pre-determined by the Board in the name of "consistency of decision-making".

I also believe that the creation of such a list of "overarching factors" (in the words of the August 9 discussion paper) would unleash an intense political lobbying campaign by the different stakeholders to see to it that "their" factors, meaning those which they believe uniquely favour their commercial and other vested interests, get included on the Board's list of criteria.

I am of the view that such a process, which would undoubtedly be viewed by the different stakeholders as a way to influence future Board decisions, would be completely antithetical to the role of a quasi-judicial administrative tribunal such as the Board.

In the last few years, particularly following the Copyright Board's Re:Sound Tariff 8 decision in May, 2014, and the judicial review application that followed in the Federal Court of Appeal, those of us who practise regularly before the Board have heard a number of different criteria banded about as to what should be included on such a list of factors, most predominantly related to so-called "market proxies" and what a willing buyer would pay a willing seller. I believe that the inclusion of these and several other factors on such a list of criteria would only serve to limit the Board's discretion and undermine its status as a neutral and disinterested decision-maker under the *Copyright Act*.

13. Harmonize the tariff-setting regimes of the Act

I believe that the implications of such major changes to the *Copyright Act* in terms of harmonizing the various tariff regimes are completely unknown at this

time, and should therefore not form part of the public consultation associated with the August 9 discussion paper as it relates to options for the reform of the Copyright Board.

Much like the case of Option 6 above, relating to placing all the different collective societies on the same footing to enter into licensing agreements of overriding effect, Option 13 appears, on its face, to represent a reasonable approach. However, the changes to the current structure of the *Copyright Act* that this proposed option represents would likely be overwhelming and, consequently, well beyond the scope of this consultation.

The existing provisions of the *Copyright Act* for these different tariff regimes are quite intricate and are in a state of some balance. As such, making the changes proposed in Option 13, without any consideration of the possible "domino effect" that may result, does not appear to me to be a prudent course of action. It is also unclear to me how such changes would make the Board's hearing processes more efficient and allow the Board to issue its tariff decisions on a more timely basis, which is the stated goal of this consultation. I would therefore suggest that, certainly at this time, these changes not be made.

Conclusion

I would like to thank the Department of Innovation, Science and Economic Development, the Department of Canadian Heritage, and the Copyright Board, for providing me with this opportunity to provide my comments in response to the 13 options set out in the August 9 discussion paper. As stated in the beginning of this letter, the views that I have expressed are my own alone, and do not represent those of any other person or party.

If there is anything else I can provide in relation to the discussion paper, please let me know. Thank you.

Yours very truly,

J. Aidan O'Neill

FASKEN MARTINEAU DuMOULIN LLP

JAO/eh