September 29, 2017

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

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

Copyright Board of Canada
56 Sparks St., Suite 800
Ottawa, Ontario
K1A 0C9

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

Attention: CBconsultations@canada.ca

This submission is made on behalf of Music Canada, a non-profit trade organization that promotes the interests of its recording industry members, as well as their partners, the artists. This submission is in response to the Government of Canada's request for submissions, dated August 9, 2017, on the matters addressed in the government's consultation paper, "A Consultation on Options for Reform to the Copyright Board of Canada.

Music Canada's members are engaged in all aspects of the recording industry, including the production, promotion and distribution of music. Accordingly, Music Canada (on behalf of its interested members) is a key stakeholder on matters related to the operations, procedures and processes of the Copyright Board. In particular, Music Canada's members have a keen interest in providing input on all matters that may positively impact the Board's efficiency, productivity and transparency.

A. Introduction

Music Canada congratulates the government on its joint initiative to engage with stakeholders on how best to reform the Copyright Board of Canada (the "Board"). As a stakeholder who depends on the work of the Board and its ability to set tariffs in a timely, efficient, predictable and transparent manner, Music Canada welcomes the opportunity to participate in this public consultation, with the aim of improving the Board's tariff-setting process.

Stakeholders cannot properly operate, and an innovative economy cannot grow, in the face of the marketplace uncertainty caused by an unpredictable Copyright Board that takes years and years to certify tariffs. The time it takes for tariff rates to be set should not be economically prohibitive for stakeholders. As an economic regulatory body, the Board's mandate and rate-setting process should be modelled more like a business development office – an entity whose focus should be to facilitate and drive business. For Canada to have a successful innovation agenda, and one that supports and encourages our cultural industries, Board stakeholders must, as a starting point, have access to a regulatory framework that fosters rather than hinders innovation.

Music Canada believes that while the Board plays an important regulatory role, it has struggled to keep pace in the digital era, which inevitably hurts individual creators, the cultural industries and users including the general public who benefit from innovative service offerings.

B. Guiding Principles

Music Canada believes that, in today's digital era, the Board must render timely and predictable decisions as efficiently as possible. In order for Canada to compete locally and globally, our institutions cannot stand in the way of innovation. In the cultural industries, rights holders, businesses and Canadian consumers deserve to have a tariff-setting process with defined and reasonable timelines; they deserve an institution with a clear mandate and policy goals; and they deserve a tariff-setting process that is predictable and operates according to clear rate-setting criteria.

Accordingly, Music Canada believes that the options for reforming the Board's tariff-setting process should be guided by three important principles: (1) timeliness; (2) efficiency; and (3) predictability. In order to seize this opportunity for real and meaningful reform, we urge the government to undertake only those changes that further one or more of these principles. Without a timely, efficient and predictable tariff-setting process, we cannot foster an innovative technology economy.

1. Timeliness

The Board must render timely decisions. Long delays at the Board needlessly cost rights holders, businesses and consumers money and lead to greater uncertainties in the market. Long delays also discourage innovative entrepreneurs from entering the Canadian marketplace. With these points in mind, Music Canada recommends implementing reasonable timelines governing the overall length of the tariff-setting process, including regulating the incremental procedural steps throughout.

2. Efficiency

While overall and incremental timelines are important, it is also vital that the Board's work be focussed where it is most needed. Long delays in consideration and a full hearing should not be required when the relevant parties come to the Board with a negotiated agreement on a tariff. Streamlining and/or removing these proceedings from the Board's workload will make the Board more effective and eliminate costly delays for all stakeholders. Music Canada supports regulatory changes to the Board's mandate and tariff-setting process to allow parties to enter into overriding agreements independently of the Board – effectively rendering the Board a tribunal of last resort, to be used only when the parties require assistance in setting a tariff rate. Music Canada also supports other regulatory measures that aim to reduce the length of time it takes the Board to hold a hearing and render its decisions.

3. Predictability

The Board's processes and decision-making criteria must be clear and transparent so that its decisions are more predictable. Aside from certain jurisprudential and self-imposed guidelines, and a specific requirement for even-handedness as between broadcasters,[1] the only requirement on tariff rates set out in the *Copyright Act* is that the Board's decisions must be "fair and equitable", and that requirement is only expressly imposed as a duty on the Board in respect of private copying levy decisions.[2] The Board views itself as having an unlimited amount of discretion in setting tariff rates, which often results in unpredictable results and royalty rates being set that are not reflective of the evidence presented at hearings, nor the true market value of the uses of the copyrighted works and other subject matter at issue. While the Board is currently accorded a great amount of deference in setting tariff rates, the Federal Court of Appeal recently (and correctly) noted that the *Copyright Act* provides that the Governor in Council can impose upon the Board more structure in this regard if it so chooses:

> *[16] Although there are no pre-set criteria that the Board must take into account when determining fair and equitable royalties, the Governor in Council has the power to make regulations establishing criteria. The power is found in section 66.91 of the Copyright Act.*[3]

Proceedings at the Board are also very costly for participants. More and more, participants are required to prepare highly technical, complicated and costly evidence and arguments for the Board's consideration, and then employ additional resources for a lengthy hearing. And yet, the Board then freely relies on its internal economists and legal staff for making decisions and, in some cases, creating their own rate-setting methodologies. This practice must end. Like comparable tribunals and courts, the Board's decisions must be based upon the evidence that is presented and tested by the parties. There cannot be a black box within the Board; the type and function of evidence required by the Board must be clarified and subject to definitive rules.

Transparency and predictability underpin sound decisions. Further, decisions that set royalties not based on the evidence creates market place distortions when royalty rates do not reflect the true value of the works and other subject matter. This pricing inefficiency frequently results in prices that are not market-based, thus impairing the balance in copyright by reducing the supply (the incentive to produce and distribute content), which hurts the entire copyright ecosystem for copyright-based goods and services.

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With these principles in mind, Music Canada applauds the energy and urgency displayed in the government's consultation paper. This process represents an answer to the call that stakeholders have been making for decades. And with this process comes tremendous opportunity: this consultation should reset an outdated institution and provide stakeholders with the tools they need in a modern technological economy. Stakeholders cannot afford another 'check-in' on the well-documented limitations of the Board as it is currently constructed. As the

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[1] *Copyright Act*, R.S.C. 1985, c. C-42, s. 68(2)(a)(ii) [*Act*].
[2] Section 83(9) imposes this as an express requirement on the levies set by the Board. By contrast, Section 66.91(a) permits the Governor in Council to define criteria that the Board must apply "in establishing fair and equitable royalties to be paid pursuant to this Act", but does not clearly state that all royalties set by the Board must satisfy that condition. However, the Federal Court of Appeal has interpreted this as a general requirement. See *Re:Sound v. CAB et al.*, 2017 FCA 138 at para. 4.
[3] *Re:Sound v. CAB et al.*, 2017 FCA 138 at para. 16.

report of the Standing Senate Committee on Banking, Trade and Commerce noted in 2016, "the Board is dated, dysfunctional and in dire need of reform."[4]

The Board will not reform itself. On November 26, 2012, the Board established an ad hoc committee to look into the operations, procedures and processes of the Board to make them more efficient and more productive.[5] However, after nearly half a decade, no changes have been made. Fortunately, as the consultation paper highlights (at Section 1.2), the government is in possession of years of research and consultation on this topic. The government must follow up these initiatives and consultations with real and meaningful reform aimed at reshaping the institution designed for an innovative Canada in 2017.

Music Canada believes that, wherever possible, regulatory action should be undertaken immediately, with introduction of legislation to address whatever cannot be done by regulation. The parliamentary process is long and uncertain, and we would welcome real regulatory change as quickly as possible.

C. Comments on the Options for Reform

Music Canada supports the goals set out in the consultation paper to, among other things, develop a package of reforms to improve the Board's tariff-setting process. In the section that follows, Music Canada addresses in turn each of the recommendations set out in the government's consultation paper. In each case, we identify whether the recommendation will improve tariff setting, based upon the three principles identified above: timeliness; efficiency; and predictability. If so, we identify how the recommendation must be implemented in order to achieve these objectives.

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

Consistent with our view that the Board must render timely and efficient decisions, Music Canada recommends that the Minister of Innovation, Science and Economic Development ("ISED"), pursuant to sections 66.91 and 66.6(1) of the *Copyright Act*, seek to impose regulated timelines for all proceedings at the Board. Further details are provided on timelines as part of the comments provided in response to Recommendation 2, below.

As the consultation paper notes, comparable tribunals have regulated the requirement to advance proceedings expeditiously (i.e. The Competition Tribunal, the National Energy Board, the Patented Medicines Prices Review Board and the Canadian Radio-television and Telecommunications Commission (the CRTC)).[6] While Music Canada supports any enactment

[4] Report of the Standing Senate Committee on Banking, Trade and Commerce, "Copyright Board: A Rationale for Urgent Review" at p. 7. Available online: https://sencanada.ca/content/sen/committee/421/BANC/Reports/FINALVERSIONCopyright_e.pdf.
[5] Working Committee on the Operations, Procedures and Processes of the Copyright Board, "Discussion paper on Two Procedural Issues" at p. 1. Available online: http://cb-cda.gc.ca/about-apropos/pdf/discussion-paper.pdf.
[6] The Supreme Court has also emphasized that undue process and protracted proceedings can prevent the fair and just resolution of disputes. *See Hryniak v. Mauldin*, 2014 SCC 7 at para. 2. "Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving

that would require (and not merely 'authorize') the Board to dispense with matters as expeditiously, efficiently and predictably as possible, we recommend the imposition of timelines within which such a requirement would operate. For instance, subsection 11(4) of the *National Energy Board Act* requires all proceedings to be dealt with "as expeditiously as the circumstances and considerations of fairness permit", but clarifies that it must be done "within the time limit provided for under this Act" (i.e. the clear time limits legislated in sections 52(4), 58(5) and 58.16(5) of that Act).

Overall, Music Canada believes that a more structured tariff-setting regime, with predictable and defined timelines, will yield greater efficiency compared to: (1) merely a 'requirement' model (i.e. similar to that of the Competition Tribunal) that does not also have defined timelines; or (2) an 'authorization' system (i.e. similar to the CRTC), which would give the Board the power to dispense with or vary the rules at its discretion, adding to the procedural uncertainties that already exist at the Board.

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

Music Canada supports the adoption of this recommendation, as it supports the goal of improving the timeliness and efficiency of the Board's tariff-setting process. As described above, Music Canada recommends that the Minister of ISED, pursuant to sections 66.91 and 66.6(1) of the *Copyright Act*, prescribe regulatory timelines for all proceedings.

For example, proceedings under the *Patented Medicines (Notice of Compliance) Regulations* ("*PM(NOC) Regulations*") are subject to a defined 24-month time limit, within which all steps must be completed – including any settlement discussions, discoveries, cross-examinations, preparation of expert evidence, and the consideration and rendering of decisions.[7] Incremental steps that fall within the outside time limit are decided upon as part of a case management process, typically by consent of the parties.

As such, Music Canada recommends the implementation of regulatory timelines to expedite the process for the certification of tariffs – including: i) those that are contested and require a full hearing, ii) those that are uncontested, and iii) those that are negotiated by agreement and brought to the Board for certification. Music Canada would recommend the following regulatory language:

(1) **For contested tariffs**: *The Board shall certify the approved tariffs as soon as practicable, and no later than 6 months after the end of the hearing, and 24 months from the time the proceeding is initiated by one or more of the parties*.

In these instances, the initiating process should not be unlimited; if a proceeding has not been initiated by one or more of the parties within 6 months of the filing of a proposed tariff, a case management conference should be convened to intervene and facilitate the timely advancement of the proceeding. If after 12 months of the filing of a proposed tariff the proceeding has still not been initiated, it should be initiated automatically by the Board, or at a time fixed by the Board at its discretion, subject to the considerations of fairness and public interest.

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the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just."

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

In addition, Music Canada recommends that interim and procedural matters be resolved expeditiously, in the interests of properly adhering to set timelines. As such, Board rulings on procedural matters should be issued no later than two weeks after being heard.

(2) **For uncontested tariffs:** *Where a proposed tariff is uncontested – i.e. no objections are filed according to the statutory requirements – the Board should be required to consider the tariff in an expedited manner and certify the tariff as soon as practicable, and no later than 6 months after it is proposed.*

(3) **For tariffs settled by agreement:** *Where a joint submission for certification of a tariff is filed by the relevant collective society and one or more objectors or other prospective licensees, the Board shall:*
   (i) consider the tariff in an expedited manner on the basis of the joint written submissions;
   (ii) unless clearly inconsistent with [the relevant rate-setting criteria], certify the tariff on the terms and conditions proposed by the joint submission, subject to any alterations the Board considers necessary to address the submissions of any Objectors not parties to the agreement; and
   (iii) *certify the approved tariffs as soon as practicable and no later than 3 months after the date of the joint submission*.

In addition, Music Canada supports the recommendation to shorten the period of time following the publication of proposed tariffs from which objections may be filed (currently sixty days). In the interests of reaching timely and efficient outcomes, Music Canada supports the broader goal of advancing proceedings as quickly and efficiently as possible.

It is less clear that a requirement for the Board to track and make public the length of time it takes to render decisions following hearings would support any of the stated goals of this consultation. Stakeholders will benefit more from express timelines; not enhanced public reporting requirements on the part of the Board.

Note: Subsection 2.1.2: "Limiting the Contributions of Parties to Delays".

Music Canada believes the title to Subsection 2.1.2: "Limiting the Contributions of Parties to Delays," may be mistaking the symptom for the cause. The implication here is that Board participants are a cause of the delay. This characterization is inapt for the parties who appear before the Board – at great expense and investment of their time and effort. In general, Board participants have nothing to gain by engaging in delay tactics or unnecessarily extending proceedings. They do, however, act within the rules that apply to them, which often fail to impose proper discipline on any of the actors involved in proceedings (including the Board).

The flexibility in the current regime was not intended to permit delays. However, too much flexibility can permit or even encourage the parties to take more time than is needed. This is precisely why Music Canada recommends the implementation of regulatory timelines and improved efficiency, to limit delays of any kind. If firm timelines are set, parties will necessarily act within them. Currently, Board participants must work within the procedures and processes that exist. Improvements to the process (i.e. through the adoption of case management) will help keep matters on track, will greatly assist the Board in managing its case load, and will provide much needed predictability to an otherwise *ad hoc* process.

Consultation Paper Recommendation 3: Implement case management of Board proceedings.

Music Canada supports this recommendation. Case management is an effective tool used by administrative and judicial bodies to supervise proceedings, bring about more effective resolutions and enhance the efficiency of the court/tribunal. By specially managing proceedings, case managers can conduct status reviews/updates, fix periods for procedural steps, deal with any procedural issues more expeditiously/informally (i.e. issues relating to interrogatories), and conduct dispute resolution conferences that can limit the issues at the hearing. But while Music Canada appreciates the potential benefits of case management, we believe that this recommendation could only be effective for Board proceedings if coupled with defined timelines, a point that has been outlined above. If timelines were imposed, case management could be employed as a useful procedural guide post within which each step could be scheduled, working backwards from when the tariff must be certified.

Case management is mandatory in all Federal Court matters, and is typically the first step in all proceedings under the *PM(NOC) Regulations*. The same could be accomplished in the tariff-setting process before the Board, including the scheduling of all procedural steps (i.e. interrogatories, filing cases, evidence, briefs, case conferences, etc.), the timing of the hearing and the deadline for the release of a decision. Case management would be more useful if it were mandatory, with case management conferences occurring at specified check-points during the tariff-setting process, or when specifically requested on consent by the parties.

Case management is also potentially more effective when the case manager is not the ultimate decision-maker. For example, at the Federal Court, prothonotaries serve as case managers, not Federal Court judges. A similar approach at the Board would allow for a more transparent and efficient pre-hearing period, and would free up Board Members for the consideration of tariffs. Therefore, Music Canada recommends that a new position be created to specially manage cases at the Board; alternatively, the government could consider appointing additional prothonotaries who could serve this function.

Consultation Paper Recommendation 4: Empower the Board to award costs between parties.

Music Canada supports this recommendation, in part. Costs awards can serve a variety of purposes. To the extent that costs awards could or should be utilized by the Board, Music Canada recommends that they only be used as a punitive measure, when a party unreasonably delays or deviates unjustifiably from the scheduled proceedings.

Such a determination is best left to the Board following the determination of the case, subject to arguments from the parties, and should be subject to a defined process and certain predictable criteria, such as those outlined in the *Canadian Radio-Television and Telecommunications Commission Rules of Practice and Procedure*.[8]

It should also be noted that the Board's lengthy and complex tariff-setting process already weighs heavily on Board participants, particularly financially. While the Board serves an important regulatory role, that role is undermined if it becomes too costly to engage in the Board's tariff-setting process. Accordingly, Music Canada believes that costs awards should, if

[8] See *Canadian Radio-Television and Telecommunications Commission Rules of Practice and Procedure*, SOR/2010-277 at s. 68, 70; see also the powers conferred on the Competition Tribunal: *Competition Tribunal Act*, R.S.C., 1985, c. 19, s. 8.1.

at all, only be used as a punitive mechanism (in the most egregious instances) to foster a culture of greater efficiency at the Board.

Further, if proceedings are case managed to specific timeframes, there will be fewer opportunities to engage in delay tactics. Music Canada believes that the necessity of costs awards would be greatly reduced by more structured/regulated timelines, as discussed above under the comments to Recommendation 2. With less ability for parties to drag their feet, there would be less need for the Board to resort to costs sanctions.

Music Canada notes that the consultation paper does not suggest that the Board should adopt the practice of the CRTC of using cost awards to force parties to subsidize participation in the proceedings by other parties.[9] Whatever the merits of that regime when applied as between subscribers and providers of telecommunications services, there is no principled basis to look to right holders to subsidize the users who seek to exploit their works. In the absence of some behaviour deserving of the Board's sanction, the parties should continue to bear their own costs.

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

Music Canada does not support this recommendation. A preliminary gating mechanism or an additional layer of procedure at the front end of the tariff proceedings seems unlikely to improve efficiency. To the extent that this requirement is treated as a precondition to publication of a proposed tariff in the *Canada Gazette*, it would be inconsistent with section 67.1 of the Copyright Act. In any case, it seems more likely to create additional delays than to avoid them.

Subject to the comments below, Music Canada does not object to a process that includes more information at the commencement of tariff proceedings, provided that the requirement is not treated as a gating mechanism that requires some form of approval in order to initiate the proceeding. However, we think the beneficial effect of such a requirement is likely to be marginal, at best, compared to fixed timelines or other more direct procedural interventions. In this regard, even in the most complex legal proceedings, parties are only required to plead material facts and not the evidence that will be adduced at trial.

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

Music Canada believes that this recommendation, considered in isolation from fixed timelines and other regulatory measures designed to streamline the overall tariff-setting process, would at best act as an incremental adjustment to the *status quo*. In addition, requiring collective societies to include additional explanations with proposed tariffs may actually have the opposite effect of reducing delays; for instance, it could force collective societies to speculate on the relevant industry details (i.e. the perceived value of the tariff for certain targeted activities) in the absence of or prior to obtaining discovery on the subject and expert analysis, which would likely create more confusion in the process, not less.

The Consultation paper states that the "additional information sought from collective societies would not be an intrusive or definitive reveal of their confidential strategies or yet-undeveloped argument." Theoretically, this may be true; but practically, many of the suggestions listed under subsection 5(a) of the Consultation paper would require collective societies to advance a theory of their case that, at the outset, is simply not yet possible. If more details were required of

[9] See *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277), ss. 60-70.

collective societies – details that they may not know and won't know until after the conclusion of the interrogatory process -- at a too early stage, supplanted or modified proposals may be necessitated as relevant information becomes available. This would add a procedural process, add uncertainty to the process, and cause delays.

Section 67.1 of the *Copyright Act* defines what is required of a performing rights collective society when filing a tariff. Since filing a tariff is effectively a pre-condition to any enforcement by the collective society,[10] any barrier to such a filing could have the substantive result of depriving right holders of their statutory rights under the Act. As a result, such a measure cannot be considered a merely "procedural" rule.[11]

As a practical matter, Music Canada notes that collective societies do not necessarily have visibility into what users are doing prior to filing a tariff with the Board. It would be inappropriate and counterproductive to require rights holders to attempt to police the marketplace outside of the tariff process. Moreover, there is no principled or statutory basis to put the burden on rights holders to do so as a precondition to exercising their legal rights.

Music Canada does, however, support the government's initiative to streamline and shorten the tariff-setting process. We recognized that part of this entails defining the issues earlier, rather than leaving it to the parties to speculate what the other parties' cases are. Many of the issues requiring clarification by objectors or the Board could likely be solved informally through case management efforts.

It may make sense for rights holders to provide a non-binding statement of the rationale for a new tariff or for proposed changes to a tariff. Music Canada notes that the CRTC practice includes a similar requirement in its procedural rules for telecommunications tariffs.[12] Provided that this does not become a source of delay or a barrier to enforcement, providing users (and potential users) with additional context for a tariff application may help avoid unnecessary or irrelevant objections.

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

For the most part, objectors are in a similarly difficult position – they may not be in a position to provide sufficiently detailed objections until they have received expert analysis on the proposed uses, or until they have received the Statement of Case from the collective societies. Again, with the goal of streamlining the tariff-setting process and making it more efficient, timely and predictable, any confusion or additional information that is required on the part of the objectors could be addressed informally at an early case management conference. Forcing an objector to divulge more information than is available is counter-productive at this early stage.

In any case, the only way in which this obligation would be likely to significantly improve efficiency would be if the Board was also prepared to introduce a summary mechanism to strike objections as insufficiently supported or irrelevant to a proceeding. No such mechanism has been proposed.

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[10] In principle, enforcement is possible with the consent of the Minister. However, this is a discretionary political decision which, by itself, does not give substance to the rights holders' otherwise exclusive rights under the *Copyright Act*.

[11] See e.g. Robert W. MacAulay and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, Toronto: Thompson Reuters Canada Ltd, 2017) s. 9.2 ("Things which operate to increase or decrease the jurisdiction of a body, or to create, terminate or extend rights are not procedural in nature.", citing *Ostrowski v. Saskatchewan (Beef Stabilization Board Appeals Committee)* (1993), 9 Admin. L.R. (2d) 227, 101 D.L.R. (4th) 511, 109 Sask. R. 40 (C.A.)).

[12] CRTC, Telecom Information Bulletin CRTC 2010-455, paras. 3.b.i, 8.c.

It is difficult to imagine a scenario in which a non-binding statement of the basis for an objection would substantially change a collective's approach to interrogatories which, at first instance, are directed to positively establishing the record to support the proposed tariff, not to rebut objections. Moreover, since the consultation paper contemplates that neither the collective nor the objectors would be in any way bound by their initial submissions, the live issues for a proceeding would still not be truly known until after the parties file their statements of case. The courts have made it clear that the Board cannot, by way of a procedural decision, prevent a party from raising a valid concern at a later stage of a proceeding in response to issues which arise after the initial publication of the tariff in the Gazette.[13] In other words, this proposal offers little practical benefit over the *status quo*.

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

Music Canada supports this recommendation, particularly as it is consistent with the principles of improved efficiency and predictability. As such, Music Canada supports legislative and regulatory changes that would reduce mandatory involvement by the Board in situations when no dispute resolution is required. As the Consultation paper rightly notes, tariff proceedings strain the time and resources of the Board and the parties involved; wherever possible, there should be support and incentive for parties to establish licenses independently of the Board.

In many countries, no approval is required by rate-setting tribunals where parties come to an agreement on a tariff rate independently of the tribunal.[14] These tribunals act effectively as 'tribunals of last resort', only called upon to resolve disputes when negotiated agreements are not possible. This type of deference to market-oriented, market-negotiated rates is recommended by Music Canada, and is more reflective of the type of license that is desirable as between the actual rights holder(s) and the most relevant/likely prospective users. Further, settlements are usually reached between collectives and industry associations of users that have grouped together to oppose particular tariffs. There is therefore no need for the Board to engage in hearings to correct for any imbalance in market power.

As the Consultation paper outlines, not all collective societies in Canada are permitted to enter into and enforce agreements with users independently of the Board. In effect, some collectives are mandated to file proposed tariffs with the Board (i.e. collective societies for musical works and sound recordings), while others may choose to do so – or not. For the reasons outlined above, this discrepancy should be fixed through legislative amendment, providing all collectives with the same autonomy to enter into negotiated agreements.

However, legislative action is not needed to expedite the process for rates negotiated between the parties. Music Canada recommends that the Minister of Innovation, Science and Economic Development ("ISED"), pursuant to sections 66.91 and 66.6(1) of the *Copyright Act*, seek to impose a regulated procedure for certifying tariffs based on agreements. As noted above under the comments to Recommendation 2, Music Canada would recommend the following regulatory language:

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[13] See *Netflix, Inc. v. SOCAN*, 2015 FCA 289.

[14] For example, such countries include Australia, Austria, Germany, Italy, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, U.K. and the U.S. In certain cases in the U.S., voluntary licenses automatically take precedence over rates set by the Copyright Royalty Board or by the Librarian of Congress (see 17 USC §114(f)(3). In the U.K., Australia and New Zealand, for instance, the rate-setting bodies only have jurisdiction if no agreement can be made between the parties – no dispute resolution process is used unless there is disagreement.

Where a joint submission for certification of a tariff is filed by the relevant collective society and one or more objectors or other prospective licensees, the Board shall:

- *(i) consider the tariff in an expedited manner on the basis of the joint written submissions;*
- *(ii) unless clearly inconsistent with [the relevant rate-setting criteria], certify the tariff on the terms and conditions proposed by the joint submission, subject to any alterations the Board considers necessary to address the submissions of any Objectors not parties to the agreement; and*
- *(iii) certify the approved tariffs as soon as practicable and no later than 3 months after the date of the joint submission*.

Music Canada disagrees with the recommendations in the Consultation paper on the requirement for parties to file agreements with the Board, and more broadly, to permit the Board to make these agreements public. As noted above, the common practice of most countries is that such voluntary agreements need not even be filed with a tribunal or governmental authority, let alone made public. There is little public interest or value in making licensing terms public – other than to potential competitors of the parties to the agreement. In fact, requiring the disclosure of commercially sensitive information could potentially disincentivize parties from utilizing this type of expedited process, for a variety of business reasons.

While the Consultation paper correctly notes that parties who currently file agreements with the Board are exempt from section 45 of the *Competition Act* ("Conspiracies, agreements or arrangements between competitors"), this is not typically the type of incentive that parties seek by entering into market-based, negotiated agreements. Board participants are largely concerned with the time and resources it takes to participate in full hearings, and largely prefer a more predictable and streamlined outcome independent of the Board's unpredictable, *ad hoc* process. However, collectives and users may be concerned about breaching the *Competition Act* if agreements are not filed. This could inhibit parties from reaching negotiated settlements. This would not be in the public interest. Music Canada recommends that the *Copyright Act* be amended to extend the protection of the *Competition* Act where parties notify the Board of such agreements in writing.

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

Music Canada does not recommend the adoption of longer minimum effective periods as a general rule, and instead would recommend that effective periods be left to the parties to decide as the circumstances of each tariff may dictate. As the consultation paper itself notes, "the appropriate length of a tariff's effective period depends greatly upon the uses it encompasses".[15]

In some cases, particularly for established and relatively well-established markets, a longer effective period will be consistent with Music Canada's principles of improving the Board's timeliness, efficiency and predictability. Theoretically, in a well-established market it is desirable for all parties for tariffs to have longer effective periods so as to limit the amount of time and resources that participants spend at the Board, and to allow for the Board to redirect its resources to other matters. To the extent that it would be commercially desirable for the parties involved, multi-year tariffs are effective, and are already used quite commonly. Of course, this practice should continue where it is appropriate.

[15] Consultation paper, at 13.

However, in cases where there is less market certainty or higher risks for a fluctuating market (such as with new technologies or services), valuation of rights is more speculative and usage patterns are susceptible to rapid evolution. In such circumstances, shorter effective periods are often preferred by both rights holders and users alike. Mandating a longer minimum effective period in such a case would not be desirable. Nor would this assist in providing Board stakeholders with the most efficient and predictable process in the long run, since tariffs based on assumptions which diverge from reality are likely to generate more disputes, not fewer.

In the absence of a regulated change, the Board could be empowered to issue Practice Notices or Notices to the Profession indicating how it expects tariffs to be filed and/or considered. However, it should be noted that due to the length of delays at the Board and the unpredictable nature of the decision-making process, Board stakeholders have a difficult time committing to longer effective periods. As Board efficiency and predictability improves, it is to be expected that parties will feel more confident filing for longer effective periods.

Consultation Paper Recommendation 8: Require proposed tariffs to be filed longer in advance of their effective date.

Music Canada supports this proposal as part of a comprehensive procedural approach involving fixed timelines for decision-making and case management, with the goal of avoiding retroactive decisions and the burdens they impose on all stakeholders. If a realistic and predictable decision-making process will take more than a year to complete, it would be reasonable to expect that the proceeding should be initiated earlier.

In the context of such an overall solution, Music Canada believes that this recommendation would support the principles of increased timeliness and efficiency. Ideally, no Board stakeholder desires to have a tariff that is retroactive – particularly since, on average, tariffs have a period of retroactivity of 2.2 years.[16] This causes tremendous business uncertainty for rights holders, businesses and consumers.

Music Canada agrees with the recommendation to move the filing date up from March 31 to January 31 immediately prior to the applicable expiry/effective dates. However, advancing the filing deadline by two months, on its own, will not reduce the negative retroactive effects of the Board's tariff-setting process. In isolation, it is less obvious that merely adding additional lead time will improve the timeliness of decision-making. In some cases, it may have the opposite effect. Particularly in the case of new or rapidly-changing markets, collective societies may not always be in possession of the necessary business or technical information to file a proposed tariff, or renew an existing tariff, far in advance of an expiry or effective date. In such circumstances, increasing the lead time may simply force collectives to rely on more assumptions which need to be clarified through the interrogatory process. This may increase the scope of disagreements between collectives and users, leading to more issues that need to be resolved, and a longer and more complex proceeding. In the absence of measures to ensure a predictable and efficient process, lead time *per se* will not guarantee timely decisions.

This option for reform should be adopted in conjunction with other recommendations supported by Music Canada within this submission to address the timely, efficient and predictable resolution of matters before the Board.

[16] Jeremy de Beer, "Canada's Copyright Tariff Setting Process: An Empirical Review" (April 16, 2015), at p. 4.

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

Music Canada supports the adoption of this recommendation, noting however that this is already the case for the 'general' and 'mandatory' tariff-setting regimes. This change would harmonize the various regimes, and simplify the tariff-setting process and add a level of procedural predictability that is much needed. In practice, collective societies operating under the 'general' and 'mandatory' regimes already continue collecting royalties under a previous tariff until the renewal tariff is certified – an important aspect of the tariff regime that supports the efficient and timely collection and distribution of royalties.

Music Canada does not support the suggestion in the consultation paper that the Board could be granted the power to make interim decisions on its own initiative and not merely at the request of the parties. This is a decision that should be left to the parties, and would not represent a desirable extension of the Board's decision-making power.

In any case, interim tariffs are, at best, an unsatisfactory solution to the problem of slow and late decision-making. Interim decisions are necessarily based on a preliminary assessment of incomplete information. They do little to provide certainty for users or right holders, since they will always be subject to retroactive change. Furthermore, interim decisions frequently create disputes rather than settling them, leading to appeals which in turn burden all of the participants with more costs and more delays.

Moreover, the need for interim tariffs could largely be avoided if final tariffs were certified in a consistent and timely manner. Music Canada believes that this recommendation would be rendered largely moot by the imposition of regulated timelines and more freedom for parties to enter into negotiated licensing agreements. These would be more effective solutions, and more faithful to the goals of timeliness, efficiency, and predictability.

Music Canada also notes a concerning development whereby users are taking the position that they have the right to elect whether they want to be bound by certified tariffs set by the Board, even when they make uses of works covered by tariffs.[17] This has the potential to undermine participation in the tariff process and makes enforcement of tariffs more difficult. Music Canada does not agree that users have the right to election to opt out of approved tariffs (or interim or continuation tariffs) certified under the section 67 or 70.1 tariff process. However, clarity in this regard would usefully put an end to this process which undermines the Board's legitimacy and process.

Consultation Paper Recommendation 10: Codify and clarify specific Board procedures through regulation.

(i) ***The need for Procedural Regulations: Efficiency and Predictability***

Music Canada supports the codification (through regulation) of the tariff-setting procedures and processes. Currently, the Board has authority over its procedural rules pursuant to section 66.6 of the *Copyright Act* – which it has attempted to codify through its *Model Directive on Procedure*. The tariff-setting process is guided flexibly (on a case-by-case basis) with reference to the steps outlined in the *Model Directive on Procedure*. In practice, the *Model Directive on Procedure* is more akin to a list of the steps in a typical tariff-setting proceeding, and not a set of rules of

[17] See, *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669. Also, we understand users in the K-12 and post-secondary markets are refusing to pay tariffs certified by the Board in favor of Access Copyright based on this assertion.

practice and procedure to streamline the process, such as with the *CRTC Rules of Practice and Procedure* or the *Competition Tribunal Rules*.

Therefore, Music Canada recommends that the government codify and clarify specific Board rules and procedures through regulation, not legislation or through a modified *Model Directive on Procedure*. A clear regulatory rules package will improve efficiency and predictability, and reduce the time and resources needed to participate at the Board.

(ii) *Authority to Make Regulations*

As a basic principle, the authority to make regulations is presumptively not open to sub-delegation unless there is express authority for such sub-delegation. In other words, the power to make regulations must presumptively be exercised by the person or body authorized by the enabling statute. In some circumstances, there can be implied authority to sub-delegate "administrative" powers, but this generally does not apply to "legislative" powers such as the power to make regulations.

The *Copyright Act* allocates authority based on subject matter. Section 66.6 allocates most procedural matters to the Board, while section 66.91 gives the Governor in Council the authority to give "policy directions to the Board and establishing general criteria to be applied by the Board or to which the Board must have regard".

It is possible to argue that the authority under 66.91 to give policy directions to the Board is unlimited. There is no reason to read that down to imply an exclusion of directions on procedural matters. After all, the Board's power under section 66.6(1) is not mandatory (it "may" make regulations) and is subject to the approval of the Governor in Council; and in addition, the Governor in Council has an omnibus power under section 62(1)(e) to make regulations "generally for carrying out the purposes and provisions of the Act."

In situations like this, there is a hierarchy of authority. The Board's regulations will be subordinate (of narrower application) to the Governor in Council's, and will be invalid if and to the extent that there is a conflict between them.[18] The practical consequence is that the Governor in Council can direct the Board to amend its rules of procedure, as a policy direction which the Board must apply or have regard to, depending on the wording of the particular regulation.

(iii) *Regulated Procedures Must be set within Fixed Timelines*

As noted above under the comments to Recommendation 2, Music Canada believes that additional procedural details, codified through regulation, should only be made in coordination with fixed deadlines governing the entire tariff-setting process. Without outside time limits on the process, or the ability for participants to fast-track the process independently of the Board, the regulation of specific Board procedures will do little to achieve a more timely, efficient and predictable tariff-setting process. The goal must be to clarify and simplify the process for the Board and its participants, not compound the existing procedural inefficiencies at the Board.

(iv) *The Use of 'Practice Notices'*

Music Canada supports the use of Practice Notices by the Board, in an effort to provide guidance on its procedures and the interpretation of relevant legislation and regulations that govern the tariff-setting procedure. While Practice Notices do not have the force of law, they are

[18] See *O.N.A. v. Toronto Hospital* (H.C.J.), 1989 CanLII 4296 [ONSC].

helpful as indicators of how a court or tribunal will act procedurally and as another mechanism to manage the efficiency and predictability of proceedings.

Other Canadian tribunals and federal statutes use or contemplate the use Practice Notices.[19] The federal courts also effectively make use of Practice Guides/Directions[20] and Notices to Parties and the Legal Profession[21] in an ongoing effort to clarify rules and procedures. While lacking the technical force of law, practitioners treat practice guides and notices as if they did, showing a professional commitment to an efficient, timely and predictable court process. Practically speaking, adherence to these guides is also closely monitored (and expected) by judges and case management prothonotaries, as the case may be.

(v) ***General Comments on Sections 10(a)-(e):***

To achieve greater efficiency, issues relating to the procedural matters outlined in Sections 10(a) ('Statement of Issues'), (b) ('Interrogatory Process'), (d) ('Evidence') and (e) ('Confidentiality') could be addressed through case management, with reference to specific schedules set within a regulated timeline. For instance, as with proceedings under the *PM(NOC) Regulations,* the scheduling of the incremental steps that fall within the outside time limit (i.e. 24 months) are decided upon as part of a case management process, typically by consent of the parties.

Comments on Section 10(a): 'Statement of Issues'

With a view to creating a more timely and efficient tariff-setting process, Music Canada supports a requirement for parties to file joint statements of issues – so long as this proposal could be managed in a way that would not substantially add to the number of steps and written submissions required of the parties at the outset. A narrowing of the issues (facts and points of law) would help focus the attention of the Board members, and expedite the process.

In the absence of a requirement to file joint statements, the Board and the parties could rely on case management to effectively achieve the same outcome.

Comments on Section 10(b): 'Interrogatory Process'

Music Canada supports the creation of a more streamlined, efficient interrogatory process that would, ideally, reduce the level and frequency of disputes between parties. This option for

[19] The Manual of Patent Office Practice (MOPOP) is published as a guide for patent examiners, applicants, agents and the public to the operational procedures and examination practices of the Canadian Patent Office [see http://www.cipo.ic.gc.ca/eic/site/cipoInternet-Internetopic.nsf/eng/h_wr00720.html]; the Patent Office also publishes practice notices regarding the practice and interpretation of relevant legislation [see: www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr00292.html]; the *Patent Act* expressly provides for the PMPRB to make general rules and to issue guidelines [*Patent Act*, RSC, 1985, c. P-4, s. 96]; the Canada Agricultural Review Tribunal publishes practice notes regarding the practice and procedure with respect to hearings [see: http://www.cart-crac.gc.ca/cases/practice-notes-chronological-en.html]; the Canadian International Trade Tribunal publishes practice notices [see: http://www.citt.gc.ca/en/case-resource-types/practice]; the Public Service Labour Relations and Employment Board publishes practice notes [see: http://pslreb-crtefp.gc.ca/resources/practicenotes_e.asp]; and the Social Security Tribunal publishes practice directions [see: http://www1.canada.ca/en/sst/rdl/practicedirections.html].

[20] Federal Court Practice Guides [see: http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Practice_Guides]; and Federal Court of Appeal Practice Directions [see: http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fca-caf_eng/directions_eng].

[21] Federal Court Notices to Parties and the Legal Profession [see: http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Notices]; and Federal Court of Appeal Notices to the Profession [see: http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fca-caf_eng/notices-avis_eng].

reform should be adopted with a view to improve the timeliness and efficiency of the tariff-setting process as a whole.

The current interrogatory process is subject to very little regulatory/procedural oversight, meaning that it is practically and comparatively very inefficient. However, as noted above under the comments to Recommendation 2, Music Canada believes that additional procedural details, codified through regulation, should only be made in coordination with fixed timelines governing the entire tariff-setting process and, where necessary, overseen by a case management regime.

Music Canada generally agrees with the process improvements outlined in bullet form in the consultation paper. In fact, some points reflect current practice or practices that practitioners have been devising. The third bullet point (i.e. requirement to link interrogatories to specific issues), however, is problematic: requiring parties to expressly and pre-emptively link their interrogatories to specific issues identified in their statements of issues, including explanations as to relevancy, is not a reasonable or necessary intrusion into a party's litigation strategy.

It must be recognized that information about the uses of copyright works are, in general, entirely in the hands of users. Collectives are fundamentally dependant on the interrogatory process to develop the evidence that is required to support a proposed tariff. Any limitation on the interrogatory process, if applied blindly or uncritically, could deprive the Board of the record it needs in order to perform its statutory duty to certify tariffs. Accordingly, Music Canada recommends that the substantive rights to ask for information that is relevant to the issues in a proceeding not be curtailed.

Many of the issues that arise in respect of interrogatories, particularly issues that require motions or the involvement of the Board (i.e. rulings on relevance, sufficiency, etc.), could be dealt with on an informal, case-by-case basis, through discussions between the parties as part of the case management process. The Board could also be empowered to issue guidance on these issues through the use of Practice Notices, or maintaining and publishing its prior rulings on such issues. Where required, a prothonotary should be empowered to resolve disputes concerning interrogatories.

It will be critical to ensure that any limits on the interrogatory process do not create opportunities for parties to resist provision of relevant information that is necessary for a proper record for the proceeding. Accordingly, any such limitations should be accompanied by appropriate measures to discipline the parties, such as adverse inferences and, in egregious cases, costs awards against parties who fail to produce relevant information in a timely fashion. Further, some users who would be directly effected by a tariff have strategically avoided participating in tariff proceedings to avoid being subject to the interrogatory process. Music Canada submits that users that would be directly affected by a tariff should be subject to the interrogatory process.

Comments on Section 10(c): 'Simplified Procedure'

Music Canada welcomes this recommendation, particularly because it seeks to expedite the tariff-setting process when a full hearing is not required. Simplified procedures are used by comparable tribunals in other countries, with a view to limiting the time spent by the rate-setting body on less contentious matters.

For instance, the tribunals in Australia, the U.K. and the U.S. all either have a simplified process or a mandate to consider matters expeditiously when the circumstances permit. The U.K. has a 'small applications track' when the monetary value at issue is low and the facts and legal issues are simple.[22] A similar approach is used in the U.S., with the matter proceeding nearly entirely

[22] UK, *The Copyright Tribunal Rules* 2010, S.I. 2010 No. 791, s. 17.

by way of written evidence/submissions, and in Australia, where the *Copyright Act* dictates that matters must be dealt with expeditiously and informally when possible.[23]

Accordingly, Music Canada recommends the implementation of a simplified procedure in the following circumstances, and subject to the following conditions:

- Automatically, on the consent of the parties;
- Automatically, where no objection has been filed in respect of a proposed tariff and it is not substantially different from a previously certified tariff (i.e. when a tariff is being renewed on the same or similar terms and conditions);
- At the discretion of the Board, when the issues in dispute are relatively simple or the monetary value at issue (if one can be determined) is likely below a threshold of $100,000;
- The Board must consider the tariff in an expedited manner on the basis of a written record, and must certify the approved tariff as soon as practicable and no later than the day before the tariff is proposed to take effect; and
- Automatically be subject to case management, which would govern an expedited form of interrogatories (limit on the scope and volume of interrogatories), and be subject to limitations on the length of expert/witness reports, and statements of cases.

However, Music Canada notes that various aspects of a simplified procedure could be made available in all proceedings, where appropriate and as determined by the parties and the case management process.

Comments on Section 10(d): 'Evidence'

As a starting point, it should be emphasised that expert evidence is one of the most important elements that should be used by the Board in setting tariff rates. Currently, the Board is not statutorily (or otherwise) required to base its decisions on the evidence it hears as part of the tariff-setting process. The Board appears to exercise an unlimited amount of discretion in how it arrives at tariff rates, which often results in unpredictable results that are not always reflective of the evidence presented at hearings, nor the true market value of the copyrighted works at issue.

Music Canada believes that it would be helpful to clarify the type of evidence that the Board can rely on in reaching its decisions. Too frequently, the Board discards the exhaustive, expensive and time-consuming expert evidence and studies adduced by the parties in favour of its own theories, which the parties do not have an opportunity to review or comment upon. This is an unacceptable practice that fails to uphold the principles of procedural fairness, transparency and predictability. The decisions of the Board should, where applicable, be based solely or substantially on the evidence before it.

Furthermore, it should be clarified that if a right holder puts forward evidence that a use exists in the market, the Board must certify a tariff even if that evidence is less than perfect. As the Supreme Court of Canada has noted, "[f]rom the moment the right is engaged, licence fees will necessarily follow."[24] While the Board has historically acknowledged this principle,[25] it has not

[23] See, for e.g., U.S., 17 USC §803; and Australia, *Copyright Act 1968*, s. 164.
[24] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 SCR 615, 2015 SCC 57, para. 77.
[25] See e.g. Copyright Board, Tariff No. 22.A (Internet – Online Music Services) 1996-2006, (18 October 2007), 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 a recourse.").

always acted upon it.[26] As much as possible, the Board's decisions should be based on the best evidence available to it, and/or predictable economic factors that are actually reflective of the rights in issue.

With a view to making the Board's tariff-setting proceedings more timely, efficient and predictable, Music Canada supports the recommendation to have expert evidence in chief be limited to written reports. Often, experts appearing at a hearing provide direct evidence in an oral presentation format, which is not helpful or efficient. Efficiencies can be gained by requiring this type of evidence to be filed in written format sufficiently in advance of the hearing.

In addition, in order to ensure that the Board continues to receive the best evidence possible upon which to base its decisions, Music Canada supports other initiatives, such as:

- Streamline the process of qualifying expert witnesses – consider a requirement to have experts sign/file an expert acknowledgment, akin to Form 52.2 used in the Federal Courts (i.e. that the expert has read the Code of Conduct for Expert Witnesses [set out in the schedule to the *Federal Courts Rules*] and agrees to be bound by it); and
- A requirement to standardize the format of, and content contained in, expert reports – i.e. that expert reports to the Board contain the same or similar content as required in expert reports pursuant to the *Federal Courts Rules.*[27]

Music Canada does not believe that efficiencies can be gained by permitting the Board to appoint independent experts to enquire into and report on any issues it deems relevant. In the interests of timeliness, efficiency and transparency, the Board should be required to base its decisions on the best evidence provided to it by (i) the expert and non-expert evidence submitted by the parties, and (ii) sample agreements (for the rights in issue) that have been voluntarily entered into between willing buyers and willing sellers.

Another issue of concern is the Board's reliance on its internal economists and legal staff for making decisions and in some cases, creating their own rate-setting methodologies. Procedural fairness requires that decisions of the Board be made by the members of the panel hearing the matter and that decisions be based on the evidence that was introduced and tested at the hearing, in which all parties have the opportunity to participate. As is discussed under Music Canada's comments to Recommendation 13, clear rate-setting criteria should be established, including the above-noted requirement that decisions be based on the evidence that was before both the Board and the parties during the hearing.

Comments on Section 10(e): 'Confidentiality'

As an economic regulator, the Board often requires its participants to submit confidential and proprietary business information to assist it in properly valuing the right(s) in issue. Accordingly, it is often the case that the potential harm caused by the disclosure of certain information would outweigh any perceived public interest in the information. In most cases, matters before the Board are limited to very specific industries or stakeholders within those industries, often competitors. There is little public interest or value in making Board documents and/or licensing terms public – other than to potential competitors of the parties to the agreement.

As such, Music Canada does not support a shift towards a standard that would make documents presumptively "public"; instead, the framework should support parties in their

[26] Furthermore, the Board's decision not to certify a tariff covering all of the online uses of music identified by right holders was upheld as reasonable by the Federal Court of Appeal in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2010 FCA 139.
[27] See *Federal Courts Rules,* SOR/98-106, Schedule (52.2), "Code of Conduct for Expert Witnesses", s. 3 for a complete list.

assessment to either submit documents publicly or mark them confidential. Any challenge or dispute about the nature of the confidentiality could be handled efficiently as part of a case management conference.

If a participant's sensitive, commercial or proprietary information was made public, parties could be severely constrained in the type of evidence they would be able to file. This would have severely negative consequences on the breadth and quality of evidence made available to the Board going forward.

Consultation Paper Recommendation 11: Stipulate a Mandate for the Board in the Act.

Music Canada supports the codification of a clear mandate for the Board. As an economic regulatory body, the Board oversees nearly $440 million in royalties generated by the tariffs it certifies, and does so in an ever-increasing complex economic and legal landscape. Accordingly, the Board's work has a substantial impact on Canada's cultural industries, particularly for rights holders, businesses and consumers who rely on the Board for rendering timely and predictable tariffs. The Board and its stakeholders would benefit from the enactment of an explicit mandate governing its policy and decision-making obligations.

Music Canada believes that a clear, legislated mandate for the Board is also consistent with the goal of ensuring a more timely, efficient and predictable tariff-setting process. The *Act*, as it currently reads, is relatively silent as to how the Board should approach its decision-making duties. Greater detail with respect to the Board's mandate would provide more predictability to the process and allow participants to present evidence that is better aligned with the expectations of the Board.

As the consultation paper notes, it is helpful to consider the mandates and decision-making obligations of comparable tribunals in Canada and around the world.

In Canada, the CRTC's mandate focuses on achieving policy objectives established in the relevant acts. For instance, the *Broadcasting Act* and *Telecommunications Act* set out clearly the objectives to be achieved by the Canadian broadcasting and telecommunications systems.[28] Many of the policies that direct the CRTC's mandate are focused on innovation and the development and protection of a functioning marketplace.

In the case of the Board, Music Canada recommends the codification of a mandate that contemplates more than simply "fair" rates. Music Canada believes that the following guiding principles – some of which have been referenced in the consultation paper – should be considered:

(i) that the Board certify tariffs in a manner that serves to safeguard, enrich and strengthen the cultural, social and economic fabric of Canada;
(ii) 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
(iii) that the Board ensure that royalty rates and their related terms and conditions are fair, in so much 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.

Music Canada believes that if the above criteria are satisfied, the dual goals of copyright – maximizing the availability of creative works to the public and ensuring copyright holders receive

[28] *Broadcasting Act,* SC 1991, c. 11, s. 3(1); *Telecommunications Act*, SC 1993, c. 38, s. 7.

a fair return for their creative endeavors – will be achieved. The fulfillment of achieving balance in copyright (which is reflected in the laws of supply (a fair return for creators) and demand (maximizing the availability of works) will also necessarily take into account the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, contribution to the opening of new markets for creative expression and media for their communication.

Since the stipulation of a mandate in the Act, and a change to the duties of the Board, would require legislative amendment, it should be made following the implementation of other recommendations discussed herein, namely those that would achieve immediate improvements to the timeliness, efficiency and predictability at the Board, and that could be enacted through regulations.

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

Music Canada strongly recommends the adoption of specific, mandatory rate-setting criteria – in particular, based on a market price or willing buyer, willing seller standard – to assist the Board and its stakeholders in the tariff-setting process. As the consultation paper properly highlights, the current decision-making criteria are sparse, unclear and in some cases, based on unfounded legal and economic principles. The lack of codified criteria has led to an entirely unpredictable and inefficient tariff-setting process that forces participants to invest enormous amounts of time and money only to have to 'guess' at what criteria might appeal most favourably to the Board. Implementing clear rate-setting criteria would not only allow participants to better prepare for the tariff-setting process, it would add much needed predictability and business certainty for new and existing businesses. It would also restore a market-based efficient allocation of economic resources in the production, dissemination, and use of copyright content by those who are forced to rely on the rates set by the Board.

In the text accompanying this Recommendation, the consultation paper highlights an inevitably confusing scheme: only one tariff-setting regime (of the four) specifies rate setting criteria. The sole specified criteria – that rates be "fair and equitable" – are themselves broad and non-specific. Apart from this sole provision, of limited application, the Board has virtually no guidance, prescriptions or binding precedents on what it can or ought to consider in setting tariffs, which has led to unreliable and unpredictable decisions.

The Board and all stakeholders are in need of guidance. The work of the Board is significant – the licensing of cultural content in Canada is a key business component for all cultural stakeholders. According to the Department of Canadian Heritage, arts, culture and heritage represent a combined $54.6 billion in the Canadian economy.[29] Yet the lack of objective guidance in the current tariff-setting regime – particularly regarding applicable criteria – has created enormous uncertainties and unpredictability for cultural and technology industries.

Although the former Chair of the Board has asserted that the Board uses "current market rates" to set the price of a licence,[30] the actual practice of the Board does not bear this out. And the

[29] Department of Canadian Heritage, online: https://www.canada.ca/en/canadian-heritage.html.
[30] Speech by the Honourable Justice William J. Vancise to a Seminar jointly sponsored by the Intellectual Property Institute of Canada and McGill University, (14 August 2007), online: http://www.cb-cda.gc.ca/about-apropos/speeches-discours/20070815.pdf at 6 ("How does the Board set the price for a license? The current market rate for the intended use is the rate normally used. That market rate can

Federal Court of Appeal has held that a market price is but one possible rationale for setting a tariff and that the Board is not bound to set tariffs only on that basis.[31] Unless the Government acts, stakeholders cannot expect the process or results of the tariff process to improve by further proceedings before the Board or the courts.

This problem has been exacerbated by a recent decision of the Supreme Court of Canada, which has set out a number of other non-statutory considerations the Board must "assess", such as balance and technological neutrality, without any explanation of how these factors should be applied.[32] This leaves right holders and users alike in the difficult situation of not knowing what evidence they can or should rely on to make their cases. It will complicate cases by requiring complex evidence that is not always available and will ultimately subject decisions of the Board to judicial reviews based on ambiguous standards that were not explicitly tied to any economic theory, compounding uncertainty and delay.

A royalty standard reflecting market-based principles is consistent with best practices around the world. The government can certainly look to other jurisdictions and comparable tribunals for guidance in this respect. There is widespread adoption by many of Canada's largest trading partners whose rate-setting tribunals use market proxies (or the 'willing buyer, willing seller' method) as the prevailing standard or at least one of the most important rate-setting criteria. For example, Australia[33], New Zealand[34], the EU[35], the U.K.[36] and the U.S.[37] all serve as reasonable benchmarks in this regard.

Music Canada agrees with the recommendations of the United States Copyright Office that royalty rates should be harmonized to a willing buyer/willing seller standard to arrive at rates believed to reflect what would be agreed in the open market:

> The Office believes that all government rate-setting processes should be conducted under a single standard, especially since the original justifications for differential treatment of particular uses and business models appear to have fallen away. There is no longer a threatened piano roll monopoly, and satellite radio is a mature business. Further, however that single rate standard is formulated—i.e., whether it is articulated as

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readily be ascertained from a recognized market (e.g., publication of a novel) or a price that is generally applied to a collective society (e.g., SODRAC and CMRRA for mechanical licenses).").

[31] *Canadian Association of Broadcasters v. SOCAN* (1994), 58 CPR (3d) 190 (FCA) at 196-197.

[32] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 SCR 615, 2015 SCC 57, para. 75.

[33] See *Phonographic Performance Company of Australia Limited (ACN 000 680 704) under section 154(1) of the Copyright Act 1968* (Cth) [2007] ACopyT 1 (10 July 2007), para. 11.

[34] Existing market rates are most often used; and then a modified 'willing buyer, willing seller' method is used: i.e. rates negotiated by a willing, not overly anxious licensor and willing, and not overly anxious licensee of similar rights and similar licences.

[35] EU Member States utilize the following framework: "rights to remuneration shall be reasonable in relation to […] the economic value of the rights in trade." See, for e.g., EU Directive 2014/26/EU "On Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market", Art. 16(2).

[36] In the U.K., there is a requirement to determine what is reasonable in the circumstances [see, for e.g., *Copyright, Designs and Patents Act 1988*, 1988 c. 48, ss. 118(3), 125(3), 129, 135], and the 'willing buyer, willing seller' is an accepted method of determining what is 'reasonable' [see *Working Men's Club and Institute Union Limited v. The Performing Rights Society Limited*, [1992] RPC 227].

[37] See 17 USC, §114(f) and 17 USC §114(f)(2)(B); also note that in February 2015, the U.S. Copyright Office (in its report entitled, "Copyright and the Music Marketplace") recommended the 'willing buyer, willing seller' be adopted as the single rate-setting standard, to achieve "to the greatest extent possible the rates that would be negotiated in an unconstrained market": online https://www.copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf at p. 144.

> "willing buyer/willing seller" or "fair market value"—it should be designed to achieve to the greatest extent possible the rates that would be negotiated in an unconstrained market. To the extent that it enumerates specific factors, they should be ones that might reasonably be considered by copyright proprietors and licensees in the real world. In the Office's view, there is no policy justification to demand that music creators subsidize those who seek to profit from their works.
>
> Under such a unified standard, the CRB or other rate-setting body would be encouraged to consider all potentially useful benchmarks—including for analogous uses of related rights (e.g., fees paid for the comparable use of sound recordings when considering musical work rates)—in conducting its analysis. But again, it should take into account only those factors that might be expected to influence parties who negotiated rates in the open market. These might include, for example, the substitutional impact of one model on other sources of revenue, or whether a service may promote sales of sound recordings or musical works through other channels. But upon arriving at rates believed to reflect what would be agreed in the open market, those rates would not be discounted on the basis of abstract policy concerns such as "disruptive" impact on prevailing industry practices or solicitude for existing business models notwithstanding their competitive viability in the marketplace.[38]

To do otherwise creates market distortions resulting in rights holders subsidizing users and thereby also reducing the incentives to invest in creating and distributing content. [39]

A market-based approach to valuation also has the benefit of a well developed, robust and flexible framework for setting tariff royalties. The market value/willing buyer/willing seller standard is used in compulsory acquisition cases[40] and in actions for damages for infringement of a copyright or patent.[41] The approach, which has been adopted in Australia, also lends itself to setting royalties based on actual market rates, and where these are not available, notional bargain rates or comparable bargains, and where the other methods are infeasible, based on judicial estimation of the amount to be paid based on willing buyer/willing seller marketplace principles.[42] In addition to establishing royalties that will support a functioning and efficient marketplace, including an efficient allocation of resources to meet market needs and

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[38] U.S. Copyright Office, Copyright and the Music Marketplace at pp 143-144.
[39] U.S. Copyright Office, Copyright and the Music Marketplace, February 2015, at pp. 81, 143-144, 179-180.
[40] See, *Fraser v. The Queen*, [1963] S.C.R. 455 at 474-75; *Aikman v. The Queen*, [2002] 2 C.T.C. 2211 at paras. 94-95 (TCC), aff'd 2002 FCA 114.
[41] See, *General Tire and Rubber Co. v. Firestone Tyre and Rubber Co., Ltd*., [1975] 2 All E.R. 173 (HL); *Profekta International Inc. v. Lee (Fortune Book & Gift Store)*, [1997] F.C.J. No. 527 at 2 (FCA); *AlliedSignal Inc v. Du Pont Canada* Inc. (1998), 78 C.P.R. (3d) 129 at para. 19 (FCTD), aff'd (1999), 86 C.P.R. (3d) (FCA); *Consolboard Inc. v. MacMillan Bloedel (Sask.) Ltd.* (1983), 74 C.P.R. (2d) 199 at para. 10; *Anne of Green Gables Licensing Authority Inc. v. Avonlea Traditions Inc.* (2000), 4 C.P.R. (4th) 289 at para. 284 (ONSCJ), aff'd (2000), 6 C.P.R. (4th) 57 (ONCA); *Stovin-Bradford v. Volpoint Properties Ltd*., [1971] Ch. 1007 (CA) at 1016, referred to in *Hutton v. Canadian Broadcasting Corp*., (1989) 29 C.P.R. (3d) 398 at para. 253 (ABQB), aff'd (1992) 41 C.P.R. (3d) 45 (ABCA).
[42] *University of Newcastle v*. *Audio-Visual Copyright Society Ltd* [1999] ACopyT 2; (1999) 43 IPR 505 at paras. 33-39; *Reference by Australasian Performing Right Association under s. 154 of the Copyright Act 1968,* [1992] ACopyT 2 at 17, 43; Audio-Visual Copyright Society Ltd v. Foxtel Management Pty Ltd (No 4) [2006] ACopyT 2 (3 May 2006) at paras. 130-153; *Copyright Agency Ltd. v. Department of Education of NSW*, [1985] ACopyT 1 (20 March 1985) at 8-11; *WEA Records Pty Ltd v Stereo FM Pty Ltd* (1983) 1 IPR 6, at 6-19.

opportunities for the creation and dissemination of copyright materials, it would provide a predictable framework that would make proceedings before the Board more expeditious.

A market-based approach would also promote settlements, as the parties would have no incentives to fight royalty battles based on divergent hypothesis and theories and expert evidence of what is "fair and equitable." The parties would, though, have every incentive to settle at a negotiated rate, knowing that if they are unable to agree, the Board will simply attempt to proximate such a rate. The parties would be empowered, and encouraged, to take rate setting into their own hands, further relieving the system and promoting efficiency.

The willing buyer/willing seller standard would also be consistent with the Supreme Court's guidance that the Board must consider the principles of balance and technological neutrality in setting tariffs. As the Court in the *CBC v. SODRAC* case correctly noted, in an unregulated market, both right holders and users will price their investments and will rationally optimize outcomes across technological platforms and business models.[43] A market standard, such as the willing buyer/willing seller standard, properly reflects the balance in copyright law between right holders and users. Translated into economic terms, it reflects the market based precepts of supply (incentive to create and disseminate works) and demand (the price users will pay). It also takes into account the principle of technological neutrality by implicitly making price adjustments based on factors such as investments made by users and creators. No other economic principle reflects this balance principle, nor does any other set of criteria obviate the obvious and impenetrable and expensive difficulties of trying to price or adduce evidence of "balance" or "technological neutrality" into a royalty rate. Yet, without binding direction, the Board and the Courts will insist on costly and impractical levels of evidence to establish that tariff royalties reflect the balance and technological neutrality principles.[44] Mandating the willing buyer/willing seller principle would also clarify how the Supreme Court's principles of balance and technological neutrality can and should be satisfied and reduce the time and expense of proceedings.

As a result, a clear direction to the Board to set rates based on the best possible estimate of what would be freely negotiated in an unregulated market will assist the Board (and participants) in applying the Court's guidance.

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[43] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 SCR 615, 2015 SCC 57, para. 76 ("In an unregulated market, a commercial user will always consider whether it makes economic sense to pay the license fee demanded by the copyright holder. A license fee that precludes the user from recovering what it considers an adequate return on its investment in its technology will result in there being no license and no royalty").

[44] See *CBC v. SODRAC, ibid,* at paras. 92-93 where the Court states a requirement for the Board to "recognize technological neutrality and balance between user and right-holder interests" in establishing tariff royalties. See also *Re:Sound v. Canadian Association of Broadcasters*, 2017 FCA 138, at paras. 95-99, where the Court of Appeal states that specific evidence of value associated with technological differences is required and suggests that even market-based agreements of the value of a use in a particular environment would have to be supplemented by equivalent agreements showing the market value in the other (or older) technological environment. ("While experts did comment on the increased value of sound recordings in the webcasting setting, no expert provided any indication of how to quantify those differences. The applicant points to their agreements with webcasters as an indicator of this value. However, the agreements alone are not helpful. The technological neutrality analysis is relative, comparing the value of the sound recording under the new and old technology: SODRAC at para. 73. Therefore, the Board would need equivalent market agreements for commercial radio to make a useful valuation.").

The Act expressly authorizes the Governor in Council to prescribe criteria that must be applied by the Board when setting rates.[45] The Federal Court of Appeal acknowledged as much in a recent decision, adding further support that clear rate-setting criteria will bring welcomed clarity.[46] It is vitally important that this direction be provided in the form of a mandatory directive to apply a market-based approach, rather than merely being one factor to be considered among others.[47]

Accordingly, Music Canada recommends that the government provide the Board with decision-making criteria, such as the following, adopted through regulation:

> *Where applicable, the Board must apply the following criteria in rendering its decisions and in certifying any tariffs:*
>
> *(i) the Board shall certify royalties (including equitable remuneration) that most clearly represent the rates that would have been voluntarily negotiated in the marketplace between a willing buyer and a willing seller (including collective societies) for the rights in issue; and*
>
> *(ii) the Board shall consider the best evidence provided to it of the rates that have been or would be voluntarily negotiated in the marketplace for the rights in issue, such as agreements voluntarily entered into between willing buyers and willing sellers (including collective societies) for the rights in issue or for similar rights.*

A set of clear, mandatory rate-setting criteria will undoubtedly result in a more efficient, timely, and predictable tariff-setting process for the Board and its stakeholders. Efficiency will be improved, because the parties will know what evidence will be relevant and what standard will be applied. Timeliness will be improved, because the Board will not be forced to repeatedly reinvent its approach to valuation. Perhaps most importantly, predictability will be improved, because the rates set by the Board will not diverge wildly from expectations. Lastly, this standard will result in the most efficient allocation of economic resources, which will produce the highest standards of economic welfare that will inure to the benefit of creators and users, including the consuming public.

A market-driven approach will promote innovation. A rate-setting process that stands in the way of a functioning marketplace will lose relevance and will ultimately hurt the very stakeholders who must rely on it. As an example of the Board's impact on innovation in Canada, consider the public comments of the former general counsel and chief negotiator at the online music service Pandora on why Pandora is unavailable to consumers in Canada:

> *When I was at Pandora, the primary reason Pandora didn't launch in Canada was because of the delay in the Copyright Board's decisions on webcasting pricing. I remember sitting with then-CEO Joe Kennedy and him saying, "I don't get it. You asked me to come launch a service today and then say, 'Oh, and in two years I'll tell you how much you owe.'" There's no way that a company, particularly a company with shareholders, can launch a service in that kind of an environment.*

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[45] *Copyright Act,* RSC 1985, c. C-42, s. 66.91.

[46] *Supra* note 3.

[47] Note: previous attempts to guide the Board through regulations have had little practical impact on the Board's decision-making, precisely because they left undetermined the weight to be given to these considerations. See Copyright Board, Retransmission of Distant Radio and Television Signals, File No. 1991-10 at 19 ("The Board is required "to have regard to" the criteria. While it is bound to address the issues thus sketched out, it remains free to determine their weight in the final result").

Clearly there is a need, if there is going to be a rate-making process, for that process to be timely.[48]

Finally, Music Canada disagrees with the implication in the consultation paper that more clarity and predictability in the form of rate-setting criteria could somehow "result in some degree of uncertainty". Any complexities that can be expected with the interpretation of new regulations will be dwarfed by the legal and economic uncertainties that already exist in the Board's current rate-setting standards.

Consultation Paper Recommendation 13: Harmonize the tariff-setting regimes in the Act.

Music Canada supports a move towards a more simplified, harmonized tariff-setting scheme – subject to certain modifications and amendments that have been discussed throughout this submission.

Ultimately, there should be greater procedural harmony for all tariff-setting regimes in order to achieve greater efficiency at the Board – regardless of the copyrighted work at issue. For instance, all collective societies and prospective users stand to benefit from:

- Fixed timelines (Recommendation 2);
- Case management of Board proceedings, where no agreement between the parties is reached (Recommendation 3);
- The ability for all participants to enter into licensing agreements of overriding effect with users independently of the Board (Recommendation 6);
- Greater procedural efficiency, clarity and transparency between the parties (Recommendations 5 and 10);
- An overarching mandate for the Board (Recommendation 11); and
- A common set of mandated rate-setting criteria for the Board (Recommendation 12).

However, there are a number of specialized regimes in the *Copyright Act* and it would be inappropriate to delay making changes that are urgent while consideration is given to how all the regimes can be harmonized.

D. Concluding Remarks

Music Canada applauds the government's initiative and urgency in undertaking this reform process. Stakeholders, experts, academics, international observers and government committees have long believed that the Board must operate more efficiently, predictably, and render decisions in a more timely manner. The options for reform that have been proposed in this consultation process would represent significant steps forward for the Board, and provide hope for Board participants that the tariff-setting process will finally be improved.

Music Canada urges the government to seize the significant and longstanding momentum that has developed for urgent Board reforms. For instance, in 2010, the first recommendation by the House of Commons Standing Committee on Canadian Heritage was to "examine the time that it takes for decisions to be rendered by the Copyright Board of Canada" ahead of the statutory five-year review of the *Copyright Act* so that "any changes could be made "as soon as

[48] Comments by Christopher Harrison, now CEO, Digital Media Association, at the Fordham Intellectual Property Law Institute, New York, NY, speaking at a Music Licensing Seminar (April 21, 2017).

possible".[49] More recently, following two days of hearings on the Board's operations and procedures, the Standing Senate Committee on Banking, Trade and Commerce reported that the Board was "dated, dysfunctional, and in dire need of reform."[50] Thankfully, Ministers Bains and Joly have heard the calls, and are taking urgent action.

As the consultation paper also highlights, there has been a wealth of public commentary and research regarding the Board in the last fifteen years. Despite best efforts, improvements to the Board's tariff-setting process are few and long overdue. However, many of the options for reform outlined in the consultation paper, if applied as outlined within this submission, will greatly improve the timeliness, efficiency and predictability of the Board's decision-making process.

The government should be mindful of the relative ease and speed of enacting and amending certain procedures/policies by regulation. While certain amendments and improvements will only be possible through statutory reform, Music Canada strongly urges the government (through the Governor in Council) to accomplish as much as it can – and to the extent it has the authority – by regulatory enactment. Stakeholders can't risk the longer delays and uncertainty that will surely accompany the legislative amendment process; stakeholders urgently require the government to provide them with workable regulatory solutions that provide the Board and its participants with a more timely, efficient and predictable tariff-setting regime.

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In view of the above submission, Music Canada welcomes any questions or comments the government or the Board may have in response. In addition, Music Canada would like to thank Minister Bains, Minister Joly and the Board for their hard work in preparing the consultation paper and the options for reform, and for their commitment to reform and modernize the Board's tariff-setting process.

[49] House of Commons, Standing Committee on Canadian Heritage, "Review of the Canadian Music Industry" (June 2014), at p. 25.
[50] *Supra* note 4.