Options for Reform to the Copyright Board of Canada

SUBMISSION OF THE
COUNCIL OF MINISTERS OF EDUCATION, CANADA, COPYRIGHT CONSORTIUM

INTRODUCTION

The Council of Ministers of Education, Canada's Copyright Consortium (the "CMEC Consortium") is composed of the ministers of education in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Yukon, and Nunavut. Because copyright law has significant implications for Canada's education sector, the CMEC Consortium welcomes the opportunity to comment on the discussion paper, *A Consultation on Options for Reform to the Copyright Board of Canada* (the "Discussion Paper") published on August 9, 2017.

The CMEC Consortium believes that several of the options in the Discussion Paper raise significant policy questions that would directly affect the ability of the Copyright Board (the "Board") to protect users of copyright-protected material from the monopoly powers of collectives. The *Copyright Act* (the "*Act*") contains a carefully constructed set of checks and balances that, taken together, allow rights holders to exercise their rights collectively because the Board protects users from any abuse of collectives' monopolies. Changes to any one of these checks and balances could result in unintended consequences that could adversely affect both rights holders and users. Any changes therefore require careful analysis before being implemented.

The CMEC Consortium's comments on each of the Discussion Paper's proposed options are set out in what follows.

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

This option suggests that the Board would become more efficient if the *Copyright Act* or a regulation required or authorized it to conduct its proceedings informally or expeditiously, or allowed it to dispense with or vary some of its procedural rules, where the circumstances and considerations of fairness and the public interest permit.

Amending the *Copyright Act* or enacting a regulation requiring or authorizing the Board to expedite its proceedings would add nothing to the Board's existing ability or powers in this regard. General principles of administrative law apply to the Board. Under the extensive body of law that exists on the powers of administrative tribunals, the Board is already master of its own procedures. Nothing currently prevents the Board from managing its proceedings expeditiously.

This option indirectly implies that the Board somehow manages its proceedings in a non-expeditious manner. The Board does not deliberately decide it will slow its proceedings down. In fact, and in everyday practice, the Board is constantly imposing deadlines on the

parties who appear before it and will not extend those deadlines unless a party has a good justification for an extension. In other words, the Board already has all the powers necessary as part of its inherent legislative authority to move proceedings forward as quickly as possible and it exercises those powers to its fullest ability.

By way of example, the most recent Board decision in online music grouped the proposed tariffs of three collectives into a single proceeding. This is not new for the Board. The commercial radio tariffs going back to the early 2000s considered the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and what was then known as the Neighbouring Rights Collective of Canada (NRCC) (currently Re:Sound) tariffs together. The Board also merged two Access Copyright government tariff proposals into a single hearing. The Board's ability to consolidate tariffs and hearings has been subsequently confirmed by the Federal Court of Appeal.[1]

The Board's ability to consolidate tariffs and hearings is valuable. In the music field, there are multiple rights holders and multiple collectives administering those rights. Where possible and feasible, the Board exercises its powers to hear evidence from all rights holders in a single hearing so that it has the entire picture before setting tariffs that affect competing collectives.

The Board has been consolidating hearings on related tariff proposals for many years. Its practice is to consult with the parties and hear their views before deciding on the most expeditious way to proceed. The Board uses its existing administrative law powers to require joint hearings when that is the most expeditious way to proceed. Nothing would be added to the administration of copyright by explicitly requiring or authorizing the Board to advance proceedings expeditiously.

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

This option may have its origins with the Copyright Royalty Board ("CRB") in the United States. The CRB certifies only five tariffs, each of which is filed at different times and must be for a period of five years.[2] The CRB issues preliminary findings, those findings are reviewed, and the tariff is then reissued. How this system would work if applied to the more complex and voluminous workload of the Board requires careful analysis. It is

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[1] *Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada*, 2003 FCA 302, online: http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/31933/index.do?r=AAAAAQAaY29weXJpZ2h0IHRhcmlmZnMgaGVhcmluZ3MB, at para 56.

[2] *Copyright Law of the United States* (Title 17), online: https://www.copyright.gov/title17/, at s. 804 (b) (1) and ss. 111, 112, 114, 115, 116.

possible that, given the volume and complexity of the Board's tariff-setting role, setting fixed deadlines would not work well. In practice, each Board proceeding unfolds differently. A "one-size-fits-all" set of deadlines would simply not work.

The Board process is long when the Board is dealing with inaugural tariffs and when tariff proposals seek large increases in existing rates. That the Board takes the time to consult the parties on the many issues that arise in the course of a proceeding benefits the parties because they are able to express their views. The policy issue raised by this option is whether it is better for the Board to take the necessary time to adjudicate issues that arise between the parties as the normal part of the Board proceeding or have these issues taken to the Federal Court of Appeal on judicial review. In practice, the Board is well equipped to deal with these issues as they arise in the normal course of a proceeding. The Federal Court of Appeal is not. Its role is to adjudicate on matters of law, on whether Board procedures were fair, and on whether the Board's final decision is reasonable.

It bears noting that judicial review proceedings can be helpful to the Board and to the parties. First, judicial review decisions establish legal principles to guide future cases. The Federal Court of Appeal should not be cast into the role of having to review matters that the Board was unable to consider because of legislated deadlines in the *Copyright Act* or regulations. Second, the Board has the expertise to assess complex economic evidence, something the Federal Court of Appeal does not have. Third, the Federal Court of Appeal must have sufficient reasons in the Board decision it is reviewing to decide whether a Board decision is reasonable, legally correct, and procedurally fair. If the ability of the Board to produce these reasons is limited because of the imposition of artificial deadlines to issue decisions, there will be more judicial review applications than ever before. Judicial review applications are costly and take more time to ultimately have a final decision. If the Federal Court of Appeal sends the decision back to the Board for reconsideration, another proceeding before the Board must take place which can extend the time to reach a final decision exponentially.

Finally, any government consideration of this issue should also consider deadlines for collectives to bring their tariff proposals before the Board for certification. Some collectives file tariffs to start the "meter running" and then do nothing to have them certified for many years. As the years roll by, collectives have no incentive to proceed because the meter continues to run until the final tariff is certified. Users, on the other hand, face an ever-increasing bill that must be paid on a retroactive basis. An example is the Access Copyright provincial and territorial government tariff proposals. The first tariff was filed in 2004 and the second in 2009. However, the collective did not initiate the hearing process until more than five years after the first tariff had been filed. The Board finally issued a notice on September 8, 2009, requiring the parties to discuss scheduling

and report back to the Board.[3] It is not clear how long the process would have taken if the Board had not issued this notice.

OPTION 3: Implement case management of Board proceedings.

In practice, each contested Board proceeding involves multiple orders, notices, and procedural rulings. Often, each of these steps requires original and reply submissions from the parties and a Board ruling for reasons of procedural fairness. Case management could help to reduce the work load involved in this process. An analysis of existing case-management systems would be required to appropriately assess how case management could be used in Board proceedings.

This option suggests that case management could be applied to "the evidence sought to be filed, including both fact and expert evidence."[4] This would go beyond procedural direction and extend case management to the substantive preparation of a party's case. On one hand, proceedings before the Board are adversarial. On the other hand, the Board needs evidence to make its decisions. An example is that repertoire-use studies are often needed by the Board to calculate rates. Although the Board currently attempts to have the parties agree on the evidence, it does not direct how the parties must make their cases before the Board. There is a policy implication arising here: adversarial proceedings could be transformed into a Board-supervised mediation process. This would be a fundamental policy change in the administration of copyright in Canada, and would undoubtedly be unwelcomed by the parties to Board proceedings.

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

In the court system, costs are generally awarded on the basis of who wins and who loses a case. At the Copyright Board, there are no winners or losers. The Board sets a rate to be paid for the use of a copyright-protected work. Therefore, the award of costs has no place in Board proceedings. Justice Vancise, the former Copyright Board Chairman, had this to say about costs in a speech he delivered on May 25, 2016:

> … the awarding of costs in a regulatory proceeding as distinct from a trial or other adversarial process is not only impossible but not helpful. To take an obvious example, should Access Copyright be punished in costs in

[3] Notice of the Board, September 8, 2009, online: http://www.cb-cda.gc.ca/avis-notice/index-e.html#access1-08092009; "The Board however intends to proceed with the examination of the proposed tariffs for 2005–2009 and 2010–2014 diligently. While it wishes to encourage and facilitate discussions between parties, the Board must ensure that the proceedings leading to a hearing are not unreasonably delayed. Consequently, parties are encouraged to engage in substantive and scheduling discussions with a view to reporting to the Board, in writing, no later than Friday, November 13, 2009."

[4] A Consultation on Options for Reform to the Copyright Board of Canada, August 2017, page 9.

> both Government and K–12 because it did not achieve the amount of the tariff that it requested or should it receive costs on a lesser scale because it achieves only a minimal amount of what it requested. The Board's role is to set a tariff that is fair and equitable both for the right holders and the users. There are no winners and no losers. In my tenure at the Board, I can hardly think of a situation that would have warranted awarding costs. The legal community that practices before the Board acts in good faith, representing their clients' interests vigorously. There may be at times examples of "remedial overreach" or expressions of "litigation culture" but this does not warrant costs.[5]

The power to award costs *might* be useful to the Board in a case where a party causes unnecessary delays for another party or the Board or acts egregiously in some way. This, however, is unlikely to happen very often.

OPTION 5(a): Require collective societies to include additional explanations with proposed tariffs.

Requiring collectives to provide more information about tariff proposals would help to limit the "fishing expeditions" that are a major problem with the Board's interrogatory process. Interrogatories are one of the most burdensome, time-consuming, and costly part of any Copyright Board proceeding—especially for users. Collectives seek a great deal of information, much of which is never used because it is not relevant to the case the collective makes to the Board. Having more information would also assist the Board in ruling on interrogatory objections by providing more background and a context within which to make its rulings.

For example, at the outset of the Board's recent hearing to set the Access Copyright K–12 education tariff, and along with its interrogatories, Access Copyright provided a list of issues to the objectors, each of which was explicitly linked to several of the interrogatories. As a result, disputes over the relevance of interrogatories were either avoided or were much easier to resolve. In its March 25, 2013 notice, the Board expressed its appreciation in the following terms: "The statement of issues filed by Access, while still wide-ranging, is of some help in focusing the issues."[6]

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[5] Speech delivered by the Honourable William J. Vancise, Former Chairman of the Board, ALAI Symposium, The Copyright Board of Canada: Which Way Ahead? Ottawa, Ontario,
May 25, 2016. Available at http://www.cb-cda.gc.ca/about-apropos/speeches-discours/30052016-en3.pdf.

[6] Please see Copyright Board of Canada, Notices and Rulings, March 25, 2013, online at http://www.cb-cda.gc.ca/avis-notice/index-e.html#access3-25032013 under the heading "Access Questions to Objectors."

There may be other situations where it would be useful to require early disclosure of the reasons for a tariff proposal. One is where there is a tariff proposal that seeks large increases to previously established rates.

For example, traditionally royalties in the commercial radio tariff have been divided between SOCAN and Re:Sound, with Re:Sound receiving slightly less than half what SOCAN receives. Five collectives are involved in the tariff for commercial radio (SOCAN, Re:Sound, CSI, Connect/SOPROQ, and Artisti). Although four of the five collectives could be content with the rate in the existing tariff, one collective might want its share to be quadrupled. In this situation, it would be useful to the Board, the other collectives, and to the commercial radio stations to know the basis upon which this one collective proposes to justify a four-fold increase in its share of the tariff royalties. Currently the Board does not have the explicit power to require that this information be provided.

In adversarial proceedings at the Board, the parties closely guard their case strategies. If the parties were required to provide additional information at an earlier stage it could possibly lead to more settlement agreements, thereby reducing the number of hearings in contested cases.

OPTION 5(b): Require objectors to include additional explanations with statements of objection.

This change could also save the Board time. Currently some objectors file objections, only to withdraw them once they have received more information from the collectives relating to their tariff proposals. The objection is filed as a form of "placeholder" to give the objector more time to decide whether to actually proceed with the objection. This practice adds unnecessarily to the Board's work load. If more explanation was required, it could reduce the number of withdrawn objections and free up the Board staff to work on other matters.

Of course, to provide objectors with enough information to include additional explanations of their objections, the collectives filing proposed tariffs will need to have included additional information themselves. In other words, option 5(b) cannot be implemented without option 5(a) also being implemented.

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

This option raises complex and important public policy issues. As mentioned in the introduction, any option that would directly affect the Copyright Board's ability to protect users of copyright-protected material from the monopoly powers of collectives requires a careful analysis of the implications of the change being considered.

Public policy requires safeguards to protect the public against potential abuses of the monopoly powers inherent in the collective administration of copyright rights. A cornerstone in this system is the oversight by the Copyright Board pursuant to section 70.5 of the *Copyright Act*, and the Commissioner of Competition under the *Competition Act*.

There is an obvious danger should this option be implemented that can be best explained with an example. Assume a fact situation with eighteen users and one collective. Using a deliberate negotiation strategy, the collective successfully concludes agreements with one or even two users who are willing to pay rates that the other sixteen users consider too high. The collective under this option could then use section 70.2 to have the Board arbitrate agreements with the other sixteen users based on the cherry-picked negotiated agreements. For the Board to hold sixteen arbitration hearings, rather than set a tariff for all eighteen users at once, would require more Board time and resources, not less.

This is only one of many examples that could be described. The policy implication is that simply allowing collectives to negotiate licences without having to involve the Board is not as simple as it may seem. The interrelationship of the various tariff regimes and the way they can be used is complex. Simply put, Board oversight is required. The Board currently performs this role, often to the chagrin of collectives. The Board's oversight role serves an essential public policy purpose and it should not be changed without a clear understanding of all the policy implications of the changes.

To protect the public interest, it would be useful to require that all agreements that collectives enter are filed with the Board. This would provide a complete picture for setting the rates for each sphere of copyright activity. In setting rates, the Board would benefit from having complete information about existing licences in each sphere of copyright activity. Without this information, the Board is put in a similar situation to that of a real estate appraiser who sets the price on a new home without being able to see what comparable homes might be selling for in the same neighbourhood.

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

This could potentially reduce the Board's work load since it would have fewer tariffs to certify.

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

This option could increase Board efficiency with simple tariff renewals. For opposed tariffs, an additional two or three months will not have much impact.

A related issue is how far into the future the Board and the parties can reasonably be expected to foresee. In the United States, tariffs have to be filed for five-year periods.[7]

Literature on this point indicates that at least some parties and judges have difficulty with having to look forward for an entire seven-year period. As a result, some collectives file higher tariffs than they might otherwise file as they attempt to anticipate values and costs six or seven years ahead. In the online environment, things change quickly, thereby making seven years a relatively long period of time.

If the *Copyright Act* required tariffs to be filed for at least two-, or even three-year, periods, the Board would have less work to do than is currently the case. The current *Copyright Act* allows for tariffs to be filed for as short a time as one year.

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

The existing *Copyright Act,* for all the different tariff regimes, provides that certified tariffs continue until a new tariff is certified. This does not apply to inaugural tariffs, nor should it.

Sections 67 to 68.2 (principally relating to SOCAN and Re:Sound)

Sections 67 to 68.2 of the *Copyright Act* apply to collective societies in the business of collecting royalties:

- for the performance in public of musical works, dramatico-musical works, a performer's performances of such works, or sound recordings;
- the communication by telecommunication to the public of such works;
- 68.2 (3) applies to permit the use of those works and the collection of royalties pending the *renewal* of a tariff.

[7] *Copyright Law of the United States* (Title 17), online: https://www.copyright.gov/title17/, at s. 804 (b) (1) and ss. 111, 112, 114, 115, 116.

Sections 70.1 to 70.191 (principally relating to Access Copyright, CMRRA, and SODRAC)

- Similarly, sections 70.1 to 70.191 apply to collective societies in the business of licensing rights under sections 3, 15, 18, and 21;

- 70.18 applies to permit the use of those works and the collection of royalties pending the *renewal* of a tariff.

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

The Board already has general administrative law principles to guide its work. Putting the *Model Directive on Procedure* into regulations would not change much except to make changes to the *Directive* more difficult to implement. Any regulations would become much harder to change than a Board Notice. Further, codifying the Board's procedures would give adversarial-minded parties more to argue about. For these reasons, it would not be desirable or helpful to codify or clarify Board procedures in regulations.

What could be of assistance is for the Board to extend its current practice of issuing notices with respect to some procedural matters. Items such as the treatment of expert witnesses and interrogatory procedures are examples of where additional notices from the Board could be helpful. This would be of some assistance to the parties and eliminate the repeated rulings the Board has to make on these issues and others like it.

(a) Statement of issues

A statement of issues could help to focus the issues to be adjudicated by the Board, to make interrogatories less of a prolonged "fishing expedition," and to eliminate non-issues as early as possible. For example, where it turns out that there is agreement on the facts among the parties to a Board proceeding, the need for witnesses to testify in relation to these facts at the Board's hearing could be eliminated in many cases. Here are a few examples of how other federal administrative tribunals deal with statements of issues.

Competition Tribunal

The *Competition Tribunal Act* enables the Tribunal to make rules regulating its practice and procedure.

Regarding Statements of Issues, those rules state:

6. Where in these Rules a reference is made to a memorandum of fact and law, the memorandum of fact and law shall contain a table of contents and, in consecutively numbered paragraphs,

(a) a concise statement of fact;

(b) a statement of the points in issue;
(c) a concise statement of the submissions;

(d) a concise statement of the order sought, including any order concerning costs;

(e) a list of the authorities, statutes, and regulations to be referred to; and

(f) an appendix, and if necessary as a separate document, a copy of the authorities (or relevant excerpts), as well as a copy of any statutory or regulatory provisions cited or relied on that have not been reproduced in another party's memorandum.

Canadian International Trade Tribunal

The *Canadian International Trade Tribunal Act* enables the Tribunal to make rules governing its proceedings, practice, and procedures.

Regarding Statements of Issues, those rules do not contain any provisions. However, there is a possibility to hold a pre-hearing conference during which the clarification and simplification of issues may be sought.

18 (1) At the same time as giving a notice of a hearing to be held in any proceeding or at any time after the giving of that notice, the Tribunal may direct that all parties to the proceeding or their counsels appear before the Tribunal or before a member thereof or the Secretary, at a time and place fixed by the Tribunal, for a pre-hearing conference for the purpose of making representations to the Tribunal or receiving guidance from the Tribunal with respect to any of the following matters that the Tribunal specifies:

(a) the clarification and simplification of issues;

(b) the procedure to be followed at the hearing;

(c) the mutual exchange between parties to the proceeding of written submissions, exhibits, and other material presented or to be presented to the Tribunal;

(d) the question of whether any written submission, other document, or testimony presented or proposed to be presented to the Tribunal contains confidential information;

(e) the question of the confidential information, if any, to which a person who is to appear on behalf of a party in the capacity of an expert on any matter should be given access; and

(f) any other matter that is relevant to the hearing.

(2) Counsel for any party to a proceeding may, if notice of a hearing has been given in the proceeding, make a written request to the Tribunal to direct that a pre-hearing conference be held to consider any matter referred to in subrule (1).

(3) On receipt of a request referred to in subrule (2), the Tribunal may direct that a pre-hearing conference be held if it determines that a pre-hearing conference would assist in the orderly conduct of the hearing.

(4) The Tribunal may conduct the pre-hearing conference in any manner that gives the parties or their counsel a fair opportunity to participate.

Patented Medicine Prices Review Board

The *Patent Act* enables the Patented Medicine Prices Review Board to make rules regulating the practice and procedure of the Board.

Regarding Statements of Issues, those rules do not contain any provisions. However, there is a possibility to hold a pre-hearing conference during which the issues may be identified or circumscribed.

23 (1) The parties must appear before the Board at the date, time, and place fixed by the Board for a pre-hearing conference for the purpose of

(a) identifying or circumscribing the issues;

(b) allowing the Board to receive and consider representations referred to in subsection 86(1) of the Act and determine whether the hearing will be held in private; and

(c) resolving any other issue that may facilitate the conduct of the hearing.

(2) The Board may direct that issues referred to in subsection (1) be addressed during a teleconference with the parties or in written submissions to be filed with the Secretary in any manner that the Board may determine.

(3) The Board may require any party who participates in the pre-hearing conference to file and serve, at any time before or during the pre-hearing conference and in any manner that the Board may determine, a written submission setting out any information that the Board considers necessary to expedite the proceeding, including a concise statement of any procedural issues or questions on the merits that the party intends to raise at the hearing.

(4) The Board may, if necessary, postpone, suspend, or adjourn and may reconvene a pre-hearing conference on any conditions that the Board considers appropriate.

Ontario Energy Board

The *Statutory Powers Procedure Act*, and the *Ontario Energy Board Act*, enable the Board to make rules governing practice and procedure.

Regarding Statements of Issues, those rules state:

28.01. The Board may identify issues that it will consider in a proceeding if, in the opinion of the Board:

(a) the identification of issues would assist the Board in the conduct of the proceeding;

(b) the documents filed do not sufficiently set out the matters in issue at the hearing; or

(c) the identification of issues would assist the parties to participate more effectively in the hearing.

28.02. The Board may direct the parties to participate in issues conferences for the purposes of identifying issues, and formulating a proposed issues list that shall be filed within such a time period as the Board may direct.

28.03. A proposed issues list shall set out any issues that:

(a) the parties have agreed should be contained on the list;

(b) are contested; and

(c) the parties agree should not be considered by the Board.

28.04. Where the Board has issued a procedural order for a list of issues to be determined in the proceeding, a party seeking to amend the list of issues shall do so by way of motion.

There are, however, drawbacks with this idea that could result in slower rather than faster proceedings. First, in adversarial proceedings, producing a "joint" statement of issues is highly unlikely. Second, attempting to produce a "joint" statement of issues would be a time-consuming process. If the Board were to be involved in the process, the process would require arguments and counter-arguments from the parties about the content of the statement of issues. On the other hand, if the parties were to attempt to produce a statement of issues without Board involvement, it is doubtful whether an agreement could be reached. Therefore, in our view, it would be preferable for the Board to require the parties to submit separate statements of issues.

(b) Interrogatory process

As a preliminary matter, the CMEC Consortium suggests that consideration be given to providing the Board with the ability to ask its own interrogatories. The Ontario Energy Board ("OEB") and the Canadian Radio and Television Commission ("CRTC") have this ability and therefore provide useful examples for consideration.

The OEB Rules of Practice and Procedure ss. 26 and 27 regarding interrogatories and responses to interrogatories can be found at: http://www.ontarioenergyboard.ca/oeb/_Documents/Regulatory/OEB_Rules_of_Practice_and_Procedure.pdf. For a sample of interrogatories from OEB staff and responses by Toronto Hydro, please see: https://www.torontohydro.com/sites/electricsystem/Documents/CIR2015/IRs_Issue8_20141105_Corrected.pdf.

The CRTC Rules of Practice and Procedure, ss. 72 to 76, lay out the Request for Information process: http://laws-lois.justice.gc.ca/PDF/SOR-2010-277.pdf. For a CRTC interrogatory timeline, please see this CRTC Telecom Notice of Consultation 2015-134, and refer to paras. 54–63. http://www.crtc.gc.ca/eng/archive/2015/2015-134.htm. For the CRTC's Request for Information/interrogatory letter to licensees, Bell Canada and Cogeco Cable Inc., see: http://crtc.gc.ca/eng/archive/2014/lt141212a.htm.

The points that the Consortium sees as being most relevant in these examples are:

- Both the CRTC and OEB are able to ask their own interrogatories;

- In the OEB's case, the rules contemplate the OEB asking interrogatories *after* the parties have already filed their evidence (Rules 26.01(a) and 26.02(b));

- OEB rule 26.01 lists specific purposes for the interrogatory procedure—to clarify evidence filed by a party; to simplify the issues; to permit a full and satisfactory understanding of the matters to be considered; or to expedite the proceeding. These specific purposes set the tone for a more focused and specific interrogatory process.

The Discussion Paper under review suggests that the Board interrogatory process could be made more efficient and require less Board involvement if the following rules were put into regulations. Our comments appear after each proposed rule.

- Clarify that parties may make and need respond to only requests that are proportionate to the nature and complexity of their disputes and their respective positions and relevant and material to the resolution of disputed issues;

  Comment: the Board already does this. Nothing would be added by putting this practice into a regulation.

- Require in cases involving multiple collective societies or objectors that generally aligned parties must consolidate their interrogatories into a single set or satisfy the Board as to why it would be unjust or inefficient to do so;

  Comment: the Board already does this. Nothing would be added by putting this practice into a regulation.

- Require that parties must explicitly link their interrogatories to specific issues identified in their statements of issues (see above) and that parties must include in their replies to objections to interrogatories explanations as to how the information sought is relevant to specific issues identified in their statements;

  Comment: A statement of issues could help to focus the issues to be adjudicated by the Board and to make interrogatories less of a "fishing expedition." However, as noted in (a) earlier, there are drawbacks that could result in slower rather than faster proceedings. Requiring each interrogatory to be linked to an issue in dispute could reduce the burden of the interrogatory process and avoid the collection of information that is not eventually entered into the Board's record as evidence.

- Clarify that interrogatories are to be exchanged after collective societies' replies to objections have been sent to the objectors;

  Comment: This text is unclear. Is the reference to a specific time frame? If that is the case, then proceedings would automatically begin after objections are filed. This may not be feasible in all cases.

- Clarify that responses to interrogatories need only be gathered from a representative sample of an association's members, rather than from all members;

  Comment: The Board already does this. Nothing would be added by putting this practice into a regulation.

- Require that a party's responses to interrogatories be provided at the same time as its objections to other interrogatories posed, if any, so motions regarding the sufficiency of the party's responses and objections to interrogatories may be heard at the same time; and

  Comment: This would not work where the objection is that the interrogatory is too onerous/burdensome. Some flexibility is required because circumstances vary from one proceeding to another.

- Require that parties use a standardized format for communicating interrogatories, responses thereto, objections thereto, replies to objections, etc., such as a table that enables readers to cross-reference the foregoing.

  Comment: The Board already does this. Nothing would be added by putting this practice into a regulation.

(c) Simplified procedure

Whether this would produce efficiencies depends on the nature of the tariff proposal before the Board. Where a tariff is not opposed, a simplified procedure could reduce the Board's workload. If no objection is filed, the public interest still should require the Board to review the tariff proposal. If it is a renewal and there is no increase in the proposed rate, there is a place for a simplified procedure. In cases where a rate increase is proposed, the Board should consider the interests of members of the public or parties who are not represented and take any actions it deems necessary and appropriate in the circumstances.

(d) Evidence

It is unlikely that regulations authorizing the Board to direct how the parties are to prepare their evidence would result in Board proceedings being faster. This option would require more time because the parties would endlessly disagree. In practice, where agreements between the parties can be found, they are. For example, with the help of the Board, joint surveys have been conducted. This is the exception though, not the rule. In practice, this type of regulation would not likely result in any efficiencies because each opposed Board proceeding unfolds differently. There is no one-size-fits-all rule that can be captured in regulations directing how evidence should be collected, generated, or presented.

(e) Confidentiality

There does not currently exist any debate among the parties who regularly participate in Board proceedings with respect to the Board treatment of documents—whether public or confidential. In this regard, the Board's *Model Directive on Procedure* notes that "Any document filed with the Board is placed on the public record unless the Board orders otherwise." The directive then goes on to set out the procedures to follow in the event a party wishes to file a document with the Board on a confidential basis. Normally, this would require the issuance by the Board of a standard Confidentiality Order and the execution by those individuals who require access to such documents of a formal Confidentiality Agreement. Within this context, there would not be any advantage or improvement to be gained relative to the Board's existing procedures by the codification of strict rules relating to the treatment of confidential information and evidence.

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

The policy rationale for amending the *Copyright Act* to specify the mandate of the Copyright Board is neither explained in, nor obvious from, the Discussion Paper. The description of the Board's mandate, if it is to be added to the *Copyright Act*, must be expressed simply so as not to encroach on the independence of the Board. An example of a simple expression of the mandate of the Board is "to set fair and equitable tariffs." If the mandate were to be made more specific, the description would be the product of what different lobby groups would like to see included.

This is illustrated by the case law on the mandate of the CRTC in section 3 of the *Broadcasting Act*. The mandate is internally contradictory and provides adversarial parties with another thing to argue and appeal about. For an example, see the Supreme Court of

Canada's decision in *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*.[8]

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

In practice, the Board—which has always been an expert rate-setting tribunal—takes into account the evidence and arguments presented by the parties as it carries out its rate-setting function, and brings to bear its own staff economists' expertise on those arguments and evidence. Market rates, willing buyers and willing sellers, proxies for value, and technological neutrality are all issues that can be relevant to varying degrees to the function of setting fair and equitable tariff rates in Board proceedings. As such, when circumstances require, they are all already taken into consideration by the Board in its various tariff-setting decisions.

The Board's copyright expertise is brought to bear in all of its work. Such being the case, the Board does not need a formalized list of factors imposed on it to know how to fulfill its legislative mandate. Requiring the Board to take a predetermined set of factors and criteria into account in those cases in which they may be neither relevant nor probative will only require the Board to explain at some length in its decisions why it considers such factors not to be relevant. That would not be a productive use of the Board's time or resources. Moreover, if the Board is required to take a list of criteria into account and concludes that some or all of them are not relevant, or disagrees with arguments made regarding the application of some of them, the Board's conclusions, however reasonable, will likely become grounds for judicial review.

As such, a list of relevant criteria should not be specified to the Board. Rather the Board's independence and long-standing expertise and proven ability to weigh and consider the evidence—as an expert tariff-setting tribunal—is still the best method of determining which factors and evidence are the most relevant in the particular cases that are before it.

No purpose would be served by the imposition on the Board of a preselected list of factors and criteria that it would be required to take into account in reaching its decisions using a one-size-fits-all approach. Such factors and criteria would essentially attempt to dictate to the Board the criteria it should employ in determining the "fair and equitable" tariff rates that should apply in widely differing evidentiary situations.

In the event, however, that such factors and criteria are eventually imposed on the Board, whether by regulation or by legislation, at the very minimum, the list must not be exhaustive, and the criteria should be applied only if, in the view of the Board, they are

[8] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168,* online: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12767/index.do.

appropriate to the evidence that is before it. This being said, the CMEC Consortium strongly opposes the imposition of such criteria on the Board.

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

This task is too large to consider doing in the time frame of this consultation. Any recalibration of the current tariff regimes in the *Copyright Act* could produce unintended consequences. The consequences of changes on rights holders and users need to be identified and considered. Case law needs to be applied to each proposed change. The way the existing regimes work, and do not work, need to be identified so that the good is retained and only the bad is repealed. A hurried recalibration of the current regimes could end up creating more problems than it solves. This task of harmonizing the tariff-setting regimes in the *Act* is a task that would be best conducted as part of the government's overall copyright reform work.

Further, it is not clear why any differences among the *Act*'s various tariff-setting regimes would have any effect on the Board's ability to do its work efficiently. The Board is an expert tribunal and is very familiar with the different tariff regimes at play.

CONCLUSION

Generally, participants in Board proceedings are not satisfied with the Board's decisions. This is to be expected because there is typically a lot of money at stake in the Board's proceedings. Collectives always think that their tariff rates should be higher. Users are equally dissatisfied because they think the rates should be lower. This is unlikely to ever change.

The problem is not that the Board does not set fair and equitable tariffs; it is that it takes too long to do so. This problem will not be corrected by specifying the Board's mandate in the *Copyright Act* or by setting out a list of criteria that the Board must consider in making its decisions. If anything, doing this would add to the work the Board is required to do, not lessen it. Some of the procedural changes described in the Discussion Paper could, however, result in Board decisions being issued in a more timely manner. Others, if implemented, could have the opposite result.