Copyright Board Canada

Commission du droit d'auteur Canada

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Citation	CB-CDA 2017-091
Regime	Collective Administration of Performing and of Communication Rights *Copyright Act*, subsection 68(3)
Members	The Honourable Robert A. Blair Mr. Claude Majeau Mr. J. Nelson Landry
Proposed Tariffs Considered	Re:Sound Tariff 3.A – Background Music Suppliers (2010-2013) Re:Sound Tariff 3.B – Background Music (2010-2015)

Statement of Royalties to be collected for the public performance or the communication to the public by telecommunication, in Canada, of published sound recordings embodying musical works and performers' performances of such works

Reasons for decision

I. INTRODUCTION

[1] On March 31, 2009, 2010, 2011, and March 30, 2012, Re:Sound (formerly NRCC) filed, pursuant to section 67.1 of the *Copyright Act*[1] (the "*Act*"), statements of proposed royalties to be collected for the public performance and the communication to the public by telecommunication in Canada of published sound recordings embodying musical works and performers' performances of such works in respect of the use and supply of background music for the years 2010, 2011, 2012 and 2013 to 2016, respectively. These are referred to jointly in these reasons as "Proposed Tariffs."

[2] The Proposed Tariffs were published in the *Canada Gazette*. On each occasion, prospective users and their representatives were given notice of their right to file objections.

[1] *Copyright Act*, R.S.C. 1985, c. C-42.

A. THE OBJECTORS

[3] The Hotel Association of Canada (HAC), Restaurants Canada (formerly CRFA), the Retail Council of Canada (RCC), DMX Music Canada Inc. (DMX), Bell Canada (Bell), Stingray Digital Group (Stingray), Totem Medias Inc. (Totem), and, jointly, Rogers Communications Inc., Shaw Communications Inc., Bell Canada, Quebecor Media Inc., and Cogeco Cable (the Broadcasting Distribution Undertakings, or "BDUs") filed timely objections to at least one of the Proposed Tariffs for 2010 to 2016.

[4] DMX, Bell, Stingray, Totem, and the BDUs provide background music to commercial establishments across Canada. Throughout the decision, they will be referred to as the "Supplier Objectors." HAC, Restaurants Canada, and RCC represent businesses and commercial establishments in the retail, food and lodging industries where background music is performed. These Objectors are referred to as the "Establishment Objectors."

i. Withdrawals

[5] The Canadian Broadcasting Corporation, the *Association des restaurateurs du Québec*, the Canadian Federation of Independent Business, PJJ Productions, the Sony Centre for the Performing Arts, the Corporation of Roy Thompson Hall and Massey Hall, the National Arts Centre, the *Place des Arts*, the Royal Conservatory of Music (in respect of Koerner Hall in Toronto), the Professional Association of Canadian Theatres, and the Canadian Arts Presenting Association also objected to one or more of the Proposed Tariffs, but eventually withdrew their objections. The Fitness Industry Council and GoodLife Fitness Centres both requested intervenor status, and later withdrew.

[6] On July 23, 2014, the BDUs wrote to the Board stating that they are withdrawing their objections conditionally on the Board certifying Re:Sound Tariff 3 with the same terms and conditions as those reflected in the Settlement Tariff referred to later. The Board continued to treat the BDUs as objectors to the matter.

[7] Life Time Fitness Inc. and County Magazine & Breakaway, who also objected, are deemed to have withdrawn further to a notice of the Board of April 24, 2015, informing parties that those who would not confirm their participation would be deemed to have withdrawn.

B. PROPOSED CONSOLIDATION

[8] In its objections of September 29, 2010 to SOCAN's proposed Tariff 15 (Background Music) and Tariff 16 (Background Music Suppliers) for 2011, RCC requested that the Board consolidate the consideration of those tariffs with Re:Sound's Proposed Tariffs, as the former tariffs would target the same activities as the latter. After SOCAN, on January 31, 2011, asked the Board to set

in motion the process leading to an oral hearing to determine its Tariff 15 for the years 2008 to 2011, RCC, on February 18, 2011, reiterated this request.

[9] Re:Sound opposed such a consolidation. It argued as follows. First, it was not ready to proceed with a hearing on its Proposed Tariffs. Rather, its focus was on the certification of its inaugural Tariffs 5 (Live Events) and 8 (Non-Interactive and Semi-Interactive Webcasts). Second, it had begun discussing a possible settlement with objectors to Tariff 3: it was therefore unnecessary to schedule a hearing. Third, the scope of the changes from the previously certified *Re:Sound 3 (2003-2009)*[2] to the Proposed Tariffs was more extensive than that of the proposed changes to SOCAN Tariffs 15 and 16: there was therefore limited overlap between the SOCAN tariffs and Re:Sound's Proposed Tariffs. Finally, numerous participants had opposed the Proposed Tariffs, whereas only a few had opposed SOCAN Tariffs 15 and 16.

[10] The Objectors, for their part, all supported the joint examination of the Proposed Tariffs.

[11] On May 17, 2011, the Board ruled that the Proposed Tariffs would not be consolidated with SOCAN Tariffs 15 and 16. One of the reasons for this decision pertained to the number of objectors with diverging points of view involved in Tariff 3. Another was that SOCAN was seeking the status quo, whereas Re:Sound was seeking significant changes to its Tariff 3.

C. NEGOTIATIONS AND PROPOSED SETTLEMENTS

[12] In its ruling on consolidation, the Board also ordered that Re:Sound provide a status report on the negotiations between the parties before September 15, 2011.

[13] Thereafter, the Board regularly asked to be apprised of the status of the negotiations between Re:Sound and the Objectors. Each time, Re:Sound stated that the negotiations were progressing and proposed a new deadline for a subsequent update.

[14] On August 30, 2013, Re:Sound informed the Board that it had reached an agreement with the Supplier Objectors, namely the BDUs, Stingray, DMX and Totem. The parties were in the process of drafting the Settlement Agreement, in the form of a draft tariff, and would advise the Board once finalized. Re:Sound also indicated that it had forwarded the draft settlement to the other objectors to Tariff 3. It therefore required more time to explore the possibility of a settlement with the remaining objectors.

[15] On February 28, 2014, and despite the fact it had previously announced that it had reached an agreement with the Supplier Objectors, Re:Sound advised that it was still waiting on

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[2] *NRCC Tariff 3 – Use and Supply of Background Music, 2003-2009* (20 October 2006) Copyright Board Decision. [*Re:Sound 3 (2003-2009)*]

comments on a Settlement Agreement from one of the Objectors. It further advised that, upon completing the execution of the Settlement Agreement, it would file a proposed "Tariff 3.A," applicable to Supplier Objectors, for the years 2010 to 2013, and would ask the Board to certify a tariff based on the agreement.

[16] Re:Sound also requested additional time to continue its negotiations with the remaining objectors with respect to what it would name "Tariff 3.B," and be applicable to the use of background music by Establishment Objectors.

[17] The Board had not been aware until this notification that Re:Sound had split its proposed tariff into two separate tariffs, namely Tariff 3.A, involving Supplier Objectors, and Tariff 3.B, involving Establishment Objectors.[3]

[18] Since the status report that followed showed no substantive progress, and considering that the parties had been negotiating since April 2011, the Board issued a notice on July 4, 2014, stating that it would start a hearing process if agreements were not reached by October 31, 2014.

[19] On July 22, 2014, Re:Sound wrote to the Board stating that it and the Supplier Objectors had reached an agreement with respect to those portions of the Proposed Tariffs that apply to background music suppliers, for the years 2010 to 2013. This was confirmed by the suppliers on July 23, 2014. Re:Sound also provided a draft tariff (the "Settlement Tariff 3.A"), and requested the Board certify this tariff. Re:Sound also informed the Board that it continued to negotiate with the Establishment Objectors.

[20] On January 30, 2015, Re:Sound informed the Board that it had reached an agreement with respect to those portions of the Proposed Tariffs that apply to establishments that play music from background music suppliers with the Establisment Objectors; namely, Restaurants Canada, HAC and RCC, for the years 2010 to 2015, in respect of all issues, save two. These issues pertained to minimum fees and the ability to share information with SOCAN under the confidentiality provision of the tariff. The parties jointly requested that these issues be determined by the Board on the basis of written submissions, and proposed a schedule to file the Settlement Tariff and written submissions on the remaining issues. On February 3, 2015, the Board granted this request.

[21] On February 27, 2015, the Establishment Objectors and Re:Sound provided a draft tariff (the "Settlement Tariff 3.B"), and asked the Board to certify it for the years 2010-2015. Re:Sound and the Establishment Objectors also filed their respective submissions on the two

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[3] Re:Sound later explained, in a letter to the Board dated 22 July 2014, that this was the result of the different negotiations pace of the two groups of users. The division of the Tariff into two tariffs ensured that the certification of the tariff, as it applies to one group, would not be delayed pending negotiations with the other.

outstanding issues. Re:Sound filed reply submissions on March 30, 2015; the Establishment Objectors did not.

II. PREVIOUS, PROPOSED, AND SETTLEMENT TARIFFS

A. RE:SOUND 3 (2003-2009)

[22] In 2006, the Board certified *Re:Sound 3 (2003-2009)* which sets the royalties to be paid to Re:Sound for the performance in public or the communication to the public by telecommunication of published sound recordings of musical works for use as background music in an establishment, including any use of music with a telephone on hold.

[23] It was contemplated that background music suppliers communicate sound recordings to the public by telecommunication when they provided background music to subscribers by wire (such as the Internet), and that those subscribers perform those sound recordings in public when they played the background music in their establishments.

[24] The quantum of the equitable remuneration depended on whether music was provided by a background music supplier or not. Where music was provided by a background music supplier (whether physically or electronically delivered to the subscriber), the royalties were 3.2 per cent of the amount paid to subscribe to the background music service, net of any amount paid by the subscriber for the equipment provided to them. The tariff did not specify whether the supplier or subscriber had to pay this equitable remuneration.

[25] This was the rate whether or not the background music was provided by telecommunication, or on a physical media, such as a CD, and whether or not the establishment provided music with a telephone on hold. As such, the total royalty rate was the same whether or not communication by telecommunication to the public took place. In its reasons, the Board stated that it set the royalties in this manner (a single price for "two uses") as there was no evidence on how to price the performance and the communication to the public by telecommunication separately.[4]

[26] Where music was not provided by a background music supplier, the royalties were based on metrics of the establishment performing the music, such as attendance, capacity, or floor area; or, where none of these metrics applied, a flat rate.

B. RE:SOUND'S PROPOSED TARIFFS

[27] In *Re:Sound 3 (2003-2009),* royalties payable when music is provided by a background music supplier were set at 3.2 per cent of the amount paid per quarter to subscribe to the background music service.

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[4] *Supra* note 2 at para 117.

[28] In its Proposed Tariffs for the years 2010 to 2016, Re:Sound proposed a rate of 16.36 per cent of the supplier's gross revenues from the supply of the recorded music, including but not limited to subscription fees and advertising revenues, per quarter, and subject to a minimum quarterly fee of $20.61 per establishment.

[29] Such a tariff would be a marked increase from the rate of 3.2 per cent in *Re:Sound 3 (2003-2009).* Furthermore, unlike that previous tariff, this amount would not be net of any amount paid by the subscriber for equipment, and the royalty rate base would potentially be larger, not being limited to the amounts paid by the subscriber.

C. SETTLEMENT TARIFFS

[30] However, as described above, Re:Sound and the Objectors now request that there be two tariffs. According to Re:Sound, Tariff 3.A would target the supply of background music, and would reflect the structure of SOCAN Tariff 16, while Tariff 3.B would target establishments that use background music, and would reflect the structure of SOCAN Tariff 15.[5]

[31] Settlement Tariff 3.A and Settlement Tariff 3.B, considered together, are structurally different from *Re:Sound 3 (2003-2009)* and the Proposed Tariffs. The latter two considered two situations, and set royalties accordingly. First, if background music was supplied by a supplier (whether by communication by telecommunication or not), the total royalties were 3.2 per cent of subscription fees; these were potentially payable be either the supplier or the subscriber. Second, if background music was not supplied by a supplier (e.g., the entity purchased CDs which it then played in its place of business), then the royalties were based on metrics such as attendance or capacity.

[32] In contrast, the Settlement Tariffs are partitioned by category of licensee. Part B would set the royalties to be paid by an establishment, whether or not that music was provided by a background music supplier. Part A would set the royalties to be paid by a supplier (in those cases where there is one). Furthermore, if the supplier pays additional royalties for the performance in public and the communication to the public by telecommunication of an establishment, the establishment would not have to pay the royalties it would owe under Part B.

[33] Given that the parties agree to treat Tariff 3 in these two separate parts, we do so, and consider each one in turn, below. However, as a preliminary matter, we first consider whether the parties to the settlements are representative.

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[5] Re:Sound letter to the Board, July 22, 2014.

i. Representativeness of the parties to the Settlement Tariffs

[34] Agreements, such as settlements, filed in the context of a tariff proceeding serve as evidence of royalty rates and conditions that both the collective and certain users of the tariff are willing to accept. As the Board previously stated, "the role of the Board is not to examine, enforce or ratify bargains between parties; it is to set fees in the public interest."[6] Therefore, such agreements are not determinative, but may be a useful proxy for market rates.

[35] However, as the Board explained in *Re:Sound 5.A-G (2008-2012)*,[7] it is necessary to consider the extent to which the parties to the agreements represented the interests of all prospective users, and whether relevant comments or arguments made by former parties had been taken into account. Furthermore, as the Federal Court of Appeal explained in *Netflix v. SOCAN*,

> [s]ince tariffs certified by the Board are of general application, the interests that must be considered are those of an industry as opposed to those of an individual or an entity.[8]

[36] Settlement Tariff 3.A was agreed to by the following Supplier Objectors: DMX, Stingray, Totem, and the BDUs. These Objectors represent the vast majority of, if not all, Canadian providers of background music.

[37] Settlement Tariff 3.B was agreed to by the following Establishment Objectors: RCC, Restaurants Canada, and HAC. Restaurants Canada represents more than 30,000 businesses from every sector of the food service industry, including restaurants, bars and caterers. HAC has more than 8,500 members, consisting of hotels, motels and resorts across Canada. RCC represents over 45,000 retailers of all kinds.

[38] All other objectors have withdrawn, either formerly, for the vast majority, or as a result of the Board's notice of April 24, 2015.

[39] We are of the view that the parties to the Settlement Tariffs adequately represent the interests of the prospective users. We have not identified elements of the Settlement Tariffs which are likely to be disproportionately favourable or prejudicial to a particular sub-group of licensees, nor has any person (party or non-party) raised such an issue.

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[6] *SOCAN – Various Tariffs* (12 August 1994) Copyright Board Decision at 35.
[7] *Re:Sound Tariff 5 − Use of Music to Accompany Live Events, 2008-2012 (Parts A to G)* (25 May 2012) Copyright Board Decision at paras 10*ff*. [*Re:Sound 5.A-G (2008-2012)*]
[8] *Netflix, Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2015 FCA 289 at para 43.

III. TARIFF 3.A – BACKGROUND MUSIC SUPPLIERS

[40] Settlement Tariff 3.A differs from *Re:Sound 3 (2003-2009)* in a number of ways. First, the Settlement Tariff refers to royalties being paid "for […] the authorization of a subscriber to perform in public." Second, the total royalty rate has increased from 3.2 per cent to 4.17 per cent. Third, a minimum fee is set. Fourth, royalties for small cable transmission systems are reduced by half. Lastly, certain administrative provisions have been altered.

A. AUTHORIZATION OF A SUBSCRIBER TO PERFORM IN PUBLIC

[41] Settlement Tariff 3.A provided that

> [t]his tariff sets the royalties to be paid to Re:Sound […] for the communication to the public by telecommunication of recorded music […] or the authorization of a subscriber to perform in public recorded music […] [emphasis added]

[42] Its royalty structure contemplated that a background music supplier pay royalties of 0.97 per cent of revenues when it communicates sound recordings to the public by telecommunication, and 3.2 per cent of revenues when it "authorizes a subscriber to perform in public recorded music."

[43] In a notice of May 17, 2017, the Board wrote to the parties in regard to the Settlement Tariff 3.A, stating that

> [w]hile it may not have been the intention of the Parties, the Agreement—on its face—purports to set a royalty in relation to an activity for which the *Copyright Act* sets out neither an exclusive right nor a right to equitable remuneration. Preliminarily, the Board views this as an undesirable basis for a certified tariff.

[44] In this Notice, the Board proposed alternative wording, which would have required a background music supplier to pay 4.17 per cent (3.2 + 0.97) as the equitable remuneration for the communication of sound recordings by telecommunication to the public. This amount would be reduced to 0.97 per cent where a subscriber paid the equitable remuneration for the performance of sound recordings in public under Re:Sound Tariff 3.A or Tariff 6.B (Use of recorded music to accompany physical activities). The reference to Tariff 6.B had been requested by GoodLife Fitness Centres Inc. as part of its withdrawal of objections to Tariff 3.A and Tariff 3.B of July 22, 2015, as GoodLife was also a party to the Tariff 6.B proceeding.

[45] The BDUs, Stingray, and DMX responded jointly in a letter to the Board of May 31, 2017. In their response, they submit that Settlement Tariff 3.A reflects the structure of SOCAN Tariff 16, which sets

> one fee for the communication of musical works by the background music supplier to the establishment and a separate fee for the public performance of those works by the subscriber.

[46] While these objectors agree with the Board's observation that Re:Sound, unlike SOCAN, does not have the right to authorize the communication or public performance of sound recordings, they submit that

> [t]he use of the word "authorize" in the Settlement Tariff was not intended to refer to an activity to which a Re:Sound right applies; rather it was intended to refer to the actions of suppliers who do more than just communicate sound recordings and who therefore will voluntarily pay the public performance royalties on behalf of the establishment in addition to paying the communication royalties.

[47] The Objectors go on to state that the Board's proposed text is problematic as it provides, by default, that all suppliers will be paying royalties for both the communication and the public performance: "[S]uppliers can never be required to pay royalties for the public performance by the establishment. They may and often do, however, opt to pay those royalties on behalf of the establishment."

[48] As such, they take the position that the wording of the Settlement Tariff does not need to be revised. Nevertheless, in the alternative, they provide the following wording which they say would address the Board's concern about the reference to authorization and would continue to reflect the parties' intention:

> (1) Subject to subsection (4), a background music supplier <u>who communicates</u> recorded music in the repertoire of Re:Sound during a quarter pays to Re:Sound 0.97 per cent of revenues received during the quarter, subject to a minimum fee of $0.64 per subscriber per establishment per quarter.
>
> (2) Subject to subsections (3) and (4), a background music supplier who <u>pays on behalf of subscribers the royalties for the performance in public</u> of the recorded music in Re:Sound's repertoire by the subscribers pays to Re:Sound 3.2 per cent of revenues from those subscribers during the quarter, subject to a minimum fee of $2.15 per subscriber per establishment per quarter.
>
> (3) Where a background music supplier pays on behalf of a subscriber royalties for the public performance referred to in subsection (2), that subscriber is not required to pay royalties pursuant to Re:Sound Tariff 3.B or Tariff 6.B. [our emphasis]

[49] In a letter of May 31, 2017 to the Board, Re:Sound indicated that it agrees with the BDUs, Stingray, and DMX that no revisions to the Settlement Tariff are necessary. Re:Sound also agrees with the alternate wording proposed by the Objectors.

[50] While we appreciate the argument that the act of authorization referred to in Settlement Tariff 3.A can be understood as a description of behaviour, and not necessarily refer to the legal standard of authorization, such a fine distinction may not be apparent to a reader of the tariff.

[51] Furthermore, the alternative wording proposed by the BDUs conveys the intent of the tariff in a much clearer manner than the wording of the Settlement Tariff 3.A: while there is no legal obligation on the background music supplier to do so, they may make a payment to Re:Sound in lieu of their subscriber having to pay equitable remuneration for the public performance under the tariff applicable to them. This is confirmed by the wording of Settlement Tariff 3.B, which provides that it "does not apply to a performance in public or a communication to the public by telecommunication for which royalties are paid by a background music supplier under Re:Sound Tariff 3.A."

[52] We wish to avoid certifying a tariff in relation to a right that does not exist. As such, the alternative wording is greatly preferable. However, this alternative wording does raise the issue of whether the Board should certify provisions which permit a person to pay in lieu of another (an issue already indirectly raised by the wording of Settlement Tariff 3.B, which states this).

i. Payment in lieu of another

[53] The Settlement Tariff 3.A contemplates that the background music supplier would make a payment to Re:Sound in lieu of the subscriber. It is important to note that this is not merely the supplier paying the royalties that would be owed by the subscriber. Under Settlement Tariff 3.B, the royalties payable are determined in a completely different manner (such as capacity, floor area, etc.) than the additional royalties for the payment in lieu under Settlement Tariff 3.A (per cent of revenues), and are very likely to result in very different amounts.

[54] As we concluded above, we prefer the alternative wording proposed by the BDUs and supported by Re:Sound. Such language would no longer refer to an act of authorization, but rather permit a person to voluntarily make an additional payment under the tariff.

[55] As a general proposition, there would be little point certifying a tariff that merely provided that one person could pay for another. In most circumstances, such an arrangement does not require a tariff. However, in this case, the payment is not being made for another— instead it is one payment (and associated reporting obligations) completely taking the place of another payment (and associated reporting obligations).

[56] There is little that the parties submitted in support of this structure. While Re:Sound and the BDUs submitted that this structure is based on *SOCAN 16 (2007-2009)*,[9,10] this is not quite the case. While that tariff also has two distinct rates, these are, as the Board explained, for the right

[9] *Supra* note 5; BDUs letter to the Board of May 31, 2017.
[10] *SOCAN Tariff 16 – Background Music Suppliers, 2007-2009* (19 June 2009) Copyright Board Decision at para 51. [*SOCAN 16 (2007-2009)*]

to communicate to the public by telecommunication, and to authorize subscribers to perform in public the music they receive.

[57] SOCAN administers the exclusive right to perform in public, along with the associated right to authorize such a performance. Re:Sound administers the right to remuneration, which has no associated right of authorization. As such, the rationale that may be applicable to a SOCAN tariff structure cannot be readily used in support of a Re:Sound tariff. The payment for authorization is not, as the payment in Settlement Tariff 3.A was described, solely made at the discretion of the supplier. Nor is the payment for the act of another; it is for the act of authorization carried out (if carried out), by the supplier.

[58] It is likely that the parties agreed to such an arrangement because of the likely efficiencies such a structure may provide. The first such likely efficiency is for Re:Sound: instead of having to collect royalties from numerous establishments, and process associated reports, it only has to collect a higher payment from background music suppliers from which it already would be collecting royalties.

[59] The second such likely efficiency is for the subscribers. The production and maintenance of records of metrics that are used to determine royalties may be costly—and would be a cost on top of the actual royalties owed. It may often be cheaper for such an establishment to have the background music supplier pay in lieu of it, and, to the extent this additional cost for the supplier is passed through to the subscriber, simply pay that one cost instead.

[60] Given that there is a rational reason for such a structure, we adopt it in the certified tariff.

B. INCREASE IN ROYALTY RATES

[61] The rate certified by the Board in *Re:Sound 3 (2003-2009)* for equitable remuneration for the communication to the public by telecommunication and public performance of background music was based on SOCAN Tariff 16 with respect to background music suppliers which provided for a rate of 7.5 per cent of net revenues and used a repertoire adjustment of 43.062 per cent. This resulted in a rate of 3.2 per cent.

[62] In its decision, the Board noted:

> [W]e consider that because Tariff 16 remunerates only the performing right and not the communication right, an adjustment could be necessary to take into account the fact that any background music supplier that is liable pursuant to the NRCC tariff needs the

> communication right to deliver music to the end user. The use of this right generates benefits, part of which should go to the rights holders.[11]

[63] However, absent any evidence, the Board did not ascribe a separate rate for the equitable remuneration for communication to the public by telecommunication.

[64] Subsequently, in *SOCAN 16 (2007-2009)*, the Board certified a separate rate for the right to communicate to the public by telecommunication.[12] The Board surveyed previous decisions where a rate was set for ancillary uses, and concluded that such rates were approximately one third that of the rate for the main use. As a result, the Board set the rate for the communication right at a ratio of 0.3 of the rate for the performance right, resulting in a rate of 2.25 per cent.[13]

[65] On June 29, 2012, *SOCAN 16 (2010-2011)*[14] was certified at the same rates as those certified for *SOCAN 16 (2007-2009).*

[66] Settlement Tariff 3.A sets the royalty rate for equitable remuneration for communication by telecommunication of 0.97 per cent of revenues, which is notionally equivalent to the royalty rate for the right to communicate by telecommunication set in *SOCAN 16 (2010-2011)* (2.25 per cent), adjusted for repertoire by multiplying by 43.06 per cent.

[67] The parties agree that the rate for the equitable remuneration for public performance would be equal to the rate certified in *Re:Sound 3 (2003-2009)* for the equitable remuneration for both the communication to the public and the public performance, that is 3.2 per cent of revenues from subscribers.

[68] Re:Sound submits that these agreed-upon royalty rates reflect the decisions of the Board in SOCAN Tariff 16, which occurred since the Board last certified Re:Sound Tariff 3, and that these rates are consistent with the Board's previous finding that Tariff 16 should be used as the basis for establishing the rates payable under Tariff 3 for the supply of background music.

[69] While we express some reservation in automatically applying rates set in the context of an authorization right to remuneration rights, we conclude that the use of SOCAN Tariff 16 as a proxy is reasonable, and the context of an agreement leads us to adopt the rates set out in Settlement Tariff 3.A in the certified tariff.

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[11] *Supra* note 2 at para 129.
[12] *Supra* note 10 at paras 46*ff*.
[13] *Ibid* at paras 63-64.
[14] *SOCAN – Multiple Tariffs, 2006-2013 (Tarif 16, 2010-2011)* (29 June 2012) Copyright Board Decision at para 19. [*SOCAN 16 (2010-2011)*]

C. MINIMUM ROYALTIES

[70] While *Re:Sound 3 (2003-2009)* did not set minimum royalties, Settlement Tariff 3.A includes minimum fees.

[71] In support of the inclusion of minimum fees, Re:Sound relies on *Re:Sound 3 (2003-2009)*. In that decision, the Board stated that minimum fees were "necessary to reflect the intrinsic minimum value of the music and the repertoire. They are also necessary to reflect some of the administrative costs incurred in issuing licences."[15] However, since Re:Sound had not requested minimum fees at the time, the Board did not set any.

[72] In its Proposed Tariffs, Re:Sound asked for a minimum fee of $20.61 per subscribing establishment, per quarter. The fees agreed upon by the parties in Settlement Tariff 3.A are equivalent to 43.06 per cent (repertoire adjustment) of the minimum fees certified in *SOCAN 16 (2010-2011)*, which are $1.50 per premises per quarter for the communication right and $5 per premises per quarter for the public performance right.[16] This results in minimum fees per quarter of $0.64 per subscriber per establishment for the equitable remuneration for the communication to the public by telecommunication and $2.15 per subscriber per establishment as payment in lieu of the subscribing establishment's payment for the equitable remuneration for the performance in public.

[73] According to Re:Sound, the application of the minimum fees is intended to operate in the same manner under both tariffs, but Tariff 3.A uses the words "per subscriber per establishment" rather than "[per subscriber] per relevant premises" used in SOCAN Tariff 16.

[74] As we conclude below, the question of whether, and what, minimum royalties should be set needs to be considered for each tariff. Given the general criteria we outline below which point to a "minimum profitable price" being more appropriate where the royalties are directly tied to the revenues from the sale of the copyrighted content, as they are in Tariff 3.A, and given that the parties have agreed to include minimum royalties, and their amount, we include them in the certified tariff.

D. SMALL CABLE TRANSMITTERS

[75] Settlement Tariff 3.A includes a provision whereby the royalty rates for small cable transmitters are halved. This is consistent with *SOCAN 16 (2010-2011)*. We include this provision in the certified tariff.

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[15] *Supra* note 2 at para 141.
[16] These fees are the same as those certified in *SOCAN 16 (2007-2009)*.

E. TARIFF WORDING AND ADMINISTRATIVE PROVISIONS

[76] The parties assert that they have agreed to a number of changes to the administrative provisions of the tariff to provide clarity and make the tariff easier to administer. These changes were indicated in the Settlement Agreement. Generally, we take no issue with these changes. These changes include the following.

i. Definitions

[77] Given that the tariff clarifies that royalties payable by a small cable transmission system are reduced by half, as mentioned above, a definition of "small cable transmission system" has been added to section 2.

[78] Also, since the new minimum fees are payable on a "per subscriber per establishment" basis, Tariff 3.A includes a definition of "establishment."

ii. Reporting requirements

[79] The parties have agreed to additional reporting requirements. Re:Sound explains that requiring background music suppliers to provide a list of the establishments on whose behalf they are paying royalties is necessary to ensure that Re:Sound does not contact these establishments directly. These are the same requirements as under section 4 of *SOCAN 16 (2010-2011).*

iii. Sharing information with SOCAN

[80] In the Settlement Tariff 3.A, the parties agreed to revise the confidentiality provision to allow Re:Sound to share information obtained under Tariff 3.A with SOCAN. Re:Sound asserts that the purpose of this change is to allow for administrative efficiencies and that it reflects the Board's view, expressed in *Re:Sound 5.A-G (2008-2012)* that "sharing information among collectives dealing with the same clients […] is both efficient and desirable."[17]

[81] *Re:Sound 5.A-G (2008-2012), Re:Sound 6.B (2008-2012)*[18] and *Re:Sound 8 (2009-2012)*[19] all provide that Re:Sound may share information with SOCAN "in connection with the collection of royalties or the enforcement of a tariff."

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[17] *Supra* note 7 at para 41.
[18] *Re:Sound Tariff 6.B – Use of Recorded Music to Accompany Physical Activities, 2008-2012* (27 March 2015) Copyright Board Decision (Redetermination). [*Re:Sound 6.B (2008-2012)*]
[19] *Re:Sound Tariff 8 – Non-Interactive and Semi-Interactive Webcasts, 2009*-2012 (16 May 2014) Copyright Board Decision. [*Re:Sound 8 (2009-2012)*]

[82] The provision agreed upon by the parties is broader. The sharing of Re:Sound's information with SOCAN does not contain the restriction that it be "in connection with the collection of royalties or the enforcement of a tariff." The provision only says that the information may be shared with SOCAN.

[83] To the extent possible, there should be language harmonization between related tariffs. For this reason, we certify the same provision as that found in *Re:Sound 5.A-G (2008-2012*), *Re:Sound 6.B (2008-2012)* and *Re:Sound 8 (2009-2012).*

iv. Interest on late reporting

[84] The parties have agreed that suppliers who fail to submit the reporting information on time and do not rectify their default within 30 days of receiving a default notice from Re:Sound, shall be subject to interest on their payment until the reporting is received. This provision is intended to provide an incentive for suppliers to comply with their obligations under the tariff similar to the existing interest provision which applies to late payments.

[85] However, as the Board has recently noted in its decision in respect of commercial radio tariff,[20] the issue of imposing penalties for late reporting is a compliance and enforcement issue rather than a tariff certification issue. As the Board has noted, enforcement issues are outside the jurisdiction of the Board. As such, and even though parties have agreed, we will not set penalties for late reporting in the tariff we certify.

IV. TARIFF 3.B – ENTITIES PLAYING BACKGROUND MUSIC

[86] In *Re:Sound 3 (2003-2009),* the Board certified the following rates (for 2006), applicable when music is not provided by a background music supplier:

> If the number of admissions, attendees, or tickets sold for days or events during which background music was played can be estimated, the rate was set at that number multiplied by 0.0831¢.
>
> If the foregoing cannot be estimated, but the capacity is known, then the rate was that number multiplied by the number of days during which background music was played multiplied by 0.1558¢ or, if capacity cannot be estimated, the number of square metres of the area to which the public has access multiplied by the number of days during which music was played multiplied by 0.2597¢.
>
> In all other instances, including when background music is used only with a telephone on hold, the rate was set at $27.92 per year.

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[20] See *Commercial Radio Tariff (SOCAN: 2011-2013; Re:Sound: 2012-2014; CSI: 2012-2013; Connect/SOPROQ: 2012-2017; Artisti: 2012-2014)* (21 April 2016) Copyright Board Decision at para 405.

[87] The tariff provided specific rates for 2003 to 2006. For the remaining years of the tariff, namely 2007, 2008 and 2009, the tariff provided at section 6 a formula to calculate rate increases. This formula takes into account increase of the Consumer Price Index (CPI), and applies only if the cumulative increase since the last adjustment is greater than 3 per cent. This increase was not entirely automatic: it required that Re:Sound provide notice of the increase to the Board and every person known to Re:Sound that was subject to the tariff. It appears that Re:Sound did not avail itself of this provision.

[88] In its Proposed Tariffs for 2010, 2011, 2012, and 2013 to 2016, Re:Sound proposed the following rates, to apply in situations where background music is not provided by a background music supplier in addition to royalties payable when recorded music is used with a telephone on hold:

> The number of admissions or attendees or tickets sold per day or event multiplied by 0.294¢, or the number of square metres multiplied by the number of days on which background music was played multiplied by 0.92¢. In all other cases, that is when royalties cannot be calculated using attendance or area, Re:Sound proposed a royalty of $98.84 per year.

[89] The Proposed Tariffs also provided for a minimum annual fee of $98.84. When background music is used with a telephone on hold, Re:Sound proposed a separate royalty of $98.84 per year for the first trunk line and $27 for each additional trunk line.

[90] Re:Sound and the Establishment Objectors subsequently jointly requested that the Board certify Tariff 3.B based on their submitted Settlement Tariff.

[91] Although Re:Sound filed proposed tariffs for the years 2010 to 2016, Re:Sound's agreement with the Establishment Objectors relates only to the years 2010 to 2015.

[92] In the Settlement Tariff 3.B, the parties agreed on the following rates, which they ask the Board to certify:

> The number of admissions (or attendees or tickets sold) per day or event during which recorded music was played, multiplied by 0.0864¢ for 2010 to 2012, 0.0895¢ for 2013 and 2014 and 0.0931¢ for 2015.
>
> If the foregoing cannot be estimated, but the capacity is known, then the rate is that number multiplied by the number of days during which background music was played multiplied by 0.1620¢ for 2010 to 2012, 0.1678¢ for 2013 and 2014 and 0.1745¢ for 2015.
>
> If the foregoing cannot be estimated, then the rate is the number of square metres of the area to which the public has access, multiplied by the number of days during which background music was played, multiplied by 0.2701¢ for 2010 to 2012, 0.2798¢ for 2013 and 2014, and 0.2910¢ for 2015.

> In all other cases, the royalty shall be $46.27 for 2010 to 2012, $47.94 for 2013 and 2014, and $49.85 for 2015.

[93] We note that the rates agreed by the parties are higher than the rates certified in *Re:Sound 3 (2003-2009)*, but much lower than the initial rates proposed by Re:Sound. However, Settlement Tariff 3.B provides for separate rates when background music is used with a telephone on hold. Unlike Settlement Tariff 3.A, the settlement does not dispose of all issues; the parties asked the Board to determine the issue of minimum fees and that related to the sharing of information with SOCAN.

A. INFLATIONARY RATE INCREASES

[94] Re:Sound explains that the rates for 2010 to 2015 have been increased on account of inflation. Although the certified rates in *Re:Sound 3 (2003-2009)* only accounted for inflation up to 2006, the parties agreed to apply the inflationary increase for 2010 to 2015, foregoing the inflationary increase for 2007 to 2009.

[95] Re:Sound further explains that the methodology used by the parties to calculate the inflationary rate increases follows the Board's methodology in *CBC Radio (2006-2011)*.[21] The inflation has thus been calculated using the January to December CPI growth, relying on Statistics Canada's CPI figures. For years where CPI was not available, namely 2014 and 2015, the Bank of Canada's target rate of 2 per cent was applied, in accordance with the Board's past practices in *CBC Radio (2006-2011)* and *Re:Sound 6.A (2008-2012).* Consistent with these decisions, inflation was calculated using CPI without subtraction. In addition, in accordance with the methodology set out in section 6 of *Re:Sound 3 (2003-2009)* tariff (except as it relates to the subtraction of one percentage point), the increase was applied only if the factor was higher than three percentage points, with any increase that could not be applied cumulated with the increase for the following year.

[96] In Settlement Tariff 3.B, the parties also provided for a manner to adjust the rates to be paid by the Establishment Objectors for 2016 and thereafter, a period not covered by the Tariff. Again, these inflation adjustments would be made in accordance with section 6 of *Re:Sound 3 (2003-2009)*, except as it relates to the subtraction of one percentage point. Re:Sound explains:

> Although the proposed rates have been adjusted for inflation up to 2015, section 5 of the Settlement Tariff is included to allow for future inflationary adjustments for the years 2016 and beyond. As the tariff will continue to apply after 2015 until the next tariff is certified,

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[21] *SOCAN-Re:Sound CBC Radio Tariff, 2006-2011* (8 July 2011) Copyright Board Decision at paras 82-91. [*CBC Radio (2006-2011)*]; Re:Sound also referred to *Re:Sound Tariff 6.A – Use of Recorded Music to Accompany Dance, 2008-2012* (15 July 2011) Copyright Board Decision. [*Re:Sound 6.A (2008-2012)*]

> this provision would allow Re:Sound to obtain inflationary increases without the need for a hearing.

[97] Over the years, various decisions of the Board have addressed questions related to inflation. For instance, in *CBC Radio (2006-2011)*, the Board explained that "failing to adjust those payments for inflation would allow inflation to erode the value of music."[22] We agree with this statement.

[98] In *CBC Radio (2006-2011)*, the Board discussed retrospective inflation adjustment. In that decision, the Board found as follows. First, inflation adjustments should be based on the CPI, not on any other index of inflation. Second, the inflation adjustments should be based on the inflation calculated from the CPI itself, rather than this amount less one percentage point. Finally, inflation for any given year should be calculated as the percentage change from January to December of that year. We reaffirm these three principles; they are as relevant to background music as they were to CBC radio.

[99] In *Re:Sound 3 (2003-2009)*, the Board set out a formula for inflation adjustment. The formula was described as follows:

> […] the annual inflationary adjustment corresponds to the annual percentage change in the CPI, minus 1 percentage point. This annual change is to be calculated over the most recent period of twelve consecutive months for which the CPI is available at the time the notice is being given to users. When the adjustment for a 12-month period is less than 3 per cent, the rates remain the same. The adjustment is cumulated with the adjustment for each subsequent 12-month period, until the cumulated adjustment is 3 per cent or more. This ensures that tariffs are not being constantly adjusted for very small amounts. To reduce further the uncertainty facing users, we will allow inflationary adjustments to be made only at the beginning of a year, before January 31.[23]

[100] In applying this formula, the parties used actual inflation rates where possible and the Bank of Canada's two per cent inflation target where actual inflation rates were unavailable. Finally, Re:Sound agreed not to apply inflation adjustments for the three rates that are multiplied by attendance, capacity or area until 2009; Re:Sound did not make this concession for minimum fees and the rates applying to a telephone on hold, however.

[101] Using the three per cent threshold rule, the parties determined that for Re:Sound Tariff 3.B, the first inflationary adjustment was to be done in 2010, to take into account inflation over the period 2009 to 2010. This adjustment amounted to 4.0 per cent. The second adjustment was

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[22] *CBC Radio (2006-2011)*, *supra* note 21 at para 83.
[23] *Supra* note 2 at para 154.

made in 2013, for the period 2011 to 2013, and amounted to 3.6 per cent. The final adjustment, of 4.0 per cent, was made in 2015 for the years 2014 and 2015.

[102] For the three rates, the starting point was the certified rates in the *Re:Sound 3 (2003-2009).* For the minimum fees and the rates applying to a telephone on hold, the starting point was the certified rates adjusted for inflation from 2004 to 2009.

[103] We accept the parties' calculations as they pertain to the years covered by Settlement Tariff 3.B, namely 2010 to 2015. By departing from the subtraction of one percentage point, the parties apply the decision taken in *CBC Radio (2006-2011).* We are in agreement. The issue of whether the threshold should remain three per cent is not considered here. In our view, the fact that the parties have agreed on the inflation adjustment rule to establish the rates for 2010 to 2015 makes this proceeding an inappropriate instance to reconsider the three per cent threshold. This issue should be examined as part of another instance.

[104] Parties have used the Bank of Canada's target, namely 2 per cent, to approximate inflation for years for which it was still unknown. Inflation is now known for all years from 2010 to 2015. However, in this matter, the parties have not asked us to substitute measured inflation for expected inflation; we do not do so.

[105] We take issue with the parties' proposal as it pertains to the formula to be applied to calculate the rates payable for 2016 and beyond.

[106] In support of its proposal, Re:Sound relies on *Re:Sound 3 (2003-2009),* in which the Board set out a formula for prospective inflation adjustment. While certified in 2006, the Tariff covered the years 2003 to 2009. The purpose of the formula certified by the Board was to provide a manner to calculate the rates that would be payable for years 2007, 2008 and 2009.

[107] Here, the formula that would apply to 2016 and beyond covers a period outside the scope of the tariff. Re:Sound appears to mischaracterize the purpose of the formula set out in *Re:Sound 3 (2003-2009*).

[108] We cannot certify the parties' proposal as it pertains to a period outside of the period under consideration in this instance and for which the Board is not properly seized. If the parties wish to apply the formula set out in *Re:Sound 3 (2003-2009),* they may well do so. We cannot.

[109] We wish, however, to reiterate what the Board said in an earlier decision on the issue of inflation adjustment.[24] As a general rule, we believe that efficiency is better served by the

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[24] *Re:Sound Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment, 2013-2018* (21 July 2017) Copyright Board Decision at para 21.

collectives filing multiyear tariffs, as opposed to filing successive single-year tariffs. From time to time, the collectives could request an inflation adjustment and expect that such an adjustment reflect the fluctuations in inflation in all of years for which no adjustments were made. This is what SOCAN is currently doing. The "time-to-time" adjustment would thus cumulate inflation starting on the last year for which such an adjustment took place. In our view, this approach simplifies the life of all the parties involved, i.e., the collectives, the users and the Board.

B. MINIMUM ROYALTIES

i. Position of the Parties

[110] As described above, in *Re:Sound 3 (2003-2009)*, the Board did not certify any minimum royalties. In its Proposed Tariffs, Re:Sound proposed a minimum annual fee of $98.84.

[111] The Establishment Objectors to Tariff 3.B agree that the tariff should provide for minimum fees. However, they are of the view that the fees proposed by Re:Sound are unreasonably high. The parties asked the Board to decide this issue.

[112] Re:Sound subsequently proposed in Settlement Tariff 3.B minimum fees of $46.27 for 2010 to 2012, $47.94 for 2013 and 2014, and $49.85 for 2015. According to Re:Sound, these fees are based on the minimum fee of $94.51 established in *SOCAN Tariff 15.A (2008-2011)*,[25] increased for inflation since 2004 (the last time the SOCAN fee was increased), and subject to a repertoire adjustment of 43.06 per cent.

[113] Re:Sound argues that setting its minimum fees based on the comparable SOCAN minimum fees is consistent with the Board's practice.[26] Re:Sound also argues that the minimum fees it proposes satisfy the Board's test of internal coherence, horizontal harmonization, and annual licence, as set out in 2004 in *SOCAN Multiple Tariffs (1998-2007)*.[27] As an example, based on Re:Sound's data on its current licences, approximately 29 per cent of licensees subject to Tariff 3.B would pay the proposed minimum fees. In *SOCAN Multiple Tariffs (1998-2007)*, the Board wrote as follows:

> The Board still believes that, generally speaking, it should be concerned about the structure of a tariff once more than one half of the users covered by the tariff pay the minimum fee.

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[25] *SOCAN – Multiple Tariffs, 2006-2013 (Tarif 15.A, 2008-2011)* (29 June 2012) Copyright Board Decision. [*SOCAN Tariff 15.A (2008-2011)*]

[26] Re:Sound refers to *Re:Sound 5.A-G (2008-2012)*, *supra* note 7 at para 27; *Re:Sound 6.B (2008-2012*), *supra* note 18 at para 176; *Re:Sound 8 (2009-2012)*, *supra* note 19 at para 189.

[27] *SOCAN – Multiple Tariffs, 1998-2007* (19 March 2004) Copyright Board Decision at 13-15. [*SOCAN – Multiple Tariffs (1998-2007)*]

> Such a proportion could indicate that the qualification criteria for the minimum fee are too broad and ought to be tightened.[28]

[114] As this number is less than half of all licensees, Re:Sound asserts that its proposed minimum fees satisfy the Board's test for internal coherence.

[115] Lastly, Re:Sound argues that its proposal to accept a minimum fee that is 43.06 per cent of the corresponding SOCAN fee is conservative. In support of its position, it refers to the fact that in *Re:Sound 8 (2009-2012)*, the Board decided that Re:Sound's minimum fees should be set without any repertoire adjustment given that minimum fee should not vary with usage of repertoire.[29]

[116] The Establishment Objectors agree with the introduction of minimum fees. They argue, however, that the fees proposed by Re:Sound are too high. Instead, they propose that the fees be set at 50 per cent of those proposed by Re:Sound. This would amount to rates of $23.14 for 2010 to 2012, $23.97 for 2013 to 2014, and $24.93 for 2015.

[117] In support of their position, they contend that if the Board were to certify the minimum fees proposed by Re:Sound, this would have the effect of quadrupling the rates paid by those of their members who pay at the low end of the tariff.

[118] They also contend that the minimum fees proposed by Re:Sound would be almost the same as the average royalty fee of $55 per year paid by Tariff 3.B licensees that are part of the food service and beverage industry.

[119] Finally, the Establishment Objectors also justify their proposal by saying that Re:Sound has not been able to tell them what the costs of collecting Tariff 3.B royalties were. Therefore, they argue, it is not possible for them to determine the minimum fee that Re:Sound should impose in order to recover a portion of the costs incurred by the issuance of a licence.

[120] In reply, Re:Sound argues that the Establishment Objectors' proposal is unreasonably low: the minimum fees they propose would represent 21.5 per cent of the SOCAN Tariff 15.A minimum fee, after it is increased for inflation. If the minimum fees proposed by the Establishment Objectors were accepted, the proportion of licensees paying the minimum fee would be significantly reduced. These fees would not meet the principles on which the Board relies when establishing minimum fees, specifically that of internal coherence.

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[28] *Ibid* at 14.
[29] *Supra* note 19 at para 189.

[121] Re:Sound also contends that comparing Re:Sound's proposed minimum fees with the average rates paid by the food service and beverage licensees is ill-founded. Tariff 3.B applies to a wide range of industries, not just the food service and beverage industries. According to it, the current average annual royalty fee across all industries under Tariff 3.B is significantly higher than Re:Sound's proposed minimum fee.

[122] Finally, it argues that the fact that the Establishment Objectors assert that certifying Re:Sound's proposal would result in the quadrupling of the fees paid by some of their members implies that these members are paying annual royalties of less than $12. This precisely demonstrates the need for higher minimum fees. Indeed, a fee of $12 fails to reflect the intrinsic minimum value of music and does not warrant the costs of its collection.

ii. Analysis

[123] The Board has grappled with the question of minimum fees since its inception in 1990. In its decision dealing with the first contested tariff for performance in public, the Board wrote:

> The Board is concerned with minimum payments in general, and their size, variation and incidence in particular. It believes that such factors as the nature of the revenues derived from these minimum payments and their effect on compliance with the tariffs ought to be examined."[30]

[124] In that same decision, the Board noted that "[m]inimum fees offer an attractive way of dealing with transaction costs."[31] Viewed in the language of economics, this purpose of the minimum fee is designed to cover some portion of the *fixed costs* of the transaction between the collective and the licensee.

[125] In a later decision, the Board exposited another rationale of minimum fees, explaining that:

> The Board is therefore of the opinion that the administrative cost incurred by SOCAN when issuing its licences should be one of the factors to be considered in establishing minimum fees. However, it cannot be the only factor. In particular, the minimum fees should also reflect the intrinsic value of SOCAN's music and repertoire.[32]

[126] The question of whether minimum royalties are appropriate, and their quantum, may need to be considered case-by-case. We agree that, in general, it is appropriate to set minimum royalties such that a portion of the costs of administering the collection of royalties under a tariff

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[30] *CAPAC and PROCAN Tariffs, 1990* (7 December 1990) Copyright Board Decision at 12.
[31] *Ibid* at 12.
[32] *Supra* note 27 at 13.

are recovered. In some circumstances, it might also be appropriate to set minimum royalties based on some minimum intrinsic value.

[127] For instance, where a tariff sets royalties for the use of copyrighted content based on the revenues of a business engaged in selling a product or service consisting mainly of that copyrighted content, a risk may arise that a licensee could price their product or service so low such that they are no longer engaging in profit-maximization vis-à-vis the activity on which the royalties are based. One example of this is where a licensee offers a product or service using the copyrighted content as a loss leader, and where the tariff does not include in its rate base revenues from the cross-subsidized offering. In such situations, minimum royalties based on an estimate of some minimal reasonable price for the product (such as the price at which the activity has any prospect of being profitable) may be appropriate.

[128] However, this is not the case in Tariff 3.B, where the licensees are not primarily in the business of selling background music. They are using it in an ancillary manner during their business operations. It appears extremely improbable that such a licensee would purposefully alter their behaviour or characteristics (such as the number of attendees, floor area, etc.) to reduce the royalties paid under this tariff. This is not a tariff where there is a real risk of "giving away" the copyrighted content. It is therefore more appropriate to base the minimum fee on the other rationale, namely: covering some of the costs of issuing and administering the licence.

[129] Given that the data that Re:Sound must collect and analyze in order to verify the royalties owing is relatively modest, we prefer to set a modest minimal fee. In this respect, the amounts proposed by the Establishment Objectors appear reasonable to us. We therefore set minimum royalties at $25 per year.

C. Separate Fee for Telephone on Hold

[130] Under *Re:Sound 3 (2003-2009),* when background music is used with a telephone on hold, no separate royalties are payable, except when the only background music used is for telephone on hold.

[131] In its Proposed Tariffs, Re:Sound proposed a royalty of $98.84 per year for the first trunk line and $27 for each additional trunk line. This constitutes an effective increase for those who use such on-hold music, above that accounting for inflation.

[132] The parties agree to introduce a separate rate for telephone on hold. The Settlement Tariff 3.B thus provides an additional, separate rate for the use of music for telephone on hold by establishments that do not subscribe to a background music supplier, regardless of whether background music is otherwise performed in the establishment.

[133] The parties have agreed on the following rates. For 2010 to 2012, the rate is of $46.27 for the first trunk line and $1.02 for each additional line. For 2013 and 2014, the rate is of $47.94 for the first trunk line and $1.06 for each additional line. For 2015, the rate is of $49.85 for the first trunk line and $1.11 for each additional line. These rates are calculated using the rates of $94.51 for one trunk line, as established in SOCAN Tariff 15.B (Telephone Music on hold) for the year 2009-2011,[33] adjusted for repertoire (43.06 per cent), and increased for inflation since 2004, the last year SOCAN's rates were increased.

[134] The use of SOCAN Tariff 15.B as a proxy is reasonable, and the context of an agreement leads us to use these rates in the certified tariff.

D. SHARING OF INFORMATION WITH SOCAN

[135] This is the second issue that the parties have asked the Board to resolve.

i. Parties' positions

[136] Re:Sound requests that the tariff permit it to share information with SOCAN "in connection with the collection of royalties or the enforcement of a tariff." Re:Sound argues that such a provision has been included in a number of tariffs.[34] In *Re:Sound 5.A-G (2008-2012)*, the Board, in certifying the same provision which Re:Sound is proposing under Tariff 3.B, stated that sharing information among collectives dealing with the same clients and using the same rate base was efficient and desirable.

[137] Re:Sound argues that the type of information reported under Tariff 3.B does not include any sensitive information; it is limited rather to information about an establishment's days of operation, music use, square footage, capacity, etc.; it is also information similar to what licensees have to report to SOCAN under Tariff 15.A and Tariff 15.B.

[138] The Establishment Objectors oppose Re:Sound's proposal. They argue that Re:Sound has not explained how the sharing of information would increase efficiencies and would result in additional savings to their members. The Establishment Objectors say that they would be disposed to accept Re:Sound's proposal on the condition that Re:Sound commits "that the expected additional operational efficiencies will be quantified and result in measurable and substantive benefit […] within two years of the revised tariff coming into force."

[139] In reply, Re:Sound argues that the conditions proposed by the Establishment Objectors are not appropriate terms for a tariff.

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[33] *SOCAN – Multiple Tariffs, 2006-2013 (Tariff 15.B, 2009-2011)* (29 June 2012) Copyright Board Decision.
[34] See e.g. *Re:Sound 5.A-G (2008-2012), supra note 7*; *Re:Sound 6.B (2008-2012), supra* note 18; *Re:Sound 8 (2009-2012), supra* note 19.

ii. Analysis

[140] In *Re:Sound 5.A-G (2008-2012), Re:Sound 6.B (2008-2012)* and *Re:Sound 8 (2009-2012)* the Board certified a provision identical to that proposed here by Re:Sound. As the Board noted in *Re:Sound 5.A-G (2008-2012)*, information sharing between collectives should be encouraged, whether or not they operate pursuant to joint tariffs. This decision sets out the many potential advantages of such information sharing.

[141] While we would have preferred that Re:Sound provide some indicia that the potential advantages are actually being realized, we continue to be of the view that such limited sharing of information can lead to efficiencies in collective administration. Furthermore, we conclude that the prejudice to the Objectors is low: the information that could be shared with SOCAN is very similar to the information that the Objectors would already have to provide to SOCAN in application of its tariffs.

[142] Consequently, and consistent with Tariff 3.A, Tariff 3.B will provide that Re:Sound may share with SOCAN information collected pursuant to the tariff, in connection with the collection of royalties and the enforcement of a tariff.

E. TARIFF WORDING AND ADMINISTRATIVE PROVISIONS

i. Definitions

[143] Since the new minimum fees are payable on a "per establishment" basis, Tariff 3.B includes a definition of "establishment." Also, a definition of "trunk line" has been added as a result of the introduction of a separate rate applying to telephone on hold calculated on the basis of the number of trunk lines.

ii. Payment provisions

[144] Under section 7 of *Re:Sound 3 (2003-2009)* Tariff, royalties are payable 60 days after the end of the year for which they are paid, or in the case of quarterly payments for royalties exceeding $350, 60 days after the relevant quarter.

[145] The parties have agreed to require that royalties be payable by January 31st of the year for which they are due. As royalties are now payable based on estimated amounts, there is a process for reconciliation of payments by January 31st of the following year.

[146] Re:Sound explains that, in addition to enabling rights holders to receive their royalties sooner and reducing issues in collecting for past periods from businesses that may no longer be in business, this change harmonizes the timing of payments with SOCAN Tariff 15.A.

iii. Interest on Late Reporting

[147] As for Tariff 3.A, the parties to Tariff 3.B have agreed to provide that suppliers who fail to submit the reporting information on time and do not cure their default within 30 days of receiving a default notice from Re:Sound, shall be subject to interest on their payment until the reporting is received.

[148] As stated above in respect of Tariff 3.A, imposing penalties for late reporting is an enforcement issue outside the jurisdiction of the Board. As such, as for Tariff 3.A, we are not certifying penalties for late reporting in Tariff 3.B.

V. TRANSITIONAL PROVISIONS

[149] Tariff 3.B contains transitional provisions made necessary because the Tariff takes effect on January 1, 2010, while it is being certified much later.

[150] A table included in the tariff sets out the multiplying interest factors to be applied on the amounts owed as a result of the certification of this tariff. The factors were derived using month-end Bank Rate. Interest is not compounded.

VI. DISPOSITION

[151] In summary, except for the issues that follow, we certify this Tariff as per the Settlement Agreements reached by the parties:

- In Tariff 3.A, we remove the reference to a payment made by a background music supplier for an act of authorization, and clarify that such a payment may be made in lieu of a subscriber's payment.
- With respect to the inflation adjustment formula, we cannot certify the parties' proposal as it pertains to a period outside of the period under consideration in this proceeding and for which the Board is not properly seized.
- With respect to minimum fees in Tariff 3.B, we accept the Objectors' proposal, though not necessarily for the reasons they invoked.
- With respect to penalties on late reporting, we conclude that this is an enforcement issue outside the jurisdiction of the Board. As such, and even though the parties have agreed, we will not set such penalties in the Tariff we certify.
- The Tariff will provide that Re:Sound may share with SOCAN information collected pursuant to the tariff, in connection with the collection of royalties and the enforcement of a tariff.
- The rates we certify are indicated in the Annex.

[152] This decision certifies Tariff 3.A for the years 2010 to 2013 and Tariff 3.B for the years 2010 to 2015. Since the initial Tariff 3 was proposed for the years 2013 to 2016, it will require a further determination.

Gilles McDougall
Secretary General

ANNEX

CERTIFIED RATES

TARIFF 3.A – BACKGROUND MUSIC SUPPLIERS	
Supplier who communicates	0.97% of revenues Minimum fee: $0.64 per subscriber, per establishment, per quarter
Supplier who pays on behalf of subscribers for the performance of music by subscribers (not payable if subscriber complies with Tariffs 3.B or 6.B)	3.2% of subscription revenues Minimum fee: $2.15 per subscriber, per establishment, per quarter

TARIFF 3.B – USE OF BACKGROUND MUSIC	
Music in an establishment	a) Per admissions, attendees or tickets sold (per days or events) 0.0864¢ (2010-2012) 0.0895¢ (2013-2014) 0.0931¢ (2015) b) If a) does not apply: Per capacity (per days of operations) 0.1620¢ (2010-2012) 0.1678¢ (2013-2014) 0.1745¢ (2015) c) If a) and b) do not apply: Per square metres (square feet) (per days of operations) 0.2701¢ (0.0249¢) (2010-2012) 0.2798¢ (0.0258¢) (2013-2014) 0.2910¢ (0.0268¢) (2015) d) If a), b) and c) do not apply: Per year $46.27 (2010-2012) $47.94 (2013-2014) $49.85 (2015)

	In all cases, minimum fee per year, per establishment $25
Telephone on hold	For the first trunk line $46.27 (2010-2012) $47.94 (2013-2014) $49.85 (2015) For each additional trunk line $1.02 (2010-2012) $1.06 (2013-2014) $1.11 (2015)