Copyright Board Canada

Commission du droit d'auteur Canada

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Regime Collective Administration of Performing Rights and of Communication Rights
Copyright Act, subsection 68(3)

Members Mr. Justice William J. Vancise
Mrs. Sylvie Charron
Ms. Brigitte Doucet

Proposed Tariff(s) Considered Tariff No. 3 – Use and Supply of Background Music (2003-2009)

Statement of Royalties to be collected by NRCC for the performance in public or the communication to the public by telecommunication, in Canada, of published sound recordings of musical works

Reasons for decision

I. INTRODUCTION

[1] Background music is a fact of everyday life, from the jarring sound of music in boutiques catering to clothes-shopping teenagers to the soothing melodies played in hotel lobbies, and everything in between. Mood enhancing music is played in factories, assembly plants, shopping malls, stores, bars, restaurants and even in planes and dentists' offices. It comes from a variety of sources: specialized commercial services that deliver music via satellite or over cable, on-site CDs, radio and the like. Cable and satellite broadcast distribution undertakings also now supply background music in addition to their core residential business.

[2] In Canada, playing music as "background" is a use for which the owner of the musical work has been entitled to be paid since 1924.[1] Those who make records and those who perform on them obtained the right to be paid for the use of the recording only in 1997.[2]

[3] This is the first time the Board has been asked to certify a tariff to be paid to makers and performers for the use of a sound recording of a musical work as background music.

[4] On April 2, 2002,[3] the Neighbouring Rights Collective of Canada (NRCC) filed, pursuant to subsection 67.1(1) of the *Copyright Act* (the *"Act")*, a statement of royalties it proposed to collect in 2003 and thereafter, for the performance in public [4] and the communication to the public by telecommunication, [5] in Canada, of published sound recordings of musical works. One of the proposed tariffs concerned the communication and performance of sound recordings as background music for the years 2003 to 2009 (NRCC Tariff 3).

[5] The statement was published in the *Canada Gazette* on May 11, 2002. Potential users and their representatives were notified of their right to file an objection no later than July 10, 2002.

[6] A number of background music suppliers, users and their representatives objected to the proposed tariff. Principal among the suppliers was the Canadian Cable Telecommunications Association (CCTA). Bell ExpressVu, Star Choice Television Network Inc. (Star Choice) and CHUM Satellite Services (CHUM) also filed objections. The Hotel Association of Canada (HAC), the Canadian Restaurant and Food Services Association (CRFA) and the Alberta Association of Agricultural Societies (AAAS) filed objections as representatives of users. Paramount Canada's Wonderland filed an objection but withdrew it after reaching an agreement with NRCC. Finally, DMX Music Inc., the Canadian Broadcasting Corporation (Galaxie) and the Canadian Society of Copyright Consumers filed objections but did not participate in the proceedings.

II. LEGISLATIVE FRAMEWORK

[7] Since this is the first time NRCC proposes a tariff for the use of background music, it is useful to outline the legislative regime in the context of this hearing.

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[1] *Copyright Act, 1921*, S.C. 11-12 Geo. V, c. 24, which came into force January 1st, 1924 – see also *Canadian Performing Right Society (Ltd) v. The Ford Hotel Co. of Montreal (Ltd)* [1935] 2 D.L.R. 392, first judicial decision on this issue.

[2] Starting in 1924, makers of sound recordings held the right to perform them in public. In 1971, the Copyright Appeal Board certified tariffs for such performances. Shortly thereafter, the *Act* was amended and that right was abolished.

[3] March 31, 2002, was a Sunday. April 1, 2002, was a holiday.

[4] Also referred to as "performance".

[5] Also referred to as "public telecommunication", "telecommunication" or "communication".

[8] The inclusion of Part II in the *Act* made it possible for Canada to become a party to the 1961 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (Rome Convention). Part II deals with the rights of performers, makers of sound recordings and broadcasters. Sections 15, 18, 21 and 26 describe the exclusive rights they enjoy. Section 19 provides that performers and makers each have a right to equitable remuneration for the performance in public or the communication to the public by telecommunication of published sound recordings.

[9] The remuneration rights of performers and makers are subject to several conditions. First, section 19 provides that the rights must be exercised jointly. Second, subsection 20(1) provides that only eligible sound recordings trigger a right to remuneration and sets out the rules to determine what is eligible and what is not. Third, paragraph 19(2)(*a*) provides that, in the case of sound recordings of musical works, the person who performs or communicates the recording is liable to pay royalties to the collective society authorized under Part VII to collect them. These societies must file proposed tariffs with the Board. These proposals are subject to the same examination as those of music performing rights collective societies.

III. POSITION OF THE PARTIES

A. NRCC

[10] The tariff NRCC proposes is for the communication of background music to establishments and its performance in those establishments. NRCC's initial proposed tariff has been substantially lowered at the hearing. In a nutshell, its new proposition is as follows.

[11] Until 2002, NRCC's proposals mirrored the tariff structure used by the Society of Composers, Authors and Music Publishers of Canada (SOCAN). The tariff under examination does not. It encompasses, in whole or in part, uses that are targeted in a number of different SOCAN tariffs.[6]

[12] NRCC asks for a single tariff with two rate structures or categories. Category A targets those who supply background music to commercial and industrial establishments. Category B targets individual establishments that provide their own background music.

[13] Under Category A, background music suppliers would pay 11.2 per cent of the gross amount they receive from their subscribers, net of any amount paid by the supplier to acquire equipment allowing the subscriber to receive the background music service.

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[6] Exhibit NRCC-18 identifies the following SOCAN tariffs as applying to uses to which the NRCC background music tariff also applies: Adult Entertainment Clubs (3.C), Exhibitions and Fairs (5), Motion Picture Theatres (6), Receptions, Conventions, Assemblies and Fashion Shows (8), Theme Parks (12), Public Conveyances (13), Background Music not Covered by Tariff No. 16 (15) and Background Music Supply (16).

[14] Under Category B, establishments that provide their own music would pay a specific dollar amount calculated according to one of three possible methods. The first method to use is the number of admissions, attendees, or tickets sold multiplied by 0.26¢. When the first method cannot be used, the second, corresponding to the number of people allowed in the public space (typically according to fire or liquor control regulations) multiplied by the number of days of background music use multiplied by 0.52¢, must be used. If neither the first nor second method applies, the third method to use is the area of the public space multiplied by the number of days of background music use multiplied by 0.867¢ per square metre (or 0.081¢ per square foot). When none of the methods can be used, the user would be charged $94.08 per year. NRCC is not asking for any minimum royalty.

[15] The arguments that NRCC puts forward to support its proposal can be outlined as follows.

[16] First, a single tariff applicable to all uses of background music is preferable to the fragmented approach used by SOCAN. The proposed tariff takes into account the deficiencies the Board identified in the SOCAN tariffs in 1991,[7] as well as some of the problems identified with multiple tariffs potentially applying to a single user. In and of itself, this justifies the difference in tariff structure. A single tariff that applies to every type of establishment that uses background music results in a more coherent tariff structure; a piecemeal approach results in numerous tariffs for numerous, yet essentially similar, uses.

[17] Second, SOCAN tariffs generally, and Tariffs 15 and 16 specifically, are not appropriate proxies for the proposed tariff. The adjustments that would have to be made to these tariffs are so significant that they render any comparison meaningless. NRCC argues that there is no business model that is comparable to the supply of background music. That being said, given the increasing importance of broadcast distribution undertakings, NRCC concludes that the most appropriate comparison that can be made is with the manner in which subscription revenues are allocated among distribution undertakings, services and rights holders in the pay-per-view television market.

[18] Third, NRCC proposes that the share of its repertoire in the overall use of sound recordings as background music be determined by using the simple average of the relative importance of that repertoire on commercial radio and in the sales of prerecorded CDs.

[19] Fourth, NRCC maintains that the amount paid for the use of a sound recording as background music should be the same regardless of whether the royalty is paid directly by individual establishments or indirectly by a company that supplies background music to those establishments.

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[7] See Board's decision of July 31, 1991 on various SOCAN's tariffs for the year 1991.

B. OBJECTORS

[20] CCTA does not see in pay-per-view an appropriate proxy for the background music market. It submits that SOCAN Tariff 16 is an appropriate proxy. It targets the use of musical works, while the proposed tariff targets the use of recorded performances of the same works. Bell ExpressVu and Star Choice adopt CCTA's objections and arguments. The position of CHUM is substantially the same. All propose the same royalty rates: 2.7 per cent for non-industrial premises and 1.7 per cent for industrial premises. These rates are based on the assumption that NRCC's share of the repertoire is the same here as for sales of prerecorded CDs; no account is taken of commercial radio airplay.

[21] CRFA and HAC take the position that NRCC should get nothing given that their members already pay SOCAN a royalty pursuant to its Tariff 16. They contend that having to pay additional royalties to NRCC would have a significant impact on their members' business. They reluctantly concede that their members will have to pay a royalty but stress that it ought to be minimal. CRFA would set the tariff at no more than 15 per cent of what is paid to SOCAN because NRCC's repertoire is smaller, because background music suppliers are not subject to Canadian content rules and because anything more would lead restaurants to substitute non-eligible sound recordings to NRCC's repertoire.

[22] AAAS contends that the tariff should be based on SOCAN Tariff 5.A, which applies to fairs and exhibitions. It argues that background music plays an almost insignificant role in these events and that no royalties should be payable for non-profit community activities organized by volunteers.

IV. EVIDENCE

A. NRCC

[23] NRCC first attempted to distinguish the rights of performers and makers from those of SOCAN. It then sought to establish a rate base that is different (and higher) than that in SOCAN Tariff 16. To that end, NRCC commissioned a report by Messrs. Paul Audley and Douglas E. Hyatt,[8] the purpose of which was to provide a basis for setting the appropriate royalties. Because their report was central to NRCC's evidence, it will be described in some detail.

[24] Messrs. Audley and Hyatt seek to value the combined remuneration rights of performers and makers. As NRCC did with respect to the commercial radio tariff,[9] they submit that, all

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[8] Exhibit NRCC-4 (hereafter, the "Audley-Hyatt Report").
[9] See Board's decision of October 14, 2005 certifying SOCAN-NRCC Tariff for Commercial Radio for the years 2003 to 2007, at p. 27.

things being equal, authors, performers and makers should each be entitled to the same amount of royalty for any given use.

[25] Messrs. Audley and Hyatt consider several possible proxies. They conclude that the SOCAN-NRCC tariff for pay audio services[10] is inappropriate and impossible to apply in the present circumstances. In their opinion, the use of this tariff would result in remuneration far too low to be considered equitable without major adjustments.

[26] Messrs. Audley and Hyatt also reject SOCAN Tariff 16 as possible proxy, for at least three reasons. First, the tariff provides that industrial users pay less than other users; they see no reason for this distinction. Second, they contend that Tariff 16 does not properly reflect the value of the rights SOCAN represents. Third, they question the relevance of the discounts the tariff offers to music suppliers.

[27] Messrs. Audley and Hyatt conclude that pay-per-view is the appropriate market to refer to in setting a tariff for background music. Both are programming services. Both are offered by broadcast distribution undertakings. Both receive all of their revenue from subscribers. Professor Marcel Boyer testified in support of this proposition.

[28] Ms. Diana Barry, Executive Director of NRCC, also testified. She explained the reasons that led the collective to propose a comprehensive tariff. She also informed the Board on the method and criteria used to determine the proportion of prerecorded CDs sold in Canada that contain sound recordings included in NRCC's repertoire.

[29] NRCC and its team of experts provided us with detailed information and economic analysis which enabled us to fully assess their proposed valuation approach. NRCC has consistently provided this kind and type of evidence and analysis in its presentations to the Board. Even though NRCC has not been entirely successful in persuading the Board to its point of view, the information it has supplied and the approach it has taken have enhanced the hearing process and continue to do so.

B. OBJECTORS

[30] CCTA commissioned a report from Professor Frank Mathewson [11] to assess certain economic issues arising from NRCC's proposal. He was specifically requested to consider and recommend an appropriate basis for setting the tariff.

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[10] *SOCAN-NRCC Pay Audio Services Tariff, 2003-2006* (hereafter, the "Pay Audio Tariff").
[11] Exhibit SUPPLIERS-1.

[31] In Professor Mathewson's opinion, SOCAN Tariff 16 is an appropriate proxy for three reasons. First, that tariff deals with background music. Second, the Board has reviewed that tariff many times, which leads him to conclude that the level of compensation is appropriate and that the rates do reflect the value of the rights SOCAN represents. Third, using the SOCAN tariff as a proxy would result in more horizontal consistency in the background music market.

[32] Professor Mathewson also rejects the use of pay-per-view as a proxy, for reasons that are reviewed below.

[33] Mr. Chris Frank, Senior Director, Government and Regulatory Affairs at Bell ExpressVu, testified about the relative importance of pay audio services and broadcast distribution undertakings in the background music market. He also compared some of the characteristics of pay audio and pay-per-view services.

[34] Mr. Brad Trumble, Vice-President Operations, DMX Music Inc. (Canada) testified on behalf of CHUM. He provided information about the services that DMX offers. He offered the view that the background music industry has become very competitive since technological advances have made it easier for smaller suppliers to operate profitably. He explained what is involved in getting users to subscribe to a service, including making cold calls to potential clients, interviewing them to determine their musical needs and working up service plans that are suited to those needs. He outlined how background music can be used as both a management tool, keeping employees motivated at work, and as a marketing tool, helping businesses better project their desired image. He also explained how the use of background music could be varied so as to suit the tastes of the various clienteles that come to an establishment at different times of the day.

[35] Finally, Mr. Trumble offered the view that any discount suppliers receive for collecting fees under SOCAN Tariff 16 and remitting them directly to SOCAN should also be built into the proposed tariff.

[36] CRFA and HAC filed separate studies dealing with their membership's reaction to the NRCC proposal. Mr. Aleksandar Ciric, Senior Manager at Deloitte & Touche, outlined the results of a study ordered by CRFA to assess the reaction of restaurant operators to the proposed tariff, the value they place on NRCC's repertoire and the possibility that a new tariff may lead them to play only American music. Mr. Anthony Pollard, President of HAC, outlined the results of a similar in-house study conducted by his organization. The main conclusions of the studies are reviewed below.

[37] CRFA offered the testimony of three operators. Mr. Pierre Labelle owns a tavern located in the Ottawa Byward Market area that opened when Queen Victoria was beginning her reign. Mr. Robert Ataman's Gatineau restaurant is a Swiss-themed establishment influenced by the slow food movement. Mr. Phil Waserman operates two restaurants in the Byward Market area and one

in West End Ottawa. Those who testified for AAAS were Mr. David Bednar, General Manager of the Canadian National Exhibition and Ms. Joyce Tafford, General Manager of the Carp Fair. All took the time to appear before us and offer the views of those who actually operate the businesses targeted in the proposed tariff on the issues under consideration in these proceedings.

V. ANALYSIS

[38] Before determining the appropriate equitable remuneration, we must address several issues. First, we must decide whether there should be a single tariff or whether we should revert to the structure found in the SOCAN tariffs. Second, we must select, if possible, an appropriate starting point for setting the tariff. Third, we must determine the share that NRCC's repertoire occupies in the background music market. Fourth, if the appropriate starting point is a SOCAN tariff, we must examine again the relationship between NRCC's and SOCAN's rates. Fifth, we must select an appropriate rate base. Sixth, we must determine if the uses targeted in the tariff are uses that trigger liability pursuant to section 19 of the *Act*. Finally, we must consider whether more should be paid if two uses are involved rather than one.

A. A SINGLE TARIFF

[39] We agree with NRCC's request to certify a single tariff for most background uses. The integrated structure NRCC proposes is simpler for the collective to administer. It also has the merit of minimizing the risk of vertical inconsistency among the collective's tariffs, a problem the Board identified as long ago as 1991.[12]

[40] AAAS requested a separate tariff based on SOCAN Tariff 5.A (Fairs and Exhibitions). We find this unnecessary. The amounts payable pursuant to this decision are small enough that a separate tariff would unnecessarily complicate the collection of royalties.

B. CHOOSING AN APPROPRIATE STARTING POINT

[41] We must decide which of all the possible starting points proposed, if any, is the most appropriate. If one is appropriate, we must adjust it to develop a fair tariff. With this in mind, we examined pay-per-view services, the Pay Audio Tariff and the relevant SOCAN tariffs.

i. Pay-per-view

[42] In NRCC's view, pay-per-view is the most appropriate of the possible proxies for several reasons. First, the price for pay-per-view services is not regulated: rates are established through negotiated, free market transactions. Second, both background music and pay-per-view movies

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[12] *Supra* note 7. See also Board's decision of March 19, 2004 dealing with various SOCAN tariffs for the years 1998 to 2007 (hereafter, "*SOCAN Multiple Licences (2004)*").

are offered separately and are not bundled with other services. Third, both rely entirely on subscription revenues, which are then split between the broadcast distribution undertaking and the supplier of the service.

[43] The Audley-Hyatt valuation model is based on a number of assumptions. One is that when a broadcast distribution undertaking supplies background music, it should retain 40 per cent of earnings, as it does for pay-per-view services. Another is that background music suppliers should only retain what Galaxie and Max Trax charge to broadcast distribution undertakings (19.1 per cent) and that the rest, or 40.9 per cent, should be shared among those who own the performing and communication rights in sound recordings and musical works if all the recordings and works were protected by copyright.

[44] This is not the first time that NRCC has sought to use pay-per-view as a proxy. It was proposed and rejected for the Pay Audio Tariff. However, NRCC contends that the pay-per-view model proposed here is different from what it proposed for the Pay Audio Tariff. Here, NRCC's comparison focuses on the role of the broadcast distribution undertaking in the pay-per-view market. NRCC argues that broadcast distribution undertakings play the same role in the pay-per-view market as in the background music market: they transport the service. According to NRCC, it is not the end product that matters, but rather that the broadcast distribution undertaking is the crucial link in product delivery – music on the one hand, movies on the other.

[45] CCTA contends that this is a distinction without a difference. In this case, NRCC is using the share of pay-per-view revenue retained by the broadcast distribution undertakings to determine the share of revenue from background music suppliers that the broadcast distribution undertakings should retain. In both cases, as Professor Mathewson pointed out, NRCC is using revenue splits from the pay-per-view industry to arrive at revenue splits for the communication of pay audio signals.

[46] CCTA, relying on the evidence of Professor Mathewson, submits that there are four fundamental problems that prevent the use of revenue splits for pay-per-view services as a starting point in this instance.

[47] First, suppliers of pay-per-view programs rely heavily on a window of exclusivity. Most of the content they offer is available only through them for a certain period of time. Background music suppliers do not offer a similar window of exclusivity. Exclusivity commands a premium, and is crucial to the broadcast distribution undertaking.

[48] Second, pay-per-view services are transaction-based: viewers pay a set fee for the right to watch a particular movie. By contrast, background music services are subscription-based: users pay the same monthly fee regardless of how much they use the service in any given month.

[49] Third, the rights involved are not the same. Pay-per-view services need the right to communicate a movie to the public; the performance that occurs at home is private and therefore, not protected by copyright. When a sound recording is used as background music, the central right is the right to perform the recording in public.

[50] Fourth, the level of risk associated with pay-per-view services and background music differs significantly. Pay-per-view entails much higher levels of risk as a result of the transaction-driven nature of the service. In contrast, background music services are subscription-based and as such, significantly less risky.

[51] This last argument appears weak. The pay-per-view business model has certain advantages that traditional background music suppliers do not enjoy. Access to the client is a given once a person subscribes to digital cable or satellite television. Background music suppliers also incur marketing, hardware and other costs that are sometimes quite significant.[13]

[52] That being said, we agree with CCTA's three other arguments.

[53] The Board rejected the use of pay-per-view as a possible proxy in its 2002 decision on pay audio services, stating that:

> […] it would not be appropriate to set the tariff by looking at what television pay and pay-per-view services spend on movie rights, even though these services do present certain similarities with DPA. Both depend on a single, externally sourced category of content: music and movies. Neither produces content; they package someone else's intellectual property. Both operate on similar, extremely lean infrastructures. Both compete for available bandwidth. However, contrary to music rights, movie rights are sold in a competitive market, with some level of exclusivity. This alone is significant enough to discard the comparison.[14]

The last comment applies with equal force to background music.

[54] As we noted earlier, NRCC contends that the Board's refusal to use the pay-per-view market as a starting point for the Pay Audio Tariff does not of itself preclude the application of the valuation model in this instance, since this time, the comparison focuses on the role of the broadcast distribution undertaking in the pay-per-view market. This difference in approach, assuming that it means anything, fails to address the three problems that Professor Mathewson identified and that we agree do exist.

[55] NRCC's valuation model is problematic from at least one other perspective. The market share of traditional background music suppliers (DMX, CHUM) is many times that of broadcast

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[13] Testimony of Mr. Trumble, tr., at p. 1130.

[14] See Board's decision of March 15, 2002 certifying SOCAN-NRCC Pay Audio Services Tariff for the years 1997 to 2002 (hereafter, "*Pay Audio (2002)*"), at p. 7.

distribution undertakings such as Bell ExpressVu, Star Choice or Rogers. Contrary to what counsel for NRCC stated in argument, we do not think that traditional suppliers are in the process of aligning their business model with that of broadcast distribution undertakings.[15] The supply of background music to non-residential establishments remains an adjunct activity for the latter. They incur no additional transmission costs for offering Galaxie to commercial as well as residential subscribers. Yet, the proposed model relies almost exclusively on the business practices of broadcast distribution undertakings. To paraphrase counsel for CCTA, following the path NRCC proposes would require us to use a rather small tail to wag a rather large dog.

ii. Pay Audio

[56] In the Pay Audio Tariff, royalties are set as a percentage of affiliation payments payable by a broadcast distribution undertaking to a pay audio service for the transmission for private or domestic use of a pay audio signal. That percentage currently is 5.85 per cent for NRCC and 12.35 per cent for SOCAN.

[57] In our opinion, the pay audio market is so substantially different from the background music market that it is not appropriate to use it as a starting point. First, the Pay Audio Tariff only targets the communication right; as will be demonstrated later, playing background music sometimes involves both the communication and performance rights. Moreover, it is the performance right, not the communication right, that is central to this tariff. Second, the Pay Audio Tariff does not apply to background music, but rather to foreground music. Third, the users are different – pay audio applies to the distribution for private or domestic uses while background music targets commercial users. These three factors taken together militate against its use as an appropriate proxy.

iii. SOCAN Tariffs

[58] Many SOCAN tariffs overlap with the uses NRCC wishes to target in its proposed tariff. Most are structured so as to make it difficult, if not impossible, to use them to derive a tariff that is as comprehensive as NRCC proposes. For example, Tariff 5.A (Fairs and Exhibitions) sets fees payable per day, based on attendance. Tariff 6 (Motion Picture Theatres) calculates an annual fee based on the number of seats per theatre. Tariff 8 (Receptions, etc.) is a fee per event, based on capacity, that varies according to whether or not dancing takes place. Tariff 15.A (Background music in establishments not covered by Tariff no. 16) sets rates per square feet or meters that are decreased by half for seasonal establishments. No one proposed that any but two of these tariffs be used. We have already explained why we do not intend to use Tariff 5.A. The only remaining tariff, then, is Tariff 16.

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[15] Testimony of Mr. Trumble, tr., at pp. 1133-1143 and testimony of Mr. Frank, tr., at p. 956.

[59] SOCAN Tariff 16 sets two separate rates based on the price paid for the service, net of any equipment costs. Industrial establishments pay 4.5 per cent; other establishments pay 7.5 per cent. In both cases, the minimum royalty is $48 per year, though that amount is reduced to $20 for non-industrial premises with no more than five permanent employees, if the charge for the service is $10 per month or less.

[60] CCTA, Bell ExpressVu and CHUM contend that Tariff 16 is an appropriate stating point for setting NRCC's background music tariff. Tariff 16 and Category A of the proposed tariff apply to background music suppliers. Both apply to the same product, to the same use and are in the same market.

[61] NRCC agrees that if the rate set in Tariff 16 reliably reflected the value delivered to background music services and the benefits such services derive from the use, it would be appropriate to calculate the value of the same rights with respect to the performers and makers of sound recordings on that basis.[16] NRCC argues, however, that this is not so.

[62] NRCC rejects the notion of having different rates for industrial and non-industrial premises. There is no rationale for charging a lower rate to the former. If background music were less valuable in industrial settings, these users would be able to purchase their background music for less; since the royalty is set as a percentage of that purchase price, the lower value to industrial premises would automatically be reflected in the amount paid to SOCAN. Consequently, SOCAN's rate for background music should be the same for all establishments.

[63] The main objection of NRCC to the use of Tariff 16 is the contention that the rate set in that tariff does not properly reflect the value of the rights SOCAN represents. According to NRCC, a review of the history of the development of the SOCAN tariff rates reveals that even though the rates and the rate structure have varied greatly, there is "no evidence in the record of earlier rate decisions that there was ever any underlying analysis of value on which rate decisions were based."[17]

[64] The Audley-Hyatt Report states:

> 36. More recently, SOCAN's Tariff 16 was considered by the Board in 1996. The Board's decision dated September 20, 1996 concluded that SOCAN "offered absolutely no evidence to support its contention that the rate levels are unreasonably low." (Decision, pages 25 and 26) The decision further concluded with respect to SOCAN's expert witness that "Dr. Chebat's testimony was irrelevant to setting the price of the blanket licence".

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[16] Audley-Hyatt Report, at ¶ 32.
[17] *Ibid*., at ¶ 35.

> 37. One further point in this decision should be noted. At page 29 of the decision the Board stated that it had received a request whose object appeared to be "to seek for comparable rates for background music irrespective of the manner of delivery of the music". The Board concluded "That is a laudable goal, and one that should be kept in mind". (Decision, page 29) For our purpose here of considering whether it would be appropriate to base the NRCC's supplier rate on the existing SOCAN rate structure, the relevance is that SOCAN currently appears to collect significantly different amounts depending on whether an establishment is licensed separately or receives its music through a background music supplier.[18]

[65] NRCC contends that SOCAN has been less than effective in seeking increases to its royalty rate. It offers as proof some of the Board's comments in its 1996 decision pertaining to background music suppliers (SOCAN Tariff 16), including the comment quoted above, where the Board stated that SOCAN "offered absolutely no evidence to support its contention that the rate levels are unreasonably low" and another, according to which SOCAN's attempt at justifying an increased rate had "failed utterly".[19]

[66] We do not find NRCC's objections to using Tariff 16 compelling. The fact that industrial users pay a lower rate is easily remedied by using only the rate paid by non-industrial users as a starting point.

[67] NRCC's second objection, that Tariff 16 should not be used because it has been the subject of harsh criticism and also appears not to be supported by evidence, deserves more consideration.

[68] We examined the evolution of Tariff 16 to test the contention of NRCC and found that contention wanting. Background music tariffs go back to the 1940s. Rates have varied considerably, as have rate structures. One of SOCAN's predecessors, the Composers, Authors and Publishers Association of Canada (CAPAC), started to use the current structure in 1959.[20]

[69] When the Board set Tariff 16 in 1996, it concluded that there was no evidentiary record before it that would allow much of anything to be decided. The Board refused to raise the rate, so there is nothing in the decision to indicate that the price paid for the performance right was unreasonably low. As for background music tariffs before 1996, there is no evidence concerning how the Board went about setting them; neither is there any evidence that would lead us to believe that the rate was inappropriate. There is therefore nothing before us that would establish that Tariff 16 is an unreasonably low (or high) tariff.

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[18] *Ibid*., at ¶ 36, 37.
[19] See Board's decision of September 20, 1996 certifying several SOCAN tariffs for the years 1994 to 1997, including Tariff 16 (hereafter, "*SOCAN 16 (1996)*"), at p. 25.
[20] Appendix C to the Audley-Hyatt Report reviews the complete history of SOCAN's background music tariffs.

[70] Using a SOCAN tariff to set a NRCC tariff accords with earlier decisions of the Board. The first NRCC tariff that the Board certified was the commercial radio tariff, in 1999. The Board then held that the value of rights exercised by SOCAN should be used as the starting point to determine the value of the rights exercised by NRCC:

> Several reasons lead the Board to conclude that the best starting point is SOCAN's present tariff.
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> First, SOCAN's tariff applies, more often than not, to the use of recorded musical works, while neighbouring rights tariffs apply to the use of recorded performances of the same works. Therefore, they involve a similar use and a similar right in a similar market.
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> Second, SOCAN's tariff has been in place for a long time; even though it constitutes a regulated price, it is one that the Board simply cannot ignore. As the Board stated in another, similar context:
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> > "…there is less need to use a proxy when an existing price, even an administered price, can be used as a starting point. This is especially true where information is available to determine whether or not the existing price is appropriate, and whether or not any adjustments ought to be made to account for changes in circumstances."
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> Third, even though SOCAN still maintains that the current rate is too low while CAB still argues that it is too high, they have agreed to maintain the *status quo* for five years. For whatever the reasons, the 3.2 per cent rate remains the going rate, and the Board need not speculate as to its correctness for our purposes.
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> Fourth, all other proxies offered by NRCC are deficient in some ways, and certainly much weaker than SOCAN's tariff.
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> Fifth, SOCAN's licence is a blanket licence. Therefore, using SOCAN's rate as a starting point avoids the difficulty of having to determine which value, if any, ought to be attributed to the blanket character of the regime.[21]

[71] CCTA contends this reasoning remains as valid today as it was then. CCTA submits that this reasoning supports its contention that Tariff 16 is the appropriate basis for determining the value of NRCC's repertoire in this instance. CCTA adds that SOCAN and the background music suppliers recently agreed that the rates certified by the Board in 1997 should continue to apply from 1998 to 2005.

[72] We agree with the reasons CCTA offers to argue that Tariff 16 should be used as the starting point to determine the equitable remuneration payable to NRCC for the use of sound

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[21] See Board's decision of August 13, 1999 certifying NRCC Commercial Radio Tariff for the years 1998 to 2002 (hereafter, "*NRCC Commercial Radio (1999)*"), at p. 30 (footnotes omitted).

recordings in background music. The adjustments that may be required to reflect the current market are not such as to invalidate this approach.

C. THE USE OF NRCC REPERTOIRE AS BACKGROUND MUSIC

[73] Not all sound recordings trigger the right to receive remuneration. Over the years, the Board has used a variety of approaches to determine the use of sound recordings that are part of NRCC's repertoire in a variety of markets.

[74] Here, NRCC urges us to adopt the same approach the Board used in the 1999 decision pertaining to private copying,[22] namely to apply the simple average of the use of NRCC's repertoire on commercial radio (50 per cent) and of the share of prerecorded CDs sold in Canada that is in the repertoire (36.12 per cent).

[75] The Objectors take no issue with the figures NRCC uses. CCTA does submit that radio airplay is not relevant, if only because radio is subject to Canadian content rules and background music suppliers are not. It argues that prerecorded CD sales better correspond to the music selection that is available to background music suppliers. As a result, only the second figure should be used.

[76] Using CCTA's approach would lead to the conclusion that 36.12 per cent of background music uses NRCC's repertoire. NRCC's approach would set the percentage at 43.06 per cent.

[77] We agree with NRCC's approach for two reasons. First, the Objectors' view that CD sales are a better predictor of the use of sound recordings as background music than either radio airplay alone or any combination of radio airplay and CD sales, is unsupported by any evidence. Second, CCTA's observation regarding Canadian content must be viewed in context. Galaxie and Max Trax are subject to such rules and provide more Canadian content than is required of radio. Other background music suppliers have designed services that respond to the specific needs of the Quebec market, thereby increasing their Canadian content. Third, their approach would rely solely on a market involving reproduction rights to set a tariff for the right to perform or to communicate. In the past, the Board has repeatedly hesitated (or refused) to use music reproduction markets to approximate the use of the repertoire in markets involving the communication or performance of music.[23]

[78] The choice then is to use the only data available from a market involving communication or to blend that data with data involving reproduction. In theory, the first approach probably is more

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[22] Board's decision of December 17, 1999 certifying the *Private Copying Tariff, 1999-2000*, at p. 27.
[23] *Supra* note 14, at p. 14.

desirable.[24] In practice, NRCC is proposing to use the blended result. That reduces the size of the eligible repertoire and, consequently, the amount of royalties the Objectors will have to pay. That also takes care of any impact that Canadian content rules may have on the relative size of the repertoire. This is the number we will use.

[79] For these reasons, we find that 43.06 per cent of all background music in Canada uses NRCC's repertoire. The final rate is adjusted accordingly.

D. THE RELATIONSHIP BETWEEN THE NRCC RATE AND THE SOCAN RATE

[80] NRCC once again argues that authors, performers and makers each deserve to be compensated roughly equally. Mr. Claude Brunet, in his eloquent closing argument for NRCC, went so far as to suggest that his client should change its name to more accurately describe the rights it manages.

[81] The letters "NR" in "NRCC" stand for "neighbouring rights". As Mr. Brunet correctly points out, there is not a single mention of "neighbouring rights" in the *Act*. Indeed, it would appear that Parliament took great care not to label the rights of performers and makers as neighbouring rights. In Mr. Brunet's opinion, the name NRCC has caused not only a misdirected debate, but has resulted in a misguided allocation of rights between authors on the one hand, and performers and makers on the other.

[82] The Board sometimes (but not always) refers to the remuneration rights set out in section 19 of the *Act* as "neighbouring rights", arguably to distinguish them from the exclusive rights that performers and makers enjoy pursuant to sections 15 and 18. That, however, is a debate about semantics, not law. Furthermore, it is irrelevant, given how events have unfolded since.

[83] NRCC has repeatedly argued that earlier decisions of the Board assessing NRCC's share of royalties were based on the misconception that there is only one remuneration right shared by performers and makers. In 2003, the Federal Court of Appeal ruled that there are two separate remuneration rights. In that same decision, it declined to intervene in a decision of the Board on the assumption that the Board must have known this.[25]

[84] The Board has consistently established a one-to-one ratio between the rate for authors represented by SOCAN and that for performers and makers represented by NRCC. Notwithstanding this, NRCC continues to claim that, all things being equal, each of the performers and makers should be entitled to as much as the authors.

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[24] This was the path followed in *Pay Audio (2002)*.
[25] *NRCC v. SOCAN et al.*, (2003) FCA 302.

[85] In 1999, the Canadian Association of Broadcasters argued that since the Rome Convention and the *Act* protect neighbouring rights less than authors' rights, the latter are worth more than the former. That argument was rejected:

> […] CAB relies on the fact that the Rome Convention and the *Act* protect neighbouring rights less than authors' rights, even though some experts, including its own, recognize that there is no formal hierarchy between them. The argument ignores a number of realities. First, the *Act* does not prioritize traditional copyright rights over neighbouring rights. To the contrary, the *Act* includes in its definition of copyright all exclusive rights granted to performers, makers of sound recordings and broadcasters. Second, section 19 rights do not differ substantially from those enjoyed by SOCAN: in both cases, there is no right to prohibit use, and the price for use is set by the Board. Third, the fact that authors enjoy more rights than performers, makers and broadcasters does not mean that their rights are more valuable; each right should be valued on its own merits, using proper valuation methodologies. Fourth, the fact that a performer retains the right to prevent certain uses of his or her performance even where the author consents to the use of the work is incompatible with the prioritization of authors' rights over those of performers.[26]

[86] NRCC, for its part, attempted to demonstrate that the rights of performers and makers were worth more than the rights of authors. Again, the Board rejected the argument:

> The Board prefers deciding on the basis that there is no reason to believe that the use of sound recordings on radio stations has any greater value than the use of the underlying works. Several reasons point to this solution. First, nothing requires the Board to look to the market (and especially a different market) for guidance; it is within its discretion to decide that this approach is reasonable. Second, these are similar uses of the same recordings by the same broadcasters. Third, it can be readily argued that a pre-recorded performance is worth no more to broadcasters than a pre-recorded work: in both cases, one is dealing with something that has already been fixed. Fourth, it matters not that one party was paid more than the other for making the fixation in the first place; we are dealing with two different markets and two different rights: the right to make the recording and the right to communicate it. [not underlined in the original] [27]

[87] The matter was revisited in 2000, when the Board certified the NRCC tariff for CBC Radio[28] and again when it set the tariff in its decision *Pay Audio (2002)*. The decision remained unchanged.

[88] The Board recently explained that it has always been of the view that there are two remuneration rights, adding that:

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[26] *Supra* note 21, at p. 27.
[27] *Ibid*., at p. 32.
[28] See Board's decision of September 29, 2000 certifying NRCC's tariff for CBC Radio for the years 1998 to 2002.

> NRCC's insistence that the matter be revisited appears to result […] from certain misunderstandings about the Board's past decisions.
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> First, the Board never concluded that subsection 19(1) of the *Act* creates a single right to equitable remuneration. That provision creates two interconnected but separate rights. The Federal Court of Appeal confirms the proposition, although the decision offers no supporting analysis and simply relies on "common ground between the parties". The wording of subsection 23(2) of the *Act* also makes it clear that there are two separate remuneration rights, even though the rights are triggered by a single act, the communication of a sound recording.
>
> Second, NRCC incorrectly assumes that the Board "focused on the value of the performer's right relative to the author's" and that "the value of the maker's right has not yet been established". These statements show a fundamental misunderstanding of the 1999 decision. The Board did not somehow forget to account for the contribution of makers or consider the makers' right to be subsumed in the performers' right. The Board has always realized that three groups of rights holders are involved. For one thing, and contrary to what NRCC itself has sometimes asserted, the report filed by Mr. Audley in the 1998 proceedings clearly drew the attention to the rights of the three groups. The 1999 decision can be interpreted as focusing on the contribution of the performer to the detriment of that of the maker only if certain statements are taken in isolation or out of their context. Viewed as a whole, the decision shows that all the relevant rights were taken into account. This much was clear to the Federal Court of Appeal.
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> Third, the valuation methodology used in the private copying decisions never assumed that all things being equal, authors, performers and makers should each receive a third of the royalties. The valuation approach was "bottom up", not "top down". The proportions used in allocating royalties resulted from adding the value of the various rights, not from determining a global value and then allocating it. It was pure coincidence that the model ascribed roughly equal values to the three rights. More significantly, the joint contribution of performers and makers was valued by using a single amount, of which the market allocates two-thirds to the performer and one-third to the maker. In other words, the very proxy that NRCC relies on to ask for equal shares does not provide for equal shares. In any event, the Board continues to be of the opinion that the reproduction market should not be used as a proxy to allocate the value of the communication right between rights holders.
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> For these reasons, the Board maintains the one to-one ratio between NRCC and SOCAN.[29]

[89] We agree both with the analysis and the result of previous Board decisions dealing with this issue. We have heard nothing in this case that would cause us to change the relationship between the two rates. The performance or communication of a published sound recording of a musical work triggers two remuneration rights: one for the performer, one for the maker. That said, the

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[29] *Supra* note 9, at p. 29.

performance or communication of a sound recording of a musical work will result in the same payment as the performance or communication of the musical work, all things being equal.

E. THE APPROPRIATE RATE BASE

[90] Everybody agrees that the rate base for background music suppliers should be their earnings from the provision of the service. They also agree that the amount should be reduced to account for the cost of equipment the subscriber needs in order to receive the service. This can be done in one of two ways.

[91] It is relatively common for suppliers to invoice subscribers separately for equipment used to receive the service. NRCC fears that excluding what is charged for the equipment might lead suppliers to charge less to supply the service and more to provide the equipment. It asks that the rate base include what the subscriber pays to rent or purchase equipment; what would then be removed is the amount the *supplier* actually paid for the equipment. NRCC states that this is the approach used in SOCAN Tariff 16.

[92] We disagree. The proposed approach is not the one used in SOCAN Tariff 16. What is removed from the rate base is not the amount the supplier pays for the equipment, but the amount it receives from the subscriber for the equipment.[30] Suppliers should not be required to calculate royalties according to rate bases whose starting point are identical and then end up not being so. There has been no indication that the issue has raised difficulties in the application of the SOCAN tariff. Consequently, the rate base shall be the same here as in SOCAN Tariff 16.

F. APPLICATION OF SECTION 19

[93] The proposed tariff provides that, when a user subscribes to a background music service, only the supplier is liable to pay royalties to NRCC. When background music is delivered by cable, by satellite or over the ether, a public telecommunication of sound recordings occurs. When the same music is delivered on site, in a prerecorded format (for example, on a removable hard drive) there is no telecommunication. How then can the supplier be liable to pay royalties to NRCC?

[94] The relevant parts of section 19 of the *Act* read as follows:

> 19. (1) Where a sound recording has been published, the performer and maker are entitled […] to be paid equitable remuneration for its performance in public or its communication to the public by telecommunication […]

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[30] The English version of the tariff is not as clear as it could be on the issue. The French version, however, could not be more clearer.

> (2) For the purpose of providing the remuneration mentioned in subsection (1), a person who performs a published sound recording in public or communicates it to the public by telecommunication is liable to pay royalties […]

Subsection 19(1) establishes the *right* to be paid royalties, while subsection 19(2) establishes *who is liable* for that royalty payment. The act that triggers the right is the performance or communication of a sound recording. The person liable for performing or communicating the recording is the person who does it.

[95] Section 19 creates a right to remuneration. It contains no mention of authorizing a performance or communication. By contrast, sections 3, 15, 18 and 21 set out the elements of copyright in works, performances, sound recordings and communication signals; each protects the right to authorize the acts enumerated within the section.

[96] A supplier who delivers a physical copy of background music on site probably authorizes the performance of musical works when the background music so supplied is played by the subscriber. It is certain that, under the same circumstances, that supplier neither performs a sound recording (because he is not doing it) nor authorizes its performance (because there is no such notion under the *Act*). A supplier cannot be held liable for the payment of equitable remuneration to NRCC unless the service is supplied through a telecommunication. The supplier who delivers a physical copy of background music on site cannot be held liable for the payment of royalties to NRCC. The certified tariff is adjusted accordingly.

[97] Nevertheless, the same rate base can be used in respect of music that is physically delivered to the subscriber. The supplier's revenues are the subscriber's costs; both possess the information needed to make the payment. Using the same rate base ensures consistency for users who acquire their background music from a third party, irrespective of the form of delivery. It also allows NRCC and suppliers, if they so wish, to agree that suppliers will act as collecting agents, something that would be difficult to achieve if royalties were calculated using information that is not available to suppliers.

G. COMMUNICATION AND PERFORMANCE – USE BOTH, PAY ONCE?

[98] In 1996, the Board ruled that SOCAN Tariff 16 would cover two uses: communication to the public and public performance. This approach is favored both by NRCC and the Objectors. Yet, more recent decisions of the Board appear to cast doubts on that approach. Therefore, we must ask ourselves whether the amount of remuneration should be the same when a background music supplier makes use of the communication right to deliver its service (thereby engaging two remunerated uses) as when that same supplier does not make use of the communication right (thereby engaging only one remunerated use).

[99] In 1996, the Board found that even though the delivery of background music by telecommunication involved two protected uses, SOCAN should receive no more remuneration than for the principal use that was engaged, that is the performance in public:

> […] the copyright owner is fully compensated for the use of the music by the payment of the royalty that is set for the purposes of the principal use (the performance in the store) irrespective of whether or not a prior, incidental use (the communication to the store) is involved in the process. Any value to the composers is already accounted for by setting the price based on the purchaser's use.[31]

[100] In rejecting any claim for added value in setting the price to be paid for the use of the repertoire, the Board, as we noted earlier, was highly critical of the evidence filed by SOCAN in support of its position that the delivery of background music by telecommunication rather than by physical support imputes an added value to the repertoire.

[101] Since 1996, the Board has ruled that rights holders have a right to be compensated for new uses of the repertoire.

[102] When it dealt with its decision *Pay Audio (2002)*, the Board stated:

> […] rights holders are entitled to receive additional benefits from new uses of the repertoire. When someone creates new value by using a pre-existing asset, part of the value so created should flow to the owner of the asset.[32]

[103] In 2003, when considering the CMRRA/ SODRAC Inc. (CSI) commercial radio tariff, the Board stated:

> First, the reproduction right is a self-standing right separate from the communications right. Its very existence tends to plead in favour of a royalty that is more than nominal, even though its use in the course of broadcasting operations is secondary to broadcasting.
>
> Second, the use of new broadcasting techniques lowers costs for radio stations. Copying music to a hard drive optimizes the use of these new techniques, thus entitling rights holders to a fair share of the efficiencies arising from this reproduction.[33]

[104] Most recently, in dealing with SOCAN's and NRCC's commercial radio tariffs, the Board stated:

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[31] *Supra* note 19, at p. 27.
[32] *Supra* note 14, at p. 16.
[33] See Board's decision of March 28, 2003 certifying the CSI tariff for commercial radio stations for the years 2001 to 2004, at p. 13.

> The Board has stated in the past that "rights holders are entitled to receive additional benefits from new uses of the repertoire." The same is true of increased uses. In the Board's view, radio's increased use of music has helped it to create significant efficiencies, a share of which should go to rights holders.[34]

[105] Thus it would seem that in appropriate circumstances and with an appropriate evidentiary base, there should be more than one payment for the use of those rights if there is more than one use. That always is the case when both the reproduction and communication rights are involved. MusiquePlus pays for its dependence on the ability to make copies of music to reduce its programming costs. Commercial radio stations pay for any copies they make of the music contained in the CDs they use; those that copy music to their hard drives pay even more than those who feed the CD into a CD player. By virtue of the Board's recent decision pertaining to musical ringtones, the providers of such ringtones must pay for the communication of the work when it is delivered over the Internet, in addition to paying for its reproduction.[35]

[106] Given the apparent contradiction in the above-quoted decisions, we reopened the hearing and asked counsel to respond in writing to a number of questions. In particular, we asked: whether the statements made by the Board in 1996 with respect to SOCAN Tariff 16 were compatible with statements made in later decisions; whether what otherwise looks like a single transaction should attract a separate price for separate uses; and how we should set those separate prices, given the record before us in these proceedings.

[107] SOCAN asked to intervene on these issues. We denied the request, but allowed SOCAN to file comments on the questions we had raised.

[108] NRCC essentially contends that *SOCAN 16 (1996)* was not intended to represent a generalization applicable in all cases where two or more separate rights are employed by the same user. It points to the historical context in which the decision was rendered, adding that SOCAN licences background music use through a number of other tariffs as well as through its Tariff 16. There was, in its submission, no evidence filed by SOCAN that could have resulted in a separate tariff for a communication right and a performance right.

[109] NRCC essentially agrees with CCTA that there is no evidentiary base for attributing a separate value to the communication right in the circumstances of the case at bar.

[110] CCTA argues that on the basis of the evidence presented, the performance and communication trigger a single payment that is equal to a performance effected by means that do

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[34] *Supra* note 9, at p. 27.

[35] For MusiquePlus, see Board's decision of November 16, 2000 fixing the royalties and conditions of SODRAC's licence for MusiquePlus. For commercial radio stations, see *supra* note 33. For ringtones providers, see Board's decision of August 18, 2006 with respect to ringtones for the years 2003 to 2005.

not involve a second use of NRCC's repertoire. CCTA contends that both NRCC and the background music suppliers agreed that the payment of royalties by a supplier would clear both the communication right and the performance right and that the amount of the royalty would be based on the value of the performing right alone.

[111] CCTA disagrees with the position taken by NRCC that the statement in *SOCAN 16 (1996)* was not intended to have general application. It argues that NRCC's expert consultants who developed the valuation study endorsed the Board's position in *SOCAN 16 (1996)*. CCTA points out that NRCC deliberately chose not to specify in its proposed tariff an amount of royalties payable for the communication of its repertoire by suppliers. In CCTA's submission, both NRCC and the Objectors took the position that the supply and use of background music together trigger a single payment that is equal to a performance that does not involve a second use.

[112] For its part, SOCAN argued that *SOCAN 16 (1996)* is not compatible with more recent statements of the Board and that these more recent statements should be adhered to, especially where different persons are making separate uses. In SOCAN's view, all rights and uses should be valued and paid for, either together or separately.

[113] The quality of the evidence that was before the Board in 1996 is not relevant to the case at hand. Simply put, we are of the view that *SOCAN 16 (1996)* cannot be reconciled with the Board's later statements dealing with the remuneration of multiple uses.

[114] First, when Parliament specifically creates two distinct rights, one must assume that each of these rights should command a separate price.

[115] Second, it is purely coincidental that in both *SOCAN 16 (1996)* and in this instance, we are considering uses that are administered by the same collective society. That will not always be the case. When both the reproduction and performing rights are engaged, different collectives are responsible for administering each use. In those cases, it would be unlikely that either collective would accept no compensation.

[116] Finally, one can presume that when a business makes decisions, it goes about it in a way that maximizes profits. Engaging in a new use implies that a business has also identified new efficiencies associated with this use. Rights owners should be compensated for that new use.

[117] While we agree that *SOCAN 16 (1996)* cannot be reconciled with the decisions that followed it, there is simply no evidence before us to assess the valuation of the two uses separately. We will therefore set only one price for the two separate uses.

H. APPROPRIATE EQUITABLE REMUNERATION

i. Adjustments

[118] Having concluded that SOCAN Tariff 16 is the appropriate starting point, it is necessary to consider certain adjustments.

a. Different rates for industrial and non-industrial premises

[119] SOCAN Tariff 16 sets a lower rate for industrial than other premises. NRCC contends that there is no justification for separate rates. It contends that the service delivered is the same and that its members should not be required to subsidize industrial users of background music. The Objectors ask that the tiered structure be applied here also.

[120] Tariffs for background music have existed since 1940.[36] Over the years, they have varied significantly. At the start, the rate for all establishments was the same. In 1959, a lower rate was set for industrial premises. Some of the rates were expressed in dollars, while others were a percentage of the cost of the service. One of SOCAN's predecessor collective, CAPAC, started using the current tariff structure in 1959; the other, the Performing Rights Organization of Canada (PROCAN), did not.

[121] There may have been justifications in the past for setting a price that was lower for industrial than other premises. However, if one examines the reality of background music today, the rationale for retaining a lower rate for industrial premises no longer exists. Background music has become a very sophisticated business. A number of specialized background music packages are available; background music can be tailored to the business or the environment. It is used both as a management tool and as a marketing tool. As a management tool, music is used to refresh and to keep employees motivated to do their jobs; as a marketing tool, music allows businesses to project the right image or to create the right mood. To illustrate this point in a commercial setting, the Vice-President of DMX , Mr. Trumble, used the example of a grocery store:

> You are a grocery store. I come to you and I say, "Who shops at your grocery store in the morning?" "Young mothers." Great. "Who shops at your grocery store in the afternoon?" "Senior citizens." Right. "Who comes in, say, around dinnertime?" "We have the double-income/no-kids guys coming in, picking up hot meals from the deli." Great. "Who comes in during the evening?" "Single males."
>
> All right. "How about we do this? How about we play love songs in the morning for the mothers who are coming in with children. How about we play big band swing in the

[36] *Supra* note 20.

> afternoon, when we have the seniors in. We will play adult contemporary during the dinner hour, and we will play classic rock at night."
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> "We won't play classic rock in the morning, and we won't play adult contemporary in the afternoon. We will swing it around. We will 'MAP' you out, so that we will suit the demographic of the people who are going to be there […]"[37]

[122] Businesses purchase background music to help them make money. In the industrial establishment, the objective is to increase productivity. Elsewhere, the objective is to increase sales. In our opinion, there is no meaningful distinction between the two objectives; consequently, there is nothing that would justify a lower rate for industrial establishments. Most important, as NRCC pointed out, the market can account for the lower value of the service by setting a lower price, which is reflected automatically in lower royalties when, as here, those are set at a percentage of the price of the service.

b. Discounts

[123] SOCAN Tariff 16 applies to establishments that purchase their background music from a supplier. SOCAN Tariff 15.A applies to those that provide their own background music. NRCC contends that all other things being equal, it costs more to play music pursuant to Tariff 15.A than Tariff 16. That is partly due to some discounts that are built into Tariff 16. The Board recognized as much in 1996 when it stated that "SOCAN has offered no evidence that the discounts offered to music suppliers are out of line with the economic benefits it derives from dealing with them."[38]

[124] NRCC points at these discounts to argue against the use of Tariff 16 as a proxy. It contends that copyright costs are a cost of doing business for background music suppliers and that there is no justification for them to receive a discount purportedly for making collection easier. On the other hand, background music suppliers point out that SOCAN licences four times as many establishments under Tariff 16 than it does under Tariff 15.A. According to the suppliers, because they collect the royalties and remit them directly to the collective, they provide a service that should be taken into account when the tariff is set.

[125] In our opinion, the tariffs the Board certifies should not have discounts built into them to reflect the services or benefits that certain users might provide to a collective. For one thing, it is difficult to assess those benefits. It is quite possible that background music suppliers benefit as much as SOCAN by remitting the royalties directly to SOCAN. This allows them to market their services as a trouble-free "turnkey" product. In fact, it would seem that a tariff targeting

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[37] Tr., at pp. 1141-2. MAP stands for Music Application Program, a proprietary method DMX uses to help commercial customers determine the music most appropriate for their business.
[38] *Supra* note 19, at p. 28.

background music suppliers was first introduced at the request of background music suppliers who contended it would help them sell their product.

[126] Most crucially, the function of the Board is to set tariffs for the use of works and other subject matters protected by copyright. Including a discount would be like valuing the collection service for commercial purposes. That is not our function. If any discount is to be afforded to the background music suppliers, it will come about as a result of negotiations between the parties. In this respect also, we disagree with the *SOCAN 16* decision (1996).

ii. The Appropriate Rate

a. Background music provided by suppliers

[127] For the reasons already set out, the starting point for the rate payable when background music is provided by a supplier is the non-industrial component of SOCAN Tariff 16, or 7.5 per cent of the amount paid by the subscriber to the background music supplier, net of equipment cost. With a proper evidentiary base, we probably would have made several upward adjustments to that rate. That, however, will not be the case.

[128] First, SOCAN Tariff 16 appears to contain an implicit discount to account for the fact that background music suppliers also act as collection agents. For the reasons we have just stated, we are of the opinion that the discount probably should be removed from the tariff. However, we have not received enough evidence to make such an adjustment in this case.

[129] Second, we 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. However, the evidence in this case does not permit us to determine the incremental value to be attributed to the communication right.

[130] Third, we received some evidence that background music has become a very sophisticated product that can effectively target specific groups of listeners in different demographic groups.[39] However convinced we may be of these improvements, we lack the necessary evidence to be able to decide whether such improvements lead to an increase in the value of background music and to decide what proportion of this increase in value, if any, should go to the rights holders.

[131] Thus, in the present circumstances, the only adjustment we can make is to take into account the proportion of eligible repertoire. Having found that 43.06 per cent of background

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[39] See, for example, the testimony of Mr. Trumble at ¶ 121 of the decision.

music is in NRCC's repertoire, we set the rate to be paid when a supplier provides the background music at 3.2 per cent (7.5 × 0.4306) of the subscription fees.

b. Other background music

[132] NRCC submits that ideally, those who provide their own background music should pay the same royalties as those who use a service. To achieve this, it is necessary to convert the rate expressed as a percentage of subscription revenues into a rate expressed as dollars multiplied by some other factor: attendance, capacity or area. This is done by applying the percentage rate to an amount – $840 per year – that is assumed to be the average price restaurants pay to subscribe to background music services. CCTA takes issue with two aspects of this methodology that are reviewed below.

[133] Subject to our earlier comments concerning situations where two rights are involved, we agree with NRCC that the tariff should, as much as possible, result in the payment of the same amount of royalties regardless of the manner in which background music is obtained. This minimizes the (somewhat theoretical) risk of users seeking to obtain their music in one way rather than another based solely on tariff considerations.

[134] The proposed methodology follows principles generally used by the Board to set tariff formulas. For example, NRCC would calculate royalties using attendance first, room capacity second and area third; if none of that information is available, a set amount would apply. This is consistent with the principle that royalties should vary with the number of persons who hear the music, among other factors. When that number is not available, royalties are calculated using numbers that offer the best available approximation for attendance.

[135] CCTA points out that the amount of $840 used to derive the rates is more than what it costs to subscribe to the background music services offered by any broadcast distribution undertaking. The amount is an average of the higher prices charged by traditional suppliers and the lower prices charged by background distribution undertakings. No reason was offered why the lower prices should be used instead of the market average. CCTA also points out that this amount includes equipment costs and argues that these costs should be excluded. Mr. Audley agrees. He then adds that the numbers used to derive the rates are somewhat lower than the actual market average; this indirectly removes from the calculation at least part of the cost of equipment. We accept that explanation.

[136] The Objectors did not offer any alternative to NRCC's proposal, making it difficult to derive the required rates in any other way. We are conscious that in many ways, the choice of the numbers used is highly arbitrary. We are also confident that a relatively conservative approach was used in arriving at the estimates, resulting in rates that are overall lower than what they could have been. For instance, using an average of two persons per seat per day in a restaurant

might seem to be on the high side, but the use of a lower estimate would result in a higher rate per person, not a lower rate. We will therefore use NRCC's methodology.

[137] Our objective is to ensure that for equivalent uses, the rates established for outsourced and self-supplied music generate the same remuneration to the rights holders. Table I, attached to this decision, details the steps involved in this methodology. The methodology is based on numbers derived from the restaurant sector, one of the major users of background music.

[138] Using this methodology, the first step is to convert the rate of 3.2 per cent into an equivalent dollar figure. NRCC estimates that, on average, restaurants that buy their background music from suppliers pay an annual amount of $840. The royalties payable for a service at that price would be $26.88. Assuming that on average, restaurants have a capacity of 60 places and are opened 300 days a year, the equivalent amount of royalties per unit of capacity per day is shown at line (7) of Table 1. Assuming that the capacity is being used twice on average leads to the rate at line (9). Using Ontario provincial government guidelines for the maximum occupant load, lines (11) and calculate the royalties per day per square foot and square metre, respectively.

[139] The rates we certify are stated at the end of these reasons.

iii. Minimum Fees

[140] We wish to reiterate the Board's position on minimum fees, as expressed in a decision made in 2004:

> The Board is convinced of the importance of maintaining minimum fees. An excessive reduction, or elimination of the minimums, while clearly favouring the small users, is generally unfair even if, in some particular cases, there might not be other solutions.[40]

[141] In our view, minimum fees are 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, the burden of which should not rest exclusively on rights holders.

[142] That being said, NRCC has not requested that minimum fees be certified, and there is no evidence available to help us on this issue. Under the circumstances, we can only establish a tariff without minimum fees.

iv. Inflationary Adjustment

[143] The rates established for users are expressed in dollars and will need to be adjusted regularly for inflation in order to remain equivalent to the percentage rate set for suppliers.

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[40] *Supra* note 12, at p. 13.

[144] NRCC argues that the rule adopted by the Board in its decision *SOCAN Multiple Licences (2004)*, to adjust tariffs using the annual percentage change in the Consumer Price Index (CPI) less 1 percentage point, results in too low an adjustment of the tariffs. NRCC claims that, over the long-term, the cost of a good or a service should typically be assumed to increase at the overall rate of inflation.

[145] NRCC proposes two alternatives to the Board's decision. The first is to adjust the tariffs expressed in dollars using the rate of inflation as measured by the CPI, plus the growth rate of the economy-wide productivity, minus one. The second is to adjust the tariffs using a measure of expected inflation equal to the difference between the nominal and real rates of return on Government of Canada bonds of comparable maturity.

[146] We reject NRCC's second alternative. It involves the use of a measure of expected inflation. The use of such an indirect measure of inflation is unnecessary, given that direct measures of inflation are available, albeit with a time lag.

[147] While agreeing with NRCC that in the long run, the price of most goods and services tend to increase at the overall rate of inflation, we also reject its first alternative. Because tariffs are proposed for a finite number of years, the opportunity arises regularly to review all factors with which they are determined. In this instance, future hearings will allow the Board to determine whether or not the rates set for users in this decision remain consistent with the royalties paid by background music suppliers. The correct measure of inflation for this tariff is embodied in the change of the average annual subscription fees that restaurants pay to background music suppliers. A change in these fees will result in a corresponding change in royalties. Because the user's rates are meant to be equivalent to the supplier rate, the former should also be eventually affected by the change in subscription fees.

[148] In future proceedings, evidence can be presented on how these subscription fees have changed over time and how these changes impact on the amount of royalties. That will be the occasion to reestablish, if necessary, the equivalence between the two categories of rates. In the meantime, the inflation adjustment rule serves as a proxy for the change in subscription fees. In this context, instances where tariff increases permanently diverge from the overall rate of inflation should not arise.

[149] We will therefore use the CPI to adjust the rates, but will subtract one percentage point from its annual percentage change. For the reasons the Board gave in its decision *SOCAN Multiple Licences (2004)*, we believe that this provides a better basis for the change in subscription fees than that proposed by NRCC. We also believe that it will ensure that the tariffs do not become themselves a factor that causes or maintains inflation.

[150] The only remaining issue is how to apply the inflation adjustment during the period of the tariff. When tariffs are being proposed for one year at a time, we can simply do the adjustment at

the time of certification. For multi-year tariffs, such as the one under current review, an inflation adjustment rule can be embodied in the tariff. Such a mechanism, because it allows for a quick adjustment to inflation, can become an encouragement for collectives to submit multi-year tariff proposals.

[151] Earlier decisions addressed similar issues. In 2004, for example, the Board stated that SOCAN could expect that adjustments for inflation would take into account inflation that occurred between adjustments. Indeed, the Board so decided. The Board also offered the view that it had the power to include, as part of the terms of a tariff, a formula that would allow multi-year tariffs to be adjusted to account for inflation occurring during the life of a tariff.[41] This instance allows us to apply the second of those principles.

[152] Certifying a tariff that allows for inflationary adjustments has advantages. It may save human and financial resources for the collective, users and the Board. It also allows for a smoother path of adjustments, more consistent with how real markets work. However, the approach may also suffer from serious disadvantages. For example, the fact that the exact rates are not known in advance might create uncertainty. In addition, users who may not even have existed at the time the tariff was filed (or certified) are deprived of making their views known. If only for that reason, certifying a tariff for a long period may be problematic, especially if the duration from the time the tariff is certified to the time it expires is long. Despite these misgivings, we think it both fair and appropriate to allow NRCC to experiment with the formula. The Board may reevaluate it in the future.

[153] The tariff will provide that NRCC can proceed with an inflationary adjustment to its rates expressed in dollars under four conditions. First, the adjustment to be applied shall be higher than three percentage points. Second, NRCC shall send a notice of the change to the affected background music users. Third, NRCC shall notify the Board of the change, including the detailed calculation of the increase. Fourth, NRCC shall post that calculation on its website.

[154] As previously mentioned, 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,[42] 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

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[41] *Ibid.*, at p. 51, endnote 17.

[42] If, for example, two successive 12-month periods had an inflationary adjustment of 2 per cent each, the cumulative adjustment would be 4.04 per cent. This corresponds to the sum of the two annual adjustments (of 2 per cent), plus the cumulated effect of the second adjustment on the first.

uncertainty facing users, we will allow inflationary adjustments to be made only at the beginning of a year, before January 31.

[155] In the current tariff, we use this method to decide whether any adjustments are needed for the years 2004 to 2006. As measured by the CPI, inflation was 2.77 per cent in 2003. Subtracting 1 percentage point leads to an adjustment of 1.77 per cent, which does not conform to the first condition. Hence, rates are not adjusted for 2004. In 2004, inflation was 1.83 per cent and the adjustment was 0.83 per cent. The cumulative total for the two years is 2.61 per cent, still below the 3 per cent threshold. The rates for 2005 will not be adjusted. In 2005, inflation was 2.23 per cent: the adjustment 1.23 per cent; and, the cumulative adjustment over the three years 3.88 per cent. Rates for 2006 are thus adjusted by that amount to take account of inflation for the years 2003 to 2005.

I. CERTIFIED RATES

[156] When music, including any use of music with a telephone on hold, is provided by a background music supplier, the royalty payable is 3.2 per cent of the amount paid to subscribe to the background music service for the years 2003 to 2009.

[157] In other cases, for the years 2003, 2004 and 2005, the rates payable by users of background music will be 0.08¢ per admission, 0.15¢ per unit of capacity per day or 0.25¢ per square meter (0.023¢ per square feet) per day. The royalty is set at $26.88 per year when none of the above methods applies: this corresponds to the royalties payable for the average restaurant that subscribes to a background music service, as shown on line (3) of Table I. An establishment that pays under one of the first three methods does not have to pay a separate royalty for the use of background music with a telephone on hold. Establishments that use only background music for telephone on hold need only pay the annual royalty. NRCC has not been able to identify other examples where this residual amount would apply.

[158] For 2006, the rates are increased by 3.88 per cent to 0.0831¢ per admission, 0.1558¢ per unit of capacity per day or 0.2597¢ per square meter (0.0239¢ per square feet) per day. The royalty is set at $27.92 per year when none of the above methodologies applies. For 2007 to 2009, the rates will be subject to the inflationary adjustment rule established in this decision.

VI. THE RISK OF REPERTOIRE SUBSTITUTION – ABILITY TO PAY

[159] CRFA and HAC insisted that a tariff at the amount NRCC proposed would lead hotel and restaurant operators to play only American sound recordings so as to avoid paying the tariff. They argued that more than half of the world’s repertoire of sound recordings that is not entitled to equitable remuneration is a readily available substitute to NRCC’s repertoire. Suppliers of background music may even have indicated to these associations a willingness to supply American-only music programming at a lower cost.

[160] The studies conducted by or on behalf of these associations clearly confirm three things. First, cost considerations are a dominant factor for hotel and restaurant operators when choosing a background music repertoire. Second, operators believe that it would be relatively easy and inexpensive to ensure that only non-eligible recordings are played as background music if the amount of royalties is perceived to be too high. Third, the switch to a wholly non-eligible repertoire would not provoke any reaction on the part of customers, who place no value on the nationality of the performers in background music.

[161] NRCC's survey expert, Mr. Benoît Gauthier, President, Circum Network Inc., took issue with the methodology used to conduct these studies; most of his misgivings probably have some foundation. However, regardless of the studies' perceived weaknesses, they each had the merit of giving the Board a broad view concerning two issues: the opinion the operators in these industries have with respect to NRCC's tariff and their perception about the means available to reduce music costs.

[162] In this instance, we think that the risk of unintended drop-off in the use of NRCC's repertoire is virtually non-existent.

[163] In theory, the price of gaining access to NRCC's repertoire can lead users to stop using that repertoire past a certain price point. However, we believe that the amounts payable pursuant to the tariff that we certify are far below any such price point.

[164] Suppliers and users of background music will have no difficulty paying royalties pursuant to the tariff we certify. The following examples, taken from the record of these proceedings and pertaining to the year 2004, show how modest the fees will be. The Swift Current Agricultural and Exhibition Association paid $51.24 to SOCAN; it will pay $12.80 to NRCC. The Calgary Stampede and Exhibition paid $2,814.36 to SOCAN; NRCC will receive approximately $469.03. For the Canadian National Exhibition, the figures are respectively $4,123.32 and approximately $1,120.

[165] The situation is the same for restaurants, as is shown using the figures for those operators who appeared before us. In 2004, Mr. Labelle's tavern paid $192 to SOCAN; it will pay $65.70 to NRCC. In the case of Mr. Ataman's dining establishment, the figures are $279 for SOCAN and $112.50 for NRCC. The person who supplies Mr. Waserman's three restaurants with background music service paid $216 to SOCAN and will pay $92.16 to NRCC.

[166] There is a second, more significant reason for doubting that background music users will avoid playing NRCC's repertoire. Users appear to underestimate how complicated it can be to determine which recordings are part of NRCC's repertoire and which are not. As explained by NRCC, it all depends on the recording; the performer plays no role in the matter. Playing only American music, whatever that may mean, will not ensure this. For example, a recording of an

American performer made in the United States will sometimes qualify, e.g. if the maker is Canadian. This was put succinctly by the Board in its decision *NRCC Commercial Radio (1999)*:

> [...] a recording is eligible not only if the maker was, at the date of the first fixation, a citizen or permanent resident of Canada or a Rome Convention country, but also if all fixations occurred in Canada or a Rome Convention country. [s. 20(1)] As a result, performers and makers who are not citizens or permanent residents of Canada or a Rome Convention country may nevertheless be entitled to remuneration.[43]

VII. OTHER ARGUMENTS

[167] In the course of these proceedings, a number of other arguments were raised that we must address.

[168] AAAS argued that background music plays an almost insignificant role in fairs and exhibitions. We think that is going too far. Even though background music may not play a prominent role in these events, it seems obvious to us that if, for example, no music was played, the atmosphere of the Midway section of a fair simply would not be the same.

[169] The argument that non-profit community activities should not attract any royalties must also be rejected. SOCAN has chosen to waive its fees for some such events under relatively strict conditions. This does not mean that community activities should be *entitled* to use NRCC's repertoire for free.[44]

[170] Also rejected, for reasons the Board has stated time and again and which we will not repeat here, is the argument that the rate should be lowered because the use and performance of NRCC's repertoire drives further sales of sound recordings.

[171] Finally, AAAS argued that it would be unfair to have to pay for a whole fairground or for all that attend the fair when background music is played only in discrete areas, especially if those areas are not accessible to all. Given the low amounts the tariff will require fairs and exhibitions to pay, addressing the issue in the tariff would unduly complicate its administration.

VIII. TARIFF WORDING

[172] The wording of the certified tariff is different in several respects from what NRCC had proposed originally. The choices we made in this decision meant that some of those changes became necessary. Others reflect the practices generally followed at the Board on a number of

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[43] *Supra* note 21, at p. 3.

[44] Subsections 32.2(2) and 32.2(3) of the *Act* provide some exceptions applying among others to fairs, exhibitions and charitable organizations.

administrative issues. Others yet are the result of consultations the Board had with participants on the wording of the tariff. The most significant issues are addressed below.

[173] The definitions (section 2) are fewer and simpler than in the proposed tariff. For example, the definition of "establishment" was simplified so as to mention only "places" (such as parks and means of public transportation), which do not obviously fall within the ambit of the term. Other definitions were omitted simply because they were unnecessary.

[174] Subsection 3(1), part of the application provision, now reflects the wording of the Act. It is different from what is found in some of NRCC's more recent tariffs and similar to what was in the earlier NRCC tariffs the Board certified. The mention that NRCC acts "for the benefit of performers and makers" was included at the request of NRCC, who wishes to eliminate any doubt as to who benefits from the tariff. Subsection 3(4) adds a reference to subsection 69(2) of the Act, which allows certain users to perform music using a radio receiving set for free.

[175] Sections 4 and 5 set the rates. As was done recently by the Board in some other tariffs and largely for the reasons set out in paragraphs 93 and following of these reasons, the tariff targets uses, not users.

[176] Section 4 applies when music is provided by a background music supplier. Suppliers will pay royalties quarterly. During consultations on the wording of the tariff, NRCC again expressed its fear that removing from the rate base the amount charged for equipment used by the subscriber might lead to some form of abuse; it asked that the provision limit these charges to those that are reasonable and verifiable. For the reasons set out in paragraphs 90 to 92 of this decision, we have not done so. The reports to be filed pursuant to section 7 should allow NRCC to verify the importance of the amounts that will be deducted in that respect.

[177] Section 5 applies in all other instances of use of background music. In the proposed tariff, royalties were to be paid quarterly, but those owing less than $175 in two consecutive quarters would be allowed to pay yearly. The certified tariff provides the opposite. Royalties will be paid once a year until royalties owed in a given year reach $350. In that case, royalties for the rest of the year and the following one will be paid quarterly. Our assumption is that most users will pay yearly, and we think that the tariff structure should reflect this.

[178] Section 5 provides that royalties are payable only in respect of days during which background music was played. This is how the proposed tariff was drafted. Still, we have reservations as to how this will work out in practice; it may be difficult for NRCC to establish days for which royalties are payable when an establishment does not use background music all of the time. This issue may need to be revisited eventually. In any event, we added to section 8 a provision requiring that users keep information required to ascertain days on which background music was used.

[179] The reporting requirements (section 7) are considerably simplified and provide that users supply to NRCC, where applicable, what was used to calculate the royalties.

[180] NRCC asked that the tariff clearly state that the information a user is required to keep includes information required to determine how and why the user decided which formula to use. The tariff as certified is meant to dictate the choice of formula, not to give users an option; the collective must be able to verify that a user has correctly chosen which formula to use. Consequently, NRCC's request for additional information is reasonable and section 8 of the tariff has been worded accordingly.

[181] Some objectors asked that NRCC be limited to one audit per year. They offered no evidence that would lead us to conclude that the collective has abused its audit privileges. More importantly, it may be reasonable, indeed necessary, to audit more than once in a year a user whose recent declarations have proven to be egregiously incorrect. Finally, the fact that NRCC supports the costs of an audit, unless it discloses a significant underpayment, is of itself a sufficient incentive not to conduct one unnecessarily. For these reasons, we have not adjusted the audit provisions in this respect.

[182] As proposed, the provision dealing with the handling of confidential information (now section 9) would have allowed that information to be shared with other collectives, even those who are not members of NRCC. This is helpful in tariffs setting royalties to be paid to two or more collectives, not in tariffs such as this one, that set royalties to be paid to only one collective. Section 9 also specifies that NRCC is entitled to act through agents, who also must abide by the provisions of the tariff, including those dealing with confidentiality.

[183] Objectors asked that section 9 expressly provide that information supplied to foreign societies to assist in the distribution of royalties should not allow those societies to associate any of the information received with specific establishments. This is unnecessary, since paragraph 9(2)(iii) already provides that NRCC can supply information to royalty claimants only "to the extent required to effect the distribution of royalties".

[184] Finally, the tariff contains certain transitional provisions made necessary because the tariff takes effect on January 1, 2003 while it is being certified much later. Two tables set out multiplying factors to be used on sums owed in a given quarter or year. The factors were derived using previous month-end Bank Rates covering the period January 2003 to August 2006 as published by the Bank of Canada. We consider that a penalty over and above the interest factor should not be imposed on retroactive payments in this matter, as there was no way for users to estimate the amounts payable until the tariff was approved. Interest is not compounded. The amount owed for a quarter or year is the amount of the approved tariff multiplied by the factor set out for that quarter or year. We hope that this will greatly simplify the users' calculations and the collectives' verifications.

Claude Majeau
Secretary General

TABLE I / TABLEAU I

CONVERSION OF RATES
CONVERSION DES TAUX

(1)	Average annual payment of restaurants to background music suppliers Paiement annuel moyen des restaurants aux fournisseurs de musique de fond	$840
(2)	Rate paid to background music suppliers Taux payé aux fournisseurs de musique de fond	**3.2 %**
(3)	Average Royalties (1) × (2) Redevances moyennes (1) × (2)	**$26.88**
(4)	Average capacity of a restaurant Capacité moyenne d'un restaurant	60
(5)	Royalties per unit of capacity (3) ÷ (4) Redevances par unité de capacité (3) ÷ (4)	$0.45
(6)	Number of days of operation in a year Nombre de jours d'exploitation par année	300
(7)	Royalties per unit of capacity per day (5) ÷ (6) Redevances quotidiennes par unité de capacité (5) ÷ (6)	**$0.0015**
(8)	Average number of persons per unit of capacity Nombre moyen de personnes par unité de capacité	2
(9)	Royalties per person (7) ÷ (8) Redevances par personne (7) ÷ (8)	**$0.0008**
(10)	Number of square feet per person Nombre de pieds carrés par personne	6.458
(11)	Royalties per square feet per day (7) ÷ (10) Redevances quotidiennes au pied carré (7) ÷ (10)	**$0.00023**
(12)	Number of square metres per person Nombre de mètres carrés par personne	0.6
(13)	Royalties per square metre per day (7) ÷ (12) Redevances quotidiennes au mètre carré (7) ÷ (12)	**$0.0025**