Copyright Board Canada

Commission du droit d'auteur Canada

Date	2018-12-14
Citation	CB-CDA 2018-225
Regime	Collective Administration in Relation to Rights under Sections 3, 15, 18 and 21 *Copyright Act*, section 66.52 and subsection 70.15(1)
Members	The Honourable Robert A. Blair Mr. Claude Majeau Mr. J. Nelson Landry
Proposed Tariffs Considered	Commercial Radio Stations Application to Vary CSI (2012-2013) Connect/SOPROQ (2012-2017) Artisti (2012-2014) Commercial Radio Stations Determination CSI (2014-2018) Connect/SOPROQ (2018) Artisti (2015-2018)

Statement of Royalties to be collected for the reproduction, in Canada, of musical works, of sound recordings, and of performers' performances

Reasons for decision

I. GENERAL

A. INTRODUCTION

[1] Beginning in March 2013, the Collectives involved in this proceeding filed a number of proposed tariffs dealing with the reproductions of musical works, sound recordings and performers' performances made by commercial radio stations in Canada as part of their broadcasting activities. The proposed tariffs were published in the *Canada Gazette*, thereby providing prospective users or their representatives with notice of the opportunity to object to

them. On behalf of its members who operate those radio stations, the Canadian Association of Broadcasters (CAB) objected. Some other broadcasters, and broadcasters' representatives, did as well.

[2] In the course of considering and dealing with the proposed tariffs, the Board issued a decision on April 21, 2016 (the "Decision"),[1] certifying reproduction tariffs for the following collectives and years: CSI (2012-2013); Connect/SOPROQ (2012-2017); and Artisti (2012-2014) (the "Certified Tariffs").[2] The Decision covered some of the proposed tariffs that were pending at that time.

[3] CSI, Connect/SOPROQ, and CAB all filed applications for judicial review of the Board's decision in the Federal Court of Appeal. While there were a number of issues in dispute, one area of concern, in particular, was at the heart of a series of events and negotiations that ultimately led to a broader settlement of all issues between the parties. The concern centred around a limited modified blanket licence (the "MBL") regime that the Board included in the certified tariff in relation to a potential royalty discount for broadcast ephemeral copies.

[4] All parties jointly submit to us now that this limited MBL regime has subsequently proved to be unexpectedly complex and impractical to put into effect. They say that, despite their extensive collaborative efforts to do so, they have not been able to develop mutually acceptable compliance requirements that would make the regime workable. In response to this turn of events, they have taken a different approach.

[5] They have negotiated a broad settlement agreement (the "Settlement Agreement") with a view to resolving not only the difficulties arising out of the limited MBL regime, but other matters relating to the applications for judicial review and future tariff periods. The settlement has received widespread industry approval. Described in more detail below, it encompasses Settlement Tariffs designed to replace the Certified Tariffs, as well as to cover subsequent periods, through to the end of 2018.

[6] We are asked to give effect to that settlement by (a) varying the Decision in such a manner as to replace the rates, terms, and conditions in the Certified Tariffs with those contained in the settlement; and (b) certifying tariffs for subsequent years with the rates, terms, and conditions contained in the settlement. While there are some overlapping considerations that apply to both

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[1] *Statement of Royalties to Be Collected bySOCAN (2011-2013), Re:Sound (2012-2014), CSI (2012-2013), Connect/ SOPROQ (2012-2017) and Artisti (2012-2014) in Respect of Commercial Radio Stations* (April 21, 2016) Copyright Board Decision. [the "Decision"]

[2] *Commercial Radio Tariff (SOCAN: 2011-2013; Re:Sound: 2012-2014; CSI:2012-2013; Connect/SOPROQ: 2012-2017; Artisti: 2012-2014)* (April 23, 2016) Copyright Board Tariff. [*Commercial Radio Tariff (2011-2017)*]

requests, there are a number of aspects that require different analyses. We will accordingly address these as two separate requests.

[7] As explained below, we grant both requests.

B. The Parties and the Subject Matter of the Tariffs

[8] This decision concerns tariffs dealing with reproductions made by commercial radio stations as part of their broadcasting activities. More particularly, it concerns three sets of rights, namely:

- The right of the owner of the copyright in a musical work to reproduce it and to authorize such a reproduction;
- The right of the owner of the copyright in a sound recording to reproduce it and to authorize such a reproduction; and
- The right of the owner of the copyright in a performer's performance to reproduce any reproduction of an authorized fixation of the performance for a purpose other than that for which the authorization was given and to authorize such a reproduction.

[9] The first of these rights is represented in this proceeding by CMMRA-SODRAC Inc. (CSI), the second by Connect/SOPROQ, and the third by Artisti.

C. The Settlement

[10] CSI, Connect/SOPROQ, Artisti (the "Collectives"), and CAB (together, the "Parties") are parties to the settlement.

[11] In the Settlement Agreement, the Parties recite that they wish to:

> (i) resolve disputes between them as to the Certified Tariffs, the Proposed Tariffs, and the Applications [for judicial review]; (ii) consolidate the Certified Tariffs and the First Proposed Tariffs, as revised in accordance with this Agreement, into a single certified commercial radio reproduction tariff for the period 2012 to 2017 in the form attached as Schedule "A" (the "First Settlement Tariff"); (iii) agree on an additional certified commercial radio reproduction tariff for 2018 in the form attached as Schedule "B" (the "Second Settlement Tariff") (together, the "Settlement Tariffs"); and (iv) have certainty and predictability as to royalty payments already payable, and to be payable, by the Stations to the Collectives during the terms of the Settlement Tariffs.

[12] The Settlement Agreement eliminates the limited MBL contained in the Certified Tariffs established by the Board in its Decision and replaces it with certain blanket royalty discounts negotiated by the Parties. In doing so, the Parties say:

> […] the Settlement Tariffs avoid the unforeseen difficulties posed by the MBL, including by simplifying the calculation of royalties, clarifying and reducing the reporting obligations of

> stations, and relieving the parties of the obligation to design and implement complicated and expensive systems to administer the MBL.

[13] The goal, as the Parties put it in their joint letter to the Board dated September 15, 2017, was to

> […] achieve greater certainty and predictability as to the royalties payable by commercial radio stations to the Collectives during the period of the Settlement Tariffs, thus reducing transaction costs and minimizing unnecessary disputes and potential litigation.

[14] The original signatories to the Settlement Agreement were the Collectives and CAB. However, paragraph 1 of the agreement provides that CAB was to use its reasonable best efforts to have broadcasters with commercial radio broadcast operations countersign, and agree to be bound by the Settlement Agreement, as "Acknowledging Stations." The Settlement Agreement was not to become effective until the Acknowledging Stations accounted for "at least 90 per cent of Canadian commercial radio revenue for 2015." As explained below, that threshold has been surpassed.

[15] Once that occurred, the Collectives were to, and did, file on September 15, 2017, the First Settlement Tariff and the Second Settlement Tariff with the Board, together with a joint request that they be approved as filed. On November 21, 2017, the Collectives and CAB withdrew their respective applications for judicial review of the Decision.

[16] Following the Board's Notice 2017-171, the Parties filed on February 9, 2018, a written Application to Vary, pursuant to section 66.52 of the *Copyright Act* (the "*Act*"),[3] in respect of the Certified Tariffs.

[17] It is important to note that the tariffs for the application to vary the Certified Tariffs are a subset of the First Settlement Tariff, as that term is used in the letter of September 15, 2017. As such, the remaining proposed tariffs addressed by the First Settlement Tariff and Second Settlement Tariff still awaited consideration by the Board.

[18] Thus, we have two main issues to consider: i) whether, and how, to grant the application to vary in relation to the Certified Tariffs, and ii) whether to certify the remaining proposed tariffs on the basis of the First Settlement Tariff and Second Settlement Tariff that cover periods subsequent to those covered by the Certified Tariffs.

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[3] *Copyright Act*, RSC, 1985, c C-42.

D. THE ACKNOWLEDGING STATIONS

[19] The Collectives, CAB, and the Acknowledging Stations, together, represent the vast majority of private commercial radio stations in Canada and the owners of the reproduction rights in the recorded music used by those stations in their broadcast operations. A total of 709 stations have agreed to be bound by the Settlement Agreement as Acknowledging Stations.

[20] Virtually every commercial radio station in Canada has been contacted. All those that responded to counsel for CAB about the settlement have agreed to be bound by it. No commercial radio station in Canada has objected. The settlement therefore has overwhelming acceptance throughout the industry.

II. THE APPLICATION TO VARY

A. FACTUAL BACKGROUND

i. The Board's April 21, 2016 Decision

[21] In its April 21, 2016, decision, the Board dealt with many issues. One area of dispute involved whether, and if so, the extent to which certain types of reproductions made by stations were entitled to benefit from exceptions provided in the *Act* for fair dealing (s. 29), backup reproductions (s. 29.24), reproductions that are part of a technological process (s. 30.71), and ephemeral copies made by broadcast undertakings for the purpose of their broadcasting (s. 30.9). The Board made determinations in each of these contested areas, but it is the structure of the Certified Tariffs with respect to broadcast ephemeral copies (the "s. 30.9 Tariff") that is the principal driver of the application to vary.

[22] The Board held that music evaluation copies, backup copies, and streaming copies made by radio stations for broadcasting purposes were entitled to benefit from the exceptions provided in sections 29, 29.24 and 30.71, respectively. It established general blanket discounts for these types of reproductions.

[23] In addition, the Board found that three other types of copies – ingest copies, live performance copies, and voice tracking copies– could potentially qualify for a discount as broadcast ephemeral copies. However, since there was substantial evidence at the time to show that radio stations had not yet taken steps to comply with s. 30.9, the Board could not apply a blanket discount for such copies. Instead, it included a limited MBL. In arriving at this disposition, the Board said:

> [215] Hopefully, information relating to the application of the MBL will be presented during the next hearing on commercial radio as well as updated evidence on industry practices. It could be relevant for the Board to know what types of reproductions made by broadcasters comply with section 30.9, and in what proportions. This evidence would allow the Board to

> re-evaluate how the effect of complying with section 30.9 would be best applied to a tariff in the future, whether it be through an overall blanket discount, an MBL, or another approach altogether.
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> […]
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> [217] We also found that since we do not have any evidence showing that stations comply with the requirements of section 30.9 of the *Act*, we cannot apply a blanket discount to the royalty rates without speculating on the anticipated level of compliance. A potential discount, however, through the application of a limited MBL, will be implemented and will be available to the stations that are able to show compliance with section 30.9.
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> […]
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> [346] In order to qualify for this additional discount in respect of ephemeral reproductions, a particular broadcaster will need to demonstrate that each of the copies for which it is claiming a discount meet all the requirements of section 30.9 of the *Act*. This will be achieved by the broadcaster completing and submitting a report to CSI, the details of which are set out later in this decision, in the section on tariff wording. [emphasis not in the original]

[24] The details, as set out in subsection 8(2) of the Certified Tariffs, required that stations claiming an MBL discount "provide all the information necessary to assess the level of compliance of the station with section 30.9 of the *Act*."

ii. The Aftermath

[25] The Parties jointly submit that ambiguity and lack of clarity resulting from the absence of compliance criteria relating to the MBL regime have made the implementation and administration of the MBL significantly more complex than could reasonably have been expected at the time of the Decision, and essentially unworkable. They have engaged in extensive negotiations with a view to developing mutually-acceptable compliance requirements that would enable stations claiming an MBL discount to establish their entitlement to the discount and Collectives to verify compliance, in a commercially practical, proportional and technologically feasible fashion. Notwithstanding these efforts, however, they have not been successful in devising such a protocol.

[26] According to the Parties, this led to the Settlement Agreement, replacing the MBL regime with certain additional blanket discounts negotiated by the Parties.

B. ANALYSIS: APPLICATION TO VARY

i. The Power to Vary

[27] The Board's power to vary a decision is found in s. 66.52 of the *Act*:

> A decision of the Board respecting royalties or their related terms and conditions […] may, on application, be varied by the Board if, in its opinion, there has been a material change in circumstances since the decision was made.

[28] This decision therefore turns on whether the circumstances outlined above give rise to a material change in circumstances. In our opinion, they do for the following reasons.

[29] The Board's statutory power to vary a previous decision is an exception to the general principle known as *functus officio*: once a tribunal makes a decision it is final, subject to appeal or judicial review. The variation power is not to be exercised in an indiscriminate fashion. That said, enabling statutes governing regulatory tribunals ought not to be construed narrowly or in a fashion that would have the effect of "sterilizing [their] powers through overly technical interpretations."[4] Legislation is to be "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[5]

[30] The Supreme Court of Canada some time ago adopted the Shorter Oxford Dictionary definition of the word "vary" – "to cause to change or alter; to adapt to certain circumstances or requirements by appropriate modifications" – to describe what the variation power in an administrative tribunal's enabling statute entails.[6] While the Court was there addressing the power of the Labour Relations Board of British Columbia to vary a decision or order pursuant to s. 65(3) of the *Labour Relations Act*, RSBC 1960, as amended, this description is equally apt to the Board's power under s. 66.52, in our opinion.

[31] Indeed, on previous occasions, the Board has exercised its power to vary a certified tariff, or indicated its willingness to do so, in order to rectify difficulties in the administration of a tariff and ensure a more efficient and more enforceable tariff.[7]

[32] This approach is consistent with the view of the Federal Court of Appeal that an application to vary is an appropriate step, and may be granted upon proper proof, where an order proves to be ambiguous and difficult of application.[8] In that case, the Court was considering whether to grant a stay of an injunction. It declined to do so, but, Stratas J.A. observed that if ambiguities in the order were creating real difficulties in its application, a motion to vary the order pursuant to Rule 399(2)(a) of the *Federal Court Rules* would be open to the complaining party, because

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[4] *Bell Canada v. Canadian Radio and Telecommunications Commission*, [1989]1 SCR 1722 at 1756.
[5] *Interpretation Act*, RSC, 1985, c I-21 s12.
[6] *Bakery and Confectionery Workers International Union of America Local 468 v. White Lunch Ltd.*, [1966] SCR 282at 295 (emphasis added).
[7] See, e.g., *SOCAN-NRCC Tariff 1.A (Commercial Radio) for the Years 2003 to 2007* (October 14, 2005) Copyright Board Decision; *Application to vary the tariff of levies to be collected by CPCC, in 2001 and 2002, for the sale of blank audio recording media in Canada* (April9, 2002) Copyright Board Decision.
[8] *Janssen Inc. v. Abbvie Corporation*, 2014FCA 176, at paras 40-43. [*Janssen*]

"[t]hese real difficulties, if true and if proven satisfactorily, can potentially qualify as 'a matter that arose […] subsequent to the making of the order.' "[9] He went on to state:

> If Janssen brings a motion in the Federal Court under Rule 399(2)(a), it will be for that Court to determine whether the real difficulties alleged by Janssen constitute "a matter that arose […] subsequent to the making of the order." The Federal Court could take the view that the difficulties were fully canvassed before the injunction was made and the wording of the injunction represents its final solution to them. In oral argument, Janssen appears to be taking the position that many of the difficulties it says are now happening were unforeseen and unaddressed at the time the Court set the terms of the injunction. To the extent that is true, a motion under Rule 399 is open to it.[10]

ii. A Material Change in Circumstances

[33] The foregoing comments focus on the approach we take to the interpretation of the Board's powers under s. 66.52 and the manner in which the Applicants seek to have us do so in this case, i.e. to vary the Certified Tariffs by making appropriate modifications to adapt to the changed circumstances. We turn now to address whether what has occurred constitutes a material change in circumstances, as contemplated by section 66.52, and, if so, whether the Board should vary the Decision to implement the First Settlement Tariff, as requested.

[34] The Parties submit that the unforeseen complexity and unworkability of the MBL, and the execution of the Settlement Agreement by the Parties and the Acknowledging Stations, together constitute a material change in factual circumstances since the Board's Decision, as contemplated in section 66.52. The difficulties relating to the implementation of the MBL regime, and the rationale underpinning the settlement are explained in their joint Application to Vary:

> 23. Concurrent with the filing of the applications for judicial review, CSI, Connect/SOPROQ, and the CAB commenced multilateral discussions with a viewto agreeing upon specific reporting requirements for the MBL.
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> 24. Those Applicants determined that it would be necessary to agree upon a fixed, uniform set of detailed reporting requirements for the MBL that would apply to at least all members of the CAB, if not all stations that might have claimed an MBL Discount. Absent such reporting requirements, there would have remained the serious risk that any number of different individual stations or station groups would have reported different information in different formats. CSI, Connect/SOPROQ, and the CAB recognized that such an outcome would have made it impossible for the Collectives and the stations to automate the exchange and processing of reporting data, which would have rendered the MBL unworkable and

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[9] *Ibid* at para 40, citing the language of theRule.
[10] *Ibid* at para 41.

> therefore impossible to administer in practice. The result would have been significant uncertainty, delay, increased transactional costs, and an increased likelihood of litigation.
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> 25. As a result, over the course of several months, CSI, Connect/SOPROQ, and the CAB collaborated extensively and in good faith in an attempt to develop mutually acceptable reporting requirements. Such efforts included in-person meetings, conference calls, written correspondence, and the exchange of draft materials. Through those efforts, the parties attempted to identify and reach agreement on the information and documentation that a station would be required to report, and would have been capable of reporting, to claim an MBL Discount, having regard to both the statutory requirements of section 30.9 and the technological and administrative capabilities of stations and station groups. Not all of that information was readily available.
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> 26. However, by December 2016, it had become clear that the parties would not be able to formulate appropriate and feasible reporting requirements for the MBL, despite their extensive collaborative efforts. As a result, it was apparent that, unless some other solution could be achieved, the Applicants would continue to face the risks described in paragraph 24 above, which would have rendered the MBL unworkable and therefore impossible to administer in practice.
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> 27. In those circumstances, each Applicant expressed a willingness to make certain concessions in the interest of achieving a negotiated resolution of the unforeseen difficulties relating to the MBL […].

[35] We accept the factual accuracy of the foregoing narrative, and find the explanation, itself, persuasive.

[36] At the time of the Decision, the Board anticipated that implementation of the MBL would pose some administrative and compliance challenges. But it expected, nonetheless, that stations would be able to comply and qualify for discounts. The Board stated that as broadcasters gradually began to comply with the requirements of s. 30.9 – something that they had not yet begun to do – and as radio stations and Collectives worked to share the administrative burden arising from those requirements, broadcasters making certain reproductions "should be able to benefit from the [ephemeral copies] exception without having to wait for the next hearing on the issue."[11]

[37] However, because of the open-ended nature of the s. 30.9 Tariff, the state of relevant information gathering in the industry at that time (or lack of it), the need for a mutually accepted automated system of compliance, and generally for the reasons explained by the Parties above, the Board's expectations have not materialized. We are satisfied that, had the evidence reliably showed that this would be the case, the Board would not have certified the tariff as it did; there

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[11] *Supra* note 1at paras 206-208.

would have been no point in doing so. The subsequent development and change in factual circumstances are therefore "material" in our opinion.[12]

[38] This is not a situation where the Parties have themselves created a change in circumstances and now seek a variation simply to put into effect a post-certification agreement more to their liking. Rather, it is a situation in which they have responded to a reasonably unanticipated turn of events by negotiating a mutually acceptable solution that has overwhelming support, and no opposition, in the industry.

[39] In the context of this proceeding, we are satisfied that this post-certification factual development constitutes both a "change" and a "material" change in circumstances of a factual nature sufficient to engage the Board's power to vary under s. 66.52.[13]

iii. Should the Application for a Variance be Granted?

[40] Not every situation in which parties to a certification proceeding arrive at a settlement of various issues post-certification – including issues that are covered by the Certified Tariffs – will necessarily lead to a variation decision. The Board's power to vary is discretionary. Each case must be determined on its own factual and legal underpinnings.

[41] The mere fact that collectives and users have entered into an agreement following a Board decision that calls for a different outcome than that provided for in a certified tariff, does not necessarily, by itself, warrant granting a variation. Given the particular dynamics of this case, however, we accept the Parties' joint submissions.

[42] The Settlement Agreement complies with the considerations generally taken into account by the Board in determining whether to certify a proposed tariff based on an agreement of interested parties where the subject matters of the settlement and the proposed tariff are the same. In such circumstances, the Board considers the following factors, sometimes referred to as "the *Re:Sound 5* framework": (a) the extent to which the parties to the agreement can represent the interests of all prospective users, and (b) whether relevant comments or arguments made by former parties and non-parties have been addressed.[14]

[43] Here, there is no debate that the applicants, together with the Acknowledging Stations, are representative of the interests of all users. While CAB does not represent every commercial radio station in Canada, it represents the great majority of them.

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[12] See *Willick v. Willick*, [1994] 3 SCR 70at para 20.
[13] See *Rogers Communications Partnership v. SOCAN*, 2016 FCA 28 at para 76; *Janssen, supra* note 8 at para 40.
[14] *Re:Sound Tariff 5 – Use of Music to Accompany Live Events (Parts A to G),2008-2012* (May 25, 2012) Copyright Board Decision.

[44] In terms of numbers, the most up-to-date information[15] demonstrates that a total of 687 commercial radio stations paid royalties to CSI in 2016. Of those, 636 (approximately 93 per cent, accounting for approximately 97 per cent of revenues) have signed on to the Settlement Agreement. In addition, a further 73 stations that do not pay royalties to CSI have agreed to be bound, bringing the total number of Acknowledging Stations to 709. Further details are provided in the following tables.

[45] Table 1 shows the breakdown of stations by region. The total number of stations, 687, is the total number of licensed radio stations in Canada that paid royalties to CSI in 2016 and includes both CAB members and non-members.

Table 1: Distribution of Stations by Region and Acknowledgment Status, 2016

Region	Acknowledging Stations	Non-responding Stations	Total	Percent Acknowledging
North	1	3	4	25.00%
West	276	16	292	94.52%
Ontario	206	10	216	95.37%
Quebec	72	18	90	80.00%
East	81	4	85	95.29%
Total	**636**	**51**	**687**	**92.58%**

[46] Table 2 shows the breakdown of stations by language of broadcast, based on the station's CRTC licence.

Table 2: Distribution of Stations by Language and Acknowledgment Status, 2016

Language	Acknowledging Stations	Non-responding Stations	Total	Percent Acknowledging
French	75	15	90	83.33%
English	548	31	579	94.65%
Other	13	5	18	72.22%
Total	**636**	**51**	**687**	**92.58%**

[47] Table 3 shows the breakdown of stations by revenue groups.

Table 3: Distribution of Stations by Size and Acknowledgment Status, 2016

Size	Acknowledging Stations	Non-responding Stations	Total	Percent Acknowledging
Small	167	28	195	85.64%

[15] The Parties provided this information in an update to the Board, as of March 22, 2018, in response to questions posed to the Parties by the Board in Notice 2017-154 issued on December 8, 2017, in relation to the representativeness of the Acknowledging Stations.

Medium	162	13	174	93.10%
Large	307	10	317	96.85%
Total	**636**	**51**	**687**	**92.58%**

[48] Tables 1-3 show that there is no high concentration of non-responding stations in any particular geographical area of the country,[16] or by linguistic breakdown, or in terms of the size of station reporting. The Acknowledging Stations are therefore reflective of the commercial radio industry in Canada.

[49] The Board has previously concluded that an objector representing over 90 per cent of relevant users spoke "for the vast array" of such users.[17] Given the foregoing information, the same assumption may safely be made here, in our opinion.

[50] The second factor in the *Re:Sound 5* analysis relates to former parties and non-parties, and to the assessment of any relevant comments or arguments they may have made. Its underlying rationale is to ensure the Board has heard, and been able to address, relevant feedback supporting any reasonably interested individual or organization that bears on the Settlement Agreement.

[51] Comments by non-parties are often harder to assess, since non-parties are often unaware of the Board's proceedings. In this case, this general statement is not true, however. In a letter to the Board on December 22, 2017, the Parties jointly stipulated that:

> CAB counsel consulted the CAB to obtain a list of all commercial radio stations in Canada that the CAB had listed in its database. The CAB has a database of all its members as well as other radio stations that it is aware of based on past communications. CAB counsel reached out to the entire database over the course of 6 months by email and phone, in some cases contacting stations 6 or more times to attempt to discuss the issue of tariffs and settlement with them. After a series of communications with counsel for CSI regarding CAB counsel's outreach efforts, CSI counsel consulted CMRRA and SODRAC regarding additional stations and station groups that each collective has listed as licensees. CAB counsel then attempted to contact the additional stations that it was made aware of from the CMRRA and SODRAC lists. Thus, CAB counsel attempted multiple communications with all stations listed in the CAB database (members and non-members) as well as all stations listed by CMRRA and SODRAC as licensees for which contact information was available. [emphasis added]

[52] In our view, the efforts described above meet those we would require of settling parties to ensure that non-parties have been contacted in this instance. Following these contacts, no comments were received by non-parties. In addition, as indicated in the Parties' letter to the Board of March 27, 2018, continuing efforts to reach more stations have resulted in more

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[16] Given that the "North" region contains very few stations, it is difficult to draw conclusions from such a small sample.

[17] *Supra* note 14 at para 11.

stations acknowledging the Settlement. Nor have those continuing efforts resulted in any further comments by non-parties being received by the Board, or by the Parties.

[53] In view of the foregoing, we are satisfied that the second part of the Re:Sound 5 analysis is also satisfied.

[54] In *Netflix*, the Federal Court of Appeal approved generally of the *Re:Sound 5* analysis, but refined it in cases where the subject matter of the settlement agreement differs from the published proposed tariffs, stating that:

> where, as here, a settlement agreement deals with subject matter that did not appear in the published proposed royalties and where none of the parties at the negotiating table are adversely affected by the change, as is the case here, it seems to me that procedural fairness requires that a representative number of the affected segment of the industry be given the opportunity, if it so chooses, to make its comments and point of view known and dealt with by the Board.[18]

[55] The *Netflix* refinement has no application in these circumstances because the subject matter of the Settlement Agreement pertaining to the Certified Tariffs and the Proposed Tariffs remains the same. We need not pursue it further, then.

[56] As such, we conclude that a variance should be granted. We therefore proceed to consider how the Certified Tariffs should be varied.

C. HOW TO VARY THE CERTIFIED TARIFFS

[57] The Parties have asked the Board to vary the Certified Tariffs on the basis of the First Settlement Tariff. We therefore proceed to analyze the relevant portions of the First Settlement Tariff.

[58] The Application to Vary, by definition, can only apply in respect of the Certified Tariffs, and the periods to which the Certified Tariffs apply. As such, the tariffs that are considered are the following:

- CSI Tariff for Low-Use Radio Stations (musical works), November 7, 2012, to December 31, 2013;
- CSI Tariff for All Other Radio Stations (musical works), November 7, 2012, to December 31, 2013;
- Connect/SOPROQ Tariff for Low-Use Radio Stations (sound recordings), January 1, 2012, to December 31, 2017;
- Connect/SOPROQ Tariff for All Other Radio Stations (sound recordings), January 1,

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[18] *Netflix v. SOCAN, et al.*, 2015 FCA 289at para 49.

2012, to December 31, 2017;
- Artisti Tariff for Low-Use Radio Stations (sound recordings), January 1, 2012, to December 31, 2014; and
- Artisti Tariff for All Other Radio Stations (sound recordings), January 1, 2012, to December 31, 2014.

[59] As can be seen from this list, the period for which the Certified Tariffs apply is different for each collective; consequently, the period for which the Application to Vary applies is also different for each collective (the "ATV period").

i. Analyzing the Tariffs

[60] Both the Certified Tariffs, as well as the Settlement Tariffs use a royalty structure based on three revenue tiers. The tiers operate similarly to income-tax brackets: a radio station pays a given rate on its revenue within a given tier, with different rates applying to revenue in different tiers. We therefore find it useful to consider the effect of the requested Application to Vary on three hypothetical radio stations, each of which has revenue corresponding to a different tier. The first, a "small" station, with yearly revenues of $312,500, the second, a "medium" station, with yearly revenues of $937,500, and the third, a "large" station, whose revenues are the average of the entire industry, ranging between $2.1 million and $2.4 million, depending on the year of consideration.

[61] This average was computed from the statistical and financial data published by the Canadian Radio-television and Telecommunications Commission. Each year, the CRTC publishes data compiled from the annual returns of commercial and Canadian Broadcasting Corporation radio stations for a broadcast year ending August 31.[19] As of the time of our analysis, data are available for the years 2012-2016. The data contain, *inter alia*, the total revenues of the commercial-radio sector and the number of stations in that sector. For the purposes of our analysis, we use the statistic formed by dividing the former by the latter and denote it as the revenue of the average radio station. For the purposes of this analysis, we assume that the revenue of the average radio station exhibits the same decline from 2016 to 2017 and to 2018, as it did from 2012 to 2016.

[62] Finally, since we are comparing amounts payable under the Settlement Tariffs with amounts under the Certified Tariffs which contain a modified blanket licence, we use rates that would apply were there no compliance with the conditions of section 30.9 – the section based on which the MBL was certified in 2016.

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[19] Canada, Canadian Radio-Television and Telecommunications Commission, *Radio – Statistical and Financial Summaries* 2012-2016 (last update: 27 July 2017).

[63] This is done for three reasons. First, the evidence given during the proceedings that led to the certification of *Commercial Radio Tariff (2011-2017)* was that, as of the last quarter of 2013, broadcasters had not put in place systems to comply with section 30.9.[20] Second, the Board has no data that it would permit it to estimate with any reliability stations' compliance in later years. Third, this approach simplifies comparison across various years, wherein some stations may have complied, but not others.

[64] Table 4 and Table 5 summarize the results of our analysis. For each of the tariffs considered, we computed the difference between the total royalties that stations would pay under the Settlement Tariffs and the royalties they would pay under the Certified Tariffs during the ATV period. A positive (negative) difference indicates a payment (savings) by the radio station.

Table 4: Difference between the Settlement Tariffs and the Certified Tariffs, by Collective for Three "Regular Use" Stations over the ATV Period

Station Revenues	Artisti (Jan. 2012-Dec. 2014)	Connect/SOPROQ (Jan. 2012-Dec. 2017)	CSI (Nov 7, 2012-Dec. 2013)
Small Stations	$0	-$13	$14
Medium Stations	$0	-$58	$61
Large Stations	$24	-$215	$325

Table 5: Difference between the Settlement Tariffs and the Certified Tariffs, by Collective for Three "Low Use" Stations over ATV Period

Station Revenues	Artisti (Jan. 2012-Dec. 2014)	Connect/SOPROQ (Jan. 2012-Dec. 2017)	CSI (Nov 7, 2012-Dec. 2013)
Small Stations	-$7	-$18	$7
Medium Stations	-$13	-$62	$29
Large Stations	-$13	-$156	$133

ii. Fairness

[65] A consideration of the ATV period alone shows that certain stations may be expected to pay more under the Settlement Tariffs. This is true in particular for the CSI tariffs. As such, on its own, this raises some concerns regarding the fairness to some stations of the settlement in relation to the ATV period.

[66] However, the settlement rates for the ATV period have to be considered in the context of the entire Settlement Agreement, as this represents the entirety of the bargain struck between the Parties. From an economic perspective, there is nothing to stop buyers and sellers from contracting for multiple periods. The amount of the payment in any one period may be higher or

[20] *Supra* note 1 at para 136.

lower than the equilibrium amount for that period, so long as the amount paid over the entire contract is the amount the buyer is willing to pay and the amount the seller is willing to accept. This may reflect the desire of the buyer to pay less initially, or the seller to receive a greater payment up-front, possibly related to the desired cash flow for either of these parties. Accordingly, an analysis of the ATV period alone does not reflect the bargain struck in this case.

[67] An examination of the rates for the post-ATV period in the Settlement Tariffs shows that these are generally lower than those in the Certified Tariffs. Indeed, the settlement rates for those years are approximately 10 per cent to 13 per cent lower than the certified rates and imply an expected compliance with the conditions of the MBL of approximately 35 per cent.

[68] Whether these rates are sufficiently low so that the agreement is actually favourable to small, medium, and large stations is not immediately obvious. As such, we repeat the analysis as we did in Tables 4 and 5, but for the entire 2012 to 2018 period.

[69] Since the Board has not yet certified the tariffs under consideration for the years subsequent to the ATV period, the rates for the post-ATV period must be compared to something else. As such, we use, as a reasonable approximation of future royalty rates, the hypothesis that the Board would have maintained the status quo and kept the same royalty rates for the tariffs under consideration through to 2018. As we did above, we again compare the rates as if radio stations did not comply with section 30.9.

[70] Table 6 and 7 summarize the results of this extended analysis.

Table 6: Difference between the Settlement Tariffs and the Certified Tariffs, by Collective for Three "Regular Use" Stations over the 2012-2018 period

Station Revenues	Artisti	Connect/SOPROQ	CSI
Small Stations	-$0	-$103	-$136
Medium Stations	-$6	-$414	-$536
Large Stations	-$4	-$1,731	-$2,186

Table 7: Difference between the Settlement Tariffs and the Certified Tariffs, by Collective for Three "Low Use" Stations over the 2012-2018 period

Station Revenues	Artisti	Connect/SOPROQ	CSI
Small Stations	-$19	-$62	-$55
Medium Stations	-$45	-$228	-$215
Large Stations	-$68	-$751	-$755

iii. Fairness

[71] Tables 6 and 7 show that stations of all sizes are expected to realize savings in paying under the rates contained in the Settlement Tariffs rather than paying rates in the Certified Tariffs, on

the assumption that they cannot, or do not decide to, comply with obligations under section 30.9 of the *Act* and demonstrate their compliance therewith.

iv. Fairness to Non-Signatory Stations

[72] The majority of non-signatory stations appear to be smaller stations with revenues of less than $625,000 per year. As can be seen in Tables 6 and 7, even these are able to pay less under the Settlement Tariffs than they would have paid under the Certified Tariffs, had they not taken advantage of the MBL provisions.

[73] As such, we are not persuaded that the existence of a relatively small number of non-signatory stations contacted and stations that could not be identified, affects the manner in which the Certified Tariffs should be varied. As the record illustrates, the Settlement Agreement reflects the agreement of small, medium, and large commercial radio stations across the country. That the overwhelming majority of commercial radio stations in Canada have agreed to abide by the Settlement Agreement is a telling indication that the entire industry views the joint Application to Vary as a fair, equitable, and positive, solution in a manner that avoids additional litigation.

[74] The applicants acknowledge that there is no need for a varied tariff insofar as the Collectives and the Acknowledging stations are concerned because, under s. 70.191 of the *Act*, a tariff does not apply where there is an agreement in place. They argue, nevertheless, that there is a need for a variation decision to put the relevant portions of the First Settlement Tariff in place to ensure that non-signing stations cannot attempt to rely on the tariff as certified in 2016.

[75] It may be unlikely that non-signatory stations would seek to rely upon the Certified Tariffs, but it is not impossible that some might seek to do so. Were that to occur, the Collectives say that they would be required to develop costly and complex mechanisms to monitor compliance, conceivably in response to different information supplied by different stations in different formats, and to do so for a disproportionately small number of enterprises. This would undermine the efficiencies created by the Settlement Agreement and undermine its very purpose.

[76] We see no prejudice to the non-signatory stations if the variation sought is granted. Indeed, as explained above, we view the granting of the Application to Vary as furthering their interests, on balance.

D. CONCLUSION: APPLICATION TO VARY

[77] The royalties at play here are not insignificant. The Parties state that, had it been workable, the potential royalty discounts generated would have amounted to up to 26.76 per cent in the case of sound recordings, and up to 27.8 per cent in the case of musical works. In the Decision the Board calculated the maximum additional reduction in royalties would amount to about $7

million per year.[21] If all stations had complied fully with the MBL requirements, the total discount over the period 2012-2017 could be up to $42 million. These discounts could be placed in jeopardy by what has shown to be a MBL that is difficult to administer. The Settlement Agreement solution – which has received overwhelming industry support – is the negotiated result.

[78] As the Parties point out in their Application to Vary, at paragraph 52:

> [G]iven the unforeseen complexities relating to the administration of the MBL, it is likely that those amounts would be tied up in disputes and protracted litigation arising out of stations' claims for MBL Discounts. Through the Settlement Agreement, and the concessions made by each Applicant therein, the Applicants have sought to avoid that undesirable outcome and provide a more certain path for stations to claim royalty discounts arising out of the application of section 30.9.

[79] The rates and terms and conditions related to the ATV period contained in the First Settlement Tariff promotes an element of certainty and a degree of consistency and uniformity that – for reasons reasonably unforeseen at the time – the Certified Tariffs lacked. It provides a commercially reasonable solution to what proved to be an impracticable and unworkable section of the tariff dealing with the MBL, and it does so with almost universal industry acceptance, with no prejudice to the public, and in a manner that is, in our opinion, fair and equitable both to copyright owners and users. The commercial radio industry will benefit from a rate structure with those features, as will the public interest in an effectively functioning regime for the collective administration of copyright.

[80] For the foregoing reasons, the Application to Vary is granted and the Certified Tariffs are varied to match the rates and terms and conditions contained in the corresponding portion of the First Settlement Tariff.

III. "FUTURE" REPRODUCTION TARIFFS

[81] In this part of the reasons we deal with the proposed reproduction tariffs for years subsequent to those in the Certified Tariffs, which are covered by portions of the First Settlement Tariff (up to 2017) and the Second Settlement Tariff (for 2018). These are:

- *Artisti's Commercial Radio Tariff* (2015-2017, 2018);
- *Connect/SOPROQ Commercial Radio Tariff* (2018); and
- *CSI Commercial Radio Tariff* (2014, 2015, 2016, 2017, 2018).

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[21] *Ibid* at para 370.

[82] Because the Settlement Tariffs form a component of the Settlement Agreement, which has been dealt with at length above, we do not repeat that analysis here. Suffice it to say, for the same reasons that apply to the First Settlement Tariff, we are satisfied that the Second Settlement Tariff also meets the requirements of the *Re:Sound 5* analysis.

[83] In summary, the Settlement Agreement has broad-based industry support from the Acknowledging Stations, and no single category of commercial radio stations is under-represented; the Parties to the agreement are therefore representative of the interests of all prospective users. The Board has been able to consider the comments of former parties and is satisfied that it has heard, and been able to address, relevant feedback supporting any reasonably interested individual or organization that bears on the proposed tariffs.

[84] Finally, as in our analysis above with respect to the ATV-period of the First Settlement Tariff, the *Netflix* considerations do not come into play because there is no difference in subject matter between the published proposed tariffs and the Settlement Tariffs.

A. Analysis of the post-ATV Settlement Tariffs

[85] In Notice 2017-058 (relating to *Re:Sound 5.A to 5.K*[22]), the Board mentioned the concept of substantive fairness. This requires comparing the existing rates with the new rates. To the extent that the new rates are higher than the old rates, this difference should not be arbitrary, but rather reflect particular reasons. The *Re:Sound 5* analysis and *Netflix* refinement relate to procedural fairness. We now analyze the Second Settlement Tariff with respect to substantive fairness.

[86] The question of substantive fairness can be readily addressed in regards of Connect/SOPROQ. The last certified rates covered 2017. The 2018 rates in the Settlement Tariffs are in all cases lower than those certified by the Board for 2017, regardless of the radio station's use of music or annual revenues. This implies that there is no issue of substantive fairness to users for the rates for Connect/SOPROQ.

[87] We turn now to the rates for Artisti. In respect of substantive fairness, rates for *low-use* stations are always lower or the same as those certified by the Board for 2014 for Artisti. In respect of *regular-use* stations, the rates are lower or the same for all but the portion of a station's revenue exceeding $1.25 million per annum. Thus, we only need to perform an analysis for the top revenue tier.

[88] The Artisti rate for *regular-use* stations for the top revenue tier is 0.02 per cent for 2015 and 2016, and 0.017 per cent for 2017 and 2018, as compared to 0.019 per cent for 2014. To analyze

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[22] *Re:Sound Tariffs 5.A to 5.G (2013-2015) and 5.H to 5.K (2008-2015) – Use of Music to Accompany Live Events* (September 1, 2017) Copyright Board Decision.

these rates, we found that if top-tier revenues were growing at a compound, annual rate of 1.2 per cent for 2015-2018, the average annual royalties paid for the same period (in dollar terms) would be equal to those paid in 2014 using the rate which assumes no compliance with section 30.9. In its Statistical and Financial Summaries for radio,[23] the CRTC reports declining total as well as per-station revenue over the period 2015-2016. This implies that on average, the average annual rate of royalties paid by stations for 2015-2016 is lower than the rate certified for 2014. We are satisfied that under the present circumstances, there is no problem with substantive fairness for the Artisti rates.

[89] CSI rates are largely analogous to the top revenue tier Artisti rates discussed above. For CSI, regardless of music use or level of income, rates for 2014-2016 are higher than those for 2013 (as certified by the Board in 2016), and the rates for 2017-2018 are lower than those for 2013. We thus have done for all six CSI rates the analysis just described for Artisti. We found that the implicit, compound, annual growth-rates that make the CSI royalties the same (on average) for 2014-2018 as they were in 2013 range between 1.315 per cent and 1.615 per cent. These are on the same order of magnitude as those for Artisti. Once again, since commercial radio station revenues declined over 2015-2016, there is no issue with the substantive fairness of the rates in the settlement.

B. OBJECTIONS

[90] Artisti, ADISQ, and Shaw Communications had objected to one or more of the proposed reproduction tariffs not being considered in the Application to Vary. Each raised certain matters in their original letters of objection, but none has advanced any further comments since the Settlement Agreement. We nonetheless address their comments in the original objections as follows.

[91] Artisti objected to the tariff proposed by Connect/SOPROQ because the rates for the two collectives are (negatively) correlated. An increase in the rate for one, absent an overall increase in the value of music, implies a decrease in the rate for the other. This is a valid point. However, since these collectives have agreed to the rates in the Settlement Agreement taking this correlation into account, this objection is rendered moot.

[92] Shaw objected to the rates proposed and to the terms and conditions of CSI's proposed tariff. The certification of a tariff based on the agreement would take this objection into account: the rates in the agreement are lower than both those proposed by CSI and those last certified, and the terms and conditions are similar to the terms and conditions in other radio tariffs certified by the Board in the past.

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[23] *Supra* note 19.

[93] Finally, ADISQ objected to Artisti's proposed tariff because the activities targeted are the subject of collective agreements between ADISQ and third parties. However, the Parties' letter of September 2017 confirmed that ADISQ does not oppose the certification of the Settlement Tariffs.

[94] We are therefore satisfied that the outstanding proposed tariffs under consideration (i.e. those for the post-ATV period) should be certified on the basis of the First and Second Settlement Tariffs, as set out in the Settlement Agreement.

C. TARIFF WORDING

[95] In general, when the Board certifies a tariff that provides for an audit report, the audit report is only shared with the collective societies and confidential information is only shared with the collective societies and their service providers, as those terms are defined in section 2 of the tariff. In this case, the Collectives propose to extend the audit report to SOCAN and Re:Sound, and the confidential information to SOCAN, Re:Sound, and *their* service providers.

[96] In 2010 and 2016, the Board certified a joint tariff for commercial radio, including both reproduction and communication.

[97] In the 2010 tariff, the audit report and the confidential information was to be shared with the other collective societies.[24] While that tariff did not define the words "collective society," it is clear from the context of the provision that it included all collective societies in the joint tariff, including SOCAN and Re:Sound.

[98] In the 2016 tariff, there were two updates to these clauses. First, the term "collective societies" was defined as "SOCAN, Re:Sound, CSI, Connect/SOPROQ, and Artisti."[25] Second, the words "service providers" were added to the confidentiality section.

[99] The Settlement Tariffs provide for the inclusion of similar clauses. We agree; adding SOCAN and Re:Sound in these two clauses would only restore the situation which existed in the tariff certified in 2016.

[100] Subsection 6(2) of the Settlement Tariffs provides that a user of the tariff may not seek a reduction in the royalties payable through the application of an exception under the *Act*. This provision is not necessary: as is the case for many of the Board's tariffs, the determination of royalty rates in this matter already includes a discount for the possible application of exceptions. Where a discount may be sought in a tariff, the possibility is already explicitly provided for.

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[24] *Commercial Radio Tariff (SOCAN: 2008-2010; Re:Sound: 2008-2011; CSI: 2008-2012; AVLA/SOPROQ: 2008-2011; ArtistI: 2009-2011) Canada Gazette* (July 10, 2010) ss 11(4), 12(2)(*a*) of the tariff.
[25] *Supra* note 2 s 2.

Moreover, including such a provision in this tariff may erroneously suggest that seeking such a discount is possible in the context of other tariffs that do not include such a provision. We therefore do not include such a provision in this Tariff.

D. INTEREST FACTORS

[101] On September 6, 2018, the Board issued Notice 2018-188 dealing with the use of multiplying interest factors. The Board first noted that, as currently drafted, the interest factors included in the First Settlement Tariff could not be certified as they were based on a past payment obligation. The Board then asked the Parties whether it had jurisdiction to certify a table of interest factors other than the one contained in the First Settlement Tariff, and whether a new table, adjusted for a new, future payment obligation, should be included. The Parties consented to the inclusion of new interest factors, and although they did not make substantive submissions on the jurisdiction issue, they confirmed that they do not contest the Board's jurisdiction to certify such a table. The Parties also considered that it was not necessary to include interest factors in the Second Settlement Tariff.

[102] We thus include in the tariff a table setting out the multiplying interest factors to be applied on the amounts owed as a result of the certification of this tariff. The factors were derived using month-end Bank Rate. Interest is not compounded. The interest factors are calculated using a due date of March 31, 2019, for any amounts owing as of December 31, 2017, or before.

IV. CONCLUSION AND DISPOSITION

[103] Given the foregoing analyses, we

- Vary the Certified Tariffs to reflect the First Settlement Tariff; and
- Certify the outstanding proposed tariffs on the basis of the First and Second Settlement Tariffs.

Gilles McDougall
Secretary General