

NOTICE OF GROUNDS FOR OBJECTION

Filed by the Canadian Broadcasting Corporation/Société Radio-Canada (“CBC”)

In relation to proposed tariff *SOCAN Tariff 1.C – Radio - Canadian Broadcasting Corporation (2026-2028)*

Filed with the Copyright Board (the “Board”) on 2024-12-13 pursuant to Rule 18 of *Copyright Board Rules of Practice and Procedure*.

1. General Statement of Objection

This is the Notice of Grounds for Objection of CBC to the *SOCAN Tariff 1.C – Radio - Canadian Broadcasting Corporation (2026-2028)* filed by SOCAN on October 15, 2024.

These objections are filed in accordance with the *Copyright Act* and the [Practice Notice on Filing a Notice of Grounds for Objection](#) published on August 5, 2022 and amended on July 24, 2024.

CBC’s objections are divided into three categories below: objections to royalties (**section 2**), objections to the terms and conditions (**section 3**), and other grounds of objection (**section 4**).

2. Grounds for Objecting to Royalties in the Proposed Tariff

This section sets out CBC’s objections to subsection 3(1) of the proposed tariff.

CBC objects to the royalties in the proposed tariff for the following reasons, each of which is discussed in detail below: (1) no inflation adjustment should be made, (2) no percentage royalty should be included, and (3) various adjustments should be applied to the initial royalties, including repertoire share adjustments, chain of title adjustments, exceptions/user’s rights adjustments, a declining-industry discount, and a public interest discount.

2.1 *No Inflation Adjustment*

The proposed tariff sets out a royalty structure which includes a rate of 4.4% of CBC’s gross income as well as a flat monthly fee. The proposed monthly fee is substantially higher than the monthly fee under the previous tariff.

In its Notice of Grounds, SOCAN justifies the proposed increase in the flat monthly fee as accounting for inflation. SOCAN's proposed "inflation adjustment" is unjustified, and the Board should decline to apply such an adjustment. There are at least two reasons for this.

First, the proposed inflationary adjustment is inconsistent with the underlying economic realities, including the amounts received by SOCAN from commercial radio broadcasters under tariff 1.A.

Second, CBC's budget, including government appropriations, has not kept pace with inflation. As such, it is unfair to mechanically apply an inflation adjustment, especially one of the magnitude sought by SOCAN.

In the alternative, if an inflationary increase will nonetheless be allowed, then it must be limited to inflation since the last approved tariff. SOCAN's Notice of Grounds claims an inflationary adjustment calculated from the year 2011, when the Board's last approved tariff is dated 2018. It is illegitimate to claim any inflationary adjustment before 2018. SOCAN's attempt to claim inflation back to 2011 is directly contrary to the Board's [*Inflation Adjustment to Royalty Rates – Default Methodology*](#). No justification has been provided to justify departing from the default methodology here.

2.2 No Percentage Royalty

SOCAN should not be allowed to claim both a lump-sum royalty and a percentage-based royalty. This is so for at least three reasons.

First, adding a percentage royalty to a lump-sum royalty violates the logic of the Board's 1991 decision which established the lump-sum royalties in the first place and results in double-dipping by SOCAN.¹ This is because the lump-sum royalty was intended to approximate the amounts earned by commercial broadcasters. Indeed, the lump sum in the 1991 decision was determined by reference to the royalties paid by commercial radio stations under Tariff 1.A, with adjustments being made to account for differences in audience share and repertoire use. The lump sum is thus already equivalent to the 4.4% sum paid by commercial radio stations. To add a second 4.4% royalty means that CBC pays two royalties where commercial broadcasters pay only one.

Second, SOCAN argues that a percentage royalty is necessary because "CBC's business model move[d] more towards that of a conventional commercial radio broadcaster." Yet, this argument is not new, and it has been rejected in the past. In 2011, SOCAN argued that "CBC is no different

¹ [*SOCAN - Various Tariffs, 1991*](#), Board File 1990-4, 1991 CanLII 13297.

than commercial radio” and that it is “no different at all from private broadcasters.”² At that time, SOCAN was already well aware that CBC pursues branding in its service offerings.³ The Board had the benefit of these arguments in setting the most recent contested Tariff 1.C back in 2011. Despite this, it declined to base CBC’s royalties under Tariff 1.C on the royalties paid by commercial radio stations under Tariff 1.A.⁴ SOCAN’s argument was rejected in 2011, and it should similarly be rejected today.

2.3 *Adjustments*

As set out below, various adjustments should be applied to the initial royalties, including (a) repertoire share adjustments, (b) chain of title adjustments, (c) exceptions/user’s rights adjustments, (d) a declining-industry discount, and (e) a public interest discount.

a. Repertoire Share

CBC will be seeking a repertoire share adjustment. The extent to which CBC uses music in SOCAN’s repertoire is a relevant factor in setting royalties under Tariff 1.C.⁵ Indeed, this adjustment is “at the core of any equitable tariff for CBC Radio.”⁶ Furthermore, the Board has held that “it is common ground” that the use CBC makes of SOCAN’s repertoire is lower than the use made by commercial stations.⁷ As such, a repertoire share adjustment is warranted.

In its Notice of Grounds, SOCAN acknowledges that the proposed percentage-based royalty is identical to the rate under Tariff 1.A: “The proposed percentage of gross income royalty rate is the same as that set out in SOCAN Tariff 1.A.” The proposed rate thus fails to account for the lower use by CBC of music in SOCAN’s repertoire. This is contrary to the previous decisions of the Board. Applying the proposed rate would yield an unfair result.

As a result of the above, CBC will be requesting a repertoire audit.

² [*SOCAN, Re:Sound - Tariff for CBC Radio, 2006-2011*](#), 2011 CanLII 152560 (CA CB) ¶59-60.

³ *Ibid* ¶60.

⁴ *Ibid* ¶80.

⁵ [*SOCAN - Various Tariffs, 1991*](#), Board File 1990-4, 1991 CanLII 13297; [*SOCAN, Re:Sound - Tariff for CBC Radio, 2006-2011*](#), 2011 CanLII 152560 (CA CB) ¶80-81.

⁶ [*SOCAN - Various Tariffs, 1991*](#), Board File 1990-4, 1991 CanLII 13297.

⁷ *Ibid*: “As to the use CBC makes of SOCAN’s repertoire, it is common ground that it is lower than commercial stations.”

b. *Chain of Title*

CBC's experience in the *SODRAC v CBC (2012-2018)* arbitration revealed deficiency rates on the order of 38%.⁸ In a more recent proceeding dealing with SOCAN's repertoire, there was a 4.2% adjustment.⁹

CBC will thus be requesting a chain of title audit of SOCAN's works, and will seek a corresponding discount on Tariff 1.C royalties based on the results of that audit.

c. *Exceptions/User's Rights*

Some of CBC's over-the-air radio broadcasts and simulcasts use music in a manner that constitutes fair dealing. These include fair dealing for the purpose of research (in the context of shows whose purpose is to inform or educate the public about music), news reporting (where programs play a piece of music as part of a news report about that music), and parody/satire (where the music is a parody or satire of an existing work or genre, or is otherwise used for satirical purposes).

CBC will accordingly seek a further discount to account for this. CBC anticipates that a sampling approach will be the preferred method of making this adjustment.

d. *Declining-industry Discount*

The Board has historically applied discounts ranging from 10% to 25% for "infant industries." For example, in *Stingray Pay Audio and Ancillary Services Tariff (2007–2016)*, the Board generalized this approach and applied a 20% "declining industry" discount that reflected increased competition and declining profitability in the relevant sector.¹⁰ Those same factors are present here and CBC will accordingly seek a 10% declining-industry discount.

e. *Public Interest Discount*

Since 2019, section 66.501 of the *Copyright Act* directs the Board to consider "the public interest" when deciding whether a tariff is fair and equitable. As Canada's national public broadcaster, many of CBC's activities are undertaken in the public interest rather than as part of a commercial or profit-seeking activity. Pursuant to section 66.501, CBC deserves credit for its public-interest

⁸ [SODRAC 2003 Inc v CBC \(2012-2018\)](#), 2021 CB 1 ¶88.

⁹ [Re:Sound and SOCAN – Stingray Pay Audio and Ancillary Services Tariff \(2007–2016\)](#), 2021 CB 5 ¶254-256.

¹⁰ [Re:Sound and SOCAN – Stingray Pay Audio and Ancillary Services Tariff \(2007–2016\)](#), 2021 CB 5 ¶192-193.

mission and activities, many of which contribute directly to the promotion of Canadian musical talent.

The Board has already recognized that “CBC *does have* a unique mandate.”¹¹ CBC “has a special public mandate including: to make all programming quintessentially Canadian; to reflect national and regional realities to national and regional audiences; and, to contribute to the flow and exchange of cultural information. Moreover, the French-language services play an important role in connecting francophone communities across Canada to one another.”¹² Accordingly, CBC will seek a public interest discount. Drawing inspiration from the infant-industry/declining-industry cases, CBC proposes a 10% discount.

3. Grounds for Objecting to Terms and Conditions in the Proposed Tariff

This section first addresses SOCAN’s proposed changes to the terms and conditions, then it lists CBC’s additional changes to Tariff 1.C terms and conditions.

3.1 SOCAN’s Proposed Changes

- **Reporting Requirements:** CBC objects to paragraph 5(1)(b) of the proposed tariff. The gross income reporting changes proposed by SOCAN exist solely to support the percentage-based royalty. Since the addition of a percentage-based royalty rate is unfair and inequitable, there is no reason to change the reporting requirement for this tariff.
- **Audit Requirements:** CBC objects to section 6 of the proposed tariff. The audit provisions of the tariff exist solely to verify compliance with the percentage-based royalty and should be removed as well. Where the tariff is a lump-sum amount, compliance is apparent on the face of the tariff and no audits are required.
- **Transmission of Information:**
 - CBC objects to the last sentence in subsection 7(3) to the extent that it relates to any gross income reporting requirements set out in paragraph 5(1)(b) of the proposed tariff. This sentence reads as follows: “Where a payment is made by EBT, the associated reporting shall be provided concurrently to SOCAN by email.” As set out above, the gross income reporting requirements in paragraph 5(1)(b) should be removed from the terms and conditions of the proposed tariff, which in turn

¹¹ [SOCAN, Re: Sound - Tariff for CBC Radio, 2006-2011](#), 2011 CanLII 152560 (CA CB) ¶61 [emphasis in original].

¹² *Ibid* ¶57.

entails the removal of provisions setting out how the reporting information is to be transmitted.

- CBC objects to subsection 7(4) of the proposed tariff, which states that the “information set out in subsection 6(2) shall be sent by email.” There is no subsection 6(2) in the proposed tariff. If this section is meant to refer to subsection 5(2) of the proposed tariff, the erroneous reference should be corrected.

3.2 CBC’s Proposed Changes

CBC proposes the following changes to the terms and conditions of the proposed tariff. For clarity, these changes are proposed regardless of whether or not the tariff will include a percentage-based royalty component:

- **Interest Payments (Overpayments):** This change relates to section 4 of the proposed tariff. The interest rate provisions of this tariff should be symmetric with respect to overpayments and underpayments. The Board has said many times that it is unfair and inequitable for collectives to request interest on underpayments, but refuse interest on overpayments. Users and collectives should be treated equally with respect to the interest provisions of tariffs.
- **Interest Payments (Frequency):** This change also relates to section 4 of the proposed tariff. Interest should be calculated on a monthly basis, and not a daily basis. This is to allow the statutory set-off provision (below) to be applied in an efficient manner. By making interest payable monthly, a \$100 overpayment can be offset by simply deducting \$100 from the next month’s payment. By contrast, if interest is payable daily, then the \$100 overpayment must be offset by more than \$100 on the next month’s royalty payment to account for interest accrued in the meantime. This requires excessive calculation and is likely to lead to confusion or disputes in administration. By contrast, monthly interest payments allow one month’s overpayment or underpayment to be easily deducted or added to the next month’s payment without further adjustment, while allowing interest to accrue if such prompt correction is not made.
- **Set-off and Overpayments:** This change relates to section 3 of the proposed tariff. A statutory set-off provision should also be added to this tariff to allow CBC to set off overpayments made in a given month against future payments under this tariff. Indeed, a great many certified tariffs include such mechanisms already. As a matter of fairness, a similar provision needs to be included in SOCAN Tariff 1.C. CBC proposes the addition

in section 3 of the proposed tariff of the following language, which is modelled on existing tariffs:

(3) Subject to subsection (4), adjustments in the amount of royalties owed by CBC under this tariff (including adjustments as a result of excess payments), whether as a result of the discovery of an error or otherwise, may be made via set-off against future royalties owing under this Tariff 1.C.

(4) For clarity, set-off under this provision shall be deducted from future royalty payments under Tariff 1.C as necessary until no money remains owing. In the event that there are no future royalty payments under Tariff 1.C, set-off may be made against future royalty payments under other SOCAN tariffs.

(3) Sous réserve du paragraphe (4), les ajustements du montant des redevances dues par CBC/Radio-Canada en vertu du présent tarif (y compris les ajustements résultant de paiements excédentaires), que ce soit à la suite de la découverte d'une erreur ou autrement, peuvent être effectués par compensation avec les futures redevances dues en vertu du présent tarif 1.C.

(4) Il est entendu que la compensation opérée en vertu de cette disposition sera déduite d'abord des paiements futurs de redevances en vertu du tarif 1.C, jusqu'à concurrence du montant dû. Au cas où il n'y a pas de paiements futurs en vertu du tarif 1.C, la compensation peut être effectuée sur les paiements de redevances dues en vertu d'autres tarifs de la SOCAN.

4. Additional Grounds for Objecting to the Proposed Tariff

This section sets out an additional ground of objection, which relates to SOCAN's attempt to reserve the right to advance methodologies not included in its Notice of Grounds.

4.1 *Additional or Alternative Methodologies*

This ground of objection relates to a mention in SOCAN's Notice of Grounds that it "reserves the right to adopt and advance additional or alternative valuation methodologies and inflationary rates in the course of the proceedings relating to the proposed tariff." This amounts to treating notices of grounds as non-binding, which is directly contrary to the recent order of the Board made in the context of the pending proceeding *SOCAN Tariff 2.D – Television - Canadian Broadcasting Corporation (2015-2025)*.¹³

In this order, the Board describes notices of grounds in the following manner:

¹³ [SOCAN Tariff 2.D - CBC Television Services \(2015-2025\)](#), Board Order CB-CDA 2024-089.

[5] Once filed, the content of the NoG is crystallized, in the sense that it is on the record in its original form. Furthermore, amending the NoG would imply extending the objection period, which is not possible because it is set in the *Copyright Act*. As such, it should not be modified.¹⁴

Allowing SOCAN to reserve its right to advance additional or alternative methodologies is equivalent to allowing it to amend its notice of grounds during the course of the proceedings. As explained in the paragraph cited above, such amendments imply extending the objection period, which is not permitted.

The ability of a collective society to provide other explanations for its proposed tariff is constrained by rules of procedural fairness.¹⁵ Indeed, the civil courts have spoken with great clarity on this very topic. They have made very clear that “It is no answer [for a party to state] that since he has not yet examined for discovery he might well discover the facts which would support the pleadings.”¹⁶

To allow SOCAN to rely on undisclosed theories that will become apparent only after interrogatories is not fair to CBC or to the Board. Accordingly, SOCAN cannot reserve its right to advance additional or alternative methodologies during the course of the proceedings.

¹⁴ *Ibid* ¶5.

¹⁵ *Ibid* ¶6.

¹⁶ *Caterpillar Tractor v Babcock Allatt Ltd*, [1983] 1 FC 487 ¶12 (TD), aff’d [1983] FCJ 528 (CA). See to the same effect: *American Home Assurance Co v Brett Pontiac Buick GMC*, 1992 CanLII 4616 (NS SC).