NOTICE OF GROUNDS FOR OBJECTION

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

In relation to proposed tariff *SOCAN Tariff 2.D – Television - 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*.

Amended on 2025-01-10 pursuant to Notice CB-CDA 2025-003

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1. General Statement of Objection

This is the Notice of Grounds for Objection of CBC to the *SOCAN Tariff 2.D – Television - 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. It has been amended on pursuant to Notice CB-CDA 2025-003, in response to SOCAN's amended notice of grounds that was filed on December 9, 2024. It applies to all years mentioned in SOCAN's amended notice of grounds, and supplements the previously-filed CBC notices for those years.

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**).

Prior to turning to CBC's specific objections, CBC notes that SOCAN's amended notice of grounds purports to reserve SOCAN's right to come up with new theories and new "valuation methodologies" during the course of the proceeding. These alternative "valuation methodologies" are said to "include" – ***but, crucially, to not be limited to*** – "the relative audience share methodology employed by the Board in its 1991 decision approving Tariff 2.D (see SOCAN - Various Tariffs, 1991, Board File 1990-4, 1991 CanLII 13297)."

This is an express attempt by SOCAN to raise issues and theories of value other than those set out in the amended notice. That is directly contrary to the Board's orders and a clear violation of procedural fairness.

The Board's order in CB-CDA 2024-089 was quite clear. If further clarity was needed, Board order CB-CDA 2024-098 provided it. SOCAN was to amend its notice of grounds to list all new theories that it wished to advance in this proceeding: "SOCAN may file and serve its new explanation for the proposed tariff."[1]

The requirement that SOCAN disclose its new explanations was made prevent prejudice and procedural unfairness to CBC. After all, if CBC does not know what SOCAN's theory of value is, then how can CBC be expected to build its factual evidence, ask relevant interrogatory questions, and engage the appropriate experts? And if neither CBC nor the Board has notice of SOCAN's theory of value, how can discovery disputes about relevance possibly be adjudicated? The orderly progress of Board files requires a party "put its best foot forward when explaining the basis for its tariff proposal."[2]

SOCAN has been given ample opportunity to amend its notice of grounds to set out any additional theories upon which it wishes to rely. SOCAN cannot maintain a constantly-shifting case and purport to reserve the right to advance new theories that are disclosed only during or after interrogatories. That would be manifestly unfair.

In light of the above, SOCAN is limited to arguing (i) the inflationary adjustments set out in its original notice, and (ii) the audience share methodology set out in its amended notice of grounds.[3] SOCAN cannot validly raise any theories other than those disclosed in the amended notice of grounds, since this would be contrary to the rules of natural justice and to Board orders CB-CD 2024-089 and 2024-098.

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: (2.1) no inflation adjustment should be made, (2.2) no percentage royalty should be included, and (2.3) 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.

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[1] Board Order CB-CDA 089-2024 ¶8.

[2] Board Order CB-CDA 089-2024 ¶4.

[3] Namely *SOCAN - Various Tariffs, 1991*, Board File 1990-4, 1991 CanLII 13297, [1991] CBD 6.

2.1 No Inflation Adjustment

The proposed tariff sets out a royalty structure which includes a rate of 1.9% of CBC's gross revenue as well as a flat monthly fee. The proposed monthly fee is substantially higher than the flat 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 four reasons for this.

First, CBC's payments under Tariff 2.D were originally calculated as a function of CBC's audience share and the royalties paid by commercial broadcasters under Tariff 2.A. In the last several years, the decline of broadcast television meant that commercial broadcasters pay fewer and fewer royalties under Tariff 2.A. It makes no economic sense for CBC to pay higher royalties under Tariff 2.D at the same time that Tariff 2.A revenues are decreasing. Such a situation would violate the fundamental logic used to arrive at the lump-sum royalties in the first place.

Indeed, commercial broadcasters are subject to the effects of inflation, and despite this, their revenues are decreasing, as are their royalty payments under tariff 2.A. It would be fundamentally unfair to increase CBC's royalties on the basis of inflation, when the underlying tariff is subject to inflation and despite this, the royalties in question are decreasing.

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.

Third, the Board has rejected attempts to claim anticipated inflation adjustments for the future. The entire period covered by the proposed tariff is in the future and as such, an anticipated inflation adjustment cannot be claimed.

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 2006, even though SOCAN accepted the status quo, without inflation adjustments, up until 2014. It is illegitimate to claim any inflationary adjustment before 2014. This approach is directly contrary to the Board's *Inflation Adjustment to Royalty Rates – Default Methodology*. Indeed, SOCAN has persistently failed to explain why an earlier date should be used, even though it had access to the Board's default inflation methodology at the time its notice of grounds was amended. The selection of 2006 as a starting point makes even less sense considering that SOCAN asks the Board to apply an inflationary increase calculated from 2006 to

a royalty rate calculated in 2014. It is manifestly inconsistent to use inflation from 2006 but apply it to a royalty approved by the Board in 2014.

With its amended notice of grounds, SOCAN belatedly proposes that in the alternative, its inflation-adjusted rates could be explained by the audience share methodology employed by the Board in its 1991 decision approving Tariff 2.D (*SOCAN - Various Tariffs, 1991*, Board File 1990-4, 1991 CanLII 13297, [1991] CBD 6).

This of course is an after-the-fact rationalisation, since the very precise numbers in SOCAN's proposed tariff were all generated using an inflationary adjustment, and SOCAN's notice of grounds admits as much. They were never calculated by reference to the Board's 1991 audience share methodology. It is a legal fiction to pretend that these numbers could be justified on the basis of a theory advanced for the first time in December 2024, when they were first calculated as far back as 2014, and using an entirely different methodology. Any similarity between the results of SOCAN's inflationary adjustment and the 1991 viewership methodology would be pure happenstance.

In any event, if the Board's 1991 viewership methodology will be used, it must remain subject to all of the adjustments set out in section 2.3 below.

Additionally, if viewership will be used to calculate royalties, then CBC's viewership numbers must be adjusted downwards to exclude the "Olympic effect" during Olympic years. This is because CBC receives higher viewership in Olympic years, but that viewership does not increase the value of music used by CBC: there is generally no music played during Olympic sporting events,[4] and when music is played during Olympic ceremonies, it consists mostly of national anthems which are either in the public domain or whose copyrights are owned by national governments, not SOCAN. Either way, SOCAN should not receive higher royalties during years where CBC's viewership increased for reasons that do not reflect an increase in the value of music.

SOCAN's proposal to use the Board's 1991 viewership methodology appears to pre-suppose that the Board would re-do the same calculations that were made in 1991 for every year of the tariff period using the statistics for that year. An alternative approach is for the Board to start from the last-approved royalty rate (i.e. that of the 2014 tariff) and make adjustments to that amount, rather starting from scratch for each year. This "historical approach" would require adjusting for changes in tariff 2.A royalties and for changes in CBC's viewership relative to the reference year of 2014.

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[4] There are notable exceptions for a small number of dance-based sports, but these are exceptions that prove the rule.

So for example if tariff 2.A revenues increased by 2% in 2015 but CBC viewership fell by 1%, then the amount payable in 2015 would be calculated as: 2014 royalty x 1.02 x 0.99, and so on. There would be no inflation-based adjustment, since the adjustment based on tariff 2.A takes account of the change in the value of music, whether due to inflation or otherwise.

The base royalties generated by the historical approach would also require adjustment to remove the Olympic effect and to account for the adjustments mentioned in section 2.3 below.

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 four reasons.

First, adding a percentage royalty to a lump-sum royalty violates the logic of the Board's 1991 decision which established those lump-sum royalties in the first place.[5] This is because the lump-sum royalty already reflects CBC's advertising revenues. Indeed, the lump sum was set with a view to approximating the royalties that a commercial TV broadcaster would pay under Tariff 2.A.

Second, SOCAN argues that a percentage royalty is necessary because "CBC's business model move[d] more towards that of a conventional commercial broadcaster." This is apparently a reference to what SOCAN perceives as a more advertising-focussed business model at CBC. Yet in its 1991 decision, the Board expressly ruled that "advertising appears to play essentially the same role" for both CBC and commercial broadcasters.[6] Advertising at CBC is not new, and was old news in 1991. The lump-sum royalty already accounts for the use of advertising at CBC.

Third, adding a percentage-of-revenues royalty while maintaining (and indeed, increasing) the lump-sum royalty results in double-dipping, since the lump-sum royalty already approximates the 1.9% paid by commercial broadcasters under tariff 2.A. It would be unfair to impose a lump-sum approximating the 1.9% rate under 2.A, and then also impose a separate 1.9% variable rate. CBC would end up paying two 1.9% royalties, while commercial broadcasters only pay one. Moreover, this approach results in increased royalties for Tariff 2.D during a period that commercial TV broadcasters are paying fewer royalties under Tarif 2.A. This again violates the economic logic under which Tariff 2.D has operated for more than 30 years. CBC should not be forced to pay higher royalties while commercial broadcasters are paying fewer royalties.

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5 *SOCAN - Various Tariffs, 1991*, Board File 1990-4, 1991 CanLII 13297.

6 *Ibid*.

Fourth and finally, as explained in subsection 4.1 below, SOCAN is proposing to decrease the scope of rights available to CBC. SOCAN cannot charge a higher royalty while offering fewer rights.

2.3 Adjustments

Regardless of the royalty base, 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

Historically, no repertoire share adjustments have been made to Tariff 2.D. There are two main reasons for this. First, when the Board set the initial royalties in 1991, it ruled that "[f]or all practical purposes, SOCAN administers the performing right to all protected works in Canada."[7] As a result, no repertoire adjustments were made to Tariff 2.D in that decision. Second, up until 2019, participating in a SOCAN tariff effectively provided protection from infringement lawsuits by non-SOCAN works. As a result, the exact size of SOCAN's repertoire was less relevant to users, since paying tariff royalties provided a benefit even with respect to non-SOCAN works. Since the 2019 reforms, that is no longer the case.

As a result of the above, CBC will be requesting a repertoire audit. CBC anticipates that it uses less protected music than conventional broadcasters, justifying a separate repertoire-share adjustment.

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 repertoire 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 2.D royalties based on the results of that audit.

c. Exceptions/User's Rights

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7 *Ibid*.

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.

Some of CBC's broadcasts 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: broadcast television is subject to competitive pressures, declining revenues/profits, and similar economic forces that justify a decrease in the initial royalties.

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 mission and activities, many of which contribute directly to the promotion of Canadian musical talent. 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 2.D terms and conditions.

3.1 SOCAN's Proposed Changes

- **Reporting Requirements**: CBC objects to paragraph 4(1)(b) of the proposed tariff. The reporting changes proposed by SOCAN exist solely to support the percentage-based

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

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 5 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.

  SOCAN's notice of grounds inaccurately states that the proposed audit clause was previously approved by the Board: "The audit clause from the previously approved tariff has been moved into its own section." The Board has ***never*** approved an audit clause for tariff 2.D and it is misleading to imply otherwise.[11]

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 subsection 3(3) 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 subsection 3(3) 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. Indeed, the exact amount required will be a function of the exact day on which the payment is received, which may be affected by

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[11] See last approved version of tariff 2.D, which is found on page 8 of the following document, and which is a two-paragraph tariff without any audit provision whatsoever https://decisions.cb-cda.gc.ca/cb-cda/certified-homologues/en/366481/1/document.do. Note that the "general" provisions appearing on page 3 do not include any audit clause.

factors outside the knowledge or control of either SOCAN or CBC. 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 2.D. CBC proposes the addition in section 3 of the proposed tariff of the following language, which is modelled on existing tariffs:

(4) Subject to subsection (5), 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 2.D.	(4) Sous réserve du paragraphe (5), 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 2.D.
(5) For clarity, set-off under this provision shall be deducted from future royalty payments under Tariff 2.D as necessary until no money remains owing. In the event that there are no future royalty payments under Tariff 2.D, set-off may be made against future royalty payments under other SOCAN tariffs.	(5) 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 2.D, jusqu'à concurrence du montant dû. Au cas où il n'y a pas de paiements futurs en vertu du tarif 2.D, la compensation peut être effectuée sur les paiements de redevances dues en vertu d'autres tarifs de la SOCAN.

- **Modified Blanket Licence**: The MBL is a well-established component of Tariff 2.A, and allows commercial broadcasters to reduce their royalty payments to SOCAN when music has been pre-cleared for broadcast. This prevents double-dipping on royalties. There is no reason to deny the same right to CBC. As such, a provision substantially similar to the Tariff 2.A MBL provision would need to be added to Tariff 2.D.

4. Additional Grounds for Objecting to the Proposed Tariff

This section sets out two additional grounds of objection, one of which relates to the scope of the activities covered by the proposed tariff and the other one to SOCAN's attempt to reserve the right to advance methodologies not included in its Notice of Grounds.

4.1 Scope of Activities Covered

This ground of objection relates to the introductory paragraph of the proposed tariff as well as to subsection 2(1).

The scope of the rights granted by the proposed tariff has been decreased in comparison to previous tariffs, without a corresponding decrease in the royalties. The most recent approved Tariff 2.D dates back to 2014. At that time, the royalties paid by CBC were a compensation for the right to perform and communicate to the public by telecommunication works in SOCAN's repertoire as well as to authorize such performance and communication.[12]

In contrast, the scope of the proposed tariff covers neither performance nor authorization. Accordingly, there has been a decrease in the rights granted. In its Notice of Grounds for an earlier version of tariff 2.D, SOCAN claimed that "the reference to 'performance' was erroneous", without giving any further details. As for the removal of the right to authorize others to perform or communicate works, SOCAN's Notice of Grounds is entirely silent. It does not mention this removal and thus fails to provide any reasons in this regard.

CBC previously raised the reduction in the scope of rights granted in its notice of grounds of objection, and SOCAN remains unwilling to explain or justify the change, which is not even mentioned in the latest notice of grounds.

To reiterate: CBC objects to any decrease in the scope of rights granted under the proposed tariff, especially since SOCAN has not offered any corresponding decrease in royalties; SOCAN in fact proposes to increase its royalties for the 2026-2028 period. A collective should not be allowed to decrease the scope of rights offered to users without offering a corresponding decrease in royalties. Attempting to offer fewer rights at a higher price is exactly the kind of monopolistic behaviour that the Board was created to prevent. A "willing buyer and a willing seller acting in a competitive market" would never agree to pay more royalties for fewer rights.

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[12] *SOCAN - Various Tariffs, 2007-2017* (Copyright Board), (May 6, 2017) C Gaz I, 3 and 8.

Finally, in light of the Supreme Court's ruling in *SOCAN v ESA*, it is not even clear if it is possible to grant the rights in the way which SOCAN is attempting to do here.[13] If there is no "telecommunication right" and only a public performance right, then it does not seem possible for SOCAN to grant the rights as it purports to do here.

4.2 No Undisclosed 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)*.[14]

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

> [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.[15]

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.[16] 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

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[13] *SOCAN v ESA*, 2022 SCC 30 ("For example, s. 3(1)(f), which gives authors the right to "communicate the work to the public by telecommunication", illustrates an activity that falls within the broader right to perform a work in public. It is not a standalone or sui generis copyright in addition to the general rights described in s. 3(1)" ¶54).

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

[15] *Ibid* ¶5.

[16] *Ibid* ¶6.

not yet examined for discovery he might well discover the facts which would support the pleadings."[17]

As explained above, 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.

Moreover, a unbroken line of Supreme Court cases hold that the purpose of the Copyright Board is to protect users from the monopolistic market power of collective societies. If a collective cannot articulate why it deserves higher royalties, than it would be a subversion of the Board's purpose to allow that collective to embark on a fishing expedition in the hopes that something will turn up during the interrogatory process. Indeed, to do so would turn the Board's user-protection mandate on its head, and allow the Board's process to be co-opted by the collectives. In no other industry can a supplier compel its customers to submit to discovery simply because the supplier wishes to charge them a higher price.

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[17] *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).