

## 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*.

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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.

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 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\*](#).

## **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.<sup>1</sup> 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.<sup>2</sup> 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.

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.

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<sup>1</sup> [SOCAN - Various Tariffs, 1991](#), Board File 1990-4, 1991 CanLII 13297.

<sup>2</sup> *Ibid.*

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.”<sup>3</sup> 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%.<sup>4</sup> 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*

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

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<sup>3</sup> *Ibid.*

<sup>4</sup> [SODRAC 2003 Inc v CBC \(2012-2018\)](#), 2021 CB 1 ¶88.

this approach and applied a 20% “declining industry” discount that reflected increased competition and declining profitability in the relevant sector.<sup>5</sup> 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 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

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

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.<sup>6</sup>

### 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 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

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<sup>6</sup> 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.

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.

(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.

(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) 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.<sup>7</sup>

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.

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.<sup>8</sup> 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

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<sup>7</sup> [SOCAN - Various Tariffs, 2007-2017](#) (Copyright Board), (May 6, 2017) C Gaz I, 3 and 8.

<sup>8</sup> *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).

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)*.<sup>9</sup>

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.<sup>10</sup>

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.<sup>11</sup> 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.”<sup>12</sup>

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.

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<sup>9</sup> [SOCAN Tariff 2.D - CBC Television Services \(2015-2025\)](#), Board Order CB-CDA 2024-089.

<sup>10</sup> *Ibid* ¶5.

<sup>11</sup> *Ibid* ¶6.

<sup>12</sup> *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).