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Lara Taylor
Secretary General
Copyright Board of Canada
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Re: CBC Notice of Grounds for Objection
SOCAN Tariff 2.D – CBC Television (2015, 2016, 2017, 2018, 2019, 2020-2022,
2023-2025)

Pursuant to Order 2 of Board Order CB-CDA 2022-024, CBC/Radio-Canada (“**CBC**”) files this Notice of Grounds for Objection to SOCAN Tariff 2.D. The Notice covers SOCAN’s proposed tariffs for the years 2015, 2016, 2017, 2018, 2019, 2020-2022, 2023-2025.

1. Background

This section first sets out the Board’s general approach to tariff-setting (subsection 1.1), and then summarizes the history of SOCAN Tariff 2.D (subsection 1.2). This contextual information will be helpful for SOCAN and the Board to understand the nature of CBC’s objections, which are provided in section 2.

1.1 *The Board’s General Approach to Tariff-setting*

As the Board stated in *Stingray Pay Audio and Ancillary Services Tariff (2007–2016)*:

[7] The Board has used the following formula for determining royalties in many previous tariffs:

$$\text{Rate Base (\$)} \times \text{Gross Royalty Rate (\%)} \times \text{Repertoire-Use Adjustment (\%)} = \text{Royalties (\$)}^1$$

This formula can be generalized as follows:

$$\text{Initial Royalties (\$ or \%)} \times \text{Repertoire-Use Adjustment (\%)} \times \text{Chain-of-title Adjustment (\%)} \times \text{Adjustment for Exceptions/Users’ Rights (\%)} \times \text{Other Adjustments (\%)} = \text{Final}$$

¹ *Re: Sound and SOCAN – Stingray Pay Audio and Ancillary Services Tariff (2007–2016)*, 2021 CB 5 ¶7.

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Royalties (\$ or %)

In the above formula:

Initial Royalties refers to the total value of music with respect to the activities covered by the tariff. This amount may be expressed as a dollar value or as a percentage rate, depending on the tariff in question.

Repertoire-Use Adjustment reflects the discount which is required to account for the share of the relevant copyrights actually held by the collective proposing the tariff. If a collective claims to hold only 50% of the relevant copyrights, then the collective should receive at most 50% of the royalties. The applicable discount is generally calculated via a repertoire study.

Chain-of-title Adjustment reflects the discount which is required due to defective chains of title for works allegedly in the collective's repertoire. Works with defective chains of title are not truly under the control of the collective and thus not covered by the statutory licence. As such, there is no justification for asking users to pay for them. A further discount is thus required to account for such works. For example, if 38% of a collective's chains of title are revealed to be defective, then a 38% discount applies. The applicable discount is generally calculated via a chain of title audit on a representative sample of works.

Adjustment for Exceptions/Users' Rights are required because, as the Board has ruled many times, the creation of new users' rights requires a corresponding reduction in royalties. The applicable discount is calculated using the methodology first developed in *Commercial Radio (2011-2017)* and applied in *SODRAC 2003 Inc v CBC (2012-2018)*.²

Other Adjustments may be required on a case-by-case basis. For example, the Board adjusted numerous tariffs on a temporary basis to account for the COVID-19 pandemic. In other cases it has applied infant industry or declining industry adjustments. The new statutory factors added by the 2019 amendments to the *Copyright Act* may require further discounts beyond those outlined above, notably to reflect public interest considerations.

Final Royalties are the result of applying all applicable discounts to the Initial Royalties.

1.2 The History of SOCAN Tariff 2.D

This is the first contested hearing on Tariff 2.D in over 30 years. The Board last heard evidence and argument with respect to Tariff 2.D in 1991.³ In that case, the Board made the following key findings: (1) royalties under Tariff 2.D "ought to be a function of the audience share of the CBC" relative to commercial broadcasters; (2) "CBC's advertising revenues ought not to be used in

² *SOCAN, Re:Sound, CSI, Connect/SOPROQ, Artisti - Tariff for Commercial Radio, 2011-2017*, 2016 CanLII 156141 ¶¶75-84, 95-97, 128-219, 295-347; *SODRAC 2003 Inc v CBC*, 2021 CB 1 ¶¶189-277, 278-314.

³ *SOCAN - Various Tariffs, 1991*, Board File 1990-4, 1991 CanLII 13297.



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determining the amount of royalties.”

The Board accordingly set Tariff 2.D royalties by multiplying CBC’s audience share (then 26.53%) by the amount paid by commercial broadcasters under Tariff 2.A (then \$22,986,301). The end result was an annual royalty of \$6,098,266.

This amount approximated what CBC would have paid if it had been a commercial broadcaster, since the underlying royalty base (namely, Tariff 2.A) was itself based on the advertising revenues of commercial television broadcasters.

All amounts approved by the Board ever since have been based (directly or indirectly) on that 1991 ruling. For example, in 1992, the Board certified a compromise rate agreed upon by the parties, which slightly increased the amounts due relative to 1991.⁴ The Board commented that in approving the parties’ settlement, it “does not abandon the approach it took in the 1991 tariff, where it established a relationship between the royalties paid by the CBC and those paid by private broadcasters. The Board merely considers that under the circumstances, the agreement offers the best solution for all concerned for the current year.”

In all subsequent years, SOCAN either did not file tariffs (1993-2001), or proposed tariffs identical to previous years, or CBC’s objections were settled via negotiation. In all cases, the resulting royalties were similar or identical to the 1991/1992 royalties. The practical effect is that for 30 years, Tariff 2.D royalties have been calculated and paid based on the Board’s 1991 decision.

The most recent certification of Tariff 2.D was in 2017, when the Board certified royalties of \$6,922,586 for 2013-2014 after CBC withdrew its objection.⁵

2. Grounds of Objection

As requested in Board Order CB-CDA 2022-024, this section sets out the grounds for CBC’s objections to the royalty rate or royalty-rate structure (sub-section 2.1, below), the scope or clarity of the activities covered by the tariff (2.2), and the terms and conditions of the tariff (2.3).

2.1 Royalty Rate or Royalty-rate Structure

This section covers the determination of the Initial Royalties (2.1.1), as well as the following adjustments: Repertoire-share Adjustments (2.1.2), Chain of Title Adjustments (2.1.3), Adjustments for Exceptions/users’ Rights (2.1.4), and Other Adjustments (2.1.5).

2.1.1 Initial Royalties

No changes should be made to the Initial Royalties in either the 2015-2022 period or the 2023-2025 tariff period. The Initial Royalties from the Board’s 2017 decision should continue to apply throughout the 2015-2022 Tariff periods.

⁴ *SOCAN - Various Tariffs (1.A, 1.B, 1.C, 2.D, 5.A, 13.A)*, 1992, Board File 1991-13, 1992 CanLII 14426.

⁵ *SOCAN - Various Tariffs, 2007-2017*, Board File CB-CDA 2017-038, 2017 CanLII 152893 ¶20.



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2015-2022 Period: No Inflation Adjustment

SOCAN's proposed "inflation adjustment" is unjustified, and the Board should decline to apply such an adjustment. There are at least three 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 has 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. SOCAN cannot have it both ways.

Second, granting an inflation adjustment here would be unfair and inequitable given how SOCAN has approached inflation adjustments for other tariffs covering the same period. Virtually all of the SOCAN tariffs approved by the Board in 2020-2021 were approved without inflationary adjustments, including TV tariffs for other public broadcasters. Treating Tariff 2.D differently from Tariffs 2.B and 2.C (both approved without any inflation adjustment), would be neither fair nor equitable.

Third, 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 2006, even though SOCAN accepted the status quo, without inflation adjustments, up until 2014. It is illegitimate to claim any inflationary adjustment before 2014.

Indeed, adjusting for inflation from 2006 results in a royalty rate increase of 28% between 2014 and 2015, which is an order of magnitude greater than the actual CPI inflation which occurred during that period.⁶ A 28% year-over-year increase cannot reasonably be characterized as an "inflation adjustment." SOCAN's notice of grounds provides no support of a 28% increase.

2023-2025 Period: No Inflation Adjustment, No Percentage Royalty

No inflation adjustment should be made for 2023-2025 either, since the reasons given above continue to apply. Additionally, the Board has rejected attempts to claim anticipated inflationary adjustments for the future.

Nor should SOCAN be allowed to claim both a lump-sum royalty and a percentage-based royalty. This is so for at least four reasons.

⁶ According to Statistics Canada, CPI inflation in 2014 was 2%. In 2015, it was 1.1%.



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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. 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. 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 royalty while maintaining (and indeed, increasing) the lump-sum royalty results in increased royalties for Tariff 2.D during a period that commercial TV broadcasters are paying fewer royalties under Tariff 2.A. This 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 section 2.2, SOCAN is proposing to decrease the scope of rights available to CBC in the 2023-2025 period. SOCAN cannot charge a higher royalty while offering fewer rights.

2.1.2 Repertoire-share Adjustment

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 “For all practical purposes, SOCAN administers the performing right to all protected works in Canada.” 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.⁷ 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.

The repertoire share adjustment will apply to the years 2019-2025. The discount will need to be prorated for 2019, since the relevant provision came into force on April 1, 2019.

2.1.3 Chain of Title Adjustment

CBC’s recent experience in the *SODRAC v CBC (2012-2018)* arbitration revealed deficiency rates

⁷ *Copyright Act*, RSC 1985, c C-42, s 67.1(4) (now repealed).



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on the order of 38%.⁸ 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.

The chain of title adjustment will apply to the entire tariff period (2015-2025).

2.1.4 Adjustment for Exceptions/Users' 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 anticipates that a sampling approach will be the preferred method of making this adjustment.

2.1.5 Other Adjustments

CBC will be seeking the following additional adjustments to Tariff 2.D royalties:

- **Declining-industry Discount (2015-2025):** The Board has historically applied discounts ranging from 10% to 25% for "infant industries." In its recent *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. 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.
- **Public Interest Discount (2019-2025):** Section 66.501 now 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 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. This discount should be pro-rated for the year 2019, since the amendments in question came into force on April 1, 2019.

2.2 Scope or Clarity of Activities Covered

There are unjustified variations between the scope of the rights granted by Tariff 2.D across various periods. For 2015-2018, the licence grant covers both performance in public and communication to the public by telecommunication, as well as authorizing those acts. From 2019-2022, the licence grant expands to include a reference to the making available provisions of the *Act*. From 2023-2025, all references to performance in public are removed from the rights granted by the tariff. The definitions of licence scope in the three periods appear below for ease of reference (in all three

⁸ *SODRAC 2003 Inc v CBC (2012-2018)*, 2021 CB 1 ¶88.



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cases, Tariff 2.D refers to a “licence”):

Scope (2015, 2016, 2017, 2018): As used in these tariffs, the terms “licence,” “licence to perform” and “licence to communicate to the public by telecommunication” mean a licence to perform in public or to communicate to the public by telecommunication or to authorize the performance in public or the communication to the public by telecommunication, as the context may require.

Scope (2019, 2020-2022): As used in these tariffs, the terms “licence,” “licence to perform” and “licence to communicate to the public by telecommunication” mean a licence to perform in public or to communicate to the public by telecommunication or to authorize the performance in public or the communication to the public by telecommunication, including the right to make works available to the public by telecommunication in a way that allows a member of the public to have access to them from a place and at a time individually chosen by that member of the public.

Scope (2023-2025): As used in this tariff, the terms “licence” [...] and “licence to communicate to the public by telecommunication” mean [...] a licence to communicate to the public by telecommunication or to authorize [...] the communication to the public by telecommunication, including the right to make works available to the public by telecommunication in a way that allows a member of the public to have access to them from a place and at a time individually chosen by that member of the public.

The underlined language from 2019-2022 drops out of the 2023-2025 tariff, decreasing the scope of the rights granted. No explanation for this difference is provided in SOCAN’s Notice of Grounds.

CBC objects to any decrease in the scope of rights granted under the tariff in 2023-2025, especially since SOCAN has not offered any corresponding decrease in royalties; SOCAN in fact proposes to increase its royalties for the 2023-2025 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.

With respect to the “making available” provisions of the *Copyright Act*, the Supreme Court’s recent decision in *SOCAN v ESA* confirms that these are merely an aspect of the performance right, and they are thus included by implication in any performance licence.⁹ For clarity and ease of use, the references to the making available right should be inserted into the licence scope across all tariff periods. This will require adjustments to the language used in the 2015-2018 tariffs.

2.3 Terms and Conditions

This sub-section first addresses SOCAN’s proposed changes to the terms and conditions, then it

⁹ *SOCAN v ESA*, 2022 SCC 30.



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lists CBC's additional changes to Tariff 2.D terms and conditions.

SOCAN's Proposed Changes

- **Reporting Requirements (2023-2025):** 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 (2023-2025):** 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.
- **Termination Provisions (2019-2025):** SOCAN has inserted language purportedly authorizing it to terminate the licence granted under Tariff 2.D on 30 days' written notice of breach. The Board has repeatedly refused to include such language in tariffs. It should be removed here.
- **Monthly Payments (2023-2025):** CBC does not object to the characterization of the royalty as a series of monthly payments instead of an annual royalty paid in monthly installments. From CBC's perspective, this is a distinction without a difference.

CBC's Proposed Changes

CBC proposes the following changes to the terms and conditions for all tariff years (2016-2025). For clarity, these changes are proposed regardless of whether or not the tariff will include a percentage-based royalty component for any given period:

- **References to "Private and Domestic Use" (2019-2022):** The tariffs for these years include qualifiers over the rights granted that refer to "private or domestic use." The Board as repeatedly held that such qualifiers are inappropriate and should be removed.¹⁰
- **Interest Payments (Overpayments):** 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):** 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

¹⁰ Indeed, SOCAN's proposal for the years 2023-2025 does not include these qualifiers.



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allowing interest to accrue if such prompt correction is not made.

- **Set-off and Overpayments:** 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 following language, which is modelled on existing tariffs:

(1) Subject to subsection (2), 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.

(2) 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.

(1) Sous réserve du paragraphe (2), 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.

(2) 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 le 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. This provision should apply to all royalty made under Tariff 2.D for the applicable period.

Official Languages

As Canada's national public broadcaster, CBC will be participating in both official languages. CBC anticipates that its counsel will use both English and French, and that its witnesses and supporting documents will be in both official languages.



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Sincerely,

FASKEN MARTINEAU DuMOULIN LLP



Michael Shortt

c.c. Caroline St-Pierre (CBC/Radio-Canada); Paula Pettit (CBC/Radio-Canada); Counsel for CMRRA; Counsel for SOCAN; Counsel for the CAB; Counsel for the BDUs

