

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

**Date** 2017-09-01

**Citation** CB-CDA 2017-092

**Regime** Collective Administration of Performing and of Communication Rights  
*Copyright Act*, subsections 68(3)

**Members** The Honourable Robert A. Blair  
Mr. Claude Majeau  
Mr. J. Nelson Landry

**Proposed Tariffs Considered** Re:Sound Tariffs 5.A to 5.G (2013-2015) and 5.H to 5.K (2008-2015) – Use of Music to Accompany Live Events

**Statement of Royalties to be collected for the public performance or the communication to the public by telecommunication, in Canada, of published sound recordings embodying musical works and performers' performances of such works**

**Reasons for decision**

**I. INTRODUCTION**

[1] On March 30, 2007, Re:Sound Music Licensing Company (Re:Sound, formerly the Neighbouring Rights Collective of Canada) filed, pursuant to section 67.1 of the *Copyright Act*<sup>1</sup> (the “*Act*”), its Proposed Tariff 5 for the years 2008 through 2012, entitled “Use of Music to Accompany Live Events.” The Proposed Tariff was published in the *Canada Gazette* on June 2, 2007. Prospective users and their representatives were informed of their right to object by August 1, 2007.

[2] Only the Hotel Association of Canada (HAC) filed a timely objection. However, on March 20, 2009, the Board granted 22 parties status as intervenors with full participatory rights in the tariff proceeding. These parties were grouped as the Arts Objectors, the Festivals Objectors, the Hospitality Objectors and the Sports Objectors, as shown in the List of Parties in Annex A.

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<sup>1</sup> R.S.C. 1985, c. C-42

[3] As a result of negotiations between the parties, the Proposed Tariff was eventually restructured into parts A to G, as follows:

A: Recorded music accompanying live entertainment in cabarets, cafes, clubs, restaurants, roadhouses, taverns and similar establishments;

B: Receptions, conventions, assemblies and fashion shows;

C: Karaoke bars and similar establishments;

D: Festivals, exhibitions and fairs;

E: Circuses, ice shows, fireworks displays, sound and light shows and similar events;

F: Parades; and

G: Parks, streets and other public areas.

[4] Following agreements between Re:Sound, the Hospitality Objectors and the Festivals Objectors, the Board certified on May 25, 2012, Re:Sound Tariff 5 (Parts A to G)<sup>2</sup> for the years 2008 to 2012.

[5] At that time, discussions with the Sports Objectors and the Arts Objectors regarding other live events using recorded music were still in progress and Re:Sound anticipated that the negotiations would result in the following new categories of events:

H: Sports events;

I: Comedy and magic shows;

J: Concerts; and

K: Theatrical and dance performances.

[6] On March 30, 2012, Re:Sound filed its Proposed Tariffs 5.A to 5.J for the years 2013 to 2015. The Canadian Restaurant and Foodservices Association (CRFA) and the HAC objected to Proposed Tariffs 5.A to 5.C, the Arts Objectors<sup>3</sup> filed an objection to Proposed Tariffs 5.A, 5.B,

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<sup>2</sup> *Re:Sound Tariff 5 – Use of Music to Accompany Live Events, 2008-2012 (Parts A to G)* (25 May 2012) Copyright Board Decision. [*Re:Sound Tariff 5 (2008-2012)*]

<sup>3</sup> The Arts Objectors are the same as in the 2008-2012 proceeding. They are the Sony Centre, The Corporation of Roy Thompson Hall and Massey Hall, the National Arts Centre, *Place des Arts*, The Royal Conservatory of Music (in respect of Koerner Hall in Toronto), the Professional Association of Canadian Theatres and the Canadian Arts Presenting Association.

5.D, 5.E, 5.I and 5.J, and the Canadian Association of Fairs and Exhibitions (CAFE)<sup>4</sup> objected to the Proposed Tariffs in general.

[7] The Federation of Calgary Communities and the Winnipeg Convention Centre filed objections to the Proposed Tariffs after the prescribed deadline and consequently, were not considered as objectors in this proceeding. They did not apply for intervenor status. In their respective letters they submitted that – in essence – the proposed rates constituted an unreasonable increase for not-for-profit organizations and, as far as the Winnipeg Convention Centre was concerned, that the rates under Tariff 5.B (Receptions, Conventions, Assemblies and Fashion Shows) should be based on attendance rather than capacity.

[8] In December 2013 and 2015, after negotiations between Re:Sound and relevant parties (which are further described below), the Board was seized of two requests for certification of a set of modified tariffs (the “Settlement Tariffs”). In terms of scope, the following modifications were proposed:

- Tariff 5.A was modified so as to apply to recorded music accompanying live entertainment in cabarets, cafes, clubs, restaurants, roadhouses, taverns and similar establishments. The initial tariff applied to recorded music accompanying live entertainment including theatrical, dance, acrobatic or other live performances; and
- Tariff 5.K was added so as to apply to recorded music accompanying theatrical, dance and other live performances.

[9] Except for Tariff 5.D (2015), the Settlement Tariffs 5.A to 5.G essentially maintain the status quo as per *Re:Sound Tariff 5 (2008-2012)*. Settlement Tariffs 5.H to 5.K are inaugural tariffs yet they are mostly benchmarked against SOCAN certified tariffs.

[10] The explanation as to why categories of events H to K were still open to negotiation despite the fact that the Board had certified Tariff 5 (parts A to G) for the years 2008 to 2012 is that they were still virtually captured under the initial Proposed Tariff for 2008-2012, as published in the *Canada Gazette* on June 2, 2007. Indeed, the Proposed Tariff was open-ended in the sense that it did not target any specific type of live events. The Proposed Tariff reads as follows:

3. (1) This tariff sets the royalties to be paid to NRCC, for the benefit of performers and makers, for the performance in public or the communication to the public by telecommunication of published sound recordings of musical works and performers’ performances of such works to accompany live events. [Emphasis added]

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<sup>4</sup> CAFE was part of the Festivals Objectors in the 2008-2012 proceeding.

## II. CERTIFIED TARIFFS

[11] After considering the parties' submissions, for the reasons mentioned below, we certify tariffs 5.A to 5.K, as summarized in the table in Annex B.

## III. CONTEXT

[12] Since this proceeding has a long history, we will first provide some explanation of its timing and progress as well as the Objectors' initial concerns with the Proposed Tariff published in the *Canada Gazette*.

[13] On December 19, 2013, Re:Sound informed the Board that it had reached an agreement in the Tariff 5 proceedings with the Sports Objectors<sup>5</sup> and filed the agreement. Re:Sound and the Sports Objectors requested that the Board certify Tariff 5.E for the years 2013-2015 and Tariffs 5.H to 5.J for the years 2008 to 2015 in the agreed-upon form and content.

[14] On February 13, 2014, the Board asked a number of questions to the parties in respect of the agreement filed with the Board. Only Re:Sound, the Sports Objectors, the Canadian Arts Presenting Association (CAPACOA), and CAFE provided responses. Only Re:Sound filed a reply, on March 14, 2014.

[15] CAPACOA, as one of the Arts Objectors, and CAFE, as one of the Festival Objectors, responded as follows.

[16] First, they are concerned with the multiplication of tariffs, and with the fact that there are inconsistencies in applications and royalties between tariffs. This could make licensing confusing and complex. Second, they expressed concerns with the fact that tariff 5.J (Concerts) would be based on capacity only, while other licensees for background music are able to pay a lower fee based on actual admissions under *Re:Sound Tariff 3 (2003-2009)*.<sup>6</sup> Finally, they expressed concerns that tariffs 5.E, 5.I and 5.J have relatively high minimum fees per event which could cause a hardship to multi-event presenters.

[17] In reply, Re:Sound responded as follows. First, Re:Sound shares the parties' interest in avoiding the application of multiple tariffs, and that it is open to consider consolidation, where possible, starting in 2016. Second, it argues that a tariff based on capacity is much simpler to administer for both Re:Sound and the licensees. Finally, it argues that minimum fees are

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<sup>5</sup> The Sports Objectors objected to the 2008-2012 tariff but did not object to the 2013-2015 tariff. They are comprised of Maple Leaf Sports & Entertainment, National Hockey League, Canadian Football League, National Football League, Toronto Blue Jays, Rogers Centre, Capital Sports Properties Inc. and Capital Sports & Entertainment Inc., and Evenko (formerly Gillett Entertainment Group) and *L'Aréna des Canadiens inc.*

<sup>6</sup> *NRCC Background Music Tariff, 2003-2009, Canada Gazette*, 21 October 2006. [*Re:Sound Tariff 3 (2003-2009)*]

necessary because the very low fees that would result from the application of the Proposed Tariffs would be insufficient to cover tariff administration costs.

[18] On January 29, 2015, the Professional Association of Canadian Theatre (PACT), one of the Arts Objectors, withdrew its objections, including to Tariffs 5.H to 5.K (not yet certified) for 2008-2012, and to Tariffs 5.A to 5.J for 2013-2015.

[19] On April 22, 2015, CAPACOA notified the Board that pursuant to a settlement with Re:Sound, it was withdrawing its objections to Tariff 5.E for 2013-2015, Tariffs 5.I to 5.J for 2008-2015, and Tariff 5.B for 2013-2015.

[20] On December 23, 2015, Re:Sound informed the Board that it had reached an agreement with the remaining active Objectors (CAPACOA and CAFE) with respect to the inaugural Re:Sound Tariff 5.K (Recorded music accompanying theatrical, dance and other live performances) for 2008-2015. Re:Sound had also reached an agreement with respect to Tariffs 5.A to 5.D and 5.F to 5.G for 2013-2015, with CAPACOA, CAFE, HAC and Restaurants Canada (formerly CRFA). All of these tariffs maintain the status quo but for minor wording changes, an inflation clause in some instances (5.B, 5.C, 5.F, and 5.G) and a revised rate structure for 5.D for 2015. Re:Sound and the relevant objectors jointly requested that the Board certify these tariffs in the agreed-upon form and content.

[21] The following entities remained as objectors: Sony Centre for the Performing Arts; The Corporation of Roy Thompson Hall and Massey Hall; the National Arts Centre; *la Place des Arts*; and The Royal Conservatory of Music (in respect of Koerner Hall in Toronto) (the “Remaining Objectors”).

[22] On April 5, 2017, the Board consulted the Remaining Objectors to determine whether they maintained their objections in light of the Settlement Tariffs and accompanying letters requesting certification. The Board ordered that, after the April 13, 2017 deadline for providing their written representations, any of the Remaining Objectors who did not file their written representations would be deemed to have withdrawn their objections to Tariffs 5.A to 5.K for 2008-2015. No written submissions were provided – before or after the deadline – and, accordingly, the Remaining Objectors are deemed to have withdrawn their objections.

#### **IV. GENERAL COMMENTS**

[23] On the issue of the application of multiple tariffs, the Board notes Re:Sound’s willingness to consider the consolidation of tariffs where possible and appropriate. It would however be premature to try to address this issue in the present proceeding. More information, and over a number of years, is necessary for the parties and the Board to be able to identify and address

issues as they relate to multiple tariffs.<sup>7</sup> The Board will therefore not address the issue in this decision. The opportunity to do so will eventually arise, when more information gradually becomes available.

[24] The Board agrees with Re:Sound that as a general rule, a tariff based on capacity is easier to administer than a tariff based on admissions.

[25] In terms of minimum fees, we also agree with Re:Sound that, where applicable, such fees are necessary. However, the issue of the burden of minimum fees for multi-event presenters must be addressed. A minimum fee such as \$61.85 per event (Tariff 5.E) could add up to substantial total royalty payments. An annual licence as it exists in some of the SOCAN tariffs is an efficient way to deal with this matter. However, we do not have any information that would allow us to evaluate the importance of the issue, and we can only postpone its examination to a later date when the relevant information will have become available.

[26] The Settlement Tariffs refer to both “performance in public” and “communication to the public by telecommunication.” Based on the little evidence in this matter, it does not appear to us that any communication to the public by telecommunication of sound recordings actually takes place during the live events targeted by the tariffs. Since this has been agreed by the parties, we are not modifying the wording of the Settlement Tariffs to remove the reference to “communication to the public by telecommunication.” However, it should be noted that, given the very limited information in this file on the value attributed to this activity, we are not making any statement as to the relative value or importance of each of the rights.

[27] Finally, in certifying various tariffs based on agreements, the Board may apply a test used – for example – in *Re:Sound Tariff 5 (2008-2012)*. In that case, the Board set out a two-part framework for certifying tariffs pursuant to agreements, in the following terms:

Before certifying a tariff based on agreements, it is generally advisable to consider (a) the extent to which the parties to the agreements can represent the interests of all prospective users and (b) whether relevant comments or arguments made by former parties and non-parties have been addressed. These are not hard and fast rules: prospective users who did not file a timely objection no longer have a right to air their views before the Board. Yet because tariffs are both prospective and of general application, some account must be taken of the interests of those who are not before us and who will be affected by our decision, especially with tariffs of first impression.<sup>8</sup>

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<sup>7</sup> Although this issue was addressed in *SOCAN – Multiple Tariffs, 1998-2007* (19 March 2004) Copyright Board Decision [*SOCAN – Multiple Tariffs (1998-2007)*], it is only recently that Re:Sound has filed a large number of tariffs, suggesting the necessity to examine consolidation.

<sup>8</sup> *Supra* note 2 at para 10.

[28] The analysis for certifying each of the Settlement Tariffs follows.

## V. ANALYSIS

### A. TARIFFS 5.A-5.C, 5.E-5.G (2013-2015); TARIFF 5.D (2013-2014)

[29] Re:Sound and the relevant Objectors request that the above-mentioned tariffs be certified at the same rates and in the same form and content as certified by the Board for the years 2008-2012, subject to minor wording amendments and, for Tariffs 5.B, 5.C, 5.D, 5.F, and 5.G, the addition of an inflation clause which parallels the existing provision certified in *Re:Sound Tariff 3 (2003-2009)*.

[30] With respect to inflation, the Board's views stated in the past continue to be relevant:

Failing to take into account the decreased purchasing power that comes with inflation leads to certifying tariffs whose fairness and equity themselves erode over time.<sup>9</sup>

[31] However, given that the Settlement Tariffs 5.B, 5.C, 5.D, 5.F, and 5.G were agreed upon at the end of the period (i.e., December 2015), it was too late for Re:Sound to avail itself of the inflation clause under section 10 of the portion of the Settlement Tariff filed in December 2015, under subheading "Rate Adjustments to Account for Inflation." The issue is therefore moot.

[32] Accordingly, the Board certifies the provisions – except section 10 – of Settlement Tariffs 5.A to 5.G (except Tariff 5.D for 2015). We wish, however, to reiterate what the Board said in a recent decision on the issue of inflation adjustment.<sup>10</sup> As a general rule, we believe that efficiency is better served by the collectives filing multiyear tariffs without an automatic adjustment for inflation. From time to time, the collectives could request an inflation adjustment and expect that such an adjustment reflect the fluctuations in inflation in all of years for which no adjustments were made. This is what SOCAN is currently doing. The "time-to-time" adjustment would thus cumulate inflation starting on the last year for which such an adjustment took place. In our view, this approach simplifies the life of all the parties involved, i.e., the collectives, the users and the Board.

### B. TARIFF 5.D (2015)

[33] Re:Sound, CAFE and CAPACOA have agreed on a revised structure and rates for Tariff 5.D (Festivals, Exhibitions and Fairs) for 2015.

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<sup>9</sup> *SOCAN and Re:Sound Tariffs 1.C – CBC Radio, 2006-2011* (8 July 2011) Copyright Board Decision at para 87. [CBC Radio, 2011]

<sup>10</sup> *Re:Sound Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment, 2013-2018* (21 July 2017) Copyright Board Decision at para 21.

[34] In their joint request for certification, the relevant parties indicated that the proposed changes to Tariff 5.D for 2015 reflect the input of the Canadian fairs, festivals and exhibitions industry. CAFE and CAPACOA consulted extensively with their members and requested changes to the Tariff to make it simpler to administer and more equitable.

[35] They submit that under the certified Tariff for 2008-2012, fairs with a total attendance of 75,000 or less, pay a fee per day, while fairs with a total attendance exceeding 75,000 persons, pay a fee per person. The Settlement Tariff for 2015 applies a daily fee structure to all sizes of fairs, based on average daily attendance (as opposed to total attendance), so that fairs are treated equally regardless of their size or duration. Additional rate tiers have been added to accommodate a wider variety of sizes of fairs. The chart in Annex C was provided to identify the difference in rates between the Settlement Tariff for 2015 and the certified tariff for 2008-2012.

[36] The relevant parties explained that the 2015 settlement rates were calculated by applying an amount of \$0.0024 per attendee and calculating the fee based on the mid-point of each rate bracket. This amount of \$0.0024 was arrived at by analyzing the average fee per attendee payable under the certified tariff for 2008-2012 for each rate bracket for both fairs of 75,000 attendees or less and those over 75,000 attendees. For the up to 5,000 attendees' bracket, the fee is \$8 rather than \$6 that would have been obtained by multiplying \$0.0024 by 2,500 attendees, so as not to reduce the current fee and to ensure a more reasonable minimum fee. For the bracket of over 200,000 attendees, the rate was calculated based on 250,000 attendees. These rates are shown in Annex C.

[37] The relevant parties further explained that while the rates appear to increase for fairs with attendance of 5,001-75,000, this is because the rate is now calculated based on average daily attendance rather than total attendance. For example, a 5-day fair with an average daily attendance of 10,000 and a total attendance of 50,000, would pay \$108.90 under the certified tariff for 2008-2012 ( $\$21.78 \times 5$  days), while under the Settlement Tariff for 2015, they would pay \$90 ( $\$18 \times 5$  days). The intent of the change is not to significantly alter the quantum of fees payable, but to replace the current tariff structure and formula with one that applies equally to all sizes of fairs, is simpler to administer, and provides fairs with the ability to more accurately estimate their royalty fees in advance.

[38] This last example shows a decrease of 21 per cent compared to the tariff certified for 2008-2012. However, the Board was concerned that in some situations, the results would have been different, such as when a festival operated for one day with 23,000 attendees. This festival would pay \$60 under the Settlement Tariff but \$8.39 under the certified tariff. This rate also constitutes an increase from Re:Sound's original Proposed Tariff rate of \$19.22, as published in the *Canada Gazette*.



[39] Further examples would show increases compared to the Proposed Tariff, for example, for fairs with one-day duration, and between 10,000 and 74,999 attendees as well as for fairs with two-day duration, and between 10,000 and 12,499 attendees or between 20,000 and 24,999 attendees.

[40] Because setting rates potentially higher than those included in the Proposed Tariff originally published in the *Canada Gazette* may entail procedural fairness issues,<sup>11</sup> the Board consulted the relevant parties on the Settlement Tariff on May 25, 2017. The parties were invited to answer a set of questions on the procedural and substantive fairness of potential fee increases compared to (i) the 2008-2012 certified tariff and (ii) the Proposed Tariff for 2013-2015. CAFE and CAPACOA were also specifically asked to describe their governance structure with a view to establishing the extent to which they represented small users of Tariff 5.D in the negotiations with Re:Sound.

[41] By June 13, 2017, Re:Sound, CAPACOA and CAFE had provided their responses to the Board's questions. Essentially, the relevant parties underscored the notion that the Settlement Tariff is fair since it is based on a structure that is more equitable and simpler to administer than the other options. The Settlement Tariff brings enhanced predictability in terms of expenses. It also allows all festivals, exhibitions and fairs regardless of size and duration to be treated equally.

[42] These assumptions were verified by testing the Settlement Tariff with attendance figures provided by 10 festival members of CAPACOA. The latter found that no festival with a daily attendance below 10,000 would experience an increase under the Settlement Tariff. In fact, they would all experience a slight to moderate decrease, as a result of resolving the "compounding effect" associated with the certified tariff. Such a compounding effect occurs for example when a nine-day festival pays higher fees than a three-day festival even if the total attendance is the same. Yet – it is argued – the value provided to attendees by playing recorded music is the same, in both cases.

[43] Re:Sound also provided examples whereby small fairs would pay similar or lower royalties under the Settlement Tariff compared to the Proposed Tariff for 2013-2015. Furthermore, Re:Sound submits that under the current tariff a small multi-day festival would pay more (5 times more in some situations) than the small one-day festival even though the total attendance for both events is the same. Finally, among other points, Re:Sound notes that it is the festivals and fairs industry that requested the change in rates and structure and certifying the Settlement

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<sup>11</sup> *Netflix, Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2015 FCA 289 at para 44: "[...] There can be no doubt that the notice publicly given to the industry by way of the *Canada Gazette* is crucial to the decision to object or not to a proposed tariff."

Tariff would be consistent with the Board's view that "tailoring tariffs to reflect the business models of users should be encouraged."<sup>12</sup>

[44] In terms of representativeness, CAPACOA indicated that at the time of negotiations, its members included 15 individual festivals, and three festival associations: Jazz Festivals Canada (18 festivals), Western Roots Artistic Directors (36 festivals), and Ontario Council of Folk Festivals (29 festivals). All were consulted on the Settlement Tariff. It also indicated that the festival community represented by CAPACOA is mainly comprised of small and mid-size festivals. They however consulted with Festivals and Major Events (FAME) as well as with *Regroupement des événements majeurs internationaux* as of July 2013 and up until the filing of the Settlement Tariff for 5.D in December 2015. Both expressed their support for the Settlement Tariff and FAME eventually joined as a CAPACOA member.

[45] For its part, CAFE indicated that it represents fairs and exhibitions across Canada. Its membership varies from small, one-day fairs with attendance of less than 1,000 people, to some of the highest attendee numbers across Canada (example: Canadian National Exhibition, Calgary Stampede). CAFE submits that there are just under 800 fairs across Canada, and while not all are members, CAFE represents and works for each fair regardless of their membership status. At the time of the negotiations, CAFE's board had representatives from fairs and exhibitions in seven provinces, with one board member representing the Maritime provinces at large (covering all 10 provinces). Its board included representation from four small fairs, six medium fairs and two large fairs, as well as a member representing the provincial association. Small fairs and exhibitions were represented by the four board members, as well as via direct communication and consultation with small fairs.

[46] In light of the relevant parties' additional input, we are of the view that the 2015 Settlement Tariff for 5.D is fair for the following reasons. First, the fact that the Settlement Tariff could result in higher fees does not reveal the entire picture. When assessing the fairness of a tariff one has to also consider its structure, among other features. CAPACOA and CAFE clearly support the Settlement Tariff in terms of its practicability and predictability, which benefits fairs, festivals and exhibitions of all sizes. As such, any payment increase – which is unlikely based on the simulation carried out by CAPACOA – would be offset by tariff efficiencies. Second, the Settlement Tariff does not benefit certain business models over others, in the sense that regardless of daily attendance or duration, the tariff scales the actual number of attendees. Based on the foregoing and the fact that CAPACOA and CAFE provide a high degree of representativeness of users' interests and that both CAFE and CAPACOA consulted non-members on the Settlement Tariff, we have no reason to believe that non-members would be negatively affected by the Settlement Tariff.

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<sup>12</sup> *Media Monitoring, 2000-2005* (29 March 2005) Copyright Board Decision at 8.

[47] Accordingly, we certify Tariff 5.D for the year 2015 in accordance with the terms and conditions set out in the Settlement Tariff.

### **C. TARIFFS 5.H-5.I (2008-2015)**

[48] The relevant parties submit that Tariff 5.H (Sports Events) is based on its SOCAN counterpart, Tariff 9 (Sports Events), and Tariff 5.I (Comedy and Magic Shows) is based on SOCAN Tariff 11.B (Comedy Shows and Magic Shows). The agreed-upon adjustments<sup>13</sup> are 40 per cent of the comparable SOCAN rates. The ratio of 40 per cent is consistent with the adjustments made in other certified Re:Sound tariffs, as shown in Annex D.

[49] Furthermore, the relevant parties submit that the rate under Tariff 5.H increases incrementally each year as do the rates under SOCAN Tariff 9, until 2011. After 2011, even though the SOCAN rate was left unchanged, the rate for Tariff 5.H continues to increase incrementally each year, as agreed upon by the parties. The Tariff 5.H rate for free sports events is \$5, the same as under SOCAN Tariff 9. The parties submit that the SOCAN rate is already such a nominal amount that applying any adjustment to the Re:Sound rate would make the resulting fee too low to warrant the costs of collection.

[50] The parties indicate that the minor wording differences between Re:Sound Tariffs 5.H and 5.I reflect the fact that the Re:Sound tariffs do not apply to the performance of live music and that Re:Sound does not have a comparable tariff to SOCAN Tariff 4 (Live performances at concert halls, theatres and other places of entertainment). They also reflect typical differences in the structure and language used by Re:Sound and SOCAN in their respective tariffs.

[51] They also submit that Re:Sound Tariff 5.H contains a more detailed definition of “gross receipts” than SOCAN Tariff 9. Instead, it adopts the same definition used in Tariff 5.E for 2008-2012. The choice of this definition reflects the agreement between the parties.

[52] Finally, they submit that both Tariffs 5.H and 5.I apply to all uses of sound recordings at an event, including both foreground and background music uses. This reflects the agreement between the parties and is consistent with the goal of avoiding that multiple tariffs target the same event. The same language is used in Tariff 5.E for 2008-2012. Tariffs 5.H and 5.I, like Tariff 5.E, apply to a discrete type of event, where it is more practical for both users and Re:Sound to include all uses of sound recordings at the event within the same tariff. As stated by the Board in *Re:Sound Tariff 5 (2008-2012)*:

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<sup>13</sup> We prefer not to refer to these adjustments as repertoire adjustments, since they are not based on a repertoire study.

Part E, on the other hand, applies to certain types of live events. In that instance, it seems much more difficult to segregate the foreground and background uses of recorded music.<sup>14</sup>

[53] Tariffs 5.H and 5.I are inaugural tariffs. The Settlement Tariffs rely on SOCAN Tariffs 9 and 11.B, but depart from them by applying an adjustment based on repertoire as well as yearly rate increases in the case of 5.H. Re:Sound's essential explanation for such increases is that they are "a significant term of the agreement."<sup>15</sup> Percentage rate increases are generally warranted when the value of music has increased or when there is a change in repertoire. In the present case none of these situations are being put forward.

[54] As the Board explained in *Re:Sound Tariff 5 (2008-2012)*,<sup>16</sup> it is necessary to consider the extent to which the parties to the agreements represented the interests of all prospective users, and whether relevant comments or arguments made by former parties had been taken into account.

[55] The relevant parties submit that the Sports Objectors represent the vast proportion of users of Tariff 5.H and are also significant users of Tariffs 5.E, 5.I and 5.J. In their request for certification, the relevant parties provided a list of the various teams and venues represented by the Sports Objectors, which include the majority of major league sports teams and sporting events in Canada as well as numerous stadium venues used to host a variety of live events. They also provided a sample of event calendars for the venues represented by the Sports Objectors showing the variety of types of events held in their venues including live music concerts, ice shows, circuses and comedy shows.

[56] With respect to Tariff 5.I, as previously mentioned, CAPACOA and PACT withdrew their objections.

[57] Furthermore, the relevant parties underscore the fact that all of the agreed-upon rates are lower than the rates proposed by Re:Sound in its Proposed Tariffs.

[58] Based on the foregoing, given the broad representativeness of the parties to the agreement, the nominal fee for free sporting events, such as those that may be hosted by the Federation of Calgary Communities and other similar not-for-profit organizations, and the minimal fee for magic and comedy shows, the Board is of the view that the Settlement Tariffs can represent the interests of all prospective users.

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<sup>14</sup> *Supra* note 2 at para 34.

<sup>15</sup> Re:Sound letter to the Board, February 28, 2014 at 3.

<sup>16</sup> *Supra* note 2 at paras 10ff.

[59] Furthermore, there have been no comments or arguments made by former parties and non-parties.

[60] Tariffs 5.H and 5.I are accordingly certified pursuant to the Settlement Tariffs.

#### **D. TARIFF 5.J (2008-2015)**

[61] Tariff 5.J (Concerts) is an inaugural tariff for which there is no SOCAN counterpart as it targets the public performance of published sound recordings at live music concerts, during the entrance and exit of audiences and during breaks in live performances at live music concerts.

[62] As part of the overall compromise reached between Re:Sound and the Sports Objectors, and without conceding that the uses of recorded music under Tariff 5.J are background music use, the relevant parties have agreed to use *Re:Sound Tariff 3 (2003-2009)* as the basis for the Tariff 5.J rate, but using only the capacity rates under section 5(1)(b)(ii) rather than the entire cascade structure, i.e., admissions or capacity or area of Tariff 3.

[63] Re:Sound submits that a tariff based on capacity is easier to administer than a tariff based on admissions. It does not require users to track and report attendance to every event or require Re:Sound to monitor and audit such reports. Capacity is far easier for both Re:Sound and users to verify and it can be determined in advance, providing users with certainty as to their royalty obligations prior to holding an event.

[64] In relation to the minimum fee of \$15 per event, Re:Sound further submits that *Re:Sound Tariff 3* has no such minimum fee. It notes that application of either the Tariff 3 admissions or capacity rates without a minimum fee, would generate royalties for events with attendance or capacity of under 10,000, of an amount well below the costs of collection. As the Board has repeatedly stated, minimum fees are intended in part, to allow a collective to recover a portion of their administrative costs incurred through the issuance of a licence.<sup>17</sup> The agreed-upon minimum fee satisfies the Board's stated principles of internal coherence, horizontal harmonization and annual licence.<sup>18</sup>

[65] We are satisfied with the foregoing arguments brought forward by Re:Sound. It is true that the capacity rates could result in increased royalties relative to the admission rates that would have prevailed had the entire Tariff 3 royalty structure been used. However, the fact that the Sports Objectors agreed to the Settlement Tariff suggests that any increase is offset by tariff-

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<sup>17</sup> *SOCAN – Multiple Tariffs (1998-2007)* at 10ff; *SOCAN Tariff 9 – Sports Events, 1998-2001* (15 September 2000) Copyright Board Decision at 13-14; *SOCAN Tariff 24 – Ringtones, 2003-2005* (18 August 2006) Copyright Board Decision at para 115; *NRCC Background Music Tariff, 2003-2009* (20 October 2006) Copyright Board Decision at para 141.

<sup>18</sup> *SOCAN – Multiple Tariffs (1998-2007)*, *supra* note 7 at 13-15.

administration savings for it. Furthermore, we are of the view that the Sports Objectors are representative of the interests of large-capacity venues. We also take comfort in the fact that all objections to Tariff 5.J were withdrawn after the Settlement Tariffs were filed with the Board. All relevant parties were given the opportunity to review them and make submissions during consultations initiated by the Board on February 13, 2014, and April 5, 2017.

[66] The Arts Objectors and CAFE represent a wide variety of events potentially subject to Tariff 5.J, and, as such, the motives for withdrawing their objections would validly extend to the interests of other users of the same category.

[67] Finally, there were no comments made by former parties and non-parties. The Board, accordingly, certifies Tariff 5.J pursuant to the Settlement Tariffs.

#### **E. TARIFF 5.K (2008-2015)**

[68] Re:Sound, CAPACOA and CAFE have agreed on the rates and terms of a new tariff, Tariff 5.K (Theatrical, Dance and Other Similar Live Performances) for the years 2008-2015, which applies to the use of recorded music as a part of any type of live entertainment events including theatrical, dance, acrobatic arts, integrated arts, contemporary circus arts or *other live performances*. This tariff is designed to fill in the remaining gap in the initial proposed Re:Sound Live Events Tariff for 2008-2012, and covers the use of recorded music during all types of live entertainment events not otherwise covered by Tariffs 5.A to 5.J.

[69] Re:Sound argued that there is no relevant SOCAN benchmark for Re:Sound Tariff 5.K, given the significant differences between the use of live and recorded music at such events. SOCAN Tariff 4 (Live performances at concert halls, theatres and other places of entertainment) applies to live musical performances rather than performances of recorded music. The rates and structure of Re:Sound Tariff 5.K are based instead on the input of the Canadian performing arts industry represented by CAPACOA and CAFE.

[70] The joint request for certification filed by Re:Sound indicates that both organizations consulted extensively with their memberships to determine the appropriate tariff structure, rates and reporting obligations. The rates were arrived at after careful consideration of the different types of use of recorded music at performing arts events, resulting in separate rates for events that make incidental use of recorded music (such as a play where one or two recordings are played) and events where the use of recorded music is much more predominant (such as a dance performance set entirely to recorded music). The rates were arrived at by analyzing Re:Sound's other attendance-based tariffs such as Tariff 3 and making adjustments for the higher value of foreground versus background music.

[71] The proposed minimum fees are \$15 per event for "incidental" use of music and \$30 per event for all other events, subject to an annual minimum fee of \$50. It is submitted that these fees

are similar to comparable tariffs such as Tariff 5.J (\$15) and Tariff 5.I (\$14.74) which both apply to more incidental uses of recorded music. The \$30 minimum fee for non-incidental uses of music and the \$50 annual minimum are comparable to SOCAN Tariff 4 (\$35 minimum per event and \$60 annual minimum).

[72] Re:Sound further submitted that, as an inaugural tariff, it is not yet possible to test for internal coherence by calculating the number of licensees that will be subject to the proposed minimum fees, however the fees do reflect the “entire structure of this tariff and the characteristics of the users to which it applies.”<sup>19</sup> Different minimum fees apply depending on whether the use of recorded music is incidental or not and an annual minimum fee is available for licensees that hold multiple events. The condition of horizontal harmonization is achieved by comparing the fees to similar tariffs as outlined above. As requested by CAPACOA and CAFE, the Tariff includes an annual licence minimum fee. Thus, the proposed minimum fees satisfy the Board’s principles of internal coherence, horizontal harmonization and annual licence.<sup>20</sup>

[73] After considering comments from non-parties and former parties, our view is that CAPACOA and CAFE represent a wide variety of events – including events held by not-for-profit organizations – potentially subject to Tariff 5.K and as such, the interests of other users of the same category would be accounted for. However, while CAPACOA and CAFE had their members’ specific activities in mind when negotiating Tariff 5.K, they could not have envisaged *all* other live performances. Because Tariff 5.K purports to apply not only to theatrical, dance, acrobatic arts, integrated arts, and contemporary circus arts events but also to any other live event not otherwise specifically covered by Tariffs 5.A to 5.J, it cannot be said that the agreement represents the interests of *all* prospective users.

[74] As a general rule, the Board will refuse to certify a tariff that could potentially have such a broad scope without proper evidence, none of which was adduced in terms of “other,” unidentified live events.<sup>21</sup> As such, we consider that Tariff 5.K should not be open-ended. We will therefore certify Tariff 5.K pursuant to the Settlement Tariffs with the following modified scope: theatrical, dance, acrobatic arts, integrated arts, contemporary circus arts or *other similar live performances*.

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<sup>19</sup> *Ibid* at 14.

<sup>20</sup> *Ibid* at 13-15.

<sup>21</sup> See for example, *SOCAN Tariffs 22.B to 22.G – Internet – Other Uses of Music, 1996-2006* (24 October 2008) Copyright Board Decision at para 108ff.

## VI. TRANSITIONAL PROVISIONS

[75] The tariff contains certain transitional provisions made necessary because it takes effect in the past. These provisions set November 30, 2017 as the date for payments of any amounts owed as a result of this tariff and for past reporting obligations.

[76] We do not set interest factors applying on retroactive payments for the following reasons.

[77] The Settlement Tariffs filed with the Board are silent on the use of interest factors to apply on retroactive payments. In such cases, it could be argued that the Board's willingness to generalize the use of interest factors as expressed in *CBC Radio, 2011*,<sup>22</sup> is enough to justify their use even if the parties did not expressly agree not to use them. However, the main evidence that we have are the Settlement Tariffs, which we must assume are the entire agreements. Furthermore, the Board has no knowledge of what rates the parties would have come to, had they known that interest factors would be included. Finally, it is even possible that the parties would not have come to an agreement, had interest factors been on the bargaining table.

[78] Lastly, it does not appear to us that the omission was the result of oversight, or other errors; nor does it appear that the parties expected the Board to amend the Settlement Tariffs to include interest factors.



Gilles McDougall  
Secretary General

## ANNEX A

### List of Parties

#### Arts Objectors

Canadian Arts Presenting Association

The Corporation of Roy Thompson Hall and Massey Hall

National Arts Centre

Professional Association of Canadian Theatres

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<sup>22</sup> *Supra* note 9 at para 133.



*Place des Arts*

Sony Centre

Festivals Objectors

Canadian Association of Festivals and Exhibitions

Festivals and Events Ontario

Ottawa Festivals Networks

Western Roots Arts Directors

Hospitality Objectors

Alliance of Beverage Licensees of British Columbia

British Columbia Restaurant and Foodservices Association Restaurants Canada (formerly CRFA)

Hotel Association of Canada

Vancouver Hospitality Association

Sports Objectors

*L'Aréna des Canadiens inc.*

Capital Sports Properties Inc. and Capital Sports & Entertainment Inc.

Canadian Football League

Evenko (formerly Gillett Entertainment Group)

Maple Leaf Sports & Entertainment

National Football League

National Hockey League and its Canadian

Member Clubs

Rogers Centre

Toronto Blue Jays

**CERTIFIED TARIFFS, 2008-2015 – RECORDED MUSIC ACCOMPANYING LIVE ENTERTAINMENT**

<b>Live Entertainment</b>	<b>Rates</b>
5.A – Cabarets, Cafes, Clubs, Restaurants, Roadhouses, Taverns and Similar Establishments (2013-2015)	0.9% of the compensation for entertainment paid in the year, subject to a minimum annual fee of \$37.64.
5.B – Receptions, Conventions, Assemblies and Fashion Shows (2013-2015)	Fee per event without dancing: \$9.25-\$39.33, depending on capacity; Fee per event with dancing: \$18.51-\$78.66, depending on capacity.
5.C – Karaoke Bars and Similar Establishments (2013-2015)	Annual fee: \$86.06 or \$124.00, depending on karaoke days per week.
5.D – Festivals, Exhibitions and Fairs (2013-2015)	<p><u>2013-2014:</u> Event ≤ 75,000 persons: from \$8.39 to \$42.05 per day, depending on attendance;  Event &gt; 75,000 persons: from 0.54¢ to 0.13¢ per person, depending on attendance.</p> <p><u>2015:</u> From \$8 to \$600 per day, depending on average daily attendance;</p>
5.E – Circuses, Ice Shows, Fireworks Displays, Sound and Light Shows and Similar Events (2013-2015)	Fee per event: 0.8% of gross receipts from ticket sales, subject to a minimum fee of \$61.85 per event.
5.F – Parades (2013-2015)	\$4.39 for each float with recorded music participating in the parade, subject to a minimum fee of \$32.55 per day.
5.G – Parks, Streets and Other Public Areas (2013-2015)	Fee per location: \$16.28 for each day on which sound recordings are performed, up to a maximum fee of \$111.47 in any three-month period.
5.H – Sports Events (2008-2015)	<p>Fee per event: 0.034-0.048% (yearly increase of 0.0002%) of gross receipts from ticket sales.</p> <p>Free admission events trigger a \$5 fee per event.</p>
5.I – Comedy and Magic Shows (2008-2015)	Fee per event: \$14.64.
5.J – Concerts (2008-2015)	Fee per event: 0.1558¢ multiplied by the capacity, subject to a minimum fee of \$15 per event.
5.K – Theatrical, Dance and Other Similar Live Performances (2008-2015)	<p>Fee per event where use of music is incidental: 0.8¢ per admission, subject to a \$15 per event minimum fee.</p> <p>For all other events, 3.2¢ per admission, subject to a \$30 per event minimum fee.</p> <p>Where royalties are paid for multiple events on an annual basis, they are subject to an annual minimum fee of \$50 instead of a minimum fee per event.</p>

**COMPARISON OF THE 2008-2012 CERTIFIED RATES AND THE 2015 SETTLEMENT RATES**

<b>Average Daily Attendance</b>	<b>2008-2012 Certified Rates (based on total attendance not daily attendance)</b>	<b>2015 Settlement Rates</b>
Up to 5,000	\$8.39 per day	\$8 per day
5,001-10,000	\$8.39 per day	\$18 per day
10,001-20,000	\$8.39 per day	\$36 per day
20,001-25,000	\$8.39 per day	\$60 per day
25,001-30,000	\$21.78 per day	\$60 per day
30,001-50,000	\$21.78 per day	\$96 per day
50,001-75,000	\$42.05 per day	\$150 per day
75,001-100,000	\$0.0054 per person	\$210 per day
100,001-150,000	\$0.0054 per person for 1st 100,000, \$0.0024 for next 100,000	\$300 per day
150,0001-200,000	\$0.0054 per person for 1st 100,000, \$0.0024 for next 100,000	\$420 per day
More than 200,000	\$0.0054 per person for 1st 100,000, \$0.0024 for next 100,000, \$0.0018 for next 300,000, \$0.0013 for all additional persons	\$600 per day

**ANNEX D**

**ADJUSTMENTS MADE IN OTHER CERTIFIED RE:SOUND TARIFFS**

<b>Re:Sound Tariffs</b>	<b>Re:Sound-SOCAN Ratio</b>
Tariff 1.A – Commercial radio	50%
Pay Audio Services Tariff	47.4%
Tariff 3 – Background music	43.06%
Tariff 5.A – Cabarets, cafes, clubs, restaurants, roadhouses, taverns and similar establishments	45%
Tariff 5.B – Receptions, conventions, assemblies and fashion show	
Tariff 5.C – Karaoke bars and similar establishments	
Tariff 5.D – Festivals, exhibitions and fairs	50-84%
Tariff 5.E – Circuses, ice shows, fireworks displays, sound and light shows and similar events	50%
Tariff 5.F – Parades	
Tariff 5.G – Parks, streets and other public areas	
Tariff 6.A – Dance	50%
Tariff 6.B – Fitness activities	36.6%