Copyright Board
Canada

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Canada

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Regime Public Performance of Music
Copyright Act, Section 67.2

Members Mr. Justice Donald Medhurst
Michel Hétu, Q.C.
Dr. Judith Alexander
Mr. Michel Latraverse

Statement of Royalties to be collected for the performance in Canada of dramatico-musical or musical works in 1991

Reasons for decision

Pursuant to section 67 of the *Copyright Act* (hereinafter, the "*Act*"), the Society of Composers, Authors and Publishers of Music of Canada (hereinafter, "SOCAN") filed with the Board a statement of proposed royalties for the performance, or the communication by telecommunication in 1991, in Canada, of musical or dramatico-musical works.

The statement was published in the *Canada Gazette* on October 6, 1990; at the same time, the Board gave notice to users of their right to file objections to the proposed tariff no later than 5 November 1990.

The Board held a pre-hearing conference on January 16, 1991. It then proceeded to public hearings on February 12, 13, 26 and 27; March 6, 20, 21, 25, 26, 27, and 28; and April 4 and 5, 1991.

This decision covers all tariffs for 1991 except tariff 2.A (commercial television) and tariff 17 (non-broadcast services). The Board has delayed its consideration of these tariffs, because the ability of the Board to deal with the related proposed tariffs for 1990 has been challenged before the Federal Court.

I. THE STRUCTURE AND OPERATION OF SOCAN

The proposed tariff is the first that SOCAN has filed with the Board. The Board has used this opportunity to address several questions to SOCAN concerning the operation of the society, as

well as certain aspects of the tariff proposals. This has enriched the public record on the general nature of the management of public performance rights for music in Canada. Such information, though available to the cognoscenti, is not generally known by the public or even the users of SOCAN's repertoire.

The Board finds it useful to present a summary of the information it has received.

A. CONSTITUTION AND MANDATE

SOCAN was incorporated on March 16, 1990. It resulted from the merger of the Composers, Authors and Publishers Association of Canada, Limited (CAPAC), created in 1925, and the Performing Rights Organization of Canada (PROCAN), created in 1940.

According to its letters patent, the objects of SOCAN are the collective administration of performing rights in dramatico-musical or musical works including performance in public and communication to the public by telecommunication or by any other means, and anything incidental or conducive to the attainment of these objects.

SOCAN's general by-law lists ten principles. In essence, they provide as follows:

- SOCAN protects, preserves and promotes the rights of its members and those of foreign affiliated societies whose rights it administers in Canada.
- SOCAN is wholly owned and controlled by its members.
- SOCAN licenses performing rights and collects the royalties for those licences.
- Royalties collected are distributed in a fair and equitable manner, without regard to the style of music. Distribution mechanisms are to be cost effective.

B. MEMBERSHIP

As of January 1, 1991, 38,864 writers and 7,604 publishers were members of SOCAN.

A *writer member* must have written the music or the lyrics of at least one musical work that has been published, recorded, or performed under licence by the Society, or must be the beneficiary of such a person.

A *publisher member* must own at least five copyrighted musical works written by a member of the Society or by a Canadian, or be entitled to the publisher's share of the performance credits of at least five copyrighted musical works that were written or co-written by a member of the Society or by a Canadian.

Upon joining SOCAN, a person signs a standard form contract under which the member assigns to the Society, his or her performing rights, by any means whether now known or later invented, as well as the right to communicate the work to the public by telecommunication, in any musical work now existing or created after joining SOCAN. The contract has a term of two years and is extended automatically, unless three months advance notice is given.

The rights associated with the presentation of a dramatico-musical or choreographic work in its

entirety, also known as “grand rights,” are excluded from the terms of the agreement; according to international custom, rights owners manage these themselves. As a result, SOCAN manages only “small” performing rights.

SOCAN contends that the agreement assigns to it the small rights to any work composed by its members, including music composed to be included in advertising.

C. THE MUSICAL REPERTOIRE ADMINISTERED BY SOCAN

For all practical purposes, SOCAN administers the performing right to all protected works in Canada. Virtually all Canadian writers who may be entitled to royalties for the public performance of music are members of SOCAN. Furthermore, agreements reached with societies managing similar rights throughout the world empower SOCAN to act on behalf of their members within Canada.[1]

SOCAN has reached reciprocal agreements with foreign societies. As a result, the Canadian repertoire is protected and is compensated for public performance in most countries of the world.

Two types of works are not part of SOCAN’s repertoire. Works in the public domain are not included. This is the case with most of what is generally referred to as the classical repertoire. Neither does SOCAN manage the rights to works that are not protected in Canada under the terms of the international agreements to which Canada is a signatory. Thus, works from countries that have not ratified the Berne Convention or the Universal Copyright Convention escape SOCAN’s net.

A SOCAN licence is not required to perform a work that is not part of SOCAN’s repertoire. That being said, one has to establish this. It is fairly easy to determine that a work from the classical repertoire is in the public domain. By contrast, a user has no means to easily determine in advance if a work does not otherwise enjoy protection in Canada.[2] It follows that the prudent user has no other choice than to obtain a licence from SOCAN. The Chief Operating Officer of SOCAN, Mr. Michael Rock, was questioned on the possibility that some users may be obtaining a licence they do not need; he responded that he knew of none, and added that he doubted, for example, that any radio station in Canada could ever find itself in such a situation.

Section 67 of the *Act* requires that SOCAN file periodically lists of works in current use with the Copyright Office of the Department of Consumer and Corporate Affairs. The evidence of Mr. Rock suggests that these lists are of little use. The various lists filed by SOCAN and its predecessors over a period of more than fifty years are stored, but neither indexed nor consolidated. Furthermore, they contain only the title of the work and the name of the author. There is no information that would allow one to determine whether the works listed over the years are still protected today, or if they are still part of SOCAN’s repertoire. The titles merely

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[1] The Appendix lists the countries and territories to which these agreements apply.

[2] For its part, SOCAN has access to a register that is maintained in Switzerland. This register allows it to determine who owns the copyright for a given musical work and whether that person is a member of a society on whose behalf SOCAN acts.

add to the "hundreds of thousands of cards, if not millions, filed directly [with the office] by composers and publishers."

It hardly needs to be said that only part of this vast repertoire is performed publicly in Canada, and is thus remunerated. Mr. Rock estimated that between 75,000 and 100,000 titles might share in SOCAN's distribution of royalties in a given year.

D. THE DISTRIBUTION OF FUNDS

In 1989, CAPAC and PROCAN collected royalties totalling $61,464,678, and distributed $58,743,477 to copyright owners. Mr. Rock described the distribution system and the measures aimed at ensuring that the revenues flowing from a given tariff are distributed to those whose works are used.

Funds are distributed quarterly.[3] To this end, SOCAN maintains five pools.

The *radio* pool receives the royalties from radio tariffs, 80 per cent of royalties from tariffs for which there is no separate pool (the "small tariffs": cabarets, receptions, sporting events, public parks etc.) and royalties for the retransmission of distant radio signals. This pool represents 46.5 per cent of the sums distributed in 1989, or $27,288,665.[4]

The *television* pool receives the royalties from television tariffs and from the retransmission of distant television signals. This pool represents 42.7 per cent of the sums distributed in 1989, or $25,081,057.

The *concert* pool receives the royalties from tariffs 4 (concerts) and 5.B (concerts at exhibitions), as well as 20 per cent of the royalties from "small tariffs."[5]

The *cinema* pool receives the royalties from tariff 6; they represent 0.25 per cent of the sums distributed in 1989, or $149,172.

The *foreign receipts* pool consists of the royalties received from foreign societies on behalf of SOCAN's members. The distribution of receipts is made according to the statements of distribution that accompany the transfer of funds. This pool represents 10.6 per cent of the sums paid out by SOCAN in 1989, or $6,224,583.

Funds contained in these pools are allotted according to the number of recorded performances of a work in a given quarter. The method of allotment differs from one pool to another.

The *radio* pool is distributed as follows. CBC network programming is analyzed in its entirety.

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[3] The exception is the cinema pool, which is distributed once a year.

[4] The numbers used in the rest of part I of the decision are used as orders of magnitude. Data obtained by the Board did not allow it to derive precise correlations.

[5] Only PROCAN maintained a concert pool. At CAPAC, concert receipts were put into the radio pool. It is thus impossible to establish exactly how much such a pool would have contained in 1989. Concerts generated royalties of approximately $3,000,000 in 1989.

The rest of CBC programming and that of other stations are sampled throughout the year; every Canadian station takes part in the exercise. Each work identified in the sample receives a credit. Works longer than seven minutes receive an extra credit. The theme music of a program receives a fraction of credit, based on its length. No account is taken of the audience share of the station under analysis: it is assumed that a song popular in a major centre is equally popular elsewhere in the country, and vice-versa.

The distribution system for the *television* pool is more complex. The complete schedules of all broadcasters are analyzed.[6] The amount a composer receives varies according to

- the length of time that the musical work is played; two minutes of playing time carries twice as many credits as one minute;
- the use made of the work: feature music currently receives five times as many credits as theme or background music;[7]
- the royalties paid by the station to SOCAN. This is done in order to account to a certain extent for the relative importance of the user that broadcasts the work.

The *concert* pool is allocated among the works identified through information provided by the users. The shares are a function of the length of the works performed and of the royalties generated by the concert.

The *cinema* pool is allocated after an analysis of the musical contents of films shown in motion picture theatres.

E. FOREIGN DISBURSEMENTS AND RECEIPTS

In 1989, the financial exchanges between Canadian and foreign music societies stood as follows:

Monies received (in $) **Entrées de fonds (en $)**	**Country** **Pays**	**Monies paid (in $)** **Sorties de fonds (en $)**
2,578,130	United States / Etats-Unis	23,047,690
336,065	Great Britain / Grande-Bretagne	3,229,003
494,769	France	1,867,920
1,652,675	Others / Autres	1,527,609

[6] In the United States, ASCAP and BMI use a sampling method for both television and radio.
[7] SOCAN is planning to reduce this ratio.

5,061,63	29,672,222

In that year, the Canadian societies paid $29,071,255 to their members. A large part of this sum ("several million dollars," according to Mr. Rock) was paid to Canadian agents of foreign publishers. Therefore, the royalties which actually benefit non-Canadians are higher than the table above suggests.

II. ISSUES COMMON TO ALL TARIFFS

A. ADJUSTMENTS TO ACCOUNT FOR PRICE VARIATIONS

CAPAC and PROCAN have asked several times that account be taken of losses in purchasing power. To do so, they have always suggested the Consumer Price Index (CPI).

In its decision of December 7, 1990, the Board questioned this approach and stated that where an adjustment is made, it is more appropriate to use the Industrial Products Price Index (IPPI). For the user who buys a public performance licence from SOCAN, music is not a consumption good, but an input into the production of the consumer good: programming, "shows," and so forth.

SOCAN stated that it is seeking an acceptable method of adjustment that could be used year after year. While submitting that the difference between the two indices was of only minor importance for the users, SOCAN again contended that the CPI would be a more appropriate index. It used the following arguments:

- Royalties distributed to the rights holders are used to buy goods and services. The CPI, not the IPPI, reflects fluctuations in the prices of these goods and services.
- The CPI is generally better understood and better accepted by rights owners as well as by users of the repertoire.
- The IPPI does not capture the prices in the cultural industries, with the possible exceptions of the printing and publishing industries.
- The public performance right is an intangible right while the IPPI relates first and foremost to the manufacturing industry.

These arguments serve at most to explain why SOCAN would prefer that the Board adopt the CPI. They do not address the reasons that led the Board to decide last year that the IPPI is the most appropriate index in the circumstances. Therefore, the Board has used the IPPI once again when it was necessary to adjust the royalties payable under the various tariffs to take account of the loss of purchasing power. SOCAN is free to revisit the question if it can advance arguments that do address the reasons given for the Board's conclusion.

From January, 1990 to January, 1991, the IPPI (1986 = 100) rose from 108.7 to 111.1, an increase of 2.2 per cent.

The Board realizes that when SOCAN files a tariff in September of a given year, it cannot possibly make use of the IPPI for the month of the following January. The Board notes, however, that it is possible for SOCAN to obtain, in time for the filing of a proposed statement of royalties,

figures for the month of June in the current year.

B. VARIATIONS IN TARIFF FORMULAS

The Board will seek to ensure a certain coherence between the various elements of the public performance tariff. Incoherence can lead to injustice. This issue is not of interest only to the users; it lies at the core of the preoccupations of the members of SOCAN who seek a just return for the use of their works.

For this reason, the Board has tried to determine why the tariff is as it is. It contains nineteen items, and stipulates some thirty different tariff systems. There is nothing to show that a considered attempt was made to ensure their uniformity or their comparability. The tariff structures vary considerably, as well as the rates charged, even for uses that appear similar. As a result, problems of coherence may arise in two ways: internally within a tariff, and "horizontally" between different tariffs.

Thus, SOCAN would set the concert tariff at two per cent of ticket sales, with a minimum fee of $69.30 per concert. A concert generating less than $3,465 in receipts would pay more than two per cent: with sales of $500, for example, that percentage would be about 14 per cent. Yet, nowhere was it shown that music is seven times more important for this concert than for another, larger one.

At the other extreme, as SOCAN rightly stressed, one finds mega-concerts such as the Canada Day celebrations. Producing these events costs tens of thousands of dollars; the performers who appear often can demand high fees. Under the tariff proposed by SOCAN, the licence for such a concert would cost only $69.30. The Board doubts that this amount represents fair compensation for the contribution of music to such an event.

Two further examples will suffice to illustrate the problems of "horizontal" coherence that could arise under the different tariff structures.

Important differences exist between the minima in various tariffs. Different tariffs exist precisely to fulfil different needs; it is thus not always possible, nor even desirable, that they be framed identically. This still leaves one wondering why the proposed minimum fee for a concert is $69.30, while the use of music in an exercise studio demands a minimum of $126 for the whole year. In its turn, an establishment subject to the cabaret tariff, with less than $5,000 a year in artists' fees, pays the minimum fee of $80 for the year. One may fail to see how these different regimes account for the relative value of music for a cabaret and for an aerobic dance studio...

The same uneasiness arises when comparing the commercial television and cinema tariffs. The latter generates for SOCAN approximately 170 times less revenue than the former. The Board has difficulty understanding why such a large disparity exists. Questioned on the subject, Mr. Rock merely stated that the rate in the cinema tariff was probably too low and implied that it was currently under study.

SOCAN acknowledged that in the past, it has paid scant attention to harmonizing the tariffs. It offered three reasons which, according to it, explain this apparent lack of coherence.

SOCAN emphasized, first of all, that the tariffs are the product of the individual circumstances surrounding their creation and evolution; negotiated agreements, compromises imposed by the previous Copyright Appeal Board after extensive hearings, and so on. Yet, the fact that users tolerate, and have tolerated in the past, a particular tariff does not, in itself, make that tariff fair. More than historical accident is required for a tariff to be fair, especially when this involves a comparison with another tariff.

SOCAN also contends that users rarely complain that the tariff structure is incoherent; they seek simply to pay less for their own use of music. This contention can be put to rest by a mere reference to the attitude of Radio-Québec when it objected to the proposed tariff for 1990. On the contrary, the Board believes that users, as well as rights holders, wish that the tariff as a whole show some minimum level of coherence.

SOCAN submitted finally that the tariff structure should allow for a simple calculation of the royalty payments, in order that all users may use SOCAN's repertoire, in full confidence of complying with the tariff. Simplicity, while laudable, ought not to become an obstacle to a fair and equitable tariff structure.

A search for coherence does not necessarily bring in its train uniform tariffs. Coherence may even imply the adoption of more sophisticated tariff structures; such may be the case of a tariff which better accounts for mega-concerts to which admission is free. The aim is, rather, to avoid incoherence which leads to inequity between different users of SOCAN's repertoire, and ultimately inequity to the creators whose works are used.

Tariff structures will not be rationalized overnight. The Board accepts that this may be a task for the longer term. SOCAN had asserted, in an early written response, that it had no intention of revising the tariff structure with an eye to improving coherence in the foreseeable future. The Board is pleased that SOCAN reconsidered during the hearing, and indicated that it was going to deal with the issue as soon as possible.[8]

C. THE MERGER OF CAPAC AND PROCAN: IMPACT ON THE TARIFF

Some of the written questions addressed by the Board to SOCAN dealt with various issues relating to the merger resulting in the creation of SOCAN and to the benefits this merger might bring to the copyright owners as well as to users.

Several users of SOCAN's repertoire actively participated in the exchanges concerning this issue. However, they did not file any evidence and were content to comment on the evidence which SOCAN produced. The consideration of the impact of the merger gave rise to several procedural incidents which it is not necessary to recapitulate here. A number of requests for information were addressed to SOCAN, one of which resulted in a reasoned interlocutory order. All parties were given access to the information thus filed, and provided with an opportunity to address the related issues.

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[8] This is not the first time that questions have been raised on this issue; see the 1983 decision of the Copyright Appeal Board on the concerts tariff.

i. Evidence

The evidence presented by SOCAN deals with essentially two aspects:

a. the circumstances that led to the merger;
b. the reasons in support of the proposed tariff being the sum of the royalties collected by CAPAC and by PROCAN.

a. The Circumstances Giving Rise to the Merger

Three witnesses explained the circumstances which led to the merger of CAPAC and PROCAN: Messrs. John V. Mills, former Chief Executive Officer of CAPAC, Jan Matejcek, Chief Executive Officer of SOCAN and former chairman of PROCAN, and Michael Rock. The reasons for the merger can be distilled as follows:

- The societies' members wanted the merger. They believe that their interests will be better served by a single entity, be it in terms of the collection of royalties or of the promotion of their interests with public authorities.
- For reasons of efficiency, a single society administers music performance rights in most parts of the world. By conforming to this model, Canadian authors are able to enhance their relations with foreign societies.
- In the medium term, the merger should result in efficiency gains which will bring about either a reduction of operating costs or improved services to members.

Two reports, which SOCAN produced following an order of the Board, shed light on the more technical aspects of the impact of the merger. These reports were prepared in support of an application to the Director of Investigation and Research under the *Competition Act* for an advisory opinion on the merger.

The first of these reports was written by the firm of Price Waterhouse. It provides a detailed assessment of the financial impact of the merger on the operation of the societies and attempts to establish the importance of the resulting efficiency gains. The report concludes – with certain reservations and qualifications – that if the merger had come into effect on January 1, 1989, it would have resulted in savings of $14 million over the first five years, including $4.7 million in 1993.

Dr. Leonard Waverman is the author of the second report, which is dated December 22, 1988. The report concludes that the merger of the two societies would not substantially lessen competition within the meaning of section 64 of the *Competition Act*,[9] and would bring about substantial real efficiency gains.

Questioned on the financial impact of the merger, Mr. Rock stated that it was impossible for the time being to determine whether the anticipated benefits would be realized or how much time it

[9] The relevant provision is now section 92 of the *Competition Act*, R.S.C. 1985, c. C-34.

would take for this to happen. Furthermore, SOCAN took certain decisions – including that of moving into a head office which it built – from which it should benefit in the long run. Mr. Rock maintained that these decisions resulted in additional expenses in the short run which make it that much more difficult to distinguish between the benefits (or costs) that are associated with the merger and those that are not.

b. The Reasons in Support of the Tariff Being the Sum of the Royalties Collected by CAPAC and PROCAN

The royalties which would be payable under SOCAN's proposed tariff would be the same as the sum of those payable under CAPAC's and PROCAN's tariffs, with adjustments aimed at reflecting price increases. Mr. Rock stated that he found several advantages to this approach. It is simple. It is justifiable because, in the past, the Board always established first the total royalties payable by the user, and then apportioned them among the societies. It has no negative consequences for users. In theory, it might have been possible in the past to deal with only one society; in practice, it would have been, in Mr. Rock's opinion, unlikely if not impossible.

Mr. Rock also attempted to justify using the same approach in the case of the minimum rates set out in the various tariffs. He first acknowledged that their genesis parallels that of the tariffs themselves. There had been no attempt to correlate the various rates; they represent individual reactions to specific circumstances.

Mr. Rock also appeared to be saying that the minimum rates had not been established to offset the transaction costs associated with the issuance of a licence. Rather, according to him, they are intended to reflect the value of CAPAC's and PROCAN's repertoires, now combined, for various users. In such circumstances, he submitted, the addition of the minimum rates is justified.

However, Mr. Rock offered other reasons to explain the existence of the minimum rates and their current level. It could be an amount which is "not too low so as to be ridiculous but not too high so as to attract widespread opposition."

Mr. Rock also admitted that the cost of issuing a licence by SOCAN is similar to what it was for CAPAC or PROCAN.

There is no evidence contrary to Mr. Rock's testimony that the efficiency gains which may result in 1991 are negligible.

ii. Analysis

The users put forward several arguments which, according to them, justify that they share in any efficiency gains from the merger. Some of those arguments address the principle of apportioning the efficiency gains. Others concern the manner of apportioning these gains if need be. Given the Board's conclusions with respect to the very principle of apportioning gains, it is not necessary to rule on the parties' other arguments.

To begin with, one must recognize that the merger is an exceptional event. This type of occurrence can profoundly change the structure of the market of music performance rights.

Furthermore, the merger is not without consequence for the users. It is no longer possible to reduce royalties by using only one repertoire. The evidence reveals that at least one radio station considered exercising that option. It is also possible that certain concerts used only one repertoire. However, nobody contradicted the testimony of Mr. Rock that this type of situation is exceptional.

Any determination as to the effect a modification in the market structure ought to have on tariffs must be made with a view to the Board's mandate. The Board was created to prevent performing rights societies – whose existence was made necessary by the very nature of the music performance rights market – from upsetting the balance of market power which ought to exist between copyright owners and users. The Board fulfils this mandate by regulating the price paid by the user. Therefore, it is that price, not the amount of money or services that a copyright owner receives, that ought to serve in determining who shall benefit from the efficiency gains associated with the merger.

It is all the more difficult for the Board to share efficiency gains when it does not control the number of performing rights societies. It is doubtful that the users would accept without objection an application for higher tariffs which aimed solely to compensate the efficiency losses that could result from a split up of SOCAN.

Furthermore, the parallel the objectors drew between the Board and agencies that regulate public utilities is not relevant to the present issue. The context within which the latter make decisions is different in more than one respect from the environment within which the Board operates.

- The administration of public performance rights is not carried out by a risk capital corporation. By contrast, the price of public utilities is usually regulated on the basis of a fair rate of return on investment; it is for that reason that operating costs are scrutinized, and that it is sometimes possible to reduce the cost of the product to the consumer when these costs go down.
- Contrary to agencies regulating public utilities, the Board does not control who the participants are in the market for public performance rights. It could not deny to a collecting body the right to operate a licensing scheme for a repertoire different from that of SOCAN.
- Public utilities are commercial corporations; they aim to make a profit. SOCAN is a non-profit organization acting on behalf of its members and whose purpose is to collect and distribute royalties.

Given the evidence and arguments available to the Board, it concludes that it is for the authors to draw the benefits (or shoulder the inconveniences) that flow from the administrative structure they provide themselves for the purpose of collecting public performance rights. The efficiency gains which might result from the merger shall therefore remain with SOCAN and its members. The objectors and others are of course free to reopen the issue for the consideration of further arguments.

III. OBJECTIONS TO PARTICULAR TARIFFS

A. TARIFF 1.A (COMMERCIAL RADIO)

Commercial radio stations have paid to the performing rights societies 3.2 per cent of their gross revenues since 1977. In 1987, the socie- ties asked that the rate be raised to 3.5 per cent, while the Canadian Association of Broadcasters (the "CAB") requested that it be lowered to 3.0 per cent. The status quo was then maintained. Following that decision, the CAB and the music societies signed an agreement to keep the rate as its current level until the end of 1992.

Objections to tariff 1.A were filed on behalf of two radio stations, CFMX and CFRB. They seek to pay a lower rate than other commercial stations. Such a request, which is not entirely novel, would require abandoning the principle of a single rate for commercial stations. This Board's predecessor always declined to abandon the single rate approach, which SOCAN requests be maintained.

i. Evidence

The general manager of CFRB, Mr. George Ferguson, explained how the conversion of the station's format to one of talk and news had led to progressive reductions in its use of feature music. In his opinion, music now assumes a secondary role in programming at CFRB. He added that he could not see any reason that could lead the station to play feature music for more than ten per cent of its broadcast time.

CFRB produced exhibit STANDARD-9, with regard to the use of music on 470 out of 472 commercial radio stations in Canada.[10] The study established the proportion of music programming that each station stated it would play as a proportion of the broadcast day, in its most recent promise of performance filed with the CRTC. The study shows wide variations in the use of music, from less than 10 per cent to over 90 per cent. Currently, all stations pay the same rate for the use of music.

Mr. Michel Arpin, a vice-president of Radio Mutuel and a sometime director of the CAB, testified to the progressive decrease in the use of music on French language AM radio stations. Using his experience on the board of directors of the CAB, he also commented on the 1987 agreement, as well as on the nature of its relationship with the members of the CAB and with the performing rights societies. His testimony was corroborated by the Corporate Counsel of the CAB, Mr. Tony Scapillati, who appeared at the request of the Board.

Mr. Jerry Good, manager of CFMX, described it as Canada's only commercial classical music station. While music is its reason for existence, various factors, including licence restrictions, have led it to rely almost exclusively on "popular" classical music, most of which is in the public domain. Less than 25 per cent of the music it broadcasts is protected; this is a much lower proportion than for any other commercial radio station. Mr. Good also discussed the station's

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[10] This is the first time that a study filed with the Board breaks down music use on a station to station basis.

difficult financial situation and the burden that royalty payments place on it.

Counsel for CFRB relied on a comparison between the use of feature music on CFRB and on other stations to put forward a rate of between 0.5 and 0.6 per cent for stations using protected feature music for less than ten per cent of their total air time. For her part, counsel for CFMX suggested that the rate be fixed at 0.8 per cent for stations where less than 25 per cent of the feature music used is protected. This ratio would be the same as the one found in tariff 4, where the rate for a classical concert is set at one fourth of that for other concerts.

ii. Analysis

The arguments put forward by the parties focused on several issues.

First, much was made by SOCAN of the agreement signed between its predecessor societies and the CAB. SOCAN maintained that in view of that agreement, abandoning the single rate would be unfair to it. Yet, this agreement *qua* agreement cannot govern the relationship between SOCAN and the two objectors. Under the *Act*, they are entitled to have their objection considered in light of all relevant circumstances. The CAB had no mandate to bind its members. Nothing suggests that SOCAN might have been led to believe that the legal requirements for such a mandate had been fulfilled. Neither CFRB nor CFMX have conducted themselves in a way that would lead one to conclude that they ought to be made to conform to the terms of the agreement.

The Board expresses no opinion as to whether the agreement, which purports to put a ceiling of 3.2 per cent on the tariff until the end of 1992, prevents SOCAN from filing a revised tariff before then.

Second, SOCAN would like tariff 1.A to be kept simple. It maintained this goal is best achieved by a blanket licence *and* a single rate, and that having more than one rate would compromise the simplicity of the tariff. Simplicity ought not to be pursued at the expense of other goals or values such as fairness to creators and equity amongst users. Furthermore, the tariff already creates several classes of users amongst radio stations, including CBC stations and non-commercial stations.

Third, it was argued that having more than one rate would compromise the integrity of the tariff, since that rate is correlated to the average use of music throughout the industry. This last proposition can only be true if the amount generated by the tariff, whatever the formula used to generate that amount, is somehow correlated to the value of the use made of SOCAN's repertoire by the industry as a whole. The single rate would then become a linchpin of the tariff structure; a reduction in favour of low music users would require an increase to those who use relatively more music.

There are other ways to view the current single rate. It may be the maximum all commercial stations, including those which use little music, are willing to pay without too much difficulty. This approach would conform with Mr. Arpin's statement that 3.2 per cent is a "fair maximum," and Mr. Scapillati's statement that it is "a standard [the industry] can live by."

Fourth, SOCAN suggested that there ought to be some consonance between the cost per minute of small and grand rights, the latter being several times higher than the former. The argument is attractive, although quite contrary to the concept of blanket licence which SOCAN endorses wholeheartedly. However, the Board rejects the comparison for three reasons. First, there is no compulsory regime for grand rights. Second, the performance of a complete feature length work is intrinsically different from playing short pieces. Finally, the comparison, if it is made, must be pursued for the whole class; it cannot be used only in debating the merits of a lower rate for low music users.

Finally, several arguments turned on the notions of public domain music, protected music, and "cleared" music. Thus, the distinction between protected music and public domain music is clear in theory. However, Part I-C of this decision already explains how difficult it can be in practice to draw that distinction.

A further difficulty arises from the as yet uncertain status of protected, non-feature music. The term "non-feature" refers both to production music (music used in links, themes, etc.) and music used in commercials. The objectors claim that the performing rights to such music are "cleared" at the source. SOCAN maintains that the rights are assigned to it under its membership agreements, and therefore cannot be cleared at source.

Unfortunately, the evidence before the Board on this issue is fragmentary and confusing. It is therefore difficult to establish valid comparisons between various sets of figures. It is not possible, as CFRB tried to do, to compare percentages contained in exhibit STANDARD-9 with those filed in 1987 by SOCAN and by the CAB, because of the different bases used in them. The 1987 studies referred to actual use of music; exhibit STANDARD-9 uses projections contained in promises of performance and accounts for feature music only.

Furthermore, none of these studies focuses on the activity for which tariff 1.A is established in the first place: the public performance by commercial radio of any protected music in SOCAN's repertoire. Therefore, and in spite of the efforts made by the parties in this regard, it cannot be said that SOCAN's repertoire is used either more or less on the airwaves than it was five or ten years ago. It does not follow either, then, that since some stations now use SOCAN's repertoire less than they did several years ago, there must be stations that use that repertoire more than in the past.

iii. Conclusions

The Board considers that using protected music less than 20 per cent of broadcast time is low enough to justify paying less than the current rate. The Board notes that this level of use is less than that of stations objecting to the tariff in 1982 or 1983.

The Board does not adopt the approach put forward by CFMX because it would have required creating two categories of low users: classical music stations and others. The Board wishes to establish only single category.

The tariff is based on the use of any music in SOCAN's repertoire. No evidence was offered that, to a radio station, non-feature music is worth less, or is less important. Authors are entitled to

compensation for the use of all music, feature or otherwise.

The Board prefers to use the radio station as calculation unit for the tariff. It rejects basing the tariff on the average use of music within a group of stations. This approach would require complex calculations: establishing the relative ratings of the stations, ascribing income to each unit of the group, and so forth.

To qualify for the lower rate, a station will have to meet the 20 per cent criterion throughout the previous year. The Board is concerned with minimizing monitoring difficulties. A yearly test will avoid the possibility of a station paying at different rates every month. This should also make the auditing less costly, since SOCAN will be able to determine for a full year the rate for which a station qualifies.

The promises of performance on which exhibit STANDARD-9 is based are not the best indicator of the use made of SOCAN's repertoire; however, they are the best data available to the Board. If one examines the distribution of the use of music among radio stations, 20 per cent represents just over one third of the time devoted to music on the average station (or 55.7 per cent) and approximately the same proportion for the median station (which plays music 57.4 per cent of the broadcast day).[11] This comparison, by itself, would set the rate at between 1.12 to 1.15 per cent.

The rate is set at 1.4 per cent. The object of that slight increase is to account for the general benefits associated with having access to the whole of SOCAN's repertoire under a blanket licence regime.

B. TARIFF 1.B (NON-COMMERCIAL RADIO)

Tariff 1.B concerns non-commercial, or community and campus, radio stations. In 1990, these stations paid royalties totalling 3.2 per cent of their operating costs. SOCAN requests that the status quo be maintained.

The National Campus and Community Radio Association (NCRA) objected to the proposed tariff on behalf of the 20 or so of its 50 member stations holding a SOCAN licence. Therefore, it represents about one third of the stations licensed under tariff 1.B. NCRA recommends that each station pay royalties of $100 per year.

i. Background

Non-commercial stations have been subject to a tariff since 1960. The royalties they pay have always been correlated to their operating costs. From 1960 to 1982, only CAPAC had such a tariff, which was fixed at two per cent. In 1983, PROCAN requested a similar tariff, and the combined rate was pegged at 3.86 per cent. In 1987, this was reduced to 3.2 per cent.

In 1983, and again in 1987, the *Association des radiodiffuseurs communautaires du Québec*

[11] Since these figures are close together, the distribution of stations is approximately symmetric.

(ARCQ), representing some 25 community stations in the province, filed an objection to the proposed tariffs. The arguments put forward by the ARCQ were similar in many respects to those of the NCRA. What the ARCQ was aiming for, however, was different: it wanted both commercial and non-commercial stations to pay royalties equal to 3.2 per cent of advertising receipts.

The Copyright Appeal Board rejected this approach. It considered that it would create inequities between otherwise similar stations, since the percentage of income derived from advertising by ARCQ member stations varied from a low of 33 per cent to a high of 85 per cent. The Board concluded that operating costs remained a more equitable tariff base. It reduced the rate to 3.2 per cent from 3.86 per cent in order to establish a more acceptable equivalence with the tariff in effect for commercial stations.

In recent past years, non-commercial stations have paid to SOCAN the following amounts:

1986	$ 107,588
1987	$ 151,753
1988	$ 213,105
1989	$ 220,978
1990	$ 265,000

ii. Evidence

SOCAN relies essentially on the decisions of the Copyright Appeal Board in 1983 and 1987 to support its position. Its witnesses, Mr. Victor Perkins and Ms. France Lafleur, sketched the history of the tariff and of the relations between the societies and non-commercial stations. More specifically, Mr. Perkins recounted the difficulties which PROCAN had experienced over the years in trying to introduce an acceptable auditing system of these stations' programming.

The NCRA produced as witnesses the managers of the Ottawa, Carleton and McGill university stations, as well as an Ottawa composer and member of SOCAN, Mr. Alex Sinclair, who also acts as a concert promoter and record producer. The essence of these testimonies is as follows.

First, the financial situation of non- commercial radio remains unstable. Stations must constantly show initiative in raising the funds they need to operate.

Second, the role non-commercial stations are called upon to play is both different from that of commercial stations and important in several respects. They do not seek profits. They pursue educational and community service goals that cannot be readily compared to those of commercial stations. They offer a varied, even eclectic programming, of a kind which is rarely available from other stations.

Most importantly, non-commercial radio allows artists and others an access to the airwaves that would not be available to them from commercial radio or the CBC. Certain costs are associated with promoting authors, composers and artists. One of the witnesses suggested that given those costs, non-commercial radio already pays its dues, and that it should not be subjected to additional charges, given its precarious financial situation.

Mr. Sinclair supported this argument. He saw no difficulties with the NCRA proposal. He added that he considered royalties to be only one benefit among many others, perhaps more important, offered to rights owners by community radio. He likes to support these stations because of how important they are to him, and because he would not want to see them vanish through lack of funds. Counsel for SOCAN, for his part, tried to establish that Mr. Sinclair's opinion did not represent the views of all rights owners.

Thirdly, non-commercial stations could not operate without volunteers. They have few paid employees. It is the number of their volunteers that allows them to offer diversified programming that no commercial station could afford: the coordinator of CKUT (Montreal) suggested that offering their type of programming would require around 100 full time employees.

iii. Analysis

According to the NCRA, non-commercial stations ought to pay a flat royalty, regardless of their size or relative importance. It submits that $100 per year, per station, would account for the similarity of the mandate of these stations, the nature of the services they offer, and for the paucity of their financial means.

This proposal is unacceptable. It would reduce the royalties payable from $265,000 in 1990 to $6,000 in 1991. The NCRA maintains that this constitutes a relatively insignificant reduction when compared to the total royalties collected by SOCAN under the radio tariffs. It nevertheless remains dramatic if one focuses on tariff 1.B in itself, and would clearly give non-commercial radio preferential treatment over other broadcasters. The *Act* requires that small retransmission systems receive preferential treatment; it provides neither an exemption, nor special treatment for non- commercial stations.[12]

The NCRA also submits that the current formula ought to be abandoned. According to the association, this formula does not take into account the particular characteristics of non-commercial stations and simply mimics the commercial radio tariff. Yet, the operating costs of a non- commercial station and the advertising receipts of a commercial station are quite different tariff bases: the latter is much broader than the former. Advertising revenues of a commercial station are used, among other things, to pay for programming services. In the case of non-commercial stations, these services are provided by volunteers, whose contribution is not at all reflected in the cost of the licence. Therefore, it cannot be said that the tariff formulas are equivalent.

The NCRA also maintains that operating costs cannot be part of an acceptable tariff formula because they are in no way a reflection of a station's audience share. By contrast, there is a measure of correlation between the advertising revenues of a commercial station, and its audience share. However, the NCRA has suggested no other base that might capture more accurately each station's share of the listening audience in establishing the royalties payable by

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[12] See *Association des compositeurs, auteurs et éditeurs du Canada Ltée c. Installation radiophonique CKRL-MF, Campus Laval FM Inc.*, [1986] R.J.Q. 1491 (S.C.).

each one. Given the circumstances, the Board finds that it is reasonable to use operating costs as a base for calculating copyright fees. Among other things, this allows the financial burden to be distributed amongst all stations according to their means. It is also preferable to a formula based on advertising revenues since their importance to individual stations varies too widely.

Having determined that it intends to use the same tariff base as in the past, the Board must establish the rate to be applied to that base. Four factors could influence the level at which that rate is set: the relative use of music, changes in circumstances, audience share and characteristics particular to the relevant user group.

The NCRA did not try to minimize the importance of music on non-commercial radio. Neither did it claim that these stations make less use of SOCAN's repertoire than commercial stations, as a percentage of their broadcast days. It merely pointed out that these stations use a different part of that repertoire. Therefore, no adjustment is required in this respect.

The NCRA asserted that non-commercial radio had undergone changes that the tariff ought to reflect. However, no evidence was presented as to the nature or ambit of this evolution. Consequently, the conclusions reached by the former Board in 1987 are still valid today.

By contrast, the Board is of the opinion that the royalties paid by non-commercial stations ought to take their audience share into account. Such an approach is already in place in the radio tariff for the CBC. Unfortunately, it is not possible to determine whether the rights paid by non-commercial stations adequately reflect their audience share, since the evidence does not allow the Board to determine the audience share of non-commercial stations.[13] Nothing in the evidence supports NCRA's assertion that these stations pay royalties that are out of proportion to their audience share.

The Board provided the parties with a chart, the object of which was to determine that audience share. Following representations of the parties, the Board chose not to take that chart into account. It is therefore unable for the time being to make allowances for audience share. Nevertheless, the Board still considers that relating the royalties paid to the audience share would bring about a more equitable result. It immediately puts the parties on notice that it intends to establish such a comparison starting next year, insofar as this is possible.

On another front, the Board considers that an immediate adjustment of the rate is necessary in order to reflect more faithfully the particular conditions under which non- commercial stations operate, quite apart from the audience share they might obtain. It considers that reducing the rate from 3.2 to 2.7 per cent better accounts for the special role they play for the radio listening audience in Canada. The position they occupy, their small size and the mandate they fulfil are factors that go a long way towards explaining the financial difficulties which confront them. Contrary to what SOCAN maintained, the Board is of the opinion that a fair tariff should give some consideration to the financial situation of the users of its repertoire.

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[13] Non-commercial stations paid, in 1990, royalties that represent 1.16 per cent of those paid by commercial stations. This ratio would be acceptable only if the audience share of non-commercial radio represented 1.16 per cent of that of commercial radio.

Finally, the NCRA made much of the absence of a system for distributing the payments received by SOCAN to the writers and composers whose works are used by community stations. Until recently, non-commercial radio programming was not sampled for the purpose of distributing the radio pool. The NCRA considers it unfair that its members be asked to pay royalties that are distributed to rights owners whose works are played on commercial radio and on the CBC, but not by its own members.

The NCRA even claimed that a station whose programming is not included in the analysis should not be required to pay SOCAN for the use of its repertoire. The Board likes to believe that the royalties are distributed to those whose works are used under the terms of the various tariffs. However, it is for the members of SOCAN, not for the Board, to decide how to ensure that the distribution of royalties is as equitable as possible. Any imperfections in the distribution system cannot remove the requirement for anyone using works which form a part of SOCAN's repertoire to pay a fair price for that use. This having been said, the issue appears to be no longer relevant, as SOCAN recently put in place a system for analyzing music played on non-commercial stations. This will permit it in the future to list works that are performed by these stations and will give appropriate credit to the copyright owners.

C. TARIFF 1.C (CBC RADIO)

i. Background

On July 8, 1987, the Copyright Appeal Board set at $1,556,256 the royalties payable for the use of music on the radio networks of the Canadian Broadcasting Corporation (CBC). The CBC filed an application for review of the decision with the Federal Court of Appeal, arguing that the Board had not taken into account the fact that CBC stations use less protected music than commercial stations. On June 4, 1990, the Court allowed the application and referred the matter back to the Board in order to consider CBC's contention that the royalties to be paid ought to reflect the use made by it of the societies' repertoires.

On December 7, 1990, the Copyright Appeal Board reduced the royalties to $1,269,282. It first established a ratio between the relative audience shares of the CBC and the private stations, and applied it to the royalties paid by these stations in 1986: this produced a figure of $1,813,260. It then noted that the CBC uses 60 per cent less protected music than commercial stations. It reduced the amount of $1,813,260 by 30 per cent, thereby taking into account half of the difference in the use of protected music.

SOCAN requests that the formula developed in the revised decision of the Copyright Appeal Board be used again without any changes. It also requests that the tariff be expressed as a fixed sum to be paid for the annual licence, and not in terms of a per capita fee.

The CBC asks that the 1987 formula be modified so as to take full account of the difference in the use made of SOCAN's repertoire by commercial stations and by the CBC. It joins SOCAN in requesting that the per capita tariff be set aside. Finally, it asks that the annual licence be payable in equal monthly instalments.

ii. Evidence

Mrs. Barbara Brown and Messrs. Robert DuBroy and Jean-Guy Doucet provided detailed testimony explaining Exhibit CBC-2, *Radio Monitoring Study*. The object of the study is to compare the use made of SOCAN's repertoire by CBC stations and by commercial stations. The study was restricted to the Montreal and Toronto markets. It excluded CFMX and CFRB because of their special characteristics. SOCAN did not question the validity of the results contained in the study.

According to this study, the CBC's use of protected music accounts for 29 per cent of air time, compared with 64.5 per cent in the case of commercial stations. Therefore, the CBC uses 55 per cent less protected music. These figures do not account for the relative audience shares of AM and FM stations. However, this does not appear to cause much difficulty. Mr. Stan Staple, director of research at the CBC, testified to having used figures contained in a report published by Statistics Canada, and related to the advertising income of AM and FM stations as a weighting factor, in order to test the sensitivity of the results. This calculation led to the conclusion that the CBC uses 54.7 per cent less protected music than commercial stations. Therefore, it seems that the figures generated in Exhibit CBC-2 can be relied upon.

Mr. Staple also testified with regard to the audience share of the radio networks of the CBC. He prepared Exhibit CBC-3 for that purpose, using BBM fall surveys. According to this exhibit, CBC's audience share was 9.3 per cent in 1987, 9.0 per cent in 1988, 9.1 per cent in 1989, and 9.8 per cent in 1990.

Finally, Mr. Michael McEwen, executive vice-president of the CBC, reviewed in his testimony the non-commercial nature of CBC radio and the particular objectives pursued by the networks, within the context of the special mandate of the Corporation. His testimony establishes the following:

- The AM and FM networks of the CBC are the only national radio networks in Canada.
- These networks have a cultural, non- commercial mandate. Private broadcasters deliver markets to advertisers. The CBC delivers pro- grams to listeners, Their missions are completely different.
- These networks generate no revenue, except for a modest return associated with the broadcast of Montreal Canadiens hockey games.

Answering a question from the Board, Mr. McEwen concurred that the value of a musical work is essentially the same for a commercial station as it is for a public broadcaster.

iii. Analysis

The Board intends to establish a formula by which the royalties paid by the CBC are a function of both its audience share and the use it makes of SOCAN's repertoire relative to commercial stations.

As to audience share, SOCAN submits that the result of the fall 1990 survey (9.8 per cent) ought to be used in the calculation. The CBC arguing a need for stability in the royalties it pays, would

prefer that the average for the fall sweep of the last four years (9.3 per cent) be used. The Board accepts the arguments of SOCAN. Using the most recent data allows to better reflect changing conditions. Furthermore, using a four-year average in determining the audience share factor would leave one wondering why the same is not done for all the other factors used in determining the amount.

As to the use CBC makes of SOCAN's repertoire, it is common ground that it is lower than commercial stations. SOCAN would take CFRB and CFMX into account, and suggests 52 per cent is the correct figure. The CBC argues that these stations ought to be excluded from the calculation. The Board agrees with the CBC and uses the figure of 55 per cent. CFRB and CFMX present special situations which ought not to be taken into account for this year in establishing the ratio between CBC and commercial stations.

Finally, SOCAN did not put forward any argument to contradict the conclusion that the CBC ought to receive the full benefit of its lower use of protected music than commercial stations. Therefore, the Board does not support this aspect of the revised decision of the Copyright Appeal Board.

The derivation of the tariff is as follows:

Royalties paid by commercial stations in 1990: $22,863,165

Audience share of CBC radio stations: 9.8 per cent, or 10.86 per cent of the audience of commercial stations:

$22,863,165 × 0.1086 = $2,482,940;

Relative use of protected music by CBC radio stations: 45 per cent. The royalties payable by the CBC to SOCAN are therefore:

$2,482,940 × 0.45 = $1,117,323

The royalties paid under tariff 1.A account for the benefits associated with having access to the whole of SOCAN's repertoire under a blanket licence regime. That amount is used in the previous calculation. Therefore, no increase in the result is required to account further for the benefits.

The Board also accedes to CBC's request that this sum be payable in equal monthly instalments. This measure merely puts the CBC on the same footing as commercial stations.

D. TARIFF 2.B (TVONTARIO)

SOCAN requests that TVOntario pay royalties of $348,940 in 1991. This would mean an increase of five per cent from 1990.

In 1990, TVOntario paid SOCAN less than the amount the Board had certified. Before the certified tariff was published, the parties agreed to set the royalties at $332,327. They advised the Board of this agreement only after the tariff was published.

TVOntario did not object to the tariff. It did request, after the deadline for filing objections had expired, that the same price increase formula be applied to it as would be to Radio-Québec.

The Board, here as elsewhere in the tariff, intends to use the IPPI. In the circumstances, the basis for establishing the 1991 tariff ought to be the amount actually paid by TVOntario in 1990. Therefore, the royalties for 1991 are set at $339,638.

E. TARIFF 2.C (RADIO-QUÉBEC)

The proposed tariff filed on August 31, 1990 would impose on Radio-Québec a payment of $286,350 for 1991. On December 7, 1990, the Board established at $219,600 the royalties for 1990. On February 14, 1991, counsel to SOCAN suggested that the royalties for 1991 be set at the amount paid in 1990, adding to it whichever factor the Board chooses to apply to account for price increases.

The Board therefore establishes the royalties at $224,430.

F. TARIFF 2.D (CANADIAN BROADCASTING CORPORATION TELEVISION)

In 1987, the Copyright Appeal Board set the royalties to be paid by the CBC for the use of music on its television networks at 2.1 per cent of its advertising income. The CBC reached agreements with the former societies for the years 1988, 1989 and 1990, the object of which was to account for cost of living increases. These agreements, which the Board ratified, provided for increases of 7.5, 7.5 and 5.5 per cent.

SOCAN suggests that royalties for 1991 be increased by five per cent to $6,200,075.

The CBC puts forward the amount set in 1987 as a starting point. It asks that the Board adjust that amount in accordance with the formula used for Radio-Québec in 1990. This manner of accounting for the increase in the IPPI and CBC's loss of audience share would set the royalties for 1991 at $4,475,980.

i. Evidence

The evidence establishes the following.

The mandate of the CBC is very different from that of commercial stations. Mr. McEwen alluded to various aspects of that mandate: higher Canadian content, the specific nature of the programming, continued encouragement to the production in Canada of high quality programs, and significant contribution to the development of new productions. In his opinion, these constitute a crucial contribution to the continued and expanding production of television programs that can meet the highest standards. He also submits that it is precisely for the purpose of encouraging Canadian programming that the CBC receives Parliamentary appropriations in the order of $800 million annually.

On the other hand, the gap between the CBC and private television is closing in two respects. First, the use made of protected music by private and public broadcasters is similar. Second,

advertising appears to play essentially the same role for both.

Finally, the audience share of the CBC shrank by about 14 per cent between 1987 and 1990. Mr. Staple attributes this decrease first and foremost to the introduction of *Télévision Quatre-Saisons,* and also to the introduction of specialized services and pay television.

ii. Analysis

The Board recognizes the special mandate of the CBC as initiator, promoter and leader in the implementation of Canadian programming in both official languages. It is convinced, as is Mr. McEwen, that it is to compensate the increase in operating and programming costs linked to this mandate that the CBC receives Parliamentary appropriations.

The Board does not accept that it ought to use the same formula for the CBC that it applied to Radio-Québec last year. The context of the two hearings was quite different. In 1990, the parties had agreed to use the 1987 decision as a starting point. This is not so with the CBC: by requesting that the tariff account for a loss in audience share, the CBC sets aside the very essence of the formula used in 1987. Furthermore, the Board has before it information which allows it to develop a formula that is more equitable for both parties than a mere reliance on the results obtained four years ago.

The Board adopts the principle that the royalties ought to be a function of the audience share of the CBC. This approach directly reflects the relative variations of audience shares. It accounts for new participants in the television market, whose emergence has caused an even greater fragmentation of the advertising pie, and for which SOCAN itself wants to account for in the filing of its proposed tariff 17.

CBC's advertising revenues ought not to be used in determining the amount of royalties, since these revenues may vary for reasons that have nothing to do with its audience share: recently, these revenues have increased while CBC's audience share declined. For this reason, it is not necessary to determine which of the amounts put forward by the parties really represents the advertising income of the CBC.

In the fall of 1990, the audience share of the CBC was 26.53 per cent of that of commercial broadcasters. The Board therefore sets at 26.53 per cent of the amounts paid under tariff 2.A for the year 1990, the amount to be paid by the CBC under tariff 2.D for the year 1991.

Applications in the Federal Court still prevent the Board from setting tariff 2.A for 1990. Commercial broadcasters have paid to SOCAN, on an interim basis, royalties of $22,986,301 for the year 1990: therefore, the CBC shall pay on an interim basis, for the year 1991, the sum of $6,098,266, in equal monthly payments. SOCAN and the CBC shall adjust this amount if and as it is required.

G. TARIFF 4 (CONCERTS)

The proposed tariff filed on August 31, 1990 is the simple sum of the tariffs proposed for 1990 by PROCAN and CAPAC, with the proposed minimum being set at $69.30, an increase of five

per cent over the sum of the minima proposed by PROCAN and CAPAC for 1990. On December 7, 1990, the Board set the minimum for 1990 at $10 for each society.

BCL Entertainment Corporation and the Canadian Association of Arts Presenters objected to the proposed tariff. They submit that the merger of PROCAN and CAPAC represents a material change in circumstances and that some of the efficiency gains ought to be passed on to the users. This matter is dealt with in part II-C of this decision; nothing further needs to be added. Therefore, the basic rate formula for tariff 4 shall remain unchanged.

SOCAN argued that the minimum ought to be re-established at a higher level. SOCAN recapitulated the history of the tariff. However, it offered only one argument, through its witness Mr. Luc Plamondon, a well-known song writer. This related to the application of the minimum tariff to mega-concerts where no entrance fee is charged.

In Part II-B of this decision, the Board has already expressed its doubts that the current tariff formula provides fair compensation for the contribution of music to such an event. However, it does not think that this issue ought to be dealt with through the imposition of a higher minimum which would apply not only to the Canada Day celebrations, but also to church basement performances.

Since SOCAN did not offer any other arguments that would justify raising the minimum from its current level, it shall remain at $20.

H. OTHER TARIFFS

The Board certifies as filed all the other tariffs that are the object of this decision. This is subject where relevant, to adjustments so as to reflect the IPPI, in accordance with Part II-A of this decision.

Philippe Rabot
Secretary General

APPENDIX COUNTRIES AND TERRITORIES	COLLECTIVES	ANNEXE PAYS ET TERRITOIRES	SOCIÉTÉS
Algeria	ONDA	Açores	SPA
American Virgin Islands	ASCAP, BMI, SESAC	Afrique du Sud	SAMRO
Andorra	SACEM	Algérie	ONDA
Anguilla	PRS	Allemagne (ancienne RDA)	AWA
French Austral and Antarctic Possessions	SACEM	Allemagne	GEMA
Antigua	PRS	Andorre	SACEM
Argentina	SADAIC	Anguilla	PRS
Aruba	BUMA	Antigua	PRS
Ascension Island	PRS	Argentine	SADAIC
Ashmore Island	APRA	Aruba	BUMA
Australia	APRA	Australie	APRA
Australian Antarctic Territory	APRA	Autriche	AKM
Austria	AKM	Bahamas	PRS
Azores	SPA	Bangladesh	PRS
Bahamas	PRS	Barbade	PRS

Bangladesh	PRS	Barbuda	PRS
Barbados	PRS	Belgique	SABAM
Barbuda	PRS	Belize	PRS
Bear Island	TONO	Bénin	SACEM
Belgium	SABAM	Bermudes	PRS
Belize	PRS	Bonaire	BUMA
Benin	SACEM	Botswana	SAMRO
Bermuda	PRS	Brésil	SICAM, UBC
Bonaire	BUMA	Brunei	PRS
Botswana	SAMRO	Burkina Faso	SACEM
Brazil	SICAM, UBC	Burundi	SABAM
British Virgin Islands	PRS	Cameroun	SACEM
British Antarctic Territory	PRS	Chili	SCD
British Indian Ocean Territory	PRS	Chypre	PRS
Brunei	PRS	Côte d’Ivoire	SACEM
Burkina Faso	SACEM	Curaçao	BUMA
Burundi	SABAM	Danemark	KODA

Cameroon	SACEM	Dominique	PRS
Cartier Island	APRA	Égypte	SACEM
Cayman Islands	PRS	Espagne	SGAE
Central African Republic	SACEM	États-Unis d'Amérique	BMI, ASCAP, SESAC
Channel Islands	PRS	Fidji	APRA
Chile	SCD	Finlande	TEOSTO
Christmas Island	APRA	France	SACEM
Cocos (Keeling) Island	APRA	Georgie du Sud	PRS
Curaçao	BUMA	Ghana	PRS
Cyprus	PRS	Gibraltar	PRS
Czechoslovakia	OSA, SOZA	Grèce	AEPI
Denmark	KODA	Grenada	PRS
Dominica	PRS	Groenland	KODA
Egypt	SACEM	Guadeloupe	SACEM
Falkland Islands	PRS	Guam	ASCAP, BMI, SESAC
Faroe Islands	KODA	Guinée	SACEM

Fiji Islands	APRA	Guyane	PRS
Finland	TEOSTO	Guyane française	SACEM
France	SACEM	Hollande	BUMA
French Guyana	SACEM	Hong Kong	CASH
French Polynesia	SACEM	Hongrie	ARTISJUS
Germany (formerly GDR)	AWA	Île Cartier	APRA
Germany	GEMA	Île McDonald	APRA
Ghana	PRS	Île Jan Mayen	TONO
Gibraltar	PRS	Île Niue (Savage)	APRA
Greece	AEPI	Île Macquarie	APRA
Greenland	KODA	Île de Man	PRS
Grenada	PRS	Île Tokelau (Union)	APRA
Guadeloupe	SACEM	Île Hope	TONO
Guam	ASCAP, BMI, SESAC	Île des Ours	TONO
Guinea	SACEM	Île de l’Ascension	PRS

Guyana	PRS	Île Ashmore	APRA
Heard Island	APRA	Île Heard	APRA
Hong Kong	CASH	Île Christmas	APRA
Hope Island	TONO	Île Cocos (Keeling)	APRA
Hungary	ARTISJUS	Île de Ross	APRA
Iceland	STEF	Îles Vierges américaines	ASCAP, BMI, SESAC
India	PRS	Îles Vierges britanniques	PRS
Indonesia	BUMA	Îles Pitcairn	PRS
Ireland	PRS	Îles Sandwich Sud	PRS
Israel	ACUM	Îles Salomon	APRA
Italy	SIAE	Îles Caïman	PRS
Ivory Coast	SACEM	Îles Faroe	KODA
Jamaica	PRS	Îles Falkland	PRS
Jan Mayen Island	TONO	Inde	PRS
Japan	JASRAC	Indonésie	BUMA
Kenya	PRS	Irlande	PRS

Kiribati	APRA	Islande	STEF
Lebanon	SACEM	Israël	ACUM
Lesotho	SAMRO	Italie	SIAE
Liechtenstein	SUISA	Jamaïque	PRS
Luxembourg	SACEM	Japon	JASRAC
Macquarie Island	APRA	Kenya	PRS
Madagascar	SACEM	Kiribati	APRA
Madeira	SPA	Lesotho	SAMRO
Malta	PRS	Liban	SACEM
Malawi	PRS	Liechtenstein	SUISA
Malaysia	PRS	Luxembourg	SACEM
Mali	SACEM	Madagascar	SACEM
Man (Isle of)	PRS	Madère	SPA
Martinique	SACEM	Malaisie	PRS
Mauritius	SACEM	Malawi	PRS
Mayotte	SACEM	Mali	SACEM
McDonald Island	APRA	Malte	PRS

Mexico	SACM	Maroc	SACEM
Monaco	SACEM	Martinique	SACEM
Montserrat	PRS	Maurice (Île)	SACEM
Morocco	SACEM	Mayotte	SACEM
Nauru	APRA	Mexique	SACM
Netherlands	BUMA	Monaco	SACEM
New Caledonia and dependencies	SACEM	Montserrat	PRS
New Zealand	APRA	Nauru	APRA
Nigeria	PRS	Nigeria	PRS
Niue (Savage) Island	APRA	Norfolk Island	APRA
Norfolk Island	APRA	Norvège	TONO
Norway	TONO	Nouvelle-Guinée	APRA
Pakistan	PRS	Nouvelle-Zélande	APRA
Panama Canal Zone	SESAC	Nouvelle-Calédonie et dépendances	SACEM
Papua-New Guinea	APRA	Ouganda	PRS
Paraguay	APA	Pakistan	PRS

Peru	APDAYC	Panama (Canal de)	SESAC
Philippines	FILSCAP	Papouasie	APRA
Pitcairn Islands	PRS	Paraguay	APA
Poland	ZAIKS	Pérou	APDAYC
Portugal	SPA	Philippines	FILSCAP
Puerto Rico	ASCAP, SPACEM	Pologne	ZAIKS
Reunion	SACEM	Polynésie française	SACEM
Ross Dependency	APRA	Porto Rico	ASCAP, SPACEM
Rwanda	SABAM	Portugal	SPA
Saba	BUMA	Possessions françaises dans le Pacifique Sud et dans l'Antarctique	SACEM
Saint-Pierre and Miquelon	SACEM	République centrafricaine	SACEM
Samoa	BMI	Réunion	SACEM
San Marino	SIAE	Royaume-Uni	PRS
Senegal	SACEM	Rwanda	SABAM

Seychelles	PRS	Saba	BUMA
Sierra Leone	PRS	Saint-Christophe-et-Nevis	PRS
Singapore	PRS	Saint-Eustatius	BUMA
Solomon Islands	APRA	Saint-Kitts-et-Nevis	PRS
South Africa	SAMRO	Saint-Marin	SIAE
South Sandwich Islands	PRS	Saint-Martin	BUMA
South Georgia	PRS	Saint-Pierre et Miquelon	SACEM
Spain	SGAE	Saint-Vincent	PRS
Spitsbergen (Svalbard)	TONO	Sainte-Hélène	PRS
Sri Lanka	PRS	Sainte-Lucie	PRS
St. Martin	BUMA	Samoa	BMI
St. Eustatius	BUMA	Samoa (les îles occidentales)	APRA
St. Vincent	PRS	Sénégal	SACEM
St. Kitts-Nevis	PRS	Seychelles	PRS
St. Christopher and Nevis	PRS	Sierra Leone	PRS

St. Helena	PRS	Singapour	PRS
St. Lucia	PRS	Spitsberg (Svalbard)	TONO
Swaziland	SAMRO	Sri Lanka	PRS
Sweden	STIM	Suède	STIM
Switzerland	SUISA	Suisse	SUISA
Tanzania	PRS	Swaziland	SAMRO
Tokelau (Union) Island	APRA	Tanzanie	PRS
Tonga	PRS	Tchécoslovaquie	OSA, SOZA
Trinidad and Tobago	PRS	Territoires de l'Australie en Antarctique	APRA
Tristan de Cunha	PRS	Territoires britanniques en Antarctique	PRS
Tunisia	SACEM	Territoires britanniques dans l'océan Indien	PRS
Turks and Caicos Islands	PRS	Tonga	PRS
Tuvalu	APRA	Trinidad et Tobago	PRS
United States of America	BMI, ASCAP, SESAC	Tristan da Cunha	PRS

Uganda	PRS	Tunisie	SACEM
United Kingdom	PRS	Turks et les îles Caicos	PRS
Uruguay	AGADU	Tuvalu	APRA
Union of Soviet Socialist Republics	VAAP	Union des républiques socialistes soviétiques	VAAP
Vatican City	SIAE	Uruguay	AGADU
Venezuela	SACVEN	Vatican (Cité du)	SIAE
Wallis and Futuna	SACEM	Venezuela	SACVEN
Western Samoa	APRA	Wallis-et-Futuna	SACEM
Yugoslavia	SAKOJ	Yougoslavie	SAKOJ
Zaire	SACEM, SONECA	Zaïre	SACEM, SONECA
Zambia	PRS	Zambie	PRS
Zimbabwe	PRS	Zimbabwe	PRS