Copyright Board
Canada

Commission du droit d'auteur
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
Additional reasons delivered by Mr. Justice Medhurst concerning Tariffs 4 and 5.B

Statement of Royalties to be collected for the performance or communication by telecommunication in Canada of musical or dramatico-musical works in 1992, 1993 and 1994

Reasons for decision

FOR THE YEARS 1992 TO 1994:

4, 5.B Concerts

9 Sports Events

11 Circuses, Ice Shows, Comedy Shows and Magic Shows

FOR THE YEARS 1993 AND 1994:

1.B Non-commercial Radio

7 Skating Rinks

8 Receptions, Conventions, Assemblies and Fashion Shows

19 Fitness Activities

FOR THE YEAR 1994:

3	Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns and Similar Establishments
5.A	Exhibitions and Fairs
10	Public Parks, Streets or Squares
12	Ontario Place Corporation, Canada's Wonderland and Similar Operations
13.A	Aircraft
14	Performance of an Individual Work
15.B	Music on Hold
18	Recorded Music for Dancing
20	Karaoke Bars and Similar Premises
21	Recreational Facilities Operated by a Municipality, School, College or University

I. GENERAL INTRODUCTION

Pursuant to section 67 of the *Copyright Act* (the "*Act*"), the Society of Composers, Authors and Publishers of Music of Canada (SOCAN) filed with the Board a statement of proposed royalties for the public performance, or the communication to the public by telecommunication in 1994, in Canada, of musical or dramatico-musical works. Similar filings were made for the years 1992 and 1993.

The statement was published in the *Canada Gazette* on October 9, 1993. At the same time, the Board gave notice to users of their right to file objections to the proposed tariff no later than November 6, 1993. Statements filed for 1992 and 1993 had been published in a similar fashion.

The following gives reasons for Tariffs 4, 5.B, 9 and 11 (for 1992 to 1994), Tariffs 1.B, 7, 8 and 19 (for 1993 and 1994) as well as Tariffs 3, 5.A, 10, 12, 13.A, 14, 15.B, 18 and 20 (for 1994). Tariff 21 is added for 1994. Other tariffs will be disposed of later.

II. TARIFF WORDING

As was done in the decision of December 6, 1993, and for the same reasons given at that time, modifications have been made to the wording of tariffs certified in this decision. Again, these changes do not alter the substance of the tariffs but aim at making them more accessible to the public.

III. THE SOCAN/CAMP AGREEMENT

The Canadian Alliance of Music Presenters (CAMP) is an *ad hoc* coalition of performing rights

users under tariffs 4 and 5.B (Concerts), 9 (Sports Events) and 11 (Circuses). CAMP filed objections to these tariffs for 1992 and 1993. On August 9, 1993, SOCAN filed an agreement it had reached with CAMP. The agreement dealt with most elements of the tariffs that CAMP had challenged, for periods from 1992 to 1997.

On September 3, the Board addressed a series of questions to CAMP and SOCAN. The answers clarified some aspects of the agreement, and resolved a few misunderstandings as to its meaning and ambit. The Board also asked for, and received, comments from several persons who had expressed an interest in the tariffs covered in the agreement. Some of these persons participated in the hearings into tariffs 4 and 5.B.

The issues raised by the agreement are discussed in the passages dealing with the separate tariffs.

IV. REQUEST FOR A SEPARATE TARIFF DEALING WITH RECREATIONAL FACILITIES

The predecessor to the Ontario Recreational Facilities Association (ORFA) was established in 1947. Its some 2,000 members include leisure service professionals, businesses and associations and Ontario municipalities operating recreational facilities. SOCAN is an associate member.

ORFA's preoccupation with copyright issues goes back to the early 1980's. Its relationship with SOCAN has been one of mutual cooperation. With the help of SOCAN, it has attempted to educate its members on their obligation to pay royalties for the public performance of music, and on the manner of dealing with SOCAN. It has helped in holding seminars on copyright in Ontario, as well as in Prince Edward Island, Alberta, Manitoba and Saskatchewan. ORFA appears to have discussed copyright issues with most, if not all, of its parent associations throughout Canada. It stated that recreational facilities associations in the rest of Canada are aware of, and agree with, the proposals it puts forward.

ORFA's objection in 1993 is the first to lead to a hearing; others, dating back to 1987, were withdrawn. Further correspondence between ORFA and the Board determined that the 1993 objection is directed to tariffs 7 (Skating Rinks), 8 (Receptions, Fashion Shows), 9 (Sports Events), 11 (Circuses) and 19 (Fitness Activities).

Hearings into these tariffs were delayed to allow negotiations to continue between ORFA and SOCAN. Examination of these tariffs began once it became clear that an agreement could not be reached. A hearing was held to consider ORFA's proposal on December 14, 1993. ORFA proposed two separate tariffs, paralleling the existing ones, aimed at municipally owned recreational facilities.

The first tariff, "proposal A," provided an option to tariffs 7, 9 and 11, and allowed the purchase of an annual licence by each facility, for all events at which music is used for a secondary purpose and the majority of participants are under the age of nineteen. The annual licence fee was $75, rising to $150 if admission was charged for any event covered by the licence during the year.

The second tariff, "proposal B," was an alternative to tariffs 8 and 19. It allowed the purchase of

an annual licence for events where music is used as a secondary element of the function. The price was a fee per room, based on the number of "event days" or the average number of rentals a year, starting at $125 for up to 52 event days, and then going to $275 for up to 156 event days, and $500 for any number of event days over 156.

The debate surrounding ORFA's proposal covered several issues.

A. COMPLIANCE

SOCAN is correct in stating that very little evidence was provided during these proceedings on the extent to which municipalities comply with the tariffs. The Board nevertheless agrees with ORFA that there appears to be a serious problem. In 1992, 753 out of more than 3,900 municipalities filed under one or more tariffs.[1] In the Board's view, it is highly unlikely that eighty per cent of municipalities do not require a SOCAN licence.

Evidence on the number of licensed facilities seems to confirm the existence of the problem. ORFA puts at 2,000 the number of recreational facilities in Saskatchewan and Ontario and at over 4,000 in all of Canada. Licences issued by SOCAN in 1992 covered only 1,156 facilities throughout Canada.

The Board agrees with ORFA's identification of the two main causes for this problem. The first is that many operators simply do not know that they must obtain a licence if they perform music in public, let alone that they might need more than one. It seems that until ORFA itself became aware of that possibility, it was commonly assumed that payment under tariff 7 covered all uses of music for a facility.

The second is a perception that the current tariff structure is overly complex, difficult to understand and cumbersome to administer. SOCAN does attempt to accommodate municipalities by offering them the choice of issuing a single licence for all their facilities. The Board also agrees with Mr. Perkins that municipalities probably maintain for other purposes the information they need to report to SOCAN. This may help in reducing the administrative complexity of the tariffs. However, this may not be enough to change current perception of the issue. Furthermore, a requirement to report on repeated occasions and under various tariffs does not encourage compliance.

ORFA maintains that a tariff that is more transparent, simpler to operate, and minimizes the reporting burden of each facility would help in eliciting compliance. It also argues that a single tariff structure would have a better chance of surviving municipal budget deliberations. Insofar as smaller municipalities are concerned, the Board shares this view.

B. EVOLUTION OF THE INDUSTRY

ORFA also argues that recreational facilities now provide a greater variety of services, which make it more likely that they incur liability under several tariffs. Again, the Board agrees. The

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[1] Exhibits SOCAN-4 and ORFA-5.

evidence shows that 70 per cent of facilities licensed under tariff 7 are licensed only under that tariff; this does not mean that they do not require other licences, nor that they do not use facilities for more than one purpose.

C. IMPACT OF PAYMENTS MADE UNDER SEVERAL TARIFFS

ORFA argues that cumulative payments made under several tariffs that, taken individually, are unobjectionable, can impose an undue financial burden on multi-purpose recreational facilities.

Minimum fees may well be too onerous for those who pay multiple tariffs, or for those who pay under a tariff that imposes repeatedly a minimum price for a single user. The problem is compounded because different tariffs use different units of measurement such as events, time periods, number of participants or size of a room. Thus, the price paid in a year for music played at fashion shows attended by a total of 1,000 persons will rise as fewer people attend each event. Yet the average attendance at an event may well be linked to the size of the community; if this is so, a small community may pay higher fees than a large organization, although they both serve the same number of people.

D. EFFECT ON THE ROYALTIES RECEIVED BY SOCAN

SOCAN asserts that the proposal would result in a decrease in SOCAN's revenues. ORFA claims that the tariff structure would help achieve a fairer distribution of the tariff burden amongst all users. Currently, many users do not comply with the tariffs. A simpler tariff covering many uses could encourage compliance; increased compliance could easily counteract the drop in revenues from a lower price.

E. PRACTICALITY OF THE PROPOSED TARIFFS

The Board agrees with SOCAN that, as presented, ORFA's proposed tariffs are unacceptable.

Proposal A suffers from several defects. Nevertheless, the Board finds the proposal for a multiple use tariff attractive. It also is of the opinion that the record of these proceedings is sufficient for it to devise a replacement for proposal A that both meets the legitimate claims put forward by ORFA and addresses SOCAN's objections.

First, proposal A requires that the majority of participants be under the age of nineteen. This is the sort of criterion that would be very difficult to monitor for both SOCAN and the facility. To the Board, it appears unworkable.

Second, the proposed two-tiered approach with a $75 fee where no admission is charged would almost guarantee that SOCAN would receive less revenue. The Board does not wish to introduce such a reduction by the back door where none is being asked for. A multiple use tariff should set a price that is no lower than the highest minimum price in the tariffs it is meant to replace, and high enough to ensure that over time, SOCAN derives at least the same amount of revenues from that group of users. The price of $150 suggested by ORFA would appear likely to achieve this result.

Third, ORFA deals with the problems generated by the existence of minimum prices by creating a maximum. Facilities with low revenues may need the convenience of a multiple use tariff; however, facilities deriving large revenues from their activities should pay the same price as other users in similar situations. The tariff should be such that anyone receiving more than a stated income is required to pay under SOCAN's other tariffs. That amount should probably be equal to the amount required to generate the same fee under the tariff most used by these users (in this case, tariff 7). In order to pay $150 in royalties under tariff 7 (in which the rate is set at 1.2 per cent), a user would have to generate $12,500 in revenues from skating activities; this is the figure used later.

Fourth, the tariff should remove from its ambit those activities not meant to be covered by the proposal, such as circuses, ice shows (other than an annual "carnival"), junior and professional hockey.

Fifth, given the evidence on the record, the tariff should be made available to all facilities operated by municipalities, whether or not they are owned by one. For the same reason, it should also be made available to schools, colleges and universities.

Sixth, the tariff should allow those who currently use music under only one tariff to continue to do so.

Proposal B suffers from most of the defects in proposal A. It also rests on a premise that goes against common sense: that where dancing occurs, use of music is always secondary.[2]

Attempts at the hearing to reduce the ambit of the proposal to functions at which dance is not the sole object of the event confused the issue even more. Furthermore, the concept of event days is not clear, at least in the way ORFA has defined it.

The proposal also raises difficulties for the fair treatment of other users. Facilities covered by the proposal would be treated differently from private operators subject to tariffs 8 or 19. The Board agrees with Mr. Perkins on the need to maintain a level playing field here.

The Board cannot, at this time, correct proposal B to its satisfaction, although the current structure of tariffs 8 and 19, as they apply to recreational facilities, does create difficulties that need to be addressed. While the Board does not accept proposal B as formulated, it strongly encourages SOCAN and ORFA to devise a formula that may better address those difficulties.

F. CONCLUSION

Adding this tariff to the existing list should reduce the complexity of the overall system. Many licensees will have to report less frequently, and under only one tariff, to SOCAN. The number of individual licences SOCAN will have to issue will also be reduced.

The Board shares ORFA's hope that a multiple use tariff will maintain, and even increase

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[2] ORFA appeared in the end to retreat from this position: see the transcript, p. 38.

SOCAN's revenues while reducing the administrative burden of all concerned. The Board takes note of ORFA's commitment to help increase to 2,000 the number of facilities that are licensed and in full compliance with the public performance tariffs within the next few years.

Because it is new, this tariff formula is necessarily experimental. For this reason, it is being set for 1994 only; applying it to 1993 would unduly add to the administrative burden of SOCAN and users, something the new tariff is meant to alleviate. The Board hopes that SOCAN and ORFA will monitor the tariff and its effects and inform it of any adjustments that may be warranted.

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

A. TARIFF HISTORY SINCE 1991[3]

Tariff 1.B concerns non-commercial, that is community, campus and native, radio stations. For some time, these stations have been paying royalties based on their operating costs.

In 1991, the National Campus and Community Radio Association (NCRA) objected to the tariff. After holding hearings, the Board lowered the applicable rate from 3.2 per cent to 2.7 per cent.

In 1992, SOCAN asked that the rate be raised to 5 per cent. NCRA, *l'Alliance des radios communautaires du Canada* (ARC) and *l'Association des radios communautaires du Québec* (ARCQ) filed objections. SOCAN and the objectors agreed to keep the rate at 2.7 per cent. They also undertook to develop a tariff formula that would take into account each station's use of music and audience share. In the decision giving effect to that agreement, the Board stated that it welcomed SOCAN's undertaking to explore with the objectors the possibility of basing future tariffs on audience share and music use.

In its proposed tariffs for 1993 and 1994, SOCAN asked again that the rate be raised to 5 per cent. NCRA, ARC and ARCQ filed objections. In June 1993, after long and unsuccessful negotiations, the objectors asked that the Board initiate proceedings leading to public hearings. These hearings took place on December 1 and 2, 1993.

SOCAN's position kept changing until the beginning of the hearings. In its pre-hearing memorandum, it requested that the rate and base for the tariff be the same as the commercial radio tariff that is, 3.2 per cent of income. For their part, objectors proposed a rate of 1.9 per cent of their operating costs.

SOCAN and the objectors now agree on two points. First, a station's operating costs should continue to serve as the base for the tariff. Second, the Board's decision should deal with 1994 as well as 1993. The only task remaining is to set a rate.

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[3] The history of this tariff before 1991 is set out at pages 24-25 of the Board's decision of July 31, 1991 (*pp. 303-304 in this volume).*

B. THE STATIONS' PROPOSAL

The objectors ask that the royalties payable by non-commercial stations as a group be a function of the ratio of their audience share to that of commercial stations. To achieve this, they propose a formula combining information provided by the stations to the CRTC and Statistics Canada with BBM data. This formula appears to represent a consensus, following discussions amongst all the members of the three associations.

First, the royalties to be received by SOCAN under tariff 1.B would be estimated by multiplying the royalties paid to SOCAN under tariff 1.A by the ratio of the national audience share of all non-commercial stations to that of all commercial stations.

The applicable rate would then be obtained by dividing the result by the operating costs of all non-commercial stations as set out in these stations' reports filed with the CRTC and with Statistics Canada.[4] According to the objectors' calculations, this would yield a rate of 1.86 per cent for each station, which would be rounded up to 1.9 per cent.

C. EVIDENCE

Most of the testimony dealt with the relative use of music by commercial and non-commercial stations, with comparisons in their operations, and with the reliability of BBM audience data on non-commercial stations.

i. Relative Use of Music

Testifying for SOCAN, Mr. Andrew Forsyth, a communications specialist, offered the opinion that non-commercial stations use protected music for approximately the same share of their broadcast day as commercial stations. He relied for this on an analysis of promises of performance (POPs) filed with the CRTC by 82 non-commercial stations, as well as on the results of a musical content study.

This study concerned 11 stations which Mr. Forsyth thought were "representative." Its objective was to establish the number of musical works or "plays" broadcast during one of three Fridays in September and October 1993. The study was coordinated by SOCAN personnel, and conducted by students in various localities throughout Canada. The result obtained was an average of 12 plays per hour of broadcasting. By contrast, reports supplied to SOCAN by commercial stations for the last quarter of 1992 yielded an average of 10.4 plays.

The results derived from the objectors' evidence are altogether different. Using reports prepared for the CRTC by four of the stations SOCAN monitored for Mr. Forsyth, for the week during which SOCAN analysed music use on the Friday, they obtain an average of 9 plays. The average obtained by using music use reports provided to SOCAN by non-commercial stations for the last quarter of 1992 and the first quarter of 1993 is around 8.8.

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[4] A large number of native stations do not pay royalties to SOCAN; their operating costs would be excluded from the denominator.

Unfortunately, the objectors declined to provide SOCAN with copies of the broadcast day tapes they are required by CRTC regulation to maintain. Access to these tapes might have allowed the parties to establish once and for all the amount of music used by non-commercial stations.

Parties agree that non-commercial stations make greater use of the spoken word than do commercial stations. They did not establish whether this results in a reduction in music use: an increase in the spoken word could also be balanced by a reduction in the number of commercials.

ii. Comparisons Between Non-commercial and Commercial Radio

In its decision dated July 31, 1991, the Board had already underlined the significant distinctions between commercial and non-commercial radio stations.

SOCAN argues that in all respects that are relevant to setting the tariff, non-commercial stations resemble commercial stations more and more. Mr. Forsyth attempted to highlight the similarities between them. Non-commercial stations can broadcast a greater number of commercials than in the past; for some of them, this constitutes an important source of income. Their earnings before interest, depreciation and taxes seem to compare favourably with those of commercial stations. The share of earnings going to programming expenses also would appear to be the same. However, Mr. Forsyth did admit willingly that the aims of non-commercial stations and the environment in which they operate are altogether different from those of commercial stations.

Mr. Roger Rhéaume, Secretary General of ARCQ, Ms. Rina Thériault, Secretary General of ARC, and Mr. Jeff Whipple, Director General of CHSR-FM (Fredericton), Vice-President (External) and Past President of NCRA testified for the objectors. They highlighted the many ways in which non-commercial stations are not like commercial stations. Their legal structure is different: they are non-profit corporations, some of which have been granted charitable status by Revenue Canada. Their programming is varied and is intended to reach all classes and all age groups; local and regional information, as well as community service, play an important role. They make extensive use of local, alternative, independent and new music. They have multiple sources of revenue. All of them use a variety of financing mechanisms such as radiothons, benefits or bingos. Their management is largely dependent on volunteers who do the on air work and articulate the station’s policies, while permanent staff provide the operational framework. While distinctions between the two types of stations regarding the broadcasting of commercials may have diminished in recent years, market realities as well as CRTC regulations constrain the amount and type of advertising they are able to broadcast.

Ms. Thériault emphasized that member stations of ARC provide a service to French-speaking minority communities. In her estimate, the broadcast week of a non-commercial station is, on average, 30 per cent shorter than that of a commercial station. Some non-commercial stations broadcast less than 40 hours a week; by contrast, most commercial stations broadcast during the whole 126-hour broadcast week set by the CRTC.

Mr. Whipple highlighted some of the constraints faced by campus stations. Their broadcast power is limited; sometimes, they use unprotected frequencies. They derive 80 per cent of their income from the student associations supporting them. Hit music can be played during no more than 15 per cent of air time. Most publicity must take the form of sponsorships, rather than

traditional commercials. Mr. Whipple also confirmed Ms. Thériault's testimony as to the length of these stations' broadcast week: he testified that the non-commercial stations used by Mr. Forsyth in his study had an average broadcast week of 99 hours, or 78 per cent of that of commercial stations.[5]

iii. Reliability of Audience Data

According to Mr. Forsyth's analysis of BBM data for the Fall 1992 sweep, non-commercial stations obtain an audience share of

- 1.52 per cent in markets where at least one non-commercial station is "picked up" in BBM data,
- 1.22 per cent in markets with at least one non-commercial station, whether or not it is "picked up" in BBM data, and
- 0.97 per cent in all Canadian markets.

The objectors' results, while slightly different from those obtained by Mr. Forsyth, are nevertheless comparable. Using data supplied to them by the CRTC but which probably originated from the same source, they ascribed a market share of 0.92 per cent for non-commercial stations for the same period of time. For the fall 1990, spring and fall 1990, fall 1992 and spring 1993, the share varied between 0.90 per cent and 1.04 per cent, averaging 0.94 per cent.

SOCAN argues that audience data on non-commercial stations are not reliable enough to be used in setting the tariff. The objectors, while providing no evidence in this respect, are of the opposite view.

Mr. Forsyth and Mr. Michael Hanson, consultant in market studies and former Vice-President of BBM, support the position taken by SOCAN. They note that the methodology used by BBM is meant, first and foremost, to provide reliable data for stations enjoying relatively large market shares. They maintain that several factors, such as the size of the sample and the response rate, make results less reliable for stations with a small audience share or in smaller markets. All non-commercial stations are affected by one or other of those factors. This would explain in part the unstable nature of results on a station-by-station basis. At some point Mr. Hanson appeared to qualify his stand on the matter. Having first stated that BBM data on non-commercial stations were "not useful," he seemed ready to admit that they could be used for the purposes of a broader analysis.[6]

The record also shows that three-quarters of all non-commercial stations are not "picked up" during BBM sweeps.

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[5] Transcript, pp. 411-412.
[6] Transcript, p. 138.

D. ANALYSIS

The record shows the following.

Differences between non-commercial and commercial stations are as significant now as they were two years ago. There is no need to repeat here what was said then. Some of the differences may appear less important; still, by their very essence, these two sectors of the industry are different.

The broadcast week of non-commercial stations is approximately 30 per cent shorter than that of commercial stations. In their written argument, the objectors recognize that this difference is probably reflected in a station's ratings.

Everyone agrees that non-commercial stations make a more varied use of protected music than commercial stations. It is more difficult to come to clear conclusions as to the amount of protected music used by non-commercial stations. POPs seem to establish it at approximately the same level as commercial stations. By contrast, parties come to very different results for the number of plays broadcast per hour.

The evidence offered in this regard is not conclusive. Mr. Forsyth admits that POPs do not necessarily reflect actual use; on the other hand, Mr. Whipple stated during cross-examination that they give a fairly reliable picture of music use by non-commercial stations. SOCAN admits that its music contents study of 11 stations is without scientific pretensions. Since programming on non-commercial stations is more varied and less predictable than on commercial stations, doubts can be raised as to the reliability of a study focusing on a single day. The CRTC seems to share this view: when monitoring a non-commercial station's programming, it usually analyzes more than one day of programming.[7]

For their part, the reports used by the objectors could underestimate music use. Furthermore, having cast doubt on the relevance of the choice of stations made by Mr. Forsyth for the purposes of his study, the objectors can hardly present as reliable results derived from looking at 4 of those stations. It is far from certain that merely stretching the monitoring period disposes of the sampling defects raised by the objectors themselves.

The record contains other evidence which leads the Board to favour the objectors' view of the amount of music used. Commercial and non-commercial stations prepare music use reports to help SOCAN in distributing the royalties it receives to its members. According to these reports, the average number of plays per hour is 8.8 for non-commercial stations and 10.4 for commercial stations. Having said this, it is not necessary to dispose of the issue for the purposes of this decision. The objectors are not asking for a rebate for this; SOCAN does not argue that non-commercial stations use more music than commercial stations.

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[7] Testimony of Mr. Rhéaume, transcript, p 349.

E. CONCLUSIONS

The objectors ask that the Board act on its already expressed wish to establish a closer relationship between the relative audience shares of commercial and non-commercial stations and royalties they have to pay. Given the record of these proceedings, the Board is of the view that this request should be granted.

The Board is sensitive to the reservations expressed by Messrs. Forsyth and Hanson as to the reliability of BBM data on non-commercial radio.[8] However, the Board does not think that uncertainties surrounding these data are such as to prevent it from using them in setting the royalties to be paid by non-commercial stations. Global audience data for all stations are necessarily more reliable than data for each station. It is true that an audience share as small as that for non-commercial radio is subject to important fluctuations. However, using audience data over a longer period (say five years) would help reduce those fluctuations and provide SOCAN as well as the stations with a certain measure of stability. Furthermore, it should be noted that the national audience share of non-commercial stations was relatively stable during the period for which data was made available.

BBM data rates three non-commercial stations out of four as not being listened to at all during sweeps. This could prove problematic, were it not for two elements which came out during these proceedings.

First, data available in the record of these proceedings lead the Board to believe that the audience of these stations is negligible. For each non-commercial station picked up during BBM sweeps, three are not. If the actual audience of the latter stations was significant, the spread between the audience share of non-commercial stations in markets where at least one non-commercial station is picked up (1.52) and in markets where there is at least one non-commercial station, whether or not it is picked up in BBM data (1.22), would be important. As we can see, this is not the case.

Second, the record of these proceedings highlights certain characteristics shared by all non-commercial stations which could lead to a reduction in the price they pay for music. The approach suggested by the objectors does not call for any rebate linked to these stations' mandate or manner of operating. No account is taken of the number of "plays" per hour or of the broadcast week: the first appears to be lower, and the second shorter, than those of commercial stations. Furthermore, any attempt to correct upwards available audience data would require the Board to reassess the relevance of discounting the operating costs of native stations in the calculation of the rate while still using their audience share. In the Board's view, effecting multiple corrections would unnecessarily complicate the formula to account for factors which, in all probability, cancel one another.

Using a formula such as the one put forward by the objectors offers definite advantages. Participants have access to audience data, the operating costs of all non-commercial stations and the amount of royalties paid by commercial stations. Adjustments in the applicable rate may be

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[8] SOCAN noted that the same difficulties arise with small commercial stations.

made without the parties having to constitute a lengthy record, at least until someone decides to question the formula or one of its core elements.

Parties offered no argument on the figures that ought to be used in calculating the rate. The objectors' calculations use data from different time periods: BBM from fall 1990, spring and fall 1990 and fall 1992, average of royalties paid to SOCAN by commercial stations in 1991 and 1992, and operating costs of non-commercial stations in 1992. The record contains other similar data. Using them yields rates of between 1.8 and 2.0 per cent. Under the circumstances, given the record of these proceedings and the parties' arguments for adjustments to the rate upwards as well as downwards, the rate of 1.9 per cent of each non-commercial station's operating costs, as suggested by the objectors, appears fair and equitable for 1993 and 1994.

TARIFF 3 (CABARETS, CAFES, CLUBS, COCKTAIL BARS, DINING ROOMS, LOUNGES, RESTAURANTS, ROADHOUSES, TAVERNS AND SIMILAR ESTABLISHMENTS);

TARIFF 12 (ONTARIO PLACE CORPORATION, CANADA'S WONDERLAND AND SIMILAR OPERATIONS);

TARIFF 18 (RECORDED MUSIC FOR DANCING);

AND

TARIFF 20 (KARAOKE BARS AND SIMILAR PREMISES).

These tariffs reflect agreements reached by SOCAN with the Canadian Restaurant and Foodservices Association on Tariffs 3, 18 and 20; with the Hotel Association of Canada on Tariffs 3 and 18; with Ontario Place Association and the Canadian Alliance of Music Presenters on Tariff 12.A; and with Canada's Wonderland on Tariff 12.B. These tariffs are certified so as to reflect the substance of the agreements.

VI. TARIFFS 4 AND 5.B (CONCERTS)

A. INTRODUCTION

A combination of factors made it necessary for the Board to undertake a thorough review of the concert tariff in this decision. They include significant changes in the tariffs asked by SOCAN, the conclusion of the SOCAN/CAMP agreement, and several rate proposals put forward by other participants into these hearings.

This introduction reviews the history of the concert tariff and states the positions put forward by the various participants. A number of legal and general issues are then examined. Popular music concerts are dealt with, followed by issues relating to free concerts and minimum fees. The final section deals with classical music concerts.

i. History to 1982

CPRS, CAPAC's predecessor, filed its first tariff for the public performance of music in concert halls in 1939. The fee per concert was linked to seating capacity. From 1939 to 1948, it was between $1 (for a capacity of under 200 persons) and $5 (where more than 500 persons could be accommodated). An annual minimum was set at $5.

In 1949, the fee for halls accommodating 600 persons was raised to $6, increasing progressively to $20 for halls with a seating capacity of 2,500 persons or more. CAPAC was expressly authorized to issue an annual blanket licence at a reduced fee to be agreed upon with the operator. Community concerts had their own tariff, based on the number of subscribers to the series. The fee per concert varied between $5 for series with no more than 500 subscribers and $15 for series with more than 3,000 subscribers. In 1954, the minimum fee per concert was raised to $5 and the annual minimum was removed. In 1961, higher fees of up to $25 were set for halls accommodating 3,000 persons or more.

In 1981, the fees set out in CAPAC's tariff were raised from between $5 and $25 to between $6.25 and $31.25, and a rate of 0.175 per cent of gate receipts was adopted for halls with a seating capacity of more than 3,500 persons. In 1982, these fees were raised to between $7.80 and $35.30.

BMI Canada, PROCAN's predecessor, first filed a concert tariff in 1959. The fee per performance was set at $3 for a hall with a seating capacity of up to 6,000 seats, going to $7.50 for a seating capacity of over 12,000 seats. In 1967, the tariff was changed to set separate rates for classical and other music. For other music, the rate was set at $0.0075 per available seat, with a minimum fee of $5 per performance. For classical music, the fee per performance varied from $5 for a seating capacity of up to 1,000 seats to $15 for a seating capacity of over 3,000 seats. In 1972, provision was made, at a rate of $0.0075 per admission per day, for open air events where seating is not generally provided. In 1981, the tariff was set at 0.125 per cent of gate receipts for classical music and at 0.175 per cent for all other types of music, with a minimum fee of $10 per concert.

In 1982, then, the situation was:

- PROCAN charged 0.125 per cent of ticket sales for classical music events and 0.175 per cent for all other types of music, with a minimum fee of $10 per event.
- CAPAC charged 0.175 per cent of ticket sales for venues seating more than 3,500 persons. Other venues paid between $7.80 and $35.30, according to the seating capacity. Community concerts were charged between $7.80 and $23.40, according to the number of subscribers. No distinction was made between classical and other music.

The concert tariff had raised little, if any, controversy up to that time. This was about to change.

ii. History from 1983 to 1992

In 1983, both PROCAN and CAPAC asked that their rate be increased to 3 per cent, for a combined rate of 6 per cent. Several objections were filed. The Copyright Appeal Board

increased the combined rate to 0.5 per cent for classical music, and to 2 per cent for other music. It found that increasing the rate by a factor of between 16 and 40 would be "excessive for an annual increase, ... likely to create serious financial difficulties for producers in the current economic situation," especially during what was a period of wage and price controls. The rate for classical music concerts was set at 25 per cent of the rate applicable to other types of music; this, it was thought, would reflect the ratio of protected music to public domain music used during those concerts.

In 1985, a request that the rate of 2 per cent be made applicable to performances during exhibitions was granted. Objectors asked for reduced rates for concerts generating less than $50,000 or more than $250,000 in box office receipts; the rate was reduced to 1 per cent on box office receipts above $250,000.

In 1986, the combined rate asked for by the music societies was 2 per cent. Nevertheless, the *Société professionnelle des auteurs et des compositeurs du Québec* (SPACQ) asked that the rate be set at 6 per cent. The Board declined the request, stating that this would make the tariff certification process unfair. Users could not be asked to pay more than the fee set out in the music societies' proposals without notice and the opportunity to argue against the increase. The number of potential users was such that notice was just not possible. At the same time, the Board decided that the rate reduction on box office receipts exceeding $250,000 was not appropriate and would be abandoned.

In 1987 CAPAC's request that its rate be increased to 3 per cent was rejected. The Board found that no change in circumstances justifying such an increase had been demonstrated.

In 1991, following the merger of CAPAC and PROCAN, this Board set for the first time a single tariff for concerts. The previous rates were simply added. In its decision for that year, the Board spent some time looking at variations in tariff formulas. It stated concerns with the apparent lack of coherence and comparability between the tariffs and their structures. It expressed the hope that a continuing effort to harmonize the tariffs would lead to fairer treatment of all concerned:

> 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.[9]

iii. The Current Proceedings

The chain of events leading to the current proceedings was lengthy and convoluted.

SOCAN's statement of proposed royalties for 1992 clearly attempted to reflect some of the preoccupations articulated in the Board's decision for 1991 and especially those of coherence and comparability. Several changes were proposed to the tariffs, including the concert tariff.

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[9] Copyright Board Decision, July 31, 1991, p 9 (*p. 291 in this volume*).

SOCAN asked that the rate for all concerts be set at 5 per cent. This represented an increase in the order of 150 per cent for popular music concerts. The minimum fee was raised to $60 per concert; however, the minimum was $30 if fewer than 50 persons attended the concert. For the first time, SOCAN proposed that free concerts pay the same rate as paying concerts and that the rate apply to production costs rather than revenues. Classical music concerts could claim a reduction for the share, in duration, of public domain works performed during the concert. Objections to SOCAN's proposals were received from CAMP, the Canadian Band Association (Ontario), the Oshawa Civic Band, Canada's Wonderland and the Kalso Concert Society.

On January 27, 1992, the Board issued a schedule of proceedings. On April 22, at the request of SOCAN and CAMP, the Board postponed the examination of the concert tariff to allow them to continue negotiations. On July 27, the Board issued a new schedule of proceedings, leading to hearings beginning on October 28, 1992. These hearings were postponed first until November 17, 1992, at the request of SOCAN and then indefinitely at the request of SOCAN and CAMP.

On September 1, 1992, SOCAN filed its proposed tariffs for 1993. The proposed concert tariff was identical to the one filed in 1992, except that the minimum fees would have been raised to $60.78 and $30.39 respectively. CAMP refiled its objections.

On April 14, 1993, a pre-hearing conference was held to discuss scheduling matters. Allusion was made to an agreement between CAMP and SOCAN; Canada's Wonderland announced its intention to be bound by the terms of that agreement.

On August 9, 1993, SOCAN filed the agreement. The agreement was made as of November 20, 1992; it dealt with popular music concerts and with classical music concerts performed by orchestras, but not with the tariff applicable to other classical music concerts.

SOCAN's proposed tariffs for 1994 reflect the terms of the SOCAN/CAMP agreement. The proposed rate is 2.2 per cent for all concerts, with no discount for the use of public domain music in classical music concerts. The minimum fees are set at the same level as in the proposed tariff for 1992: $60 and $30 respectively. Live Entertainment, the Canadian Arts Presenting Association (CAPACOA) and Dr. Patrick Cardy filed objections.

Throughout this time, SPACQ had expressed its continuing interest in the concert tariff. Having heard rumours as to the terms of a SOCAN/CAMP agreement, it expressed concerns both to SOCAN and to the Board. After receiving copy of the agreement with the Board's letter of September 3, 1993, SPACQ requested status as a full-fledged participant to the popular music concert hearings. The Board granted that request, finding that SPACQ would bring to the issue a perspective that neither SOCAN nor CAMP were able or willing to articulate, and would help the Board to fulfil its mandate to protect the public interest.

A pre-hearing conference into the matter was held on February 2, 1994. Hearings were held from April 25 to April 28, 1994.

iv. The Participants' Positions

The objections, requests for interventions and comments received over the last three years with

respect to the concert tariff are too numerous to list here. However, a brief description of the participants to the proceedings and of the positions they took is useful.

SOCAN's final position on the 1992 and 1993 tariffs is unclear. It seems to imply that since the events in question are now long past, there is no need for a tariff. For 1994 it wants the proposed tariffs to be approved as filed.

For its part, CAMP asks that the certified tariffs for 1992, 1993 and 1994 conform to the terms of the SOCAN/CAMP agreement, resulting in the following:

- the certified tariff for 1992 would be the same as in 1991. However, SOCAN and the members of the Association of Canadian Orchestras (ACO) would abide by their 1983 agreement.
- for 1993, the tariff formula for popular music concerts would reflect SOCAN's proposed tariff for that year, but the rate would be set at 2.1 per cent. A separate tariff for orchestras performing classical music would be set. Its structure, with slightly lower rates, would be similar to the one filed by SOCAN in its proposed tariff for 1994.
- for 1994, the tariff formula for popular music concerts would remain the same, but the rate would be raised to 2.2 per cent. The rates set out in the orchestra tariff would be raised, and two categories added for orchestras whose budgets are greater than $5 million.

The SOCAN/CAMP agreement reflects the minimum fees proposed by SOCAN; however, CAMP took no position on them. CAMP also made no submissions on SOCAN's proposed "per event" tariff for classical music.

SPACQ has some 250 authors and composers from Quebec as members, but speaks mostly for the one hundred or so who are the most active in the area. Virtually all of its members are members of SOCAN.[10] Mr. Luc Plamondon, a renowned song writer, has been president of SPACQ since its foundation in 1981. Royalties for concerts, which SPACQ has always considered too low, have been one of its major preoccupations since its inception. It asks that the Board ignore the SOCAN/CAMP agreement and requests that the rate for popular music concerts be set at 5 per cent, with a minimum of $60, as was proposed by SOCAN two years ago. While it initially expressed the intention of directing its efforts only at the 1994 tariff, its arguments address the whole period under consideration.

CAPACOA represents concert presenting organizations located mostly in small communities and serving mainly English-speaking audiences.[11] It asks that the minimum fee be $25 for all concerts. It also asks that the Board adopt a presenter tariff for classical music, structured along the lines of the orchestra tariff, with fees varying from $25 to $220 per concert, depending on the potential box office gross.

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[10] SPACQ's response to CAMP's interrogatory No. 5 indicated that at least two are not.

[11] Its sister organization in Quebec, RIDEAU, deals with the francophone market: CAPACOA-6, p. 1.

Live Entertainment is the only North American publicly traded commercial entertainment presenter. It produces a number of musicals and operates the North York Performing Arts Centre. It asks that the rate for classical music concerts be kept at 0.5 per cent, that a lower rate of 0.3 per cent be set for events in which SOCAN's repertoire is used for less than one-third of the program and that tariff 14 (Performance of an Individual Work) be abolished as a result.

Dr. Cardy, Chair of the Carleton University Committee on Cultural Activities, first identified himself as a user. However, it soon became clear that his interest in the proceedings derived from being a composer and former President of the Canadian League of Composers. He joins SPACQ in stating that the rates for concerts set out in the SOCAN/CAMP agreement are too low, and that 5 per cent would be more appropriate. Nevertheless, he is willing to accept the rate of 2.2 per cent proposed by SOCAN for 1994, for the per event tariff for classical music, as a first step towards 5 per cent. He asks, however, that the rate apply to the greater of the box office receipts or the production costs. Dr. Cardy also asks that the rates set out in the orchestra tariff be raised by approximately 20 per cent. Finally, while he agrees with an annual licence for concert series, based on either potential box office gross (as with CAPACOA) or the series' annual budget (as with orchestras), he asks that the fee for this licence be set at a much higher level.

B. GENERAL AND LEGAL ISSUES

Four matters ought to be dealt with at the outset. They are the proper parties in these proceedings, the status of the SOCAN/CAMP agreement, the possibility of adopting tariffs higher than in SOCAN's proposals and the need to set tariffs for 1992 and 1993.

i. Parties to the Proceedings

CAMP and CAPACOA ask that the Board ignore the complaints of SPACQ and Dr. Cardy, who, they argue, should be required to live by the agreement signed by the society in their names. They maintain that disgruntled SOCAN members should not be allowed to use Board hearings for battles better fought internally within SOCAN.

These arguments are irrelevant. The Board does not wish to get involved in the internal management of SOCAN. The issue is whether SPACQ and Dr. Cardy are able to help the Board "to consider in the public interest, proposed royalties, objections and any replies to those, and to certify approved royalties...".[12] The Board has already indicated its willingness to hear them.

ii. The SOCAN/CAMP Agreement

Two questions were raised about the SOCAN/CAMP agreement. They concern the importance that ought to be given to it and the representative character of CAMP.

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[12] *Society of Composers, Authors and Music Publishers of Canada Inc.* v. *Canada (Copyright Board)* (1993), 47 CPR (3d) 297, (FCTD) at 323d.

a. The Status of the Agreement

SPACQ is correct in stating that the agreement does not bind the Board. All copyright administration regimes set out in the *Act* contain a safety valve to ensure that the public interest is served. Even agreements that remove the Board's jurisdiction can be examined by the Board if the Director of Investigation and Research, appointed under the *Competition Act*, so asks.

SPACQ went further and argued that the agreement cannot constitute a legally binding contract between the parties. Fortunately, it is not necessary for the Board to determine this question in order to render its decision.

Irrespective of its legal status, the agreement represents a meeting of minds; this is a factor, among others, that the Board ought to take into account in setting what it considers to be a fair tariff. On the other hand, the agreement is not determining. The role of the Board is not to examine, enforce or ratify bargains between parties; it is to set fees in the public interest. The Board's decisions "so far as they affect private rights are to be made in the public interest."[13]

Public interest warrants a policy that favours negotiations between SOCAN and potential users. Proceedings before the Board can be costly and create uncertainty. Agreements foster a climate of cordiality. Even SPACQ agrees with this.

Public interest also suggests that the Board not approve tariffs blindly simply because they reflect agreements reached with some users, however important they might be. In the end, it boils down to the Board having to set rates that are fair and equitable under the circumstances, one of which is the fact that a tariff proposed by SOCAN may be the result of an agreement.

b. The Representative Character of CAMP

Those whom CAMP says it represents are important participants in the concert industry. The various corporations and institutions named in the document filed with the Board as members of CAMP represent a significant share of licensed popular music concerts and of royalties paid to SOCAN in Canada.

These numbers also are important, though lower, in Quebec. However, the evidence of Mr. Plamondon, as well as that of Messrs. Vinet and L'Espérance, two of Quebec's most important concert producers, clearly established that CAMP's membership does not represent the francophone concert market of Quebec.[14]

On the other hand, the record is unclear as to the extent to which each corporation or institution participated in, or was informed of, the process leading to the SOCAN/CAMP agreement. CAMP operated through a steering committee of a half dozen or so persons coming from groups

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[13] *Society of composers*, *supra*, at 319h.

[14] Messrs. Vinet and L'Espérance were not approached to become members of CAMP; nor could they find more than one important Quebec producer on the list of members.

of users interested in the various tariffs covered in the agreement. Half of them probably had some interest in some aspect or other of the concert tariff; Mr. William Ballard, principal of Concert Productions International, assumed the lead role for CAMP with regard to popular music concerts. Counsel for CAMP stated that he did not know whether members of that committee had conversations with the other principal users. The agreement was signed by Mr. Rock, general manager, for SOCAN, and only by Mr. Ballard for CAMP. The agreement provided for its execution by the ACO as well as by a number of prominent anglophone producers. The Board never obtained confirmation that it had been so executed.

The representative character of participants can be a factor in setting a tariff. However, the fairness of their proposals and quality of their arguments are paramount. Thus, the participation of a single person was sufficient to convince the Board in 1990 to bring down the minimum fee for concerts to its current level.

iii. The Board's Ability to Set Tariffs Higher Than Those in SOCAN's Proposals

The Copyright Appeal Board was asked at least once to set tariffs higher than the proposals published in the *Canada Gazette*. It decided that it could do so, but only if notice was given to prospective users. It expressed the view that this would probably prove impracticable unless all users were before it, such as with a single user tariff.

This Board also is of the view that it can certify tariffs going beyond the rates in the statements of proposed royalties that are filed with it. Two reasons support this conclusion.

First, it is already established that the Board can make important changes to the tariff formula.[15] When such changes are made, it is almost inevitable that some users will be worse off under the certified tariff than they would have been under the proposal.

Second, if SOCAN's proposals impose an absolute ceiling on the level of certified tariffs, then users can always ask for a lower fee, but other interested parties can never ask for a correction where an increase is needed. The Board, in raising its own objections, as the *Act* allows it to do, would be limited in the same manner. In the Board's view, this would not be congruent with its mandate to act in the public interest (as opposed to only protecting the interests of potential users). The Board's ability to modify the tariff formula has to cut both ways.

The issue then is one of fairness. Potential users are entitled to receive notice of the issues to be raised during the proceedings. As a result, going beyond SOCAN's proposals may sometimes prove a practical impossibility.

iv. The Need to Set Tariffs in 1992 and 1993

SOCAN argues that the issue of the appropriate concert tariffs for 1992 and 1993 is moot. It even implies that tariffs for these years need not be approved: licences were purchased and

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[15] See *PROCAN* v. *Canadian Broadcasting Corporation*, *supra*.

transactions are closed.

This position is legally unsound. The licence fees for some events may yet have to be paid. Furthermore, in the absence of a certified tariff, users could very well ask for a refund; SOCAN would have no legal basis for keeping their money. It is therefore necessary to set a tariff for those two years. The parties concerned may choose not to seek any adjustments that arise from certified tariffs; that is an altogether different matter.

C. POPULAR MUSIC CONCERTS

In this part, the evidence presented by the parties is reviewed, starting with SOCAN and CAMP and ending with SPACQ. Arguments put forward by CAMP as to the nature of the evidence required for an increase in the rate are examined. Finally, the Board's conclusions are expressed and a rate is set for the relevant period.

i. The Evidence Presented by SOCAN and by CAMP

As could be expected, the existence of the SOCAN/CAMP agreement strongly influenced the attitude of SOCAN and CAMP during these proceedings. In many respects, the agreement constituted the only supporting evidence for SOCAN's proposals. Little else was offered to support the rates themselves. The Board found this part of the proceedings particularly frustrating.

The record reveals that in 1992, the popular music concert tariff generated $2.4 million.[16] Fifty-five per cent of concerts paid the minimum fee; 35 per cent of those[17] would be affected by the adoption of a percentage of production costs formula. No information was provided, however, as to the impact of this new formula on the producers of these concerts and on SOCAN's income.

SOCAN still views 5 per cent as a fair rate. It considers that rates of 2.1 to 2.5 per cent undervalue music in concerts. Mr. Rock admitted that "the opposition of the members from Quebec may not have been fully appreciated" by the directors. Nevertheless, it asks that the Board adopt the rates set out in the agreement. Mr. Rock explained how the Board of Directors of SOCAN came to approve the agreement, which they saw as being in "SOCAN's best interest, taking all factors into account on that day." These factors were identified as a desire to minimize opposition to Bill C-88,[18] a wish to concentrate efforts before the Board on files that were perceived as having a higher priority and a fear that a hearing before the Board might result in obtaining no rate increase at all. These factors may well explain why the agreement was approved, but they are of little use to the Board in setting fair and reasonable rates for concerts.

CAMP provided no evidence other than their answers to the Board's questions of September 3, 1993, nor did they provide the Board with any explanations as to how they were able to convince

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[16] Concerts held in Quebec accounted for 39 per cent of events, but only 25 per cent of royalties.
[17] Approximately 2,000 concerts, according to SOCAN's estimates.
[18] The so-called SOCAN Bill, the object of which was to remove a long-standing ambiguity in the law of the liability of certain music users.

SOCAN to sign that agreement. Their case consisted entirely of a critique of the positions taken by other parties.

As to the rates to be approved, CAMP maintains that, given SOCAN's situation as a monopoly and the costs of and uncertainty associated with objecting to a tariff, the agreement likely reflects the highest reasonable tariff levels possible. The Board disagrees with this line of argument. The Board's position on SOCAN's ability to exercise monopoly power has been stated time and again. Furthermore, given the time it took for the parties to reach this agreement, it is not unreasonable to think that the parties would have minimized their costs by coming to the Board earlier.

This leaves us with the evidence of SPACQ, the only party to have put a positive case in favour of higher tariffs for popular music concerts.

ii. SPACQ's Evidence

The object of the evidence offered by SPACQ was to establish that rates between 2 and 2.5 per cent grossly undervalue the contribution of authors and composers, who supply concerts with their raw material. Witnesses testifying for SPACQ were Mr. Plamondon, three other Quebec song writers (Ms. Geneviève Lapointe, Ms. Francine Raymond and Mr. Richard Séguin), two Quebec concert producers (Messrs. Robert Vinet and Jean-Claude L'Espérance) and a consultant in communications, Mr. Richard Paradis. All of them asked that the contribution of authors and composers receive full and fair recognition.

Mr. Plamondon offered his view of the circumstances that led to SOCAN filing a proposed concert tariff of 5 per cent for 1992. He stated that this filing had the unconditional support of Quebec authors and composers, who had long been calling for such an increase. He called the SOCAN/CAMP agreement deplorable and a giveaway. He stated that members of SPACQ had in no way been consulted about the agreement. He viewed that agreement as encroaching upon the rights of authors and composers in Quebec as well as in the rest of Canada, and offered this as the reason why SPACQ was asking the Board to disregard that agreement. He stated that he could not understand why SOCAN had withdrawn its request for a rate of 5 per cent, when the Board appeared to be favourably disposed to hear it.

While recognizing that the size of the Quebec market was a factor in the amount of royalties that SPACQ members could reasonably expect from the concert tariff, Mr. Plamondon and his colleagues complained that the current rate had produced only derisory income for them. They also stated that an increase in the rate would encourage creation of songs.

Messrs. Vinet and L'Espérance testified that, whether at 2 or 5 per cent, copyright royalties are so small when compared to other production inputs that they are not a major consideration in the decision to produce a popular music concert. Mr. Vinet even added [TRANSLATION] "copyright royalties are not an important expenditure overall and royalties at 5 or even 6 per cent

would be wholly acceptable to us as producers."[19] This testimony went unchallenged.[20]

SPACQ also compared the rate for concerts with several other prices. It first asked the Board to have regard to the fact that concert tariffs in effect in other countries are higher than those in Canada. According to Mr. Paradis (who obtained his information from the French music performing rights society, SACEM) European rates vary between a low of 3 per cent in England, to highs of 8.8 per cent in France and 10 per cent in Italy and Portugal. Mr. Plamondon, who receives substantial royalties from France, confirmed that the French tariff was 8.8 per cent; he also stated that European rates went as high as 12 per cent in Switzerland. Mr. Paradis offered no evidence, however, on the rates applied south of the border, stating simply that SPACQ had not asked for them.

Mr. Paradis made reference to the level of grand rights for musicals, which vary between 10 per cent and 15 per cent in Canada and elsewhere. He compared the expenses incurred by concert goers to attend a concert with the cost of copyright. He suggested that the proposed increase to 5 per cent would likely have no impact on ticket purchasing decisions. He admitted however that he had no reliable study on price elasticity to support his conclusion.

Mr. Paradis also compared the concert tariff with the radio tariff, which is set at 3.2 per cent of a station's revenues. He observed that radio uses a mix of music and spoken word, while concerts are totally dependent on music. Logically, the rate for concerts should be higher. CAMP took exception to this comparison, arguing that Mr. Paradis conducted no analysis of any kind to determine the relative importance of music in drawing listeners to radio as opposed to concert goers to live performances.

The comparisons offered by SPACQ have been proposed to the Board in other contexts. They have also been used with respect to concerts in the past. They can be, as suggested by SPACQ, a "source of inspiration." They are not, however, all equally useful.

References to grand rights are of limited use: this is a distinct market whose structure is different from that of the concert industry. Having said this, the discrepancy in the rates could be, in itself, an indication that the rate for concerts ought to be higher. Concert rates in foreign countries can prove useful, but ought to be put in their historical and regulatory contexts. However, comparisons with the price of consumable goods used in producing a concert or purchased during the event are of little use.

The Board finds comparison with the radio tariff clearly apposite. No scientific analysis is required to find that the role of music is altogether different, and probably more important, in concerts than on radio, or that there is more music as a percentage of "air time" in a concert than on radio.[21]

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[19] Transcript, p. 178.

[20] Only Mr. J. Marantz, programming director of the Calgary Centre for Performing Arts, testifying for CAPACOA, stated that a raise to 5 per cent might result in reduced fees being paid to performing artists.

[21] One could argue that in certain concerts, music is but one of the attractions, others being the performer, the stage

iii. The Nature of the Evidence Required for the Board to Increase the Rate

CAMP states that the evidence and argument put forward in these proceedings is similar to that offered in proceedings before the Copyright Appeal Board. It also argues that SPACQ should be required to "demonstrate either a structural change or else previously unavailable structural information or analysis in order to justify a change in the tariff rate."

The first statement is correct; the second is not, for several reasons. First, were one to accept it, the Board would reject all the increases that are being proposed in these proceedings, including those to which CAMP has agreed. Second, the Board is not bound by its previous decisions.

Absent any structural change, and subject to participants having an opportunity to comment on the possibility of such a "change of heart," the Board may simply decide that the conclusions reached in the past are not conducive to fair and equitable tariffs. Third, the Board has already stated that it "expects each participant to put forward its reasons for proposing or for objecting to the tariff"[22] rather than imposing an evidentiary burden on any one of them.

iv. Conclusions

In certain respects, the record of these proceedings could have been more complete.

Thus, no detailed evidence was forthcoming on the financial situation of the concert industry. Producers from outside Quebec could have testified to explain why, contrary to their colleagues who appeared before the Board, they believe that a rate of 5 per cent would be too high.

Notwithstanding these limitations, the record as it stands supports a significant increase in the rate. Five per cent would be more in line with other rates the Board has approved. Nothing suggests that this would constitute an unreasonably high rate. Furthermore, the only two producers to testify stated clearly that they would consider a rate of 5 per cent fairer and that it would not affect the number of concerts they produce.

The Board unfortunately cannot go beyond the rate filed by SOCAN for 1994. The SOCAN/CAMP agreement led to SOCAN asking for a rate of 2.2 per cent for 1994. This rate was published in the *Canada Gazette*. Fairness to potential users is at issue. The Board does not accept the argument that no further notice was required for 1994 since the rate of 5 per cent had already been advertised for 1992 and 1993.

Two options are theoretically open to the Board. For 1994, it could set a rate of 5 per cent for members of CAMP and CAPACOA, and 2.2 per cent for the rest of the industry. It could also set a rate of 5 per cent for 1992 and 1993, and 2.2 per cent for 1994 for all concerned. These options are clearly unacceptable.

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settings, etc. This would lead to a distinction being made as to the importance of music in different types of concerts, something which the Board is not being asked to do, and which this Board's predecessor, after a short attempt, decided not to pursue.

[22] Copyright Board Decision of December 6, 1993.

The rate will therefore be set at 2.2 per cent for the whole period. The Board hopes, however, that SOCAN will give due consideration to filing its proposed concert tariff for 1995 at a rate higher than that in the SOCAN/CAMP agreement. The Board is of the view that unless this course is followed, the interests of SOCAN's members will not be properly served.

D. FREE CONCERTS

In 1991, SOCAN argued that free concerts with large production costs should pay more than the minimum fee. At that time, the Board stated that raising that minimum fee was not the proper way of addressing the issue, and suggested that another formula, such as a tariff based on a percentage of production costs, might prove more appropriate.

SOCAN now asks that such a tariff be set for those events. The SOCAN/CAMP agreement reflects that formula. No one has objected to it. The Board grants SOCAN's request. The unfairness of paying only $20 (or even $60) for music used during the *Quebec Fête nationale* or the Canada Day festivities is obvious. The formula put forward by SOCAN appears reasonable under the circumstances.

There may be merit in Dr. Cardy's suggestion that the rate be applied to the greater of box office receipts or production costs. However, the Board accepts SOCAN's argument that, for the time being, this may unduly complicate the administration of the tariff, and it may be better to wait and see whether the approach proposed by SOCAN creates inequities in practice.

E. MINIMUM FEES

The minimum fee was set at $25 for each society in 1983, increasing progressively to $33 in 1989. In 1990, the Board reduced it to $10. In 1991, the Board rejected SOCAN's request to raise it to its 1989 level.

The evidence offered during these proceedings focused on the amounts generated by various levels of minimum fees. Thus, it appears that in 1992, approximately 11 per cent of concerts (excluding ACO and events paying the mini-mum fee) paid royalties of between $21 and $30, and 38 per cent paid between $21 and $60.[23] SOCAN estimates that by raising the minimum from $20 to $60, it would have increased the royalties in 1992 by approximately $260,000 for popular music concerts and $110,000 for classical music concerts.

No strong evidence was offered for or against the minimum fee structure put forward by SOCAN. CAPACOA asked for a minimum fee of $25 but offered no argument in support of the increase from $20. SOCAN merely repeated some of the arguments put forward in the past.

For the purposes of setting minimum fees, the Board chooses to give no weight to the SOCAN/CAMP agreement. To CAMP, this is a non-issue; it merely agreed to terms that virtually never apply to its members.

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[23] See Exhibit SOCAN-2, Table 3 and revised Table 5-A.

The Board's interest in minimum fees is a continuing one. For two reasons, the Board opts for keeping the minimum fee at its current level.

First, there is no evidence that the purpose a minimum fee serves would be better served by raising it. As the Board stated in 1991, minimum fees are onerous for events where receipts are either low or non-existent; an increase only results in more users paying the minimum.

Second, the Board finds of little use the figures advanced by SOCAN to establish its "loss" attributed to the current minimum fee. According to those figures, a large part of that loss will disappear as a result of the new rate structure for free concerts. Furthermore, the loss for classical music concerts is insignificant to SOCAN, while the proposed increase would be a major blow for small operators and an encouragement to reduce the amount of protected music played during small events: there is already evidence that, as a result of the proposed increases, one small music presenter now requires musicians either to guarantee that they will play no protected music or to pay SOCAN's royalties themselves.

The Board continues to be "concerned with minimum payments in general, and their size, variation and incidence in particular. It believes that such factors as the nature of the revenues derived from these minimum payments and their effect on compliance with the tariffs ought to be examined."[24]

F. CLASSICAL MUSIC CONCERTS

The decision addresses the per event tariff first, the orchestra tariff second, and CAPACOA's request for a presenter tariff third.

i. Per Event Tariff

Participants appear to agree on the continuing need for a per event tariff. They also agree that the tariff structure should be the same as for popular music concerts. All imply that the rate for popular music concerts should be used as a starting point. Finally, no one asked that the concept of classical music be defined. Apparently, SOCAN and users share a common understanding of the concept, which has never raised any difficulty.

The only remaining issue then is the appropriate rate. SOCAN asks that it be the same as for popular music concerts, with no discount formula. Dr. Cardy agrees with this as "a first step." Live Entertainment asks that the rate be kept at its current level, and that a lower rate be set for events using less than one-third protected music.

SOCAN offered no evidence of the impact a rate increase of 340 per cent might have on users. It argued, however, that the level of use of protected music in concerts requiring a licence is important enough that no discount is necessary. SOCAN also adds that 2.2 per cent of box office receipts would not be excessive given that the classical music concert industry derives a large

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[24] Copyright Board Decision of December 7, 1990.

part of its revenues from sources other than box office receipts, including subsidies.

For his part, Live Entertainment's Executive Vice-President, Mr. Daniel Brambilla, testified that, faced with an increase, he might ask his programming director to group protected music into as few concerts as possible. Mr. Stephen Cera, director of Live Entertainment's classical music program, offered the opinion that public domain music is generally more popular with audiences than protected music. Based on this testimony, Live Entertainment argued that SOCAN's repertoire is proportionally less valuable in classical music concerts because of the popularity and availability of public domain music. When questioned by the Board, however, Mr. Cera admitted candidly that he would not want to run a concert program that excluded protected music.

The Board considers that the rate for classical music concerts should be lower than the rate set for popular music concerts, to reflect the lower amount of protected music used in classical music concerts. It disagrees with SOCAN's argument that the amount of protected music used is such that no discount is warranted.

The Board also disagrees with SOCAN's argument that keeping the rate at the same level as for popular music concerts would merely account for the higher level of subsidies received by those events. Even if such a correction was appropriate, the record of these proceedings would not be sufficient to support it. The figure of 65 per cent used by SOCAN to establish subsidy levels concerns only ACO members.[25] Other evidence points to varying levels of subsidies, sometimes as low as 13 per cent.[26] Evidence also showed considerable difference in the level of presenters' funding in Quebec and other provinces.[27]

The Board also rejects Live Entertainment's arguments with respect to the lower value of protected music in classical concerts. The Board agrees with SOCAN that all protected music has the same value; the availability of a substitute good does not change this.

In 1983, the rate was set on the assumption that for classical music concerts approximately one-quarter of music played was protected. The record of these proceedings contradicts this assumption. During the first half of 1993, 37 per cent of music (in duration) played during ACO concerts was protected, and 61 per cent in other concerts.[28] The Board is of the opinion that the proper ratio to apply in establishing the rate is the percentage (in duration) of protected music used during classical music concerts, other than ACO concerts, requiring a SOCAN licence. There is no need to account for concerts using only public domain music since they do not need a licence. Applying that percentage to the rate set for popular music concerts yields 1.3 per cent.

With regard to a low-use rate, Mr. Brambilla testified that 21 of the 96 concerts in the 1993-1994 season at the North York Performing Arts Centre used only one protected work, and would

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[25] CAMP response to SOCAN's interrogatory No. 7.
[26] See exhibits SPACQ-2A (42 per cent) and CAPACOA-3 (13 per cent).
[27] Exhibit CAPACOA-2.
[28] The difference is explained by the fact that concerts other than ACO concerts that contain only public domain music do not report to SOCAN.

therefore, in his opinion, be entitled to obtain a licence under tariff 14. In its argument, Live Entertainment pointed to the vastly different prices that would be paid for a licence under tariff 4 and 14. It argued that as a result, coherence would be improved by setting a low-use tariff and abolishing tariff 14.

The Board disagrees, for two reasons. First, low-use concerts are already factored into the rate of 1.3 per cent; to set a low-use rate would provide users with a double discount. Second, a low-use discount in a per event tariff would create an incentive to play less protected music.

In its current form, tariff 14 may well remain an option for anyone presenting only one protected work at a concert. SOCAN's reply to Live Entertainment's arguments states that Live Entertainment has now tendered fees to SOCAN under tariff 14. Nothing can be done about this for 1994. SOCAN may wish, in its next filings, to add words to tariff 14 to exclude events falling within the ambit of tariff 4.

ii. Orchestra Tariff

In 1983, ACO and CAPAC entered into an agreement by which ACO members could purchase an annual blanket licence. Orchestras agreed to pay between $15 and $75 per concert, depending on the size of the orchestra's annual budget. The fee was paid whether or not the concert contained protected music. PROCAN's fees were similar. The agreement was never modified. From 1983 to 1991, then, ACO members paid between $30 and $150 per concert. Neither this Board nor its predecessor was informed of the existence of this agreement until it was revealed in the text of the SOCAN/CAMP agreement.

SOCAN's proposal for 1994 introduces this formula into the tariff, in accordance with the terms of the SOCAN/CAMP agreement. The rates are set at between $37.50 and $225.[29] SOCAN and CAMP ask that the 1994 statement be certified as filed. CAMP also asks that the formula be applied to 1993, in accordance with the SOCAN/CAMP agreement. Dr. Cardy supports the tariff structure, but asks that the fees set out in the agreement be raised to reflect general price increases since 1983.

The record shows that the 1983 agreement with ACO was reached to simplify administration of the tariff and the collection of royalties. The record also shows that ACO represents virtually all Canadian orchestras, and that both SOCAN and users find the formula set out in the 1983 agreement acceptable.

The Board is of the view that the tariff proposed for orchestras for 1994 should be approved. It has been in place and functioned for more than a decade; it seems to have raised little or no difficulty. It has the added benefit of removing any incentive to program only public domain music. However, it should not be adopted for 1993: this rate structure was not published for that year, and the effect of extending it to orchestras who are not members of ACO is unknown.

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[29] The agreement provides for progressive increases, ending with fees of between $45 and $300 per concert in 1997.

This formula has its limitations. Orchestras with the same budget pay different prices for their music, according to the number of performances they offer. A tariff based on a percentage of the orchestra's budget or ticket sales, set at a rate that accounts for the relative use of protected music over the whole season, may alleviate this problem while offering the same convenience as the formula proposed by the parties. SOCAN and the ACO may want to consider such an approach in the near future.

The proceedings confirmed that the tariff wording required certain adjustments. The musical ensembles being targeted should be more clearly identified. Also, any doubt as to the need to pay for concerts using only public domain music should be removed. This has been done in the text of the certified tariff.

The Board certifies the tariff at the rates proposed by SOCAN. Dr. Cardy's suggestion for an inflation correction fails to take into account that the fee per concert rises with an orchestra's budget. Presumably an orchestra's budget rises with inflation. Furthermore, since the proposed formula sets new fee levels for orchestras with higher budgets, the risk that inflation may bring a disproportionate number of orchestras into the highest fee category is reduced.

iii. Presenter Tariff

Through its Executive Director, Mr. Peter Feldman, CAPACOA asked that "presenters" be allowed to buy an annual licence for all the concerts they hold. The tariff structure would be similar to that for orchestras. However, the rates would be based on the average, per concert, potential box office gross. Fees would be set at between $25 and $220 per concert. As a percentage of revenues, the tariff ranges from 1 per cent for the smallest concerts to 0.4 per cent for the largest.

Classical music concerts are usually offered in packages. As a result, CAPACOA's proposal evolved into a "series" tariff. Each series would form the basis of the calculation, rather than the entire season.

SOCAN recognizes the merits of annual licences and does not object in principle to offering one to presenters. In its argument, however, it criticized the proposal put forward by CAPACOA. For his part, Dr. Cardy seemed to endorse the approach, while asking for higher fees.

The Board agrees to set a tariff allowing a presenter to purchase an annual licence for a series. SOCAN's objections to the formula do not convince the Board. Some of the difficulties it raised appeared sound in theory; however, no evidence was provided on the practical importance of these difficulties.

This being said, the tariff should be designed with certain objectives in mind. It should reduce the administrative burden of users, and not increase that of SOCAN. It should at the same time reflect the amount of public domain music used and remove any disincentive to programming protected music. Presenters should not face steep rate increases at different levels of revenues. Finally, it should not require small presenters to pay more than larger ones. In sum, the tariff should be neutral.

CAPACOA's proposed formula is inherently incapable of neutrality in this sense. As with any other rate structure in which sudden price increases are triggered once a certain figure is reached, it forces users to make impossible choices under certain circumstances. A presenter whose potential box office was set to increase from $4,990 to $5,010 by the sale of an extra ticket would be faced with an increase of $30 in the price of the licence. Addressing this problem within a formula of this kind is at best cumbersome and probably impossible.

In the Board's view, the most effective tariff is one whereby an annual licence can be purchased according to a formula which takes into account all of a series' events, irrespective of whether they contain protected music or not, and which avoids threshold problems. A simple percentage formula applied to an identified rate base, such as revenues, does this. There appears to be no need to resort to potential revenues. Actual revenues are not known at the beginning of the year; however, the licence can be purchased on the basis of an estimate, and adjusted at the year end when the exact amount is known. Using ticket sales as the base has the further advantage of dealing with all of SOCAN's theoretical difficulties with the use of "potential box office gross."

There then remains the matter of setting the rate, based on a ratio to the rate for popular music concerts. Dr. Cardy suggested using the percentage of concerts in which any amount of protected music is played. Congruent to the approach it has taken for the per event tariff, the Board prefers to set the rate as a function of the percentage, in duration, of protected works in all concerts forming part of a series, whether or not they contain protected works.

As the tariff would require that a fee be paid for events in which all music played is in the public domain, those events should be taken into account in assessing the music use patterns of the industry. The only information on the record of these proceedings which takes into account these events is the figure offered for ACO members in Exhibit SOCAN-3, according to which protected music represents 37 per cent, in duration, of all music performed at all ACO events. It is not unreasonable to assume that music use patterns for presenters are similar.[30] Applying that percentage to the rate set for popular music concerts yields a percentage of 0.77 per cent. For the purposes of simplicity, this figure is rounded to 0.80 per cent*.

The Board sets no minimum licence fee. The prevalence of public domain music in classical music concerts is such that any minimum fee would constitute a disincentive to playing protected music. Having said this, in order to reduce SOCAN's burden of dealing with small payments, the tariff shall provide for a single annual payment, made in advance, if the estimated royalties do not exceed $100. Otherwise, payments shall be made quarterly, as is provided in several other tariffs.

VII. ADDITIONAL REASONS DELIVERED BY MR. JUSTICE MEDHURST

I agree with the rates being set for popular music concerts in this decision. With all respect, however, I do not share the views of my colleagues on two issues.

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[30] An analysis of the North York Performing Arts Centre's 1993-94 season program lends further support to this assumption.

First, I attach greater significance to the prices set in SOCAN's statement of proposed royalties than they do. I am not as sanguine that the Board can set prices higher than those asked for by SOCAN. I see SOCAN's proposed tariffs as setting a ceiling on what it can be granted. As a matter of law, I think granting SOCAN more than what it asks may well be beyond the Board's powers. As a matter of policy, and quite apart from any issues of fair notice to affected persons, I would find it inappropriate.

Second, I disagree with them on the importance to be given to agreements reached between SOCAN and potential users. SOCAN represents its members. If the interests of potential users are properly reflected in an agreement, the Board should be loath to intervene in the matter. I cannot see how a rate that is thought to be too low can go against the interest of users.

On the other hand, where an agreement does not properly represent the interests of some users, I have no qualms about the Board intervening in the matter.

** Revised figure, Board's notice of correction, Canada Gazette, September 24, 1994*

Therefore, and for the reasons they express, I agree with my colleagues that the SOCAN/CAMP agreement on the minimum price for concerts should be disregarded.

Some members of SOCAN may have a legitimate grievance about the terms of the SOCAN/CAMP agreement or the proposed tariffs that were filed for 1994. In my view, the appropriate forum to air these grievances lies elsewhere, and not with the Board.

These considerations only serve to reinforce my feelings that the rate being set for popular music concerts is the appropriate one. As a result, an elaboration of the issues I raise here can await another day.

TARIFF 5.A (EXHIBITIONS AND FAIRS);

TARIFF 13.A (AIRCRAFT);

AND

TARIFF 14 (PERFORMANCE OF AN INDIVIDUAL WORK).

These proposed tariffs were identical to those certified for 1993. No objections were filed. The Board certifies tariffs 5.A, 13.A and 14 so as to reflect the statement filed by SOCAN.

TARIFF 7 (SKATING RINKS)

In its proposed statements for 1993 and 1994, SOCAN requested that the rate applicable under this tariff be increased from 1.2 to 2 per cent of revenues, and that the minimum price be raised from $99.75 to $107.12. It subsequently asked that the minimum price set for 1992 be confirmed for 1993 and 1994, but maintained its request for a rate of 2 per cent.

With ORFA concentrating on a separate tariff for recreational facilities, no one pursued the objection to tariff 7. SOCAN offered no justification for an increase of this magnitude. The

Board sees none, denies SOCAN's request for a raise in the rate and certifies tariff 7 accordingly.

TARIFF 8 (RECEPTIONS, CONVENTIONS, ASSEMBLIES AND FASHION SHOWS)

In its proposed statement for 1993 and 1994, SOCAN had requested that the rates applicable under this tariff be increased from $28.75/$57.55 to $29.12/$58.30. Heeding the Board's guidelines on inflationary increases, SOCAN now asks that the rates approved for 1992 be confirmed for 1993 and 1994. The Board certifies tariff 8 accordingly.

TARIFF 9 (SPORTS EVENTS);

AND

TARIFF 11 (CIRCUSES, ICE SHOWS, COMEDY SHOWS AND MAGIC SHOWS).

Introduction

The last year for which these tariffs were approved was 1991. Delays were occasioned by lengthy negotiations between SOCAN and CAMP, who had filed and objection to SOCAN's proposed tariffs for 1992 and 1993. Since CAMP and SOCAN have reached an agreement on a tariff formula, and ORFA has replaced its objections to tariffs 9 and 11 (among others) with a request for a separate tariff, no one is objecting any longer to these tariffs.

Tariff 9

Several formulas were advanced for tariff 9. The original SOCAN/CAMP agreement contained several ambiguities. In the end, SOCAN and CAMP ask first that the rates approved for 1991 be confirmed for 1992 and 1993. For 1994, the minimum price would be set at $18, and a price per ticket sold would be set. That price would vary between 0.25 and 0.80 cent, according to the average ticket price and whether the event concerns amateur, professional or major league sports.

The Board finds this formula acceptable, and certifies tariff 9 accordingly.

Tariff 11

In its proposed statements for 1992 and 1993, SOCAN had requested that the rate applicable under tariff 11 be increased from 1.6 per cent to 3 per cent of revenues, and that the minimum price be raised from $59.15 to $60 in 1992, and $60.78 in 1993. The SOCAN/CAMP agreement would confirm for 1992 the rate set in 1991. Starting in 1993, the tariff would be split. Under tariff 11.A, the same rates would continue to apply for circuses and ice shows.

Tariff 11.B would set a flat fee of $35 for comedy shows and magic shows, so long as the use of music is incidental; the concert tariff would apply where the act is primarily musical.

Both SOCAN and CAMP see tariff 11.B as an experimental measure, which will need to be revisited in the near future.

The Board finds this formula acceptable, and certifies tariff 11 accordingly.

TARIFF 10 (PUBLIC PARKS, STREETS OR SQUARES)

SOCAN's statement of proposed royalties for 1994 asked for increases in the amounts set in this tariff. No objections were filed. Given the price adjustment formula which the Board is using again this year, the amounts set in certified tariff 10 for 1994 will remain the same as in 1993.

TARIFF 15.B (MUSIC ON HOLD)

SOCAN's statement of proposed royalties for 1994 asked that the price for the first trunk line be increased from $90.38 to $93. Given the price adjustment formula which the Board is using again this year, the amount for 1994 will remain the same as in 1993.

TARIFF 19 (FITNESS ACTIVITIES)

In its proposed statements for 1993 and 1994, SOCAN had requested that the rate applicable under this tariff be increased from $2.14 to $2.20 per average number of participants per week, and that the minimum price be raised from $128 to $131.69. Heeding the Board's guidelines on inflationary increases, it subsequently asked that the rate approved for 1992 be confirmed for 1993 and 1994. The Board certifies tariff 19 accordingly.

Claude Majeau
Secretary to the Board