

**CANADA'S COPYRIGHT TARIFF-SETTING PROCESS:
AN EMPIRICAL REVIEW**

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ABSTRACT

This article empirically analyzes the process of setting copyright tariffs in Canada. It explains the national importance and international relevance of Canada's tariff setting system, putting administrative issues in the context of broader legal, economic and copyright policy matters. It reviews relevant literature, synthesizing what research exists about this process. It schematically maps key statutory and administrative milestones. Based on a robust, empirical research method, empirical data was collected in respect of a fifteen-year period between and including 1999–2013, during which major legal reforms were implemented and the economic significance of copyright tariffs increased. The article reports statistical figures and trends related to copyright tariffs within the study period, especially regarding the time involved in Canada's tariff-setting process. Eight-hundred-fifty-two different tariffs were certified by the Copyright Board during the study period. There are 209 pending tariffs that were proposed for that period that have not yet been certified. The certified tariffs took an average of 3.5 years to certify after filing. The average pending tariff has been outstanding for 5.3 years since filing (as of March 31, 2015). On average, tariffs are certified 2.2 years after the beginning of the year in which they become applicable, which is in effect a period of retroactivity. The standard deviation in the time from proposal filing to tariff certification is two years. A hearing was held in 28% of tariff proceedings. The average time from proposal filing to a hearing in those proceedings was just over three years. The average time from a hearing to tariff certification was almost 1.3 years. These empirical research findings deliver a unique understanding of Canada's tariff-setting procedures, enabling policymakers as well as the Board to better respond to the needs and concerns of copyright stakeholders.

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INTRODUCTION

The Copyright Act in Canada (“the Act”) — like its statutory counterparts in countries around the world — is both marketplace framework legislation and a cultural policy instrument that seeks to support innovation, as well as the creation of and access to cultural content. To help promote these objectives, the Act establishes a framework for the collective administration of rights (Parts VII and VIII) and encourages, and even sometimes requires, that copyright be collectively managed. While collective management is not at all unique to Canada, Canada’s administrative processes for tariff setting are extraordinary.¹ While Canada itself seeks ways to improve the effectiveness and efficiency of the tariff setting

¹ See J. Daniel Gervais, *A Uniquely Canadian Institution: The Copyright Board of Canada*, in AN EMERGING INTELLECTUAL PROPERTY PARADIGM: PERSPEC-

system, other countries may be asking whether the Canadian system is appropriate for export. This article provides valuable, empirical analysis that can inform proposals for reform or adoption of aspects of Canada's tariff setting process.

The Copyright Board of Canada ("the Copyright Board," "the Board") plays a key role, but not the only role, in tariff setting in Canada. It is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective society. The Board also has the right to supervise agreements between users and licensing bodies and issues licenses when the copyright owner cannot be located.

Collective management and the Copyright Board are long-standing features of Canadian copyright law. One major reform of the regime occurred in 1997, when Canada implemented its obligations under the Rome Convention. Five years later, in October 2002, the Government submitted its report entitled *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* ("Section 92 Report")² to Parliament as part of its comprehensive review of the Act. Among other matters, the Section 92 Report identified issues related to collective management, including whether section 66 (establishing the Copyright Board) should be amended to provide for streamlined and more efficient administrative procedures for the Copyright Board. In the concluding chapter of the Section 92 Report, these collective management issues were flagged as medium-term priorities. Most short-term priorities of the Section 92 Report were addressed through the Copyright Modernization Act of 2012; most medium-term and long-term issues remain outstanding.

The ways in which Canadians interact with cultural content, such as music, books, television, magazines and movies, have changed dramatically in the past fifteen years. Technological developments provide both new opportunities and challenges for improving the collective administration of rights. Notably, the multiplication of digital platforms has increased the number of tariffs and created a situation in which rights for music services offered through different technologies may be subject to different legal regimes.

Although no substantive amendments were made to Part VII of the Act in Canada's most recent copyright reform, the Copyright Modernization Act, some of its provisions could increase the Copyright Board's responsibilities. Meanwhile, since 2002, jurisprudence related to the rights

TIVES FROM CANADA (Ysolde Gendreau ed., 2009); other sources cited at notes 14–25 *infra*.

² GOV'T OF CANADA, SUPPORTING CULTURE AND INNOVATION: REPORT ON THE PROVISIONS AND OPERATION OF THE COPYRIGHT ACT (2002).

regulated by the Copyright Board has evolved significantly, notably with numerous milestone decisions from the Federal Court of Appeal and Supreme Court of Canada.

In 2012, the Copyright Board established an ad hoc Working Committee to look into the operations, procedures and processes of the Board so as to make them more efficient and more productive. The terms of reference were finalized in June 2013. This Committee's objectives are to conduct, over time, a thorough review of the Board's processes in general and of the Directive on Procedure in particular. To start with, it identified three areas that it found amenable to significant improvements within a fairly short time frame: the identification and disclosure of issues to be addressed during a tariff proceeding, interrogatories and the confidential treatment of information. A report from the Board's Working Committee and subsequent stakeholder comments were published in early 2015, after this research was well underway.³ While this article complements the Working Committee's report and stakeholders' comments, a review and integration of the issues raised therein is beyond its scope.

In a recent proceeding and report by the Standing Committee of Canadian Heritage on the Canadian music industry, a number of stakeholders expressed the view that the tariff-setting process takes too long. A dozen witnesses attributed delays to the Copyright Board's lack of resources.⁴ The perceived (but as of then unverified) length of time was seen as particularly problematic in a context where the music industry is changing rapidly. To this end, the Standing Committee recommended that the Government examine the time that it takes for decisions to be rendered by the Copyright Board.⁵ In its complementary report, the Liberal Caucus added that the Board "seems overwhelmed" and faces a "huge workload" of complex issues, recommending that both the modus operandi and the resources available to the Board be urgently analyzed.⁶ This empirical research helps respond to part of the Standing Committee's concerns and recommendations.

Moreover, to ensure that the Act remains responsive to a changing environment, the Copyright Modernization Act instituted a Parliamentary review every five years. The first such Parliamentary review is expected in 2017, and presents an opportune moment to consider possible legislative changes. In order to prepare for that possibility, better empirical evidence and analysis regarding Canada's tariff-setting process is required.

³ WORKING COMM. ON THE OPERATIONS, PROCEDURES AND PROCESSES OF THE COPYRIGHT BD., DISCUSSION PAPER ON TWO PROCEDURAL ISSUES (2015).

⁴ STANDING COMM. ON CANADIAN HERITAGE, REVIEW OF THE CANADIAN MUSIC INDUSTRY 7, 17 (2014).

⁵ *Id.* at 25.

⁶ *Id.* at 40.

The overarching objective of this research is, therefore, to qualitatively and quantitatively analyze the tariff-setting process in Canada, which is established by the Act,⁷ implemented by the Copyright Board, and reviewed by courts. Better understanding will enable policy and decision makers to respond more effectively to stakeholder needs, and prepare for an upcoming Parliamentary review of copyright legislation. The objective is not to produce a comprehensive analysis of all tariff proceedings. Nor is the objective to establish specific benchmarks, assess the Board's internal resource availability or allocations, or draw normative conclusions about the adequacy or inadequacy of the Board's current procedures compared to conceivable alternatives. The research aims, rather, to inform policymaker and stakeholder perspectives by providing better empirical (qualitative and quantitative) evidence about the tariff-setting process than was previously available.

A related objective of the research is to establish groundwork for possible comparative work, ongoing analysis and reporting in the future. Based on the findings of this study, Canada's tariff-setting process could be compared to processes in other jurisdictions, and/or the copyright tariff-setting process could be compared to other Canadian administrative processes. The objective is not to predetermine future research directions, but rather to make necessary preparations for a range of possible next steps. The findings of this study also lay an empirical foundation for normative analysis and possible recommendations for reforms to Canada's tariff-setting process.

To achieve its broad objectives, this article aims more specifically to: (1) review existing literature about copyright tariff setting in Canada; (2) schematically map the tariff-setting process; (3) develop a methodology for empirical analysis; and (4) collect and analyze data to begin measuring the time taken for tariff setting. After outlining the research methodology that underpins this article as a whole, each section of the article addresses one of those four objectives. The final section summarizes overarching conclusions and outlines possible directions for further research.

I. METHODOLOGY

The methodology for this study had the following four overlapping activities:

⁷ Copyright Act, RSC 1985, c C-42.

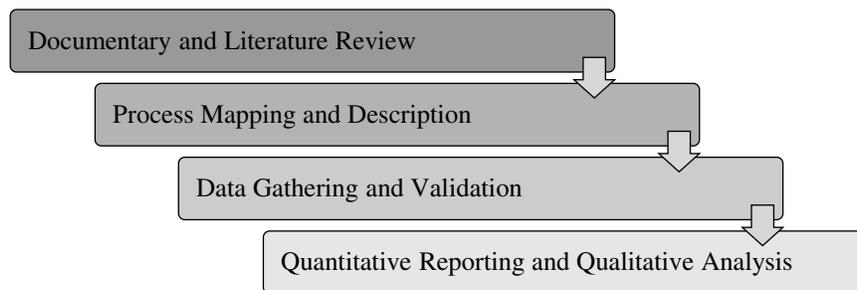


Figure 1: Four-phased methodology

A. Document and Literature Review

Documentary review of relevant legal instruments and regulations, including the Act itself and the Board’s Directive on Procedure, provided the starting point for this study. The documentary review of procedural records and Board files helped identify appropriate methods and key data sources for analysis. Only publicly available records — meaning information that was already published by the Board or would have been made available to any member of the public on request — were relied upon, however. No confidential, highly confidential or privileged documents were accessed in the course of this research.

The research also involved a thorough literature review of relevant materials written about the Copyright Board and/or Canada’s tariff-setting process. These materials include scholarly articles, books, policy reports and commentary (e.g., blog postings and articles in newspapers or periodicals). As much of the literature on this topic is known not to be contained in academic journals or scholarly databases, the documentary review was conducted using a range of alternative literature review methods,⁸ including especially citation searching and bibliographic tracing. This method — which involves searching forward and/or backward from already-known sources — was most appropriate to ensure coverage not only of key scholarly materials, but also policy-relevant literature from experts, think tanks, and inter-governmental organizations. Few, if any of those sources, would appear in standard scholarly literature reviews of academic databases.

B. Process Mapping and Description

Process mapping was used to schematically depict and textually describe the Copyright Board’s tariff setting procedures. Process mapping

⁸ See ARLENE FINK, CONDUCTING RESEARCH LITERATURE REVIEWS: FROM THE INTERNET TO PAPER (3d ed. 2010); CHRIS HART, DOING A LITERATURE SEARCH: A COMPREHENSIVE GUIDE FOR THE SOCIAL SCIENCES (2001); LAWRENCE A. MACHI & BRENDA T. McEVROY, THE LITERATURE REVIEW (2009).

helped to summarize Canada's copyright tariff-setting process and identify key statutory and administrative milestones. It also enabled necessary distinctions as to the nature of the tariff being examined, the nature of the parties involved, and the industry in which they operated. Schematics were developed using specialized process-mapping software.

The substantive information necessary for this exercise was based on the researcher's familiarity and expertise with the Board's procedures, as well as on the preceding documentary review. An ad hoc advisory group was used to reinforce the accuracy and completeness of the information gathered via the documentary review and during process mapping. Members of this group also provided methodological guidance and ideas, as appropriate. Key informants included senior Board staff and experts from relevant government departments. A small number of informal discussions and interviews were helpful for the limited purpose of obtaining feedback on methodology and/or verifying factual information. Since the purpose was not to gauge opinions from a representative cross-section of stakeholders, responses were not coded or used as data in the study. Consultation with parties or counsel who appear before the Board, other stakeholders, or the general public was beyond the feasible scope of this particular study.

C. Data Gathering and Validation

This section explains the methods used to identify, retrieve, screen, and log the data on which the quantitative and qualitative analysis is based.

1. Unit of Analysis

The first step prior to data gathering was to decide, based on the documentary review and process mapping, on the appropriate unit of analysis. Certified tariffs, defined as a tariff proposed for a specific year that was certified by the Board, were selected for two reasons. First, tariff certification is the Copyright Board's key statutorily mandated task. While there is a statutory requirement to certify tariffs that are fair and equitable, there is no precise statutory framework on which to analyze proceedings or even reasons for decision. Second, tariff certification provides a clear and consistent milestone across tariff-setting processes that are otherwise widely variable. Proposals, proceedings, and decisions may be merged with different proceedings or segmented to deal separately with legal, factual, or economic issues. It was therefore both inappropriate and impractical to review anything other than a certified tariff as the relevant unit of analysis.

Although the Board must by law certify tariffs, the Act does not define what precisely is a tariff. It is common practice for collective societies

to propose and/or the Board to certify in a single document tariffs that target multiple different uses or users of copyright-protected subject matter. Tariff rates may be calculated with widely varying methods or formulas. Tariff-setting proceedings often unfold not according to the single document that was proposed by a collective society and published by the Board, but rather according to particular parts of such documents.

Accordingly, this study's approach was to disaggregate data from every "tariff" proposal based on the multiple procedural possibilities between publication and certification. During the research proposal, every certified tariff was broken into its constituent components and subcomponents, dissected by year, number, and letter (where relevant). For example, the Board's decision on Re: Sound's Tariff 6.B (Use of Recorded Music to Accompany Physical Activities) for 2008–12 dated July 6, 2012, became five units of analysis; Re: Sound 6.B 2008, Re: Sound 6.B 2009, Re: Sound 6.B 2010, Re: Sound 6.B 2011, and Re: Sound 6.B 2012. The disaggregated data was then traced backwards to the collective society's original proposal that had initiated the tariff-setting process. One consequence of this approach is a lack of independence between some units of analysis. When the Board certifies multiple proposed tariffs together (for example, Re: Sound's Tariff 6B for 2008–12), the length of time for each tariff-unit is dependent on the time taken by the other tariff-units being certified. Although this approach precludes most inferential analyses, it provides the best, if not the only, feasible option for descriptive analysis.

2. *Limitations in Scope*

Very important limitations were placed on the scope of this study, attributable to conceptual, logistical and time/resource constraints. First, ongoing proceedings regarding pending tariffs were analyzed separately from certified tariffs. Proceedings that have not yet concluded with certification have no associated tariff-certification date, which is an essential milestone for a complete analysis. Simply put, analysis of ongoing proceedings is fundamentally incomplete, and is therefore of more limited use.

Second, analysis was limited to tariffs applicable during the fifteen-year period between and including 1999 to 2013. Some of these tariffs were proposed in 1998, and some were certified in 2014. Amendments to the Copyright Act that came into effect on September 1, 1997, imposed a March 31 filing deadline for future tariff proposals. Accordingly, a tariff proposed for 1999 must have been filed on or before March 31, 1998, while a tariff proposed for 1998 could have been filed in September 1997. Methodologically, this six-month difference between March and September would affect comparisons of data pre-and-post amendment. Furthermore, many of the regimes studied did not exist prior to the 1997 legislative

amendments, making it sensible to focus on the most recent period in the Board's history. More pragmatically, time and resource constraints made it impossible to collect more than the unexpectedly large number of tariffs that were included during the fifteen-year study period. In addition, a date had to be identified at which data collection would cease. No data was collected regarding tariffs proposed, certified, or otherwise dealt with after January 1, 2015. Finally the study does not include tariffs certified in respect of 2014, since few 2014 tariffs had been certified by the time the analysis was completed. In the future, it may be possible to expand this study's methods and data further back in time, or update the analysis going forward as new tariffs are certified.

Third, non-tariff decisions issued by the Board were not analyzed. A number of decisions that the Board releases originate by party application, rather than by tariff proposal, and seek to solve specific issues pertaining to jurisdiction, application, or definitions. For example, applications to fix royalties in individual cases (referred to by the Board as arbitration) were outside the scope of this study. Applications for licenses to use the works of unlocatable copyright owners (i.e., Canada's orphan works regime) were the subject of a previous report,⁹ and also not included in this study.

3. *Data Collection and Management*

As mentioned, only publicly available materials were collected in the course of this study. Most information was gathered from the Board's website, although several procedural dossiers maintained by the Board were also crucial to completing the full analysis.

None of the information needed to complete this study was readily accessible in a single place or an appropriate format. Most challengingly, the Board's website separates information pertaining to tariffs, decisions, and hearings. There is no automated mechanism to connect any particular tariff proposal to the decision eventually rendered, the version certified, or the proceedings involved. That entire exercise had to be done manually. Moreover, that manual process could not be accomplished without the specialized knowledge and practical experience to understand how various proposals, decisions, and proceedings were connected. The widely diverging practices and timelines, including numerous mergers or separations of processes, have created a complex web of proceedings that proved difficult to disentangle.

⁹ Jeremy de Beer & Mario Bouchard, *Canada's "Orphan Works" Regime: Unlocatable Copyright Owners and the Copyright Board*, 10 OXFORD UNIV. COPYRIGHT L.J. 215 (2010); JEREMY DE BEER & MARIO BOUCHARD, CANADA'S "ORPHAN WORKS" REGIME: UNLOCATABLE COPYRIGHT OWNERS AND THE COPYRIGHT BOARD (2009).

The chosen methodology was to work backwards from certified tariffs. That is because while not all proposals have been or will necessarily be certified, no tariff could ever be certified without an initial proposal. Technically, there are some tariffs that were certified in a form that had not been proposed, but by beginning at the end of the process, it was possible to identify the originating document that eventually led to the certified version.

A database was created that catalogues every tariff that was been certified by the Board during the fifteen-year study period, disaggregated and then reassembled by year/number/letter. For each of these tariff proceedings, a team of research assistants helped to correlate the certified version of the tariff with a number of milestones. Key milestones included the dates of:

- Filing of a proposed tariff by the collective society with the Board;
- Publication of the proposal by the Board in the Canada Gazette;
- Hearings, if applicable;
- Issuance of reasons for an interim or final decision by the Board; and
- Certification of the tariff as proposed or amended.

The significance of these milestones is elaborated upon further in the section of this study mapping Canada's tariff-setting process. Data about key milestones for each tariff had to be assembled from information scattered throughout the Board's website, as well as information embedded within documents, such as the Board's reasons for decisions and procedural dossiers. For example, a document maintained by the Board records hearing dates associated with tariffs. This document was used to log oral and written hearings in the database. These dates were considered more accurate than the Board's website, which lists ranges of possible dates. To illustrate this, the Board's website lists "January/February 2003" as the hearing dates for the tariffs Private Copying 2003 and Private Copying 2004. This would translate to an earliest possible date of January 1, 2003, and a latest possible date of February 28, 2003, creating a fifty-eight-day range. However, the Board's dossier listed January 21, 2003, and February 18, 2003, as the first and last hearing dates, which is a twenty-eight-day range. Where available, the more precise information was used in this study.

These key milestones were used to construct eight continuous variables measuring the elapsed time between milestones, including:

- Time from proposal to publication, measured in days;
- Time from publication to certification, measured in years;
- Time from proposal to certification, measured in years;
- Retroactivity period, defined as the time from the date the tariff takes effect to certification, measured in years;

- Time from the proposal date to the earliest possible hearing date, measured in years;
- Time from the earliest possible hearing date to the latest possible hearing date, measured in days;
- Time from the latest possible hearing date to certification, measured in years; and
- For proposed tariffs not certified, the time from proposal to March 31, 2015, measured in days.

Qualitative data pertaining to other matters associated with each tariff was also coded and inputted into the database, including:

- Whether the tariff involved a hearing;
- The year for which the tariff was proposed;
- The collective society or societies that proposed the tariff;
- The industry in which the collective operates; and
- The legal regime to which the tariff is related.

Consideration was given to various ways of gathering more data about other aspects of participation in or timing of tariff-setting proceedings. Information regarding the identity or number of objectors involved in each tariff proceeding during the study period, for example, was not available in any readily accessible format. To obtain consistent and reliable information about objectors in all of the proceedings during the study period, one option might have been to extract information from the Board's reasons for decisions accompanying each certified tariff, in the section where the Board typically explains the procedural history of each tariff. That laborious method was not feasible within the time and resource constraints of this study.

It is unclear whether, or with how much effort, relevant Board records about objectors or other aspects of proceedings might enhance the analysis. Even without time and resource constraints, assessing information about objectors would have proved difficult, since not all objectors oppose the same part of the proposal that often includes multiple tariffs (i.e., different users may object to different tariff numbers, letters or other sub-components). Moreover, objectors may withdraw or shift into the role of an observer partway through the tariff-setting process. The Board has recently begun to monitor this aspect of proceedings. Similarly, there was no practical way to obtain consistent and reliable information about the timing of other procedural milestones covered in the process-mapping section of this study, including for example, exchanges of interrogatories, filing of statements of legal cases, procedural motions, or other procedural incidents.

All data that was feasible to collect was cleaned, reformatted, organized and then tested for accuracy using a two-step process. First, all data

was submitted to the lead research assistant who consolidated and verified it. Second, the research team spot-checked a random selection of tariffs to validate the data. Each certified tariff was tagged with an identifier in the database. A random number generator was used to generate eighty-six different numbers. The tariff associated with that identifier was spot checked for accuracy. Zero errors were identified. Additionally, the study author, together with assistants, verified certain proceedings known to be unusually complex.

D. Quantitative Reporting and Qualitative Analysis

This empirical study assesses 852 certified tariffs applicable between and including 1999 and 2013, and 209 more still-pending tariff proposals. The tariff-setting proceedings associated with each of these units of analysis were assessed using common statistical methods.

Anticipating that many readers of this study will come from disciplines other than statistics, economics, business or other fields where quantitative analysis is common, Table 1 summarizes and defines some of the statistical tools, methods, and concepts used in this study.

Numerous iterations of slightly varying calculations were made, in order to arrive at the most reliable and appropriate way to present statistical findings. Various chart formatting and layout options were also experimented with to arrive at the most useful manner of visualizing the data. Particular care was taken to avoid representations of the data that might mislead readers to inaccurate conclusions.

The author of this study and his research term engaged regularly in communications with members of the ad hoc working group, particularly the representative from the Board, regarding the data and analysis. Multiple meetings were held during which the data, visualizations, and analytical insights were presented and discussed. Feedback from staff at the Copyright Board and relevant government departments was obtained and incorporated to improve robustness of the analysis. Importantly, however, this study has not yet been subject to an independent, blind or double-blind, peer-review process.

II. LITERATURE REVIEW

This section of the study reviews the relevant literature already written about Canada's tariff-setting process and/or the Copyright Board's powers or procedures. Its purpose is not to repeat the content of pre-existing work, but rather to determine the degree to which these matters have been addressed and the methods used to do so. Common themes and relevant gaps are identified, which helps to position this study within the broader body of work about Canada's tariff-setting process.

Table 1: Statistical Tools and Concepts Used in the Study

Tool	Description
Mean (Average)	The mean measures the central tendency of a dataset by dividing the sum of that dataset by its count. Accordingly, the mean takes into account each value of that dataset. The mean, however, is sensitive to outliers.
Median (Midpoint)	The median measures the central tendency of a dataset by providing the middle value of that dataset. Accordingly, the mean is not affected by extreme values. However, the median accounts for the precise value of only one data point.
Standard Deviation	The standard deviation measures the dispersion or spread of a dataset around its mean. The more variable a dataset is, the greater the standard deviation will be.
Skewness	Skewness characterizes the degree of asymmetry of a distribution around its mean. Positive skewness indicates a distribution with an asymmetric tail extending toward more positive values. Negative skewness indicates a distribution with an asymmetric tail extending toward more negative values.
Kurtosis	Kurtosis characterizes the relative peakedness or flatness of a distribution compared with the normal distribution. Positive kurtosis indicates a relatively peaked distribution. Negative kurtosis indicates a relatively flat distribution.

A. *General Context*

Consideration of copyright tariff setting in Canada is inseparable from an analysis of the Copyright Board. The Board is a very important economic regulatory body. According to information provided by the Board directly for this study, tariffs in effect in 2013 generated royalties of \$434 million. Its legal and policy impacts are also significant. The Board’s powers or procedures have been central to some of the most important copyright matters of the twenty-first century: music streaming, peer-to-peer file sharing, internet service provider liability, iPod or other device levies, the use of educational materials, and much more. As put by this author in a previous study: “the Copyright Board plays a crucial but underappreciated role in shaping Canadian copyright policy. Its decisions have a substantial influence on legal, economic, technological and cultural matters of interest and importance to all Canadians.”¹⁰ For instance, the

¹⁰ Jeremy de Beer, *Twenty Years of Legal History (Making) at the Copyright Board of Canada*, in *THE COPYRIGHT BOARD OF CANADA: BRIDGING LAW AND ECONOMICS FOR TWENTY YEARS 1* (Ysolde Gendreau ed., 2011).

key issues in the Supreme Court's 2012 quintet of landmark copyright decisions all originated from Board proceedings.¹¹

Given the Board's substantial economic, legal and policy impact, some may be surprised how little has been written about it. The published articles or book chapters addressing issues *related to* the Board, on topics such as copyright, competition, and/or collective societies, are far too numerous to mention all of them.¹² Some other publications examine tangential fields, like administrative law, through the lens of the Copyright Board.¹³ However, there are few works that go to the heart of the Board's powers or procedures in Canada's copyright tariff-setting process.

B. *Relevant Materials*

Professor Gendreau has edited two particularly important books about the Copyright Board of Canada. In 2002, she was responsible for the book *Institutions Administratives du Droit d'Auteur*.¹⁴ In 2009, she was invited to edit the publication of a series of papers written for a conference marking the Board's twentieth anniversary, which was published in both French and English. These two books each contain several chapters that shed light on the tariff-setting process that is the subject of this study. The introductory chapter to the 2009 volume, for example, highlights the Board's underappreciated role in copyright policymaking.¹⁵ Another chapter in the same volume, co-authored by copyright practitioners Gilles Daigle and Aidan O'Neill, was based on their detailed conference

¹¹ See THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW (Michael Geist ed., 2013).

¹² See, e.g., Ariel Katz, *The Potential Demise of Another Natural Monopoly: Re-thinking the Collective Administration of Performing Rights*, 3 J. COMPETITION L. & ECON 541 (2005), (addressing the collective administration of copyright in Canada, but not the Board per se); Jacques Robert, *An Evaluation of Collective Copyright Management in Canada*, in MARCEL BOYER, COMPETITION POLICY AND INTELLECTUAL PROPERTY 493 (Michael Trebilcock & David Vaver eds., 2009).

¹³ STANDARDS OF REVIEW OF FEDERAL ADMINISTRATIVE TRIBUNALS ch. 9 (Jeremy de Beer et al, eds., 4th ed. 2012); Paul Daly, *Courts and Copyright: Some Thoughts on Standard of Review*, in THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW 47 (Michael Geist ed., 2012).

¹⁴ INSTITUTIONS ADMINISTRATIVES DU DROIT D'AUTEUR (Ysolde Gendreau, ed., 2002) [hereinafter Gendreau, INSTITUTIONS ADMINISTRATIVES]; LA COMMISSION DU DROIT D'AUTEUR DU CANADA?: VINGT ANS ENTRE LE DROIT ET L'ÉCONOMIE (Ysolde Gendreau ed., 2009) [hereinafter Gendreau, LA COMMISSION DU DROIT D'AUTEUR]; *The Copyright Board of Canada: Bridging Law and Economics for Twenty Years* (Ysolde Gendreau ed., 2011) [hereinafter Gendreau, THE COPYRIGHT BOARD].

¹⁵ de Beer, *supra* note 10.

presentation about the Board's procedures.¹⁶ The 2002 collection contains chapters addressing, for example: the philosophy of copyright underlying Board decisions; the perspective of collective societies on valuing copyright; and the evolution of judicial review of Board decisions.¹⁷

Another of Professor Gendreau's edited collections, also published in 2009, does not pertain specifically to Canada's tariff-setting process or administrative institutions, but one of its chapters is highly relevant to this study. In a chapter titled "The Copyright Board of Canada: A Uniquely Canadian Institution," Professor Gervais provides a very useful overview of the Board's legal jurisdiction, institutional history, and procedural mechanisms. His chapter also contains a general comparison of the Board's unique role vis-à-vis copyright tribunals elsewhere, as well as opinions about the Board's relative efficiency and possible areas for reform. Professor Gervais's chapter has become one of the few must-cite works about Canada's copyright tariff-setting process.

In addition, several copyright practitioners from law firms, collective societies or other organizations have authored works about the Board. Reports of proceedings from two colloquiums held in 1994 are illustrative.¹⁸ Some analyzes take the form of background primers or practice updates.¹⁹ Others are published in journals, such as *Les Cahiers de la propriété intellectuelle*.²⁰ The most recent addition to the literature in this area is an annotated compilation of tariffs produced by a group of practi-

¹⁶ GILLES M. DAIGLE & AIDAN J. O'NEILL, *THE EVIDENTIARY PROCEDURES OF THE COPYRIGHT BOARD OF CANADA* (2009).

¹⁷ Stefan Martin, *Rémunération équitable: l'équité pour qui? Réflexion sur la philosophie du droit d'auteur au Canada*, in Gendreau, *INSTITUTIONS ADMINISTRATIVES*, *supra* note 14, at 433; George Hynna, *Evolution of Judicial Review of Decisions of the Copyright Board*, in *INSTITUTIONS ADMINISTRATIVES*, *supra* note 14, at 43; C. Paul Spurgeon, *Determining the Value of Copyright: Perspective from a Collective Society*, in Gendreau, *INSTITUTIONS ADMINISTRATIVES*, *supra* note 14, at 415; J. Daniel Gervais, *A Uniquely Canadian Institution: The Copyright Board of Canada*, in an *Emerging Intellectual Property Paradigm: Perspectives from Canada* (Ysolde Gendreau ed., 2009).

¹⁸ *COLLOQUIUM ON THE COLLECTIVE ADMINISTRATION OF COPYRIGHT* (Kathleen Vaughn ed., 1994); *LA GESTION COLLECTIVE DU DROIT D'AUTEUR* (Danielle Létourneau éd., 1994).

¹⁹ *See, e.g.*, WENDY M. NOSS, *A PRIMER ON THE COPYRIGHT BOARD AND COLLECTIVE SOCIETIES IN 2002* (2002); GOV'T OF CANADA, *RESPONSE TO REVIEW OF THE CANADIAN MUSIC INDUSTRY* (2014); Bernard Mayer, *Procedure Before the Board*, in *Institutions administratives du droit d'auteur* (Ysolde Gendreau ed., 2002).

²⁰ *See, e.g.*, Johanne Daniel, *Le cadre juridique de la gestion collective des droits d'auteur au Canada*, 11 *CAHIERS DE PROP. INTELL.* 257 (1998); Éric Lefebvre, *La gestion collective du droit d'exécution publique: historique due tarif de la radio de 1935 à 1977*, 15 *CAHIERS DE PROP. INTELL.* 95 (2002).

tioners at McCarthy Tétraut, LLP.²¹ Many of the publications coming from practitioners have a distinctly practical orientation, as one would reasonably expect. They clearly explain the issues and provide useful information on how these issues have been or may be addressed. They are often, however, very technical analyzes that are difficult to understand by those outside of a small community of specialized experts.

Other works contain relatively more critical reflection or normative commentary. One example is a paper prepared by Howard Knopf for a continuing education program offered by the Law Society of Upper Canada.²² Mr. Knopf's paper provides more than an historical and legal description of the Board's powers and procedures. Like Professor Gervais's article, it also offers commentary on aspects of the Board that "could be improved."²³ Similarly, in a recent article published in the *Journal of the Copyright Society of the U.S.A.*, a practitioner of library and information science, Victoria Owen, emphasizes the importance of having an agency to protect the public interest, but critically argues that the Board fails to fulfill this role.²⁴

Current or former staff members of the Board have produced another important set of works on copyright administration and tariff-setting issues. Numerous papers by Michel Héту and, more recently, Mario Bouchard, stand out as particularly noteworthy.²⁵ Some of these works were produced for conference proceedings; others are book chapters or journal articles. As expected, these papers contain unique insights into the Board's operations. They tend to demonstrate an enhanced awareness of the nuances of various issues, and have credibility stemming from the authors' inside perspectives on the subject. The recent report of the Board's Working Committee, facilitated by the Board's former General Counsel

²¹ PETER S. GRANT ET AL., *USER'S GUIDE TO CANADIAN COPYRIGHT TARIFFS* (2015).

²² HOWARD P. KNOPF, *CANADIAN COPYRIGHT COLLECTIVES AND THE COPYRIGHT BOARD: A SNAP SHOT IN 2008* (2008).

²³ *Id.* at 30–37.

²⁴ Victoria Owen, *Who Safeguards the Public Interest in Copyright in Canada?*, 59 *J. COPYRIGHT SOC'Y* 803 (2013).

²⁵ MARIO BOUCHARD, *AMERICANS AND THE COPYRIGHT BOARD OF CANADA: WHY BOTHER?* (2005); MARIO BOUCHARD, *THE COPYRIGHT BOARD: A REVIEW OF SOME RECENT ISSUES AND FUTURE CHALLENGES* (2007); Mario Bouchard, *Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia*, in *COLLECTIVE MANAGEMENT COPYRIGHT RELATED RIGHTS* 307 (Daniel Gervais ed., 2010); MICHEL HÉTU, *La Commission de droit d'auteur: fonctions et pratiques*, 5 *CAHIERS DE PROP. INTELL.* 407 (1993); MICHEL HÉTU, *THE COPYRIGHT BOARD AND THE COLLECTIVE ADMINISTRATION OF COPYRIGHT IN CANADA* (1996); MICHEL HÉTU, *ADMINISTRATIVE REMEDIES UNDER THE NEW COPYRIGHT ACT: THE ROLE OF THE COPYRIGHT BOARD AND OF OTHERS* (1997).

and comprised of experienced copyright practitioners, shares these characteristics.²⁶

There is also commentary about the Copyright Board contained in newspaper articles, industry periodicals, or blog postings.²⁷ Such works tend not to be descriptive, but rather adopt an editorial perspective. Often, they highlight or expand upon themes that are present but not highlighted as forcefully in the more formal literature. In the process, these commentaries help to bring various arguments and perspectives to a broader audience. They thus expand debates beyond the specialized community of practitioners or academics that might otherwise be interested in this topic. Inherent in the nature of such commentaries, however, are constraints that make it difficult to fully explore legal nuances or detailed empirical data.

C. Summary, Classification and Gaps

The first category — practitioners' papers — represents the largest body of literature about the Copyright Board and Canada's tariff setting procedures. This category includes primers, legal updates or papers in conference proceedings that mainly explain what the Board is or does. Some of these papers are published in practice-oriented journals or as chapters in specialized books.

There are only a handful of works in the second category — scholarly analyzes. These works are typically published in peer-reviewed journals or, like those written by academics' counterparts in the private sector, specialized books. The main difference between practitioners' papers and scholarly analyzes is that the former tends to be primarily descriptive, while the latter tends to include more detailed normative analysis. Of course, several key works straddle the line between categories.

²⁶ WORKING COMM. ON THE OPERATIONS PROCEDURES AND PROCESSES OF THE COPYRIGHT BD., *supra* note 3.

²⁷ Howard P. Knopf, *Canada's Copyright Board at the Cross Roads*, EXCESS COPYRIGHT (May 8, 2014), <http://excesscopyright.blogspot.ca/2014/05/canadas-copyright-board-at-cross-roads.html>; Howard P. Knopf, *More on Recent and Current Developments at and Concerning the Copyright Board of Canada*, EXCESS COPYRIGHT (Nov. 28, 2014), <http://excesscopyright.blogspot.com/search?q=More+on+Recent+and+Current+Developments+at+and+Concerning+the+Copyright+Board+of+Canada>; Michael Geist, *It's Time to Admit the Copyright Board is Broken*, TORONTO STAR (May 17, 2013), http://www.thestar.com/business/tech_news/2013/05/17/its_time_to_admit_the_copyright_board_is_broken_geist.html; Gilles Daigle, *Why the Copyright Board of Canada is Essential* (May 30, 2013), SOCAN, <http://www.socanblog.ca/en/why-the-copyright-board-of-canada-is-essential>; Aidan J. O'Neill, *Copyright Matters - Criticisms of the Copyright Board* (2015), FASKEN MARTINEAU, <http://www.fasken.com/en/copyright-matters-criticisms-of-the-copyright-board>.

The third category of literature — brief commentaries — is also normative, but is far less detailed. The distinguishing characteristic of this kind of literature is its wide accessibility to broad audiences. Practitioners’ papers and scholarly analysis tend to be far less accessible, both substantively and logistically. Substantively, editorial commentaries are written for a relatively general, as opposed to specialized, audience. Logistically, many practitioners’ papers and scholarly articles are not available in electronic format, let alone online. They are instead published in journals or books that are expensive and not widely read, available only in hard copy in libraries. Other works were difficult even for a team of research assistants to assemble. The publications had to be obtained from a variety of referrals and sources.

Table 2 summarizes the classification scheme identified through this literature review, and lists the general characteristics of each category of existing work.

Table 2: Classification of Literature About the Copyright Board and Canada’s Tariff-Setting Process

Category of Literature	General Characteristics
Practitioners’ papers	Descriptive, specialized, inaccessible
Scholarly analyzes	Normative, specialized, inaccessible
Brief commentaries	Editorial, general, widely accessible

The most notable gap in the literature about the Copyright Board and Canada’s copyright tariff-setting process is empirical. The existing literature is almost entirely descriptive and/or normative. Many published works allude to the perceived problems that motivated this study: the apparently long period of time between the filing and certification of tariffs; the seemingly intricate relationships among collectives, tariffs and users; the putatively arduous procedures to thoroughly defend or object to a tariff proposal.

The perception that such issues exist is well grounded in the direct observations and day-to-day experiences of the authors of these works. However, no empirical evidence or systematic analysis exists that would objectively validate or refute common perceptions. There is no data on which to assess the size or scope of the perceived challenges, or even indicate where specifically challenges lie. Empirical analysis is essential as a basis for benchmarking, if proposals for reform are to be advanced and, eventually, evaluated.

It is this gap in the literature that the present study has confirmed, and aims to help fill. Given the dearth of existing empirical analysis, one must be realistic about what one small study can achieve. The preliminary

contributions this study strives to make are to verify through a literature review the need for and value of more empirical analysis; map the tariff-setting process in order to determine an appropriate unit of analysis and feasible milestones to measure; develop methods to collect, organize, and assess empirical data; and analyze and discuss initial empirical findings to lay the foundation for future work.

III. PROCESS MAPPING

The Copyright Act establishes the legal procedural requirements for the proposal, consideration, and certification of tariffs. Implementation and administration of the statutory requirements is the task of the Copyright Board. Pursuant to its authority under the Act, the Board has adopted a Model Directive on Procedure.²⁸ This section of the study contains a brief explanation of the statutory framework governing the tariff-setting process, as well as discussion of the Board's procedures implementing the statutory obligations.

A. *The Structure of the Board*

Sections 66 through 66.5 of the Act govern the constitution of the Copyright Board, including its members and staff. These matters are well covered in the existing literature, to which readers are directed for further information.²⁹ The notable point for the purposes of this study is that the Board operates with few members (up to five) who may be full or part time, and a small staff. While the number of members is statutorily capped, the size of the Board's staff is not. Statutorily, the Board is also expressly permitted to engage persons with technical or specialized knowledge on a temporary basis. Resource constraints will, of course, impact the Board's ability to do so in practice.

B. *Various Statutory Regimes*

Previous studies have identified at least four different regimes administered by the Board.³⁰ The number of regimes one might identify, however, varies depending on how each is defined. This study suggests there are at least six distinct copyright tariff-setting or licensing regimes, governed by different provisions of the Act. These are:

1. Performing rights for music (sections 67.1 and 68);
2. General tariff-setting (sections 70.13 to 70.15);

²⁸ *Model Directive on Procedure*, COPYRIGHT BOARD OF CANADA, <http://www.cb-cda.gc.ca/about-apropos/directive-e.html> (last modified June 25, 2010).

²⁹ See especially Gervais *supra* note 17; BOUCHARD, *supra* note 25.

³⁰ Gervais, *supra* note 17; BOUCHARD, *supra* note 25.

3. Fixing royalties in individual cases where parties cannot agree (section 70.2);
4. Royalty-setting in particular cases of statutory licensing (sections 71 to 73);
5. Licenses for owners who cannot be located (section 77); and
6. Private copying of music (sections 79 to 88).

The legal framework and operational procedures for licensing and royalty setting in respect of the third and fifth regimes listed above (individual cases and unlocatable owners) are somewhat distinct from the others. The section 77 licensing regime for unlocatable owners is very different, and is the subject of a separate study.³¹ It will not be discussed further here. Nor will the procedures for fixing royalties in (relatively rare) individual cases, which are commenced by application of a party as opposed to filing of a tariff proposal.

The statutory rules and procedures for the other regimes (performing rights, general tariffs, particular cases, and private copying) are all relatively similar, and are the focus of the discussion below. Note, however, that the Board's practice is not to refer to these various regimes according to their statutory foundation, but rather according to the kind of work or, sometimes, kind of activity involved. So, for example, the Board's website refers to decisions issued for "arbitration," which is its non-statutory shorthand for fixing royalties in individual cases. The Board's website does refer distinctly to the performing rights regime (which it calls "public performance of music") and the private copying regime. However, the website breaks down proceedings that fall into the general tariffs or particular cases regimes as follows: educational rights, media monitoring, reproduction of musical works, reproduction of performances and sound recordings, reproduction of literary works, and retransmission of distant signals. Those classifications are adopted in this study's quantitative and qualitative analysis below. For mapping the overall tariff-setting process, however, this study refers more generally to the statutory framework.

C. *Statutory Duties and Milestones*

Since the 1997 legislative amendments, a proposed tariff must be filed by a collective society with the Copyright Board on or before March 31 of the year preceding the year in which it is to take effect. Filing of a tariff proposal is the first key statutory milestone in the tariff-setting process. The procedural onus at this stage is on a collective society.

The next step in the process requires action by the Copyright Board. The Board must publish the proposed tariff in the *Canada Gazette*. There is no statutorily imposed deadline for tariff publication by the Board, ex-

³¹ de Beer & Bouchard, *supra* note 9.

cept that it must be done “as soon as practicable.” There are at least two practical constraints. The first is that the Board reviews the proposed tariff to ensure accuracy (in translation, for example). Doing so prior to publication requires time and resources. The other constraint is that the *Canada Gazette* is published according to a particular schedule. This schedule will impact precisely when it is possible to publish a proposed tariff, and must be anticipated.

Following publication of the collective's proposed tariff by the Board, the Act fixes a deadline for objections to the proposal, which is sixty days from publication. Given the statutorily established date of March 31 for a tariff proposal and the sixty-day period for objections after publication, nearly half the calendar year is typically over before the Board has even a chance to begin considering the matter. In the best case scenario, if the Board acts very quickly to publish the proposal, it will have approximately six months to conclude its process before the tariff takes effect.

The Act then requires the Board to, “as soon as practicable,” send notices of objection to the tariff proponent. Or, if there are no third party objections, then the Board may send notices of its own questions or objections. The Act also mandates that collectives be provided an opportunity to reply. These statutorily mandated activities inevitably take time.

Following the Board's consideration of the tariff, objections, replies, and “any factor that it considers appropriate” the Board is statutorily obligated to certify the tariff with such alterations to the royalties, terms, and conditions it considers necessary. The necessity of such alterations, if any, is typically explained in the Board's reasons for decisions, which are required by the principles of administrative law. The Board must then publish the certified tariff in the *Gazette*, “as soon as practicable.” Within this very broad statutory framework, the Board has implemented specific procedures and practices to ensure the tariffs it certifies are fair and equitable.

D. Discretionary Procedures and Practices

The Board is empowered under the Act to establish regulations in respect of its procedures, if it wishes to do so, subject to the approval of the Governor in Council. The Board has not elected thus far to exercise that power. Rather, the Board has used its statutory authority — which includes all the powers of a superior court necessary to exercise its jurisdiction — flexibly. These procedures and practices are discussed in detail in the literature,³² and will not be repeated here.

The Board's Model Directive on Procedure sets out the basic steps normally involved in the certification of a proposed tariff. The Directive as a whole does several important things. In no particular order, it:

³² See especially DAIGLE & O'NEILL, *supra* note 16; Mayer *supra* note 19.

- Sets out guidelines for filing and serving documents;
- Establishes principles for the treatment of confidential documents;
- Permits participation through comments or intervention; and
- Provides a general structure for the order of proceedings.
- Among the most crucial provisions in the Directive is the one pertaining to flexibility: “The Board may dispense with or vary any of the provisions of this directive.” Those familiar with the Board will have heard the refrain that to do otherwise would unduly fetter its discretion in violation of administrative law.

Much of the Board’s Directive pertains to the order of proceedings. Proceedings commence with interrogatories (the rough equivalent of discovery in civil proceedings), objections and answers. Next, parties file and reply to each other’s “cases,” which include legal and economic arguments, as well as reference to expert reports or other evidence. In some proceedings, there is a brief on legal issues and/or a pre-hearing conference. Proceedings may then move to a hearing.

One of the challenges associated with the flexibility of the Board’s procedures is its unpredictability from case to case. While a proceeding may unfold according to the order suggested in the Board’s directive on procedure, an almost limitless array of possibilities exists for alternative procedural routes to certification. Procedures in any particular case will, of course, develop with close consultation among the Board and the parties involved. But because one party can never know what others might propose, and how the Board will respond, it is impossible to be sure at the outset how or when a specific procedural event will happen.

One of the most common procedural steps is the consolidation or separation of proceedings. Proceedings in respect of a proposed tariff — defined in this study according to the year/number/letter given by the collective society that proposed it — are almost always merged with other proposed tariffs. The most frequent form of merger is tariffs proposed by the same collective for multiple years. Furthermore, multiple tariff numbers/letters for multiple years are also often consolidated into the same proceeding where they target the same or similar groups of users.

Slightly less common, but not rare, is the merger of proceedings involving multiple collectives whose proposals would apply to the same or similar user groups. Sometimes these collectives operate under the same legal regime, as in the case of retransmission. These collectives operate under distinct regimes, such as performance and reproduction rights for music. Sometimes the collectives represent different classes of rights holders, such as authors, performers and producers.

It is also not unusual for the Board to bifurcate proceedings to deal with discrete issues. Especially where tariffs raise new legal issues, the Board may decide to proceed with first-phase hearings addressing only the

matter of legal liability. Once those issues are decided (often following review by the Federal Court of Appeal or Supreme Court), the Board will turn to address further factual and/or economic issues associated with certification.

If copyright tariff-setting proceedings sound complex, it is because they are. That statement does not suggest the Board's procedures are any more or less complex than other quasi-judicial or administrative proceedings (a conclusion that could only be reached following more detailed comparative analysis); simply that there are many variable paths from proposal to certification. The next subsection aims to schematically map the various procedural steps involved in a full tariff certification process. Importantly, the Board's procedures are so flexible that not all of these steps will apply in every case. Moreover, the sequencing of steps can also vary. There are, fundamentally, very few elements of the procedure fixed by the Act.

E. The Tariff-Setting Process Map

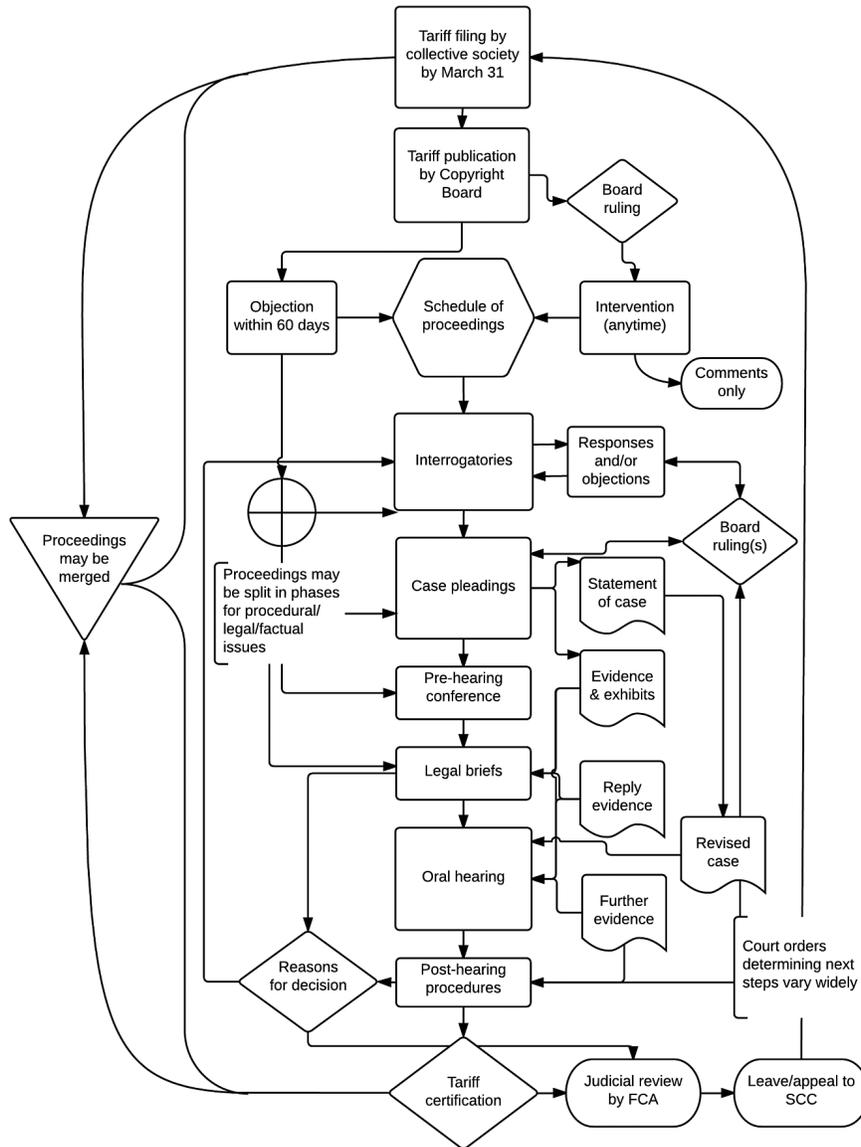


Figure 2: Full Copyright Tariff-Setting Process Map

To the author’s knowledge, based on the literature review above, this is the first study to have produced such a schematic of the Canada’s tariff-setting process.

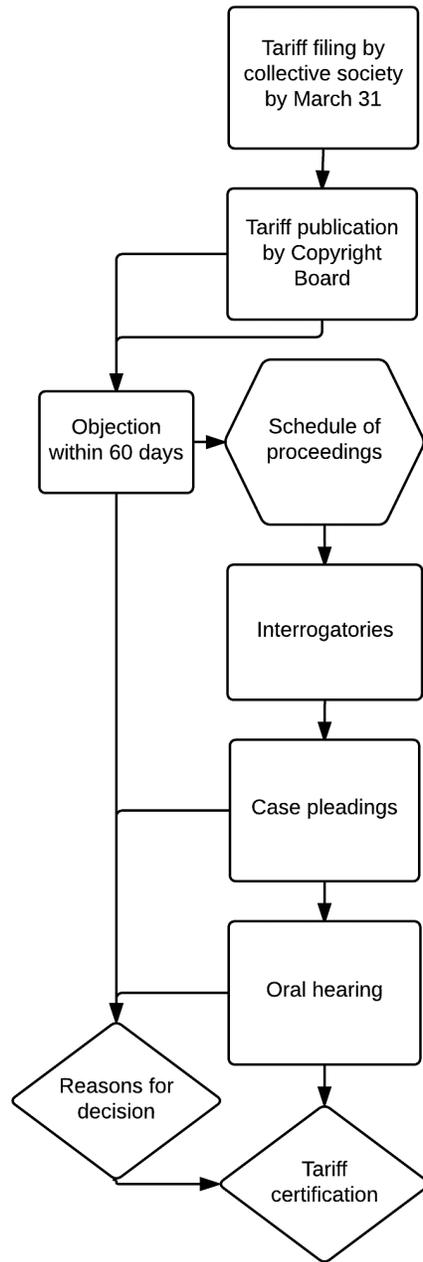


Figure 3: Abridged Tariff-Setting Process Map

The full tariff-setting process map depicted in Figure 2 could seem overwhelming to those unfamiliar with the Board's processes. It may help, therefore, to strip away some of the distracting elements from the schematic. Figure 3 depicts a more basic and general process, consisting of the key milestones specified in the Act and the Board's Directive on procedure.

The milestones of tariff filing by a collective, publication in the *Gazette* by the Board, objection within sixty days, notice and opportunity to reply, and tariff certification as soon as practicable are all mandated by the Act. Everything else that happens between the objections and reasons for a decision are procedural incidents of the Board's own making. That is not to say such procedures are unimportant or inefficient. It is merely to distinguish between the statutory and discretionary aspects of the tariff-setting process. Understanding that distinction may be a key to future considerations of potential procedural and/or legislative reform.

It is also possible to simplify the tariff-setting process even further. In fact, for this empirical study, it was necessary to do so in order to collect consistent and reliable data across all tariff-setting proceedings. There are three specific statutory milestones on which it was feasible to collect data that was applicable and comparable across proceedings: tariff filing, tariff publication, and tariff certification.

Substantively, not all tariff-setting proceedings involve interrogatories or pleadings, let alone the myriad other procedural incidents mapped in Figure 2. While it is also true that not all proceedings involve a hearing, there is an important practical difference concerning the feasibility of data collection. Hearing-related data is available (albeit with significant effort to identify, disaggregate, and reassemble) on the Board's website. This data could be cross-referenced and verified according to the Board's own procedural dossiers. In contrast, there were doubts about the accuracy of publicly available or Board information about interrogatories, pleadings and/or other procedural steps. It seemed upon initial examination that this information was not updated consistently throughout the fifteen-year study period. It is common for the schedule of proceedings to change as the tariff-setting process moves forward. However, it was not clear from the documents available to this study's research team whether the information available pertained to the schedule and procedures as had been initially planned, or as actually happened. Moreover, even if it had been clear, the time and resource constraints within which this study was conducted made it necessary to triage the data points that would be most accurate and meaningful. It may be possible to expand upon the dataset in the future to add information regarding other milestones, if that is determined to be desirable. Consequently, the quantitative and qualitative

analysis in the next section is based primarily on the key milestones identified in Figure 4.

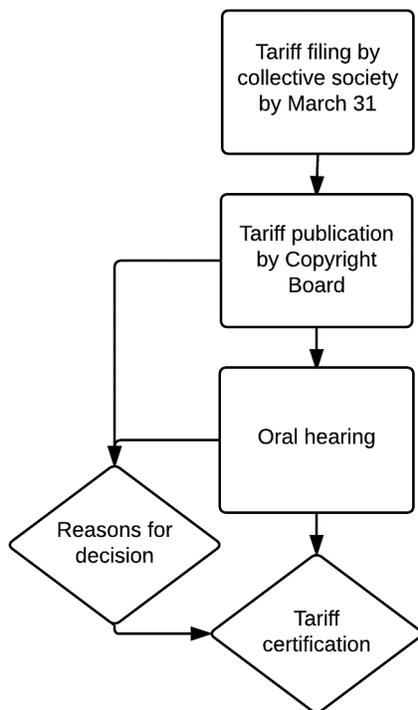


Figure 4: Milestones Used in Statistical Analysis

IV. ANALYSIS AND DISCUSSION

A. Overall Findings

1. The Dataset

Table 3 presents the major highlights pertaining to data available for this study. The Board certified 852 different tariffs in respect of the fifteen-year study period between 1999 and 2013. Only eight proposed tariffs were not certified.³³ There remain 209 tariffs proposed during that period that are not yet certified. When (and assuming) that those are eventually certified, the Board will have dealt with more than 1,050 tariffs applicable

³³ Eight tariffs were proposed but not certified, being Re:Sound’s (formerly NRCC’s) proposed tariffs 7 and 9 for the years 2009–11 and 2009–13 respectively. The Board’s decision not to certify these tariffs was upheld by the Supreme Court of Canada in *Re:Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [2012] 2 S.C.R. 376.

to the fifteen-year period since the 1997 legislative amendments entered into force. That amounts to more than seventy tariffs per year on average.

Table 3: Characteristics of the Dataset for this Study

	Figure
Number of tariffs certified in respect of the years 1999–2013:	852
Number of tariffs still pending in respect of the years 1999–2013:	209
Number of certified tariffs without hearings, 1999–2013	610
Number of certified tariffs with hearings, 1999–2013	242
Proportion of certified tariffs involving hearings, 1999–2013	28.4%
Consistent, reliable timing milestones*:	4334
Consistent, reliable milestones and other data points**:	7549

* filing date, publication date, decision date, certification date and hearing dates where applicable.

** year, collective(s), regime(s), filing date, publication date, decision date, certification date and hearing dates where applicable.

The data shows that 242 tariffs, which are 28.4% of all certified tariffs applicable to the study period, were certified following hearings. This information was obtained by (a) collecting all information available on the Board's website regarding public hearings, and (b) cross-referencing and adding further data provided directly by the Board. It is reasonably certain, therefore, that this dataset accurately captures all tariff-certification processes during the study period that involved a hearing.

Some of these tariffs were addressed as part of the same general proposal, by the same collective, targeting the same users, on the same economic basis. But many of these tariffs were associated with different years, different users, and different factual, legal or economic contexts. Counting the numerous timing milestones on which data was collected for tariffs disaggregated by year, number and letter, the dataset includes 4,334 different reliable data points that could be collected consistently across all proceedings. Reassembling these data points in combination with information about tariff titles, years, collectives, and industries, among other factors, yielded over 7,500 data points used to produce the findings in this study.

2. Findings on Certified Tariffs

Tables 4–6 present highlights of key empirical findings regarding certified tariffs. To be clear, the figures relate to tariffs that were certified prior to January 1, 2015 (the date on which this study commenced), in respect of the 2013 tariff year. That is, several 2013 tariffs were certified in 2014, and are therefore included and assessed as part of the study's primary dataset. (Tariffs proposed but not yet certified were included in a different dataset, analyzed separately for methodological reasons ex-

plained below.) The dataset also includes tariff proposals that were filed for the 1999 tariff year, which had to be on or before March 31, 1998. The total study period is, therefore the fifteen-year period of tariffs applicable between 1999 and 2013 inclusively. During this period, there were 852 certified tariffs.

Table 4 shows statistics regarding the time from proposal filing by a collective society (always prior to March 31 of the year preceding the year in which the tariff takes effect) to proposal publication in the *Canada Gazette*. The average time it took the Board to publish a proposal following its submission by a collective was fifty-five days. The median was fifty days. The median, skewness (0.65) and kurtosis (-0.21) of the data may suggest that there are more proposals that took an above-average amount of time to publish than took a below-average amount of time, and/or proposals that took a below-average time to publish may not have been not far below average.

Table 4: Statistics Regarding the Time from Proposal Filing to Proposal Publication

Time from Proposal to Publication (n = 852)*	
Average time:	55 days
Median time:	50 days
Standard deviation:	28 days
Skewness:	0.65
Kurtosis:	-0.21

The time taken from proposal publication to tariff certification took, on average, 3.4 years.³⁴ Table 5 shows statistics pertaining to this time period. The median was 3.13 years. The standard deviation of the period from publication to certification is 2.01 years. The skewness and kurtosis each of 0.82 could suggest many tariffs took a little longer than average to certify after publication, or some tariffs took much longer than average to certify.

³⁴ There was on average a 1.6-day delay between the release of reasons for a decision and publication of the certified tariff in the *Gazette* is attributable to the *Gazette’s* publication schedule. The *Gazette* is officially published on Saturdays, but available on Fridays at 15h00. The Board typically releases decisions on its website when the *Gazette* is available, regardless of its official publication date.

Table 5: Statistics Regarding the Time from Proposal Publication to Tariff Certification

Time from Publication to Certification (n = 852)*	
Average time:	3.40 years
Median time:	3.13 years
Standard deviation:	2.01 years
Skewness:	0.82
Kurtosis:	0.82

Perhaps the most notable statistics emerging from this entire study, in the author’s view, apply to the entirety of the time period from a proposal initial filing to the tariff’s eventual certification — the two key statutory milestones. These are shown in Table 6. On average, the entire tariff-certification process took 3.55 years. Because a small number of tariffs took an exceptionally long time to certify, the median time from filing to certification is slightly less, 3.28 years.

The standard deviation is two full years, which shows that there is wide variability in the amount of time it has taken for the Board to certify any particular tariff. The data has a skewness of 0.84 and kurtosis of 0.87.

The result is that, on average, a tariff was certified 2.2 years after it became effective. This delay of 2.2 years is, essentially, the average retroactivity period of a tariff. Note that the length of the retroactivity period is only one factor in assessing the significance of retroactivity. Equally or perhaps more important is the financial impact of the difference, if any, between the proposed or interim tariff and the final tariff. That is, the practical impact of the retroactivity period depends on both the magnitude and the length of uncertainty (if any) before a tariff is certified.

Table 6: Highlights of Key Empirical Findings Regarding the Entire Tariff-Setting Process

Statistics for All Certified Tariffs, 1999-2013 (n = 852)	
Average time from proposal to certification:	3.55 years
Median time from proposal to certification:	3.28 years
Standard deviation from proposal to certification:	2.00 years
Skewness	0.84
Kurtosis	0.87
Average delay (retroactivity period)*	2.20 years

It was possible to separately analyze the proceedings with (28.4%) and without (71.6%) hearings. Table 7 contains statistical highlights for tariffs that were certified in each circumstance. Tariffs with hearings take

about fifteen months longer, on average, than tariffs without hearings. However, the distribution patterns are also different.

Table 7: Statistics Regarding Tariffs Certified With and Without Hearings

Tariffs With/Without Hearing (n = 610/242)	Hearing	No Hearing
Average time from proposal to certification:	4.42 years	3.20 years
Median time from proposal to certification:	4.03 years	2.98 years
Standard deviation from proposal to certification:	2.21 years	1.80 years
Skewness	0.95	0.59
Kurtosis	0.64	0.03
Average delay (retroactivity period)	2.94 years	1.91 years

There are numerous plausible explanations for tariffs that took longer than average time to certify. One explanation for the pattern shown in Chart 1, above, is that there was an opposition and corresponding hearing process, which necessarily takes time to complete. The parties in such proceedings share with the Board responsibility for the consultative management of proceedings in such circumstances. The point is that at least some of the fifteen-month average delay in tariffs with hearings may be attributable to the parties' procedural requests or scheduling preferences, not the Board's delay. There is insufficient data to properly explore that issue, which was beyond the scope of this particular study.

It is also possible (certain for some tariffs) that part of the time taken between proposal and certification was due to judicial reviews by the Federal Court of Appeal and/or appeals to the Supreme Court of Canada. The right to seek review of administrative decisions is a principle of fundamental justice,³⁵ and thus a necessary aspect of the copyright tariff-setting process. It is not only conceptually but also methodologically justifiable to include this period of time within the parameters of this study. The key statutory milestones measured by this study are tariff proposal and tariff certification, which includes both Board and subsequent court proceedings. It was not feasible, unfortunately, within the parameters of this study to provide further analysis of judicial reviews and appeals pertaining to the tariff-setting process.

Many tariffs that did not involve a hearing also took an above-average time to certify. Note that tariffs without hearings were not necessarily unopposed. Some disputes between tariff proponents and objectors are settled partway through a proceeding, in which case the Board may with-

³⁵ John M. Evans, *The Principles of Fundamental Justice: The Constitution and the Common Law*, 29 OSGOODE HALL L.J. 51 (1991).

out a hearing certify a tariff after satisfying itself the tariff is fair and equitable. Another possible explanation — posed here but not empirically tested in this study — is that unopposed tariffs may simply linger. Unopposed tariffs may be a lower priority for the Board to devote its scarce resources to than opposed tariffs; although crucially there is no data collected in this particular study that would support or refute that hypothesis. Notably, however, tariffs without hearings, while not necessarily unopposed, may be unlikely to be judicially reviewed.

Table 8 shows statistics regarding tariff-setting proceedings that involved hearings. The average time from a proposal filing to the start of hearings, if applicable, was just over three years. According to the data collected, hearings last on average twenty-two days. The standard deviation of twenty-three days, skewness of the data and kurtosis of 10.39 indicates a potential concern. While it is reasonably certain based on the methodology whether or not a hearing took place, it was difficult to consistently determine hearing dates. For some hearings, only months were provided on the Board’s website, while for other hearings, the Board’s records provided more specific dates. This explains several significant outliers, which are hearings that the Board reports as taking place during several days spread over months-long periods of time.

It took on average a further 1.29 years for the Board to issue a decision and certify the tariff following a hearing. Note that for the period from hearing to decision, the median is higher than the mean (average). The positive but small skewness and the fact that the median and mean are not far from each other may suggest that many decisions are clustered at or slightly above the average, while a number of decisions took a very short time to render.

Table 8: Statistics Regarding the Timing of Proceedings Involving a Hearing

Timelines With Hearing (n = 242)			
	Proposal - Hearing	Hearing Duration	Hearing - Decision
Average time:	3.07 years	22 days	1.29 years
Median time:	2.69 years	21 days	1.44 years
Standard deviation:	2.14 years	23 days	0.55 years
Skewness:	1.14	2.68	0.36
Kurtosis:	1.04	10.39	1.23

3. *Findings on Pending Tariffs*

One issue that became apparent partway through this study was that it appeared from first glance at the data that the time period from tariff proposal to certification was shortening. This perception is false (or, more

accurately, unverifiable), and will be discussed in more detail in the study’s next section. The consequence, however, was a realization that many tariffs have been proposed for the years 1999–2013 but not yet certified. In the absence of a certification date, these pending tariffs were not initially included in the dataset. The only tariffs for recent years of the study period, e.g., 2008–2013, were tariffs that had been both proposed and certified relatively quickly. That is, 2013 tariffs proposed and certified very quickly were included in the data, but 2013 tariffs that were proposed and outstanding (which may not be certified until years in the future) was not.

Table 9: Highlights of Key Empirical Findings Regarding Pending Tariffs

Pending Tariffs (n = 209)	
Average time from proposal filing to proposal publication:	69.5 days
Average time outstanding (as of March 31, 2015):	5.31 years
Median time outstanding (as of March 31, 2015):	4.10 years
Skewness	1.36
Kurtosis	1.41

To partially compensate for this inherent attribute of the dataset and methodology, the Board provided data about pending tariffs. By consulting the *Gazette*, it was possible to record the time lag between filing and publication: nearly seventy days. That delay from filing to publication for tariffs still pending is nearly fifteen days more than the delay from filing to publication for tariffs already certified. Also interesting, the 209 pending tariffs have, as of March 31, 2015, been outstanding for an average of 5.3 years. This average is bolstered by several tariffs that have been outstanding for much longer; the median time outstanding is 4.1 years.

An idea that was considered but proved methodologically flawed was to assume that all pending tariffs take the historical average amount of time to certify. That approach was unsound, however, because (a) the current average delay has already exceeded the historical average, even assuming all pending tariffs were immediately certified, and (b) the wide standard deviation and — as will be discussed below — the lack of apparent correlation to any factor on which data was available, made it impossible to accurately predict which tariffs might be certified when. To better understand that methodological constraint, it helps to take a closer look at the data.

B. Patterns in the Data

The first exercise was to determine the proportion of certified tariffs associated with various collective societies. SOCAN has by far the largest share, followed by Re:Sound (formerly NRCC) as shown in Chart 2.

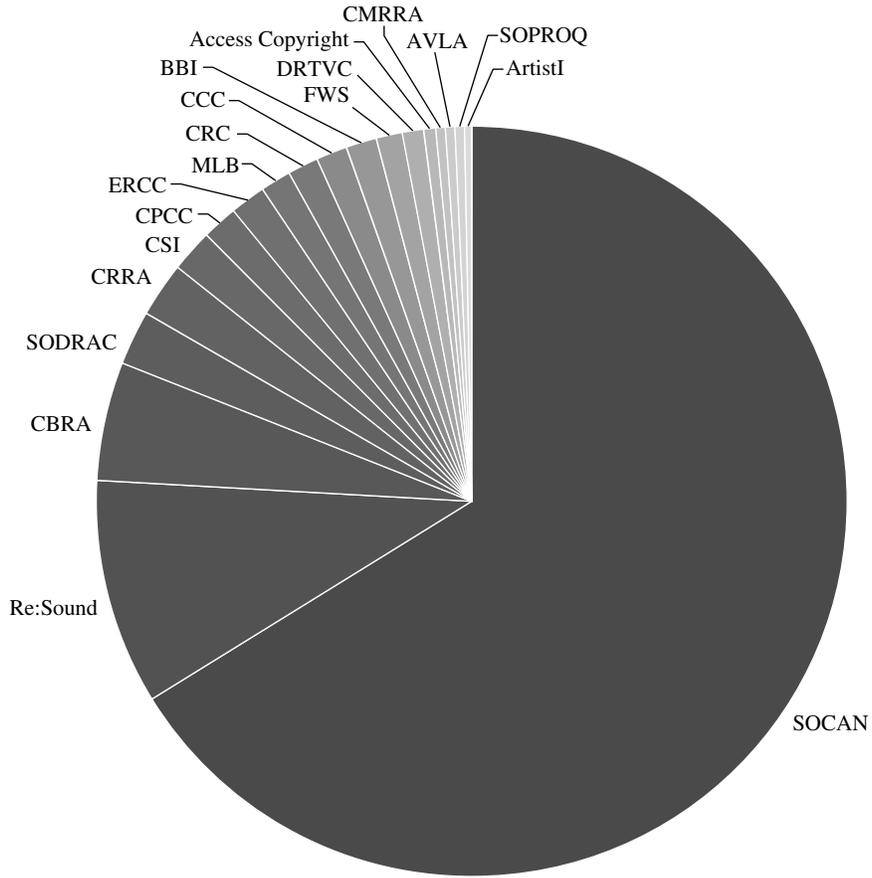


Chart 2: Proportion of Certified Tariffs, by Collective Society

Next, the data was assessed according to the tariffs' proponent collective and/or the regime as characterized by the Board. See Charts 3 and 4.

Canada's Copyright Tariff-Setting Process

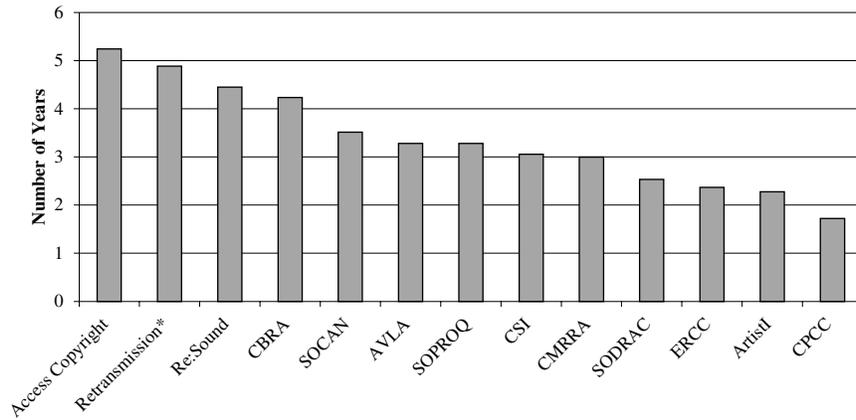


Chart 3: Average Time from Proposal Filing to Tariff Certification, by Collective Society

* Retransmission is BBI, CRC, CRRA, CCC, DRTVC, FWS, MLB.

** CBRA and SOCAN each have some retransmission tariffs, which are included in both bars.

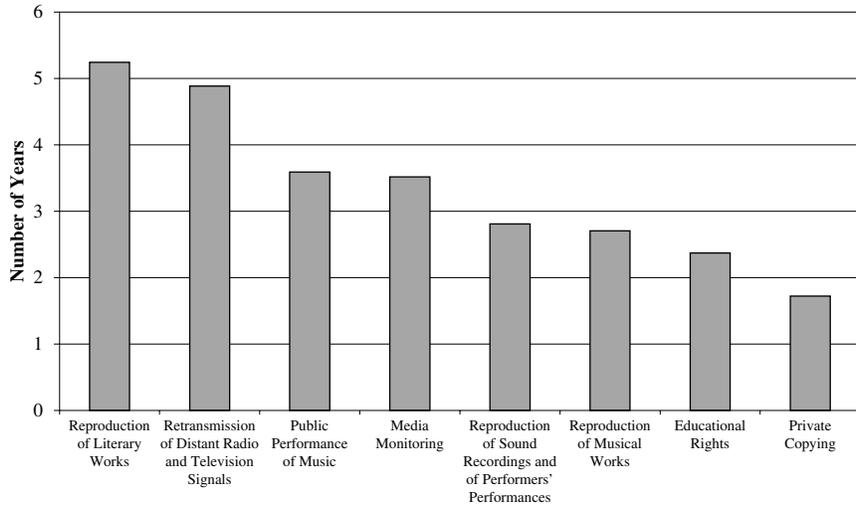


Chart 4: Average Time from Proposal Filing to Tariff Certification, by Regime as Characterized by Board

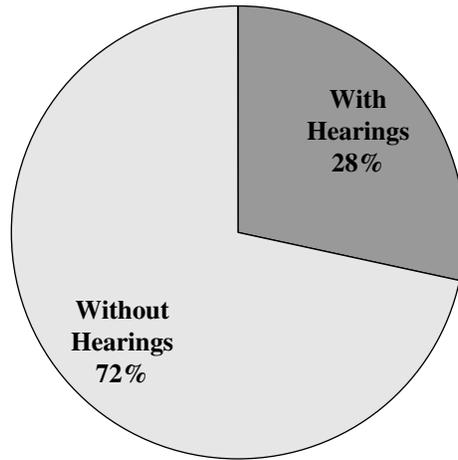


Chart 5: Proportion of Certified Tariffs with Hearings

As mentioned above, not all tariff-setting proceedings involved a hearing or hearings. Specifically, only 28% of proceedings involve a hearing, which is depicted in Chart 5.

Despite the fact that there is limited data pertaining to proceedings with hearings, useful insights can be drawn from this data. Specifically, it was possible to demarcate the timelines between key milestones: filing to publication; publication to hearing; hearing to decision; decision to certification. Chart 6 shows the distribution of these milestones for a variety of collectives involved in proceedings with hearings.

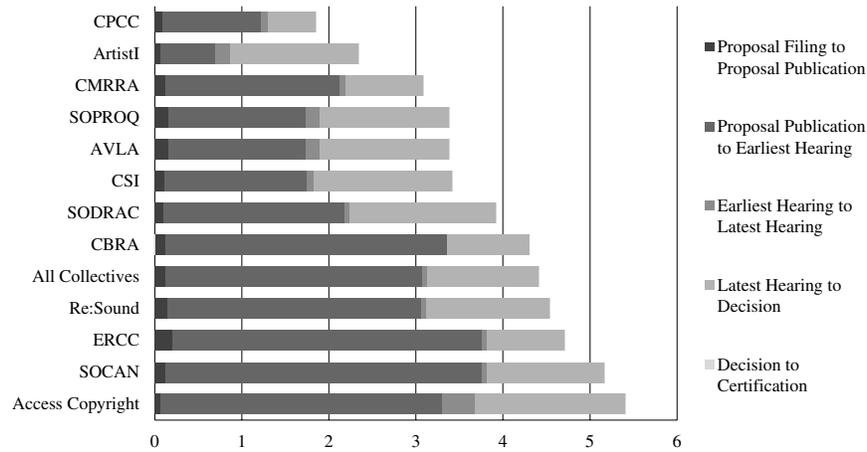


Chart 6: Average Timelines to Milestones in Proceedings with Hearings, by Collectives

Canada's Copyright Tariff-Setting Process

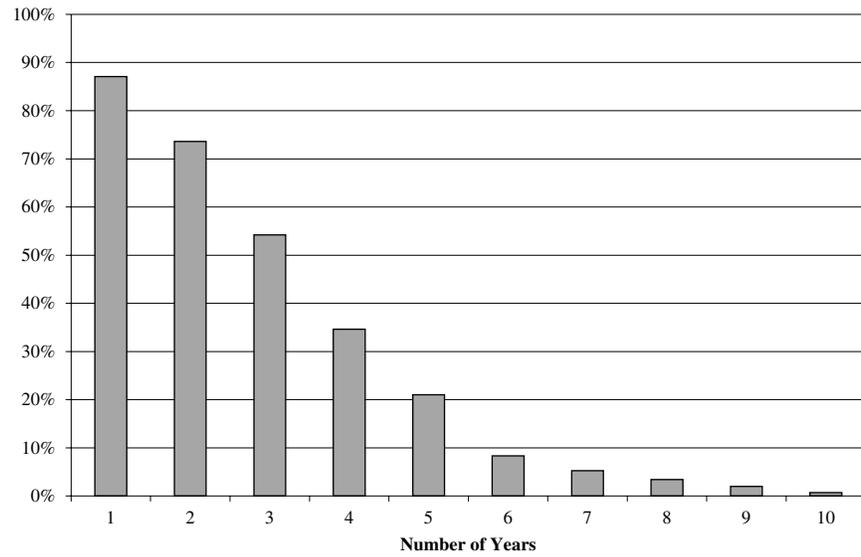


Chart 7: Proportion of Tariffs Not Certified “X” Years from Filing

Among the assessments that might now be possible with an empirical basis is benchmark performance standards. While this study explicitly disclaims any normative judgment on how long it should take to certify a tariff, or how many tariffs should be certified within a certain period, Chart 7 offers a framework for such analysis.

One of the big questions this study aimed to shed light on was whether the tariff setting process is becoming longer or shorter over time. A number of limitations in the data and methodology made it impossible to clearly answer that question. As a first step, all certified tariffs in the dataset were plotted with the tariff year on the X axis and the average number of years from proposal to certification on the Y axis. This is shown in Chart 8 on the following page.

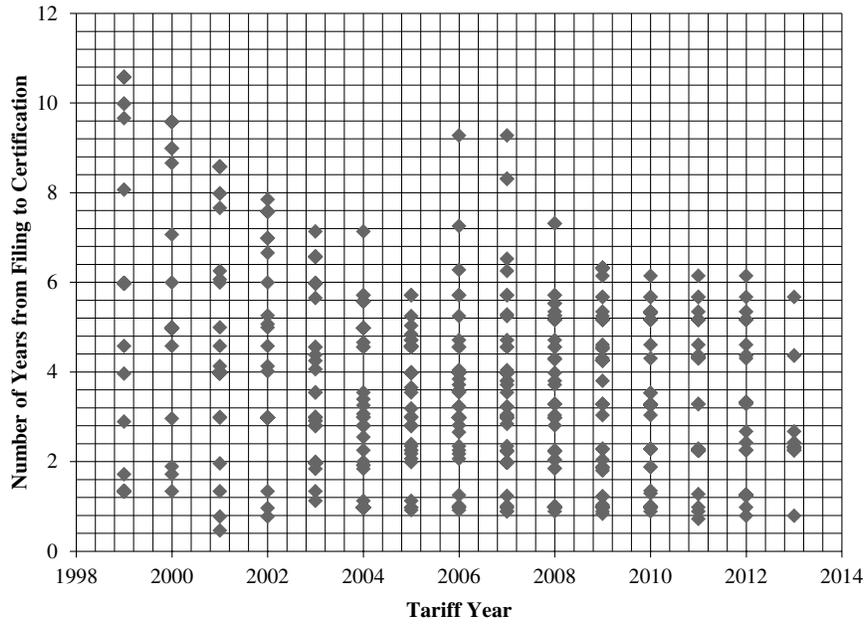


Chart 8: Scatterplot of All Certified Tariffs, by Tariff Year

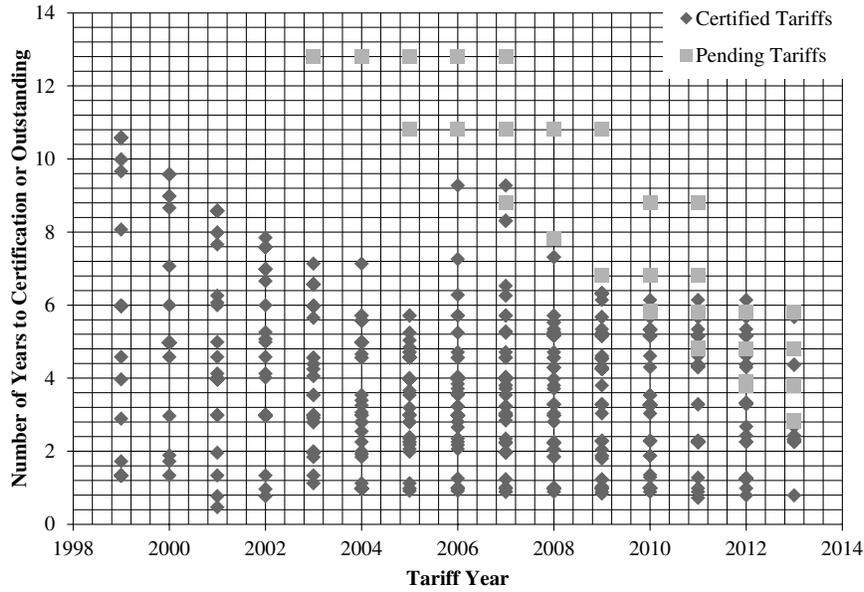


Chart 9: Scatterplot of All Certified Tariffs and Pending Tariffs, by Year

Chart 8 on the preceding page shows a conspicuous absence of data in the upper right quadrant. That is because tariffs proposed in respect of more recent years have not yet been certified and therefore were not initially included in the dataset.

Chart 9, however, combines data on both certified and pending tariffs. Note that the more recently applicable pending tariffs have not yet had enough time to be pending for a longer period, i.e., they are simply too new. There is reason to expect that these tariffs will continue to be pending for a period of time, thus shifting upward in the scatterplot. It is impossible to reliably know, however, how far any particular tariff will shift, i.e., how long any particular tariff will take to certify from this point forward.

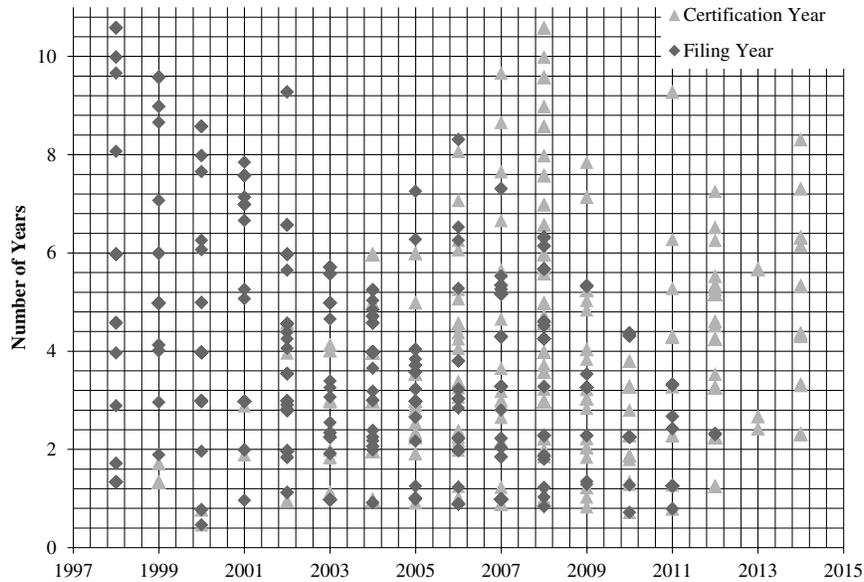


Chart 10: Scatterplot of All Certified Tariffs, by Certification Year and by Filing Year

Another way to look at the dataset is to plot certified tariffs according to either the year in which the tariff was filed or the year in which it was eventually certified. Chart 10 does both.

The interesting observation to be made from Chart 10 relates to the overall pattern of data points. When only filing year is considered, it might appear that the time period from filing to certification is decreasing. However, that is because the dataset is incomplete, including only more recently filed tariffs that have been already certified quickly.

Looked at it the other way, according to the year in which the tariff was eventually certified, it might appear that the time period from filing to certification is increasing. However, that is also because the dataset is incomplete, but in a different way. To be included in the earlier period cover by the dataset, a tariff would have had to be proposed and certified within a relatively short period of time. While many new tariffs were proposed in the period immediately following the 1997 legislative amendments to the Copyright Act, very few tariffs were quickly certified during that period.

The key takeaway point from all this analysis is that a fifteen-year time period may be inadequate to analyze trends in a tariff-setting process that takes much time. The real impact of the major legislative reforms that greatly increased the amount and complexity of the tariff-setting process in 1997 may not become apparent until years in the future. At the present time, it is simply unclear whether the Copyright Board is now settling into its role and the process is becoming faster, or whether the complexity continues to grow and the tariff-setting process is in fact taking longer than it was several years ago. Only more time, and more data, will tell.

One of the questions that might be asked regarding this study is whether there are correlations or causal relationships evident from the data. The lack of independence between units of analysis presents a barrier to such inferential analysis. However, it may be possible to conduct certain advanced statistical analyses, such as multiple level modelling or longitudinal panel analysis. These analyses would enable predictions, based on historical data of what is likely to happen moving forward in time.

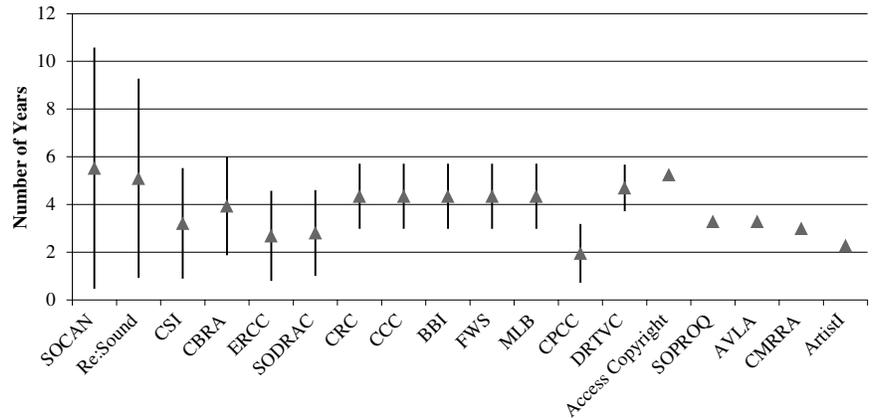


Chart 11: Ranges and Midpoints of Time from Filing to Certification, by Collective Society

It may of course be true that these advanced analyses would reveal certain variables that *would* reliably predict timelines. Perhaps it matters whether a proposed tariff is new or not. Perhaps the number of objectors, or nature of objectors has an impact. Perhaps the sector, each collective, or the technology at issue makes a difference. For example, Chart 11, on the preceding page, presents the ranges of time, as well as the average time, it took to certify tariffs proposed for each collective. Perhaps it matters how much money is at stake, or perhaps there are other factors that might lead the Board to prioritize certain tariffs over others. Unfortunately, due to various limitations with the data that could be collected and the methodology that could be adopted within this study's time and resource constraints, deeper analysis was simply not possible. The key question addressed in the next section of this study, the conclusion, is whether further analysis might be desirable, and if so, of what sort.

V. CONCLUSIONS AND NEXT STEPS

Canada's copyright tariff-setting process takes time. The time it takes to certify any particular tariff varies widely. While there is widespread sentiment among stakeholders that tariff setting takes a "long" time or "too long," it is important to recognize that those are inherently normative judgements. They beg questions like: What is a long time? What is not a long time? How long is too long? How long should tariff setting take? Is it better to take less time? Why or why not?

Answers to those questions depend on an empirically comparative or statistical benchmarking exercise that was previously impossible. Following this study, such questions can be posed and perhaps even answered on the basis of actual data as opposed to anecdotal experience.

A number of things can happen during Board's processes, in particular between the date a tariff is proposed and the date of a hearing for that tariff. The parties might wish, for instance, to try to settle so as to avoid participating in the hearing. The parties and the Board might also wish to prioritize some specific tariffs, leaving others for later consideration. The Board may decide to consider a tariff by examining separately the legal questions raised by the tariff, as a first phase. Judicial reviews at the Federal Court of Appeal and appeals at the Supreme Court can also influence the time measured between tariff proposal and certification.

Not only is it possible now to consider the empirical aspects of Canada's copyright tariff-setting process; it may also be possible to begin asking *why* the tariff-setting process takes the time it does. Academic scholars, copyright practitioners and other stakeholders have proposed a number of solutions to fix problems with tariff setting in Canada. These range from simply providing the Board with more resources to do its job; to empowering the Board to impose costs on various parties; to reforming

(perhaps even further complicating) the Board's *Directive on Procedure*; to a host of other potential solutions. For the first time, however, there is now an empirical basis on which to consider whether such solutions are appropriate, assuming that the problems are indeed significant (the normative questions posed above). This study also provides a benchmark against which solutions, if implemented, can be objectively assessed at a later time to determine their success or failure.

This study refrains from making recommendations for legislative or procedural reforms. Indeed, it was requested that the study *not* contain such recommendations. Rather, the aims of the study were to review the existing literature, map the tariff-setting process, develop methods for empirical analysis, and begin to collect and analyze data. The goal was to lay the groundwork for further analysis.

With those aims of laying groundwork achieved, however, it is appropriate to indicate the most promising possibilities for next steps. It is also appropriate to make recommendations to enhance the fruitfulness of further analysis, which in turn would be useful when later proposing, implementing or evaluating substantive reforms.

At the outset of this study process, it was suggested that there might be interest in an internationally comparative analysis. At that time, without any empirical research in Canada, it was clearly impossible to conduct meaningful comparative analysis. While international copyright comparisons might now be possible, it is not recommended as the highest priority for two reasons. First, there is already some literature comparing the tariff-setting process in Canada with processes in other countries. Second, more significantly, Canada's process is unique. The Canadian tariff-setting process is intricately tied to the distinct history, legal system and economic context in which the Copyright Board of Canada has evolved. Comparisons with other jurisdictions are, in this author's opinion, unlikely to yield many useful insights beyond the realization that things are very different here. Implementing changes to mirror laws or practices in other countries would be difficult, perhaps impossible, without taking into account many of the fundamental features of Canadian copyright policy. Unless policymakers were willing to implement major reforms, this author is not convinced that such studies would be an efficient use of limited resources.

A relatively more promising option might be to analyze the copyright tariff-setting process with *other* administrative processes. This would provide an opportunity for more in-depth reflection about what the copyright tariff-setting process is intended to achieve, why and how that compares to other contexts. It would be inappropriate to specify here the kinds of administrative process that would be suitable for comparative analysis, but one can easily imagine a broad number of systems that might spur ideas for reforms to copyright tariff setting.

Another option for further analysis would be to look at Canada's copyright tariff-setting process more *deeply* instead of more *broadly*. It was very time consuming and conceptually challenging to develop an appropriate methodology for conducting this study. That could only be done after much thought, experimentation and preliminary analysis about the kind of data that would be consistently and reliably available. Data collection was also a very difficult task, given the type of case management and information technology systems available to readily produce public information that would answer the questions at the heart of this study.

The timeline and resources available for this study were limited, making it impossible to engage in both statistical analysis of a large number of tariffs and more detailed examination of specific proceedings. It may be possible, however, to enhance the analysis in this study with the collection of additional data (pertaining to other timing milestones or qualitative factors). Systems might be identified that would make ongoing analysis, benchmarking, and perhaps evaluation and performance improvement possible. It may also be possible to conduct a deeper investigation of certain tariffs in order to determine qualitatively how or why particular tariff-setting proceedings unfold as they do. A related option is to experiment with different methodologies to collect data, such as surveys, interviews, focus groups, or stakeholder consultations.

Data from any or all of the kinds of further studies mentioned would help to propose, implement and/or evaluate reforms. Such reforms might be legislative, administrative, or practical. They might be minor, or they might be fundamental. In the context of potential further analysis, it would be important to clearly specify objectives and responsibilities. One option is for the Board to undertake such analysis itself or solicit third-party expertise. Subsection 66.4(3) of the Act enables the Board to engage technical or expert assistance in doing so. The Board has already taken some action to study procedural issues through its Working Committee. If the Board did not initiate particular studies itself, it is notable that section 66.8 of the Copyright Act requires that: "The Board shall conduct such studies with respect to the exercise of its powers as are requested by the Minister."

Alternatively or additionally, it may be possible for Government departments to conduct or solicit their own further studies of Canada's tariff-setting process. The purpose need not be to direct the Board, which is generally master of its own procedures. But the Act does contemplate, in section 66.91, that the Governor in Council may make regulations establishing criteria to which the Board must have regard in establishing royalties and rendering its decisions. This broad rule-making power could perhaps include procedural directives. Furthermore, as mentioned at the outset of this study, additional analysis would be appropriate prior to pos-

sible legislative reforms in the context of the mandatory review of the Act in 2017.

Yet another possibility is for independent analyses established, practitioners, scholars, graduate students or others may decide to broaden or deepen the study of Canada's copyright tariff-setting process.

At this stage, it would be impossible and inappropriate to prejudge the form, source, or outcome of future analyses. The purpose of this study was merely to facilitate such work, should others wish to take this matter further.