



Copyright Board
Canada

Commission du droit
d'auteur du Canada

MODERNIZING THE COPYRIGHT BOARD: STATUS UPDATE

MAY 2023





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Modernizing the Copyright Board: Status Update

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Modernizing the Copyright Board: Status Update

Over the past four years, the Copyright Board (the Board) undertook a complete overhaul of its processes, internal policies, and organizational culture to modernize its operations and meet stakeholders' expectations. This report provides an update on all the reforms implemented to increase the efficiency and timeliness of processes, and increase stakeholder and public confidence in the Board. The outcome represents the Board's first phase of its *Modernization Initiative*.

Phase 1 of the *Modernization Initiative* was undertaken in genuine collaboration, inside and outside of the Board. Everyone at the Board was involved: lawyers, economists, clerks, corporate affairs officers, senior management and Board members. They contributed their energy and expertise, showing determination to adapt to extensive reforms despite rapidly changing workplace dynamics and operational processes, in part due to the COVID-19 pandemic. Likewise, the Board's external stakeholders, in particular collective management organizations, user organizations typically engaged in Board proceedings, and various external counsel, generously offered their time, experience and insight to inform our plans and activities.

Today marks the completion of Phase 1 of the Board's *Modernization Initiative*, and the launch of Phase 2. This second phase will include the consolidation of Phase 1 results over the next two full tariff filing cycles, and the acceleration of backlog reduction using new tools and processes. It will also include the review of other mechanisms the Board has at its disposal to regulate the copyright marketplace, such as the individual cases regime and the licensing regime for the use of orphan works.

Phase 2 will also give the Board an important opportunity to begin a reflection on the fundamental issues highlighted by Phase 1 reforms, including on how to protect the public interest, and how to ensure effective regulation of the copyright marketplace. Our goal will be to engage players in the Canadian copyright ecosystem on possible solutions, in advance of the next review of the Canadian [Copyright Act](#).

Role and mandate of the Board

Established in 1935, the Board is an independent specialized administrative tribunal and an economic regulator.

A significant part of its mandate is determining fair and equitable tariffs – in effect, setting standard costs and requirements for using works protected by copyright when managed by a collective society. The *Copyright Act* (the “Act”) requires that the Board does so while taking into consideration the dynamics of a competitive marketplace, the protection of the public interest, and any other factors if considers relevant.

A tariff approval process starts with a proposal for a tariff submitted to the Board by a collective society. Collective societies play a vital role in the administration of rights associated with copyright protected content when broad access to content is desirable – such as when music is played on the radio, online, or as background music in a restaurant. Collective management of copyright through collective societies is common throughout the world, and is widespread in Canada, particularly for music performance rights, reprography and mechanical reproduction rights. Some collective societies are affiliated with foreign collective societies who collect and redistribute royalties in their respective territories.

The Board’s mandate also includes a distinct process to resolve licensing disputes between collective societies and users, on a case-by-case basis. In addition, the Board can issue non-exclusive licenses allowing the legal use of so-called orphan works, meaning works whose copyright holders cannot be found.

The Board’s tariffs affect a very wide range of industries and businesses. From online music services to libraries, airplanes, bars, arenas and hotels, the tariffs set by the Board cover activities in which all Canadians engage. As a result, the Board’s economic footprint is significant and growing: in 2020, royalties generated by tariffs approved by the Board were estimated at approximately [\\$662](#) million, based on annual reports from collective societies and internal estimates (see following diagram). This represents 38% growth between [2017](#) and [2020](#).

Tariffs the Board can approve

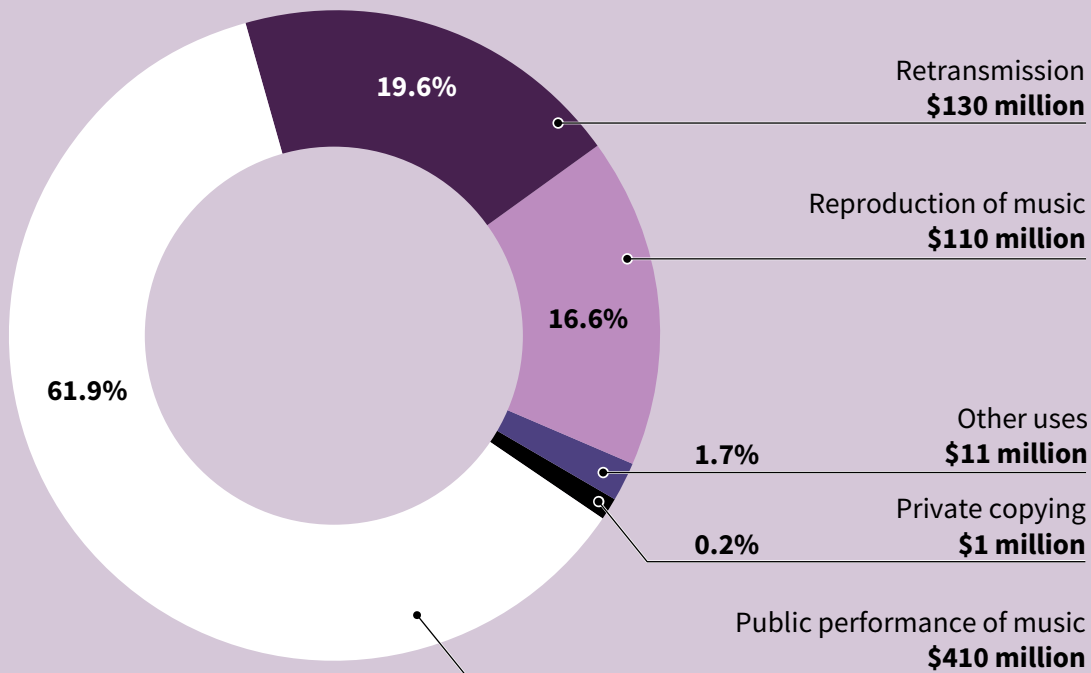
- Use of musical works, sound recordings, and performer’s performances, by entities such as television stations, satellite radio stations, online music services, hotels, and restaurants.
- Use of literary works by educational institutions and governments.
- Retransmission of works by remote television and radio signals, or reproduction and public performance of television and radio programs by educational institutions, for educational purposes.
- Manufacture or import of blank audio media for private copying.

Examples of users of tariffs set by the Copyright Board

- Radio: 1,092 radio services (commercial, non-commercial, CBC) in 2021
- TV: 794 television services in 2021
- Hotel Association of Canada: over 8,000 members
- Canada's Restaurants Industry: over 97,000 restaurants, bars and catering services
- Fitness Industry Council of Canada: over 6,000 facilities and 6 million members
- Movie Theatre Association of Canada: more than 3,000 screens across Canada
- Sports: over 16,000 facilities in Canada, including, for example, sports fields, arenas, gyms, pools, tennis courts, skateparks, curling rinks and stadiums
- Online music services: Amazon Music, Apple Music, Deezer, QUB musique, Spotify, Tidal, YouTube Music, Google Play Music, Xbox Music Pass (non-exhaustive list)

ESTIMATED ROYALTIES GENERATED BY COPYRIGHT BOARD TARIFFS IN 2020

(by types of use)



Source: [Annual reports from collective societies and internal estimates.](#)

As a public institution, the Board plays a significant role in the Canadian copyright ecosystem by balancing market power between rights holders and users. Through its tariffs, it ensures that creators and rights holders receive fair compensation, content providers and end-users pay fair prices, and Canadians have broad access to copyright content. These activities support and facilitate the development and growth of markets that rely upon copyright, and directly contribute to economic prosperity and innovation in Canada.

The Board operates in an increasingly complex copyright marketplace in Canada, with the effect of increasing the complexity of its mandate and the demand for its expertise. New technological developments and their impact on creators' remuneration, new business models for content creation and delivery, new means to access to protected content, decompartmentalization of international rights markets, and the shifting roles of intermediaries, like online service providers and platforms, are all contributing factors.

A necessary reform

Over the past decade, several calls for Board reform have been made to improve its overall performance, and in particular, the timeliness of its decision-making activities. Professor Jeremy DeBeer published an [empirical study](#) in 2015 which revealed that from 1999-2013, the Board took an average of 3.5 years to approve tariff proposals after being submitted; and the average retroactivity period 2.2 years. While his study noted a number of factors influencing the timeliness of Board processes, it confirmed that the time taken by the Board to conclude matters is simply “too long”.

In December 2016, the Standing Senate Committee on Banking, Commerce and the Economy issued [recommendations](#) to the Board to eliminate the delays that have long irritated creators and businesses. This led to [public consultations](#) the following year by the Department of Innovation, Science and Economic Development (ISED) and the Department of Canadian Heritage (PCH), in collaboration with the Board. Nearly [60 briefs](#) were submitted by individuals and organizations, most of them expressing a clear need to modernize the Board's rules and practices, and to set reasonable timelines for its decisions, in order to end the practice of retroactive approvals several years after the filing of tariff applications.

“Accordingly, reforms should seek to minimize the amount of time taken by those processes, including the length of time between the commencement of proceedings and hearings as well as between hearings and the issuance of decisions, while still enabling the Board to render sound decisions in accordance with the principles of procedural fairness and the reasonable expectations of stakeholders and the public. Ultimately, the goal is to develop reforms to the framework of the Board that strengthen overall stakeholder and public confidence in its decision-making processes. The success of any reforms to the Board must be judged by the extent to which they accomplish these objectives.”

Source: [A Consultation on Options for Reform to the Copyright Board of Canada](#)

In June 2019, as part of the five-year review of the *Act*, the Standing Committee on Industry, Science and Technology (INDU) tabled [its report](#), confirming the need to improve the Board's effectiveness. The Standing Committee on Canadian Heritage reached a similar conclusion in its [own report](#).

Following these consultations, the government increased the Board's annual operating budget to [\\$4.2 million](#), and made amendments to the *Act* to clarify the Board's mandate and give it new tools to process tariff applications more efficiently. The following year, on December 4, 2020, the [Time Limits in Respect of Matters Before the Copyright Board Regulations](#) came into force, setting a 12 month time limit for deliberation on a proposed tariff.

2019 Amendments to the Copyright Act

- *Section 66.501 – Codification of the Board's mandate to consider certain criteria when setting a tariff, including the concepts of a willing buyer and a willing seller and the public interest*
- *Section 66.502 – Duty of the Board to deal with all matters before it informally and expeditiously*
- *Subsection 66.504(1) – Explicit possibility for the Board to use case management*
- *Subsection 66.91(2) – Possibility for regulations to set time limits for procedural steps*
- *Section 68 – Establishment of a filing date for proposed tariffs (October 15 of each year) and a minimum period of application (3 years or more)*



Modernization Initiative

The *Modernization Initiative* was launched in 2019 to give the Board the ability to deliver on its new legislative and regulatory framework. It is the most comprehensive review of all Board operations in its history.

The *Modernization Initiative* is built on a new vision to position the Board as a model in the administrative tribunal community, both in Canada and abroad, and to provide better access to justice for Canadians.

This new vision establishes clear, measurable and strategic aspirational objectives for the Board, and commits to greater transparency and accountability to Canadians.

A LEAN and Integrated Approach

To deliver on this vision, the Board prioritized long lasting transformation of all its operations, recognizing early on that without a complete and in-depth review of its structures, policies and practices, it would not be able to meet its reform objectives.

Using the LEAN methodology, the Board first analyzed how it typically manages tariff-setting proceedings. The LEAN analysis confirmed that the absence of clear and harmonized rules of practice for proceedings created inefficiencies at every level. It noted, in particular, the constant back and forth between the Board and parties during the deliberation phase of proceedings to either complete the evidence or seek out additional information or clarification. Other inefficiencies related to poor management of interrogatories and more generally, *ad hoc* and mostly reactive forward planning across pending tariffs, were also highlighted by the LEAN analysis.

A new vision for the Copyright Board (2020)

The Board is recognized as a leader among federal administrative tribunals and other copyright tribunals worldwide for the quality of its work and its innovative practices in:

- Effectiveness and efficiency
- Transparency
- Sound management
- Employer of choice

The Board is perceived as a credible and well-respected institution by creators and users of copyrighted material alike, due to the efficiency of its operations and its unique expertise in copyright matters. It adapts with resilience and agility to the challenges posed by a constantly evolving legal and economic environment, whether at the national or international level, while offering high-quality support to all parties and members of the public requesting its services.

[Vision & Values | Copyright Board of Canada \(cb-cda.gc.ca\)](https://www.cb-cda.gc.ca)

The Board also applied the LEAN approach to its administrative policies and work practices – including those related to human resources, financial management, information management, official languages, accessibility, communications, procurement, and risk management. Again, inefficiencies were identified, including in areas where Board practice did not properly align with Government of Canada’s best practices, or where unclear roles and responsibilities led to duplication of work and chronic errors. Overall, the LEAN process demonstrated where the Board’s governance structure and workflows needed to be clarified or re-imagined altogether.

LEAN management is a business methodology designed to increase quality and efficiency, and avoid wasting precious resources, including time, money, and effort. It aims to improve organizational performance to create value for customers. When successful, implementing LEAN management helps reduce the time and total cost of processes while boosting production capacity.

A Pragmatic Approach

In launching the *Modernization Initiative*, the Board also knew that to be successful, it needed to be pragmatic and consider the parameters imposed by its legal and regulatory framework, as well as certain constraints specific to its operational environment.

The Board must meet its obligations arising from its status, mandate, and case law

As an administrative tribunal, the Board must be fair in its processes, rules of evidence and procedural fairness, and the power vested in Board Members to evaluate each case on its own merits and make unbiased, independent decisions, must be reflected in all Board activities. The Board must also respect the parties’ right to be heard, and take into account case law concerning administrative tribunals, such as the Supreme Court of Canada’s decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* which underscores the importance of having explicit and justified reasons for one’s decisions.

On a substantive level, amendments to the *Act* introduced over the years, especially in terms of new rights or exceptions, are often first interpreted by the Board in the context of a tariff proceeding. This, along with the consideration of evolving copyright case law, adds layers of complexity in the interpretation and execution of the Board’s mandate.

Finally, tariffs approved by the Board are of “general application”, meaning that they apply to any user, irrespective of their involvement in the proceeding. Therefore, the Board must diligently assess the proposed tariffs before it, even where there are no significant changes, or no objectors. This is also true for settlement proposals where parties bring to the Board an agreement on rates, terms and conditions in connection with a proposed tariff. In other words, the Board cannot simply “rubber-stamp” a proposed tariff.

The Board needs data, but availability and access are increasingly limited

Having access to data and quality evidence to properly assess the value of a tariff or license, is both fundamental and increasingly challenging for the Board, despite good efforts and innovations in this regard from parties in recent years. Access to data may be limited for different reasons: for example, collectives may not be able to gather data on past uses; data on future uses may not be available or reliable; some stakeholders that hold important data may not be party to a proceeding, and accordingly, may not be obligated to file existing agreements or provide data sources, etc. These limitations can make it difficult for the Board to properly assess a tariff proposal based on the criteria set in the *Act*.

To address this problem, the Board published, in spring 2020, guidelines for submitting economic evidence (now a [Practice Notice](#)), to clarify its expectations in terms of scope and caliber of economic evidence brought by parties, including data. But even with guidance, the challenge for the Board in accessing useful data is growing. Finding ways to fill gaps left by insufficient data can increase the time and burden of a proceeding for parties and the Board. Should collectives increasingly choose not to file with the Board, or users decide not to participate in Board proceedings to avoid these costs, it would become even more challenging for the Board to evaluate what constitutes a “fair and equitable” tariff.

The Board must work closely with its parties to ensure success of proceedings

Board proceedings often involve the same parties. For example: Canada's largest collective management society, SOCAN, was involved in, on average, 75% of cases; certain user associations and groups, or even Canadian companies, are often participants in up to 30% of cases; and some smaller associations can be involved as objectors in 10-30% of cases.

The fact that many of the same parties are involved in most proceedings has a determining effect on the Board's capacity to manage its workload in an optimal manner. The Board must ensure that any party with a potential stake in a proposed tariff is able to participate throughout the process. This can have an impact on the number of cases the Board can move forward at any given time. Sometimes a party has committed its resources to one big case before the Board, and so is not able move on another significant case. Some parties are not represented by legal counsel, or have little Board experience, and thus may require more time or information to fully participate. In cases where the party cannot fully participate, the Board may decide to wait before initiating a proceeding – either on its own volition or at the explicit request of a party.

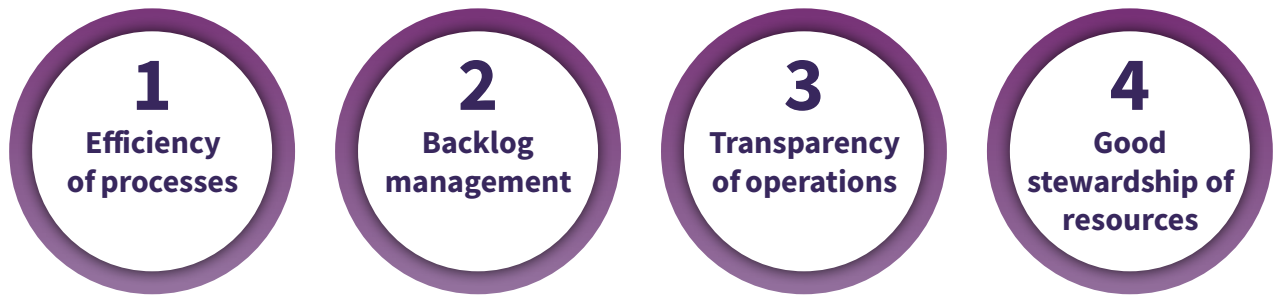
The Board must also consider one of the key elements of the 2019 changes to the *Act* – to allow collectives societies to enter into direct settlement agreements with users or their representative, without having to file tariffs with the Board. As a result, some parties may prefer to engage their resources in negotiating an agreement directly with users even though they have filed a tariff proposal; they may ask the Board to hold off or suspend a proceeding until the negotiation has completed certain steps.

The Board supports the negotiation of agreements between parties. These can be useful elements of evidence if parties decide to file them in the context of a proceeding on a tariff proposal. However, these agreements are not substitutes for tariff proposals, nor do they eliminate the need for a proceeding. A proceeding must still take place on the proposed tariff, without compromising procedural fairness and the decision-making criteria prescribed by the *Act*. Sometimes, settlement agreements may not be identical in scope to the original proposed tariffs, meaning that the Board may need to deal with excluded elements through a separate hearing process. For all these reasons and others, it would be hazardous to believe that settlement agreements automatically lead to faster decisions by the Board.



Phase 1 of the *Modernization Initiative*

Having considered the abovementioned items, the LEAN and pragmatic approach chosen by the Board was applied to four (4) areas of focus:



Area of Focus 1: Efficiency of processes

Public consultations and parliamentary reports on Board reform have all referred to the inefficiency of its processes leading to delays in decision-making, as the priority problem to be solved.

For the Board, an efficient process is one based on rules that are clear, simple, and standardized so that the parties know what to expect and can plan their actions accordingly; where back-and-forth exchanges to complete a case are managed to avoid unjustified delays and to allow the Board to do its job; where procedural fairness is preserved; and where the roles and responsibilities of employees and Board members are clear.

An efficient process places the client—the parties and other stakeholders, including individual Canadians—at the center of the equation. Time, energy and cost for all players are considered in keeping Board interventions flexible and proportionate to a fair and equitable outcome in a particular case, and with a view to minimize their impact on royalties paid by users and paid out to creators, and on overall cost to all participants. The Board must balance efficiency with its mandate to protect the public interest and meet the needs of the copyright market, even when potential stakeholders do not participate in the Board’s proceedings. An efficient process is also one that is open to the needs of the parties, taking into account operational circumstances (e.g., the closure of some users like restaurants, athletic training centres, etc. during the COVID-19 pandemic) and the availability of data, among others.

To meet these expectations, the Board undertook a number of initiatives, including the development of standard procedures for all its tariff approval proceedings. The Board’s new *Rules of Practice and Procedure* now regulate all procedural steps and related obligations and practices for the Board and for parties when engaged in a tariff approval proceeding.

Nine (9) practice notices accompany these Rules (further notices are forthcoming) to assist parties in complying with them. A user guide to Board proceedings, written in simple, accessible language, developed in collaboration with the [Canadian Institute for the Administration of Justice](#), will be published in 2023.

These tools were developed to address specific inefficiencies identified by the LEAN analysis, including the delays resulting from the lack of information in the early stages of a proceeding. The Rules and practice notices help parties anticipate and understand better the Board's expectations in that regard. They also include new requirements in terms of the type of information the parties must file with the Board, and when to do so. With this information, the Board is able to assess, very early on, the parties' positions, the issues that will need to be resolved, the quality of the evidence, the information gaps, and establish, on that basis, the work schedule. The need to go back to parties to obtain information during the proceeding, or even during the deliberation phase, is thus reduced.

Terminology used in all texts produced by the Board, including decisions, notices and orders, was also standardized to promote understanding and avoid delays caused by requests either from parties or the general public for clarification.

Finally, the LEAN philosophy whereby one always looks for the more efficient and effective way forward, was integrated in the Board's organisational culture. Every Board employee is now required to apply a LEAN lens to their work on an ongoing basis. This objective is also part of every Board employee's annual performance review.

NEW PRACTICE NOTICES

1. *Electronic files submitted to the Board*
2. *Testimony of lay witnesses*
3. *Filing an application to withdraw a proposed tariff*
4. *Acknowledgement of expert witnesses*
5. *Filing of proposed tariffs*
6. *Filing of jointly submitted texts in a proceeding*
7. *Filing of grounds for proposed tariff*
8. *Filing of grounds for objection*
9. *Guidelines for submitting economic evidence*

KEY MEASURES INTRODUCED TO IMPROVE BOARD EFFICIENCY

- *Standardized requirements for more detailed information from the parties early in the process (e.g., Notice of Grounds, Notice of Grounds for Objection, and Joint Statement of Issues) to support parties' participation, and guide the Board in predicting the length and nature of a proceeding.*
- *Designation of a case manager, where appropriate, to clarify the positions of the parties, resolve difficulties, establish reasonable parameters for interrogatory data gathering, set out the steps to follow and accelerate the proceeding.*
- *Proactive and informal engagement of parties on technical questions.*
- *Default use of written hearings, except in cases where an oral hearing would be considered useful for the completion of the file.*
- *Adjudication by a panel of only one member for less complex cases, such as applications for licences to use orphan works.*
- *Use of an expedited procedure ("fast track") for some cases considered to be simpler.*

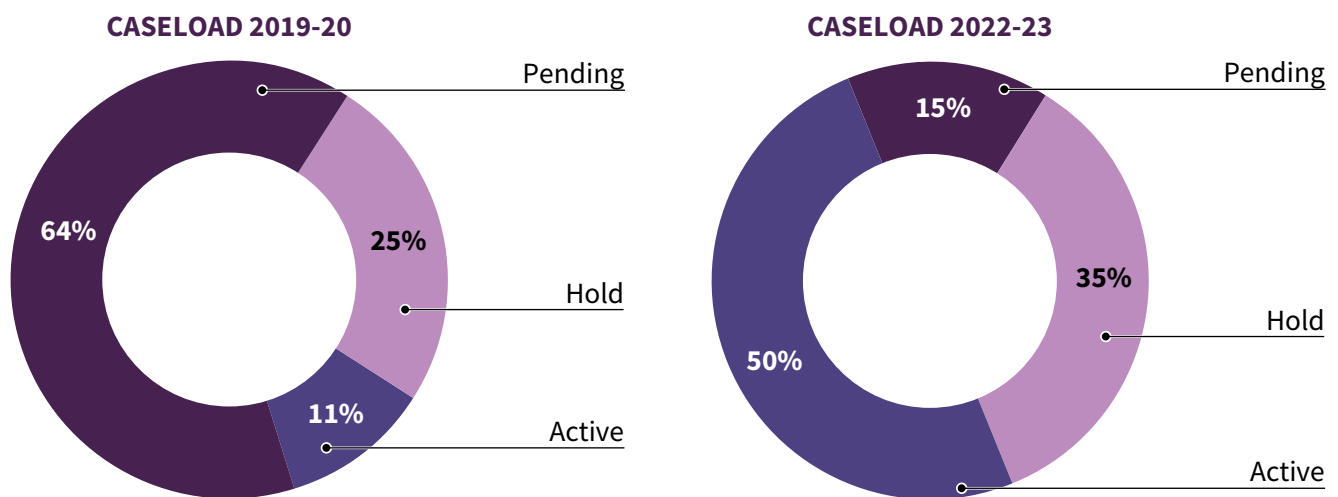
Area of Focus 2: Backlog management

Backlog management was another major priority of Phase 1 of the *Modernization Initiative*. Over the years, the Board has amassed a significant backlog with consequences for the Canadian copyright market, including causing uncertainty and instability in predicting remuneration to creators and costs for users.

To address its backlog, the Board:

- Published a detailed [backlog inventory](#) on the Board’s new website in September 2020. This had never existed in the past. This inventory revealed, among other things, that a significant part of the backlog can be attributed to proposed tariffs on hold, either at the request of parties – for example, due to ongoing negotiations – or because decisions for earlier years of similar tariffs have yet to be rendered.
- Consulted informally with a majority of parties implicated in the backlog on priorities, possibilities for expeditious action including withdrawals of tariff proposals, and considerations related to unexpected challenges (such as the impact of COVID 19 lock-down measures).
- Implemented a file prioritization system based on the age of file, relationship with other active or pending files, and any market considerations, such as in the case of digital music tariffs. Older files are dealt with on a priority basis.

Early results of the strategy are promising: since 2019, the Board has been able to increase the number of active files by initiating more proceedings at a time, reducing the overall retroactivity of its backlog (see diagram below).



Because the number of proposed tariffs on hold for the purposes of negotiation stands out as a significant percentage of the oldest files, the Board will publish this year further guidance to support a more efficient review of settlement agreements. Incorporating greater predictability for files on hold for negotiation will be an important part of the Board's backlog management plan in Phase 2 of the *Modernization Initiative*.

Tackling the backlog will continue to be a challenge for the Board for some years as new tariff proposals are filed every year, party negotiations over licences take time, and some parties struggle to engage in multiple proceedings at the Board at the same time. However, we are hopeful that with continued concerted efforts between the Board and parties to streamline and perhaps even rethink the way tariffs are structured, filed and assessed, the backlog will become more manageable and reduced over time.

Area of focus 3: Transparency of operations

Early on, greater transparency was identified as a central element of Phase 1 of the *Modernization Initiative*. Transparency cannot be achieved without first creating a culture of accountability. For this reason, the Board linked its vision to measurable strategic objectives that it published on its website. It also adopted a [new performance measurement framework](#) that measures, among other things, the degree of satisfaction of the parties' experience with respect to the transparency and effectiveness of the Board's proceedings. A survey is now sent to all parties at the end of each proceeding to assess overall satisfaction. This new performance measurement framework is required by the [Government of Canada Policy on Results](#), and will be in effect as of 2023-2024.

Transparency also requires the development of a culture of open communication with the Board's various clients: parties, stakeholders, and the public. This is a key element for an agile organization that aspires to reflect the needs of its clients in its strategic directions and operations. This is why new guidance products, such as practice notices, are generally tested with stakeholders before being published on the Board's website, to ensure the product is relevant and understandable.

The Board has also made available all its [decisions and tariffs](#) published since 1989, in both official languages and in a format compatible with the Decisia and CanLII legal information access platforms. This initiative is now recognized as a best practice within the Canadian administrative tribunal community, and was highlighted as such in the [mandate letter](#) of the new Chairperson of the Canadian Radio-television and Telecommunications Commission in February 2023.

The Board has also translated and published online over 300 past decisions related to unlocatable owner licenses, and digitized some 7,000 agreements between collective societies and users filed under section 76 of the *Copyright Act*.

The Board launched a new user-focused [website](#) and a [Twitter](#) account to establish more regular and proactive communication with its clientele and the general public. The introduction in 2023 of a new electronic filing system that includes a series of templates and electronic forms, will allow for centralized and much more effective information management, thereby improving the overall transparency of Board activities.

The Board’s operations moved to an entirely virtual mode of work during the COVID-19 pandemic, then to a hybrid mode in September 2022, without a loss of productivity. The Board also set a standard of excellence with its first hybrid oral hearing, held in October 2022. Its organisation was praised by participants.

*INTERNAL SURVEY
ORAL HEARING ON ONLINE MUSIC SERVICES (SOCAN 2007-2018)*

OCTOBER 18-20, 2022

Level of satisfaction:	9.6/10
<i>Instructions (connection and participation): Platform:</i>	9.6/10
<i>Audio and video quality:</i>	9.4/10
<i>Question and chat management:</i>	9.1/10
Overall hearing:	9.6/10

“The hearing was very well done. Very smooth and well organized.”
“This was the smoothest virtual hearing in which I have participated.”

While in some cases the Board has opted to proceed with in-person oral hearings, it has shown that it can provide full access to its proceedings in all circumstances, including in hybrid mode. Both hybrid oral and written hearings lower participation costs for all parties, an important goal for the Board, while preserving the quality of the exchanges. Of note, in 2020, the Board formally adopted a policy whereby all proceedings would be done in writing, unless specific circumstances warranted an oral hearing.

Lastly, the Board adopted new drafting practices in all its external communications, including its decisions, notices and orders, to make it easier for an uninitiated public to understand them. Once again, it embraced a concern shared by the Canadian legal community as a whole to adapt communication methods to facilitate access to justice. Formal training on clear and simple writing was provided to all Board employees and Members, and Board decisions now follow a standard structure to facilitate comprehension by the public.

Area of Focus 4: Good Stewardship of Resources

From the onset of the *Modernisation Initiative*, it was clear to Board management that only a healthy organization would be able to carry out reforms of this magnitude. In other words, for reforms to have an impactful and lasting effect, they had to be deployed by an organization with sound and modern administrative and financial policies and practices, with committed and motivated employees.

Phase 1 of the *Modernization Initiative* therefore involved a complete review of the Board's administrative processes and tools, also using the LEAN approach and aligning with Government of Canada best practices and policies. This has resulted in the development of new internal monitoring and control tools, in addition to formal internal policies for financial management and procurement in particular, human resources, security, and information technology/management.

GOOD STEWARDSHIP MEASURES TAKEN SINCE 2019

- *Streamlined corporate practices to remove duplication and formalise key services (like security screening).*
- *Upgraded financial management controls and in-house expertise.*
- *Comprehensive review of agreements with other departments for support in specialised corporate areas.*
- *Strategic Human Resources Action Plan 2020-2024 to maintain specialised in-house expertise in copyright law and economics, and to support the recruitment and development of new skills and expertise in areas of leadership, registry management, information management, administrative services, digital transformation, and innovation.*
- *Ombuds and dispute resolution services for Board employees now in place.*
- *Mandatory training and performance commitments for all employees.*
- *New partnerships with a broad and diverse range of experts and innovators in government and academic communities.*
- *Board joined the 50-30 Challenge to increase the representation and inclusion of diverse groups within its workplace.*
- *First Accessibility Plan to be published in 2023.*

On the horizon: Phase 2 of the *Modernization Initiative*

It will probably take some time to appreciate the effect of the modernization efforts put forward by the Board for the past four years, but preliminary results are encouraging – the number of active files, decisions rendered and tariff approved since 2019 has increased, and the [*Time Limits in Respect of Matters Before the Copyright Board SOR/2020-264*](#) have been systematically respected since their coming-into-force, including the fast-tracking of certain files for approval prior to their effective date.

The Board estimates that it will need two full annual tariff application cycles, i.e., until 2025, to have a sufficient volume of qualitative and quantitative data to properly assess the impact of its reforms and determine whether corrections should be made. Phase 1 has shaken up every aspect of the Board. This phase of consolidating results is essential to ensuring its sustainability.

The Board has already initiated its next phase of the *Modernization Initiative*. While the reduction of the Board's backlog will continue to be a priority, Phase 2 seeks to strategically position the Board for success in delivering on its mandate in the future.

In particular, over the next two years, the Board will launch a series of initiatives aimed at optimizing two important elements of its mandate, namely, the individual cases regimes and the licensing regime for the use of orphan works.

Modernizing the individual cases regime

Under section 71.2 of the *Act*, in case of a disagreement between a collective society and a user and at the request of one of them, the Board has the power to establish the royalties and conditions pertaining to a licence allowing the use of a collective's repertoire.

This service seems to be little known or less appreciated by collective societies and users than the tariff approval procedure, if judged by the low rate of use. Indeed, over the past five years, the Board received only two requests for individual cases.

The Board can act as an arbitrator between various stakeholders (collective societies, users, individuals) in order to protect the public interest, by:

- *determining the fees payable by a user to a collective society, where there is a disagreement.*
- *examining the agreements reached between copyright collectives and users filed with the Board by one of the parties, if requested to do so by the Commissioner of Competition.*
- *establishing the compensation to be paid by a copyright owner to a person for ceasing to perform protected acts, following the accession of a country to the Berne Convention, the Universal Convention, or the Agreement Establishing the World Trade Organization, where they were not previously protected.*

Easier access to the individual cases regime would allow parties and the marketplace to benefit from Board expertise in asking and answering complex questions of copyright law and economics, but through a more flexible process. However, for this to be of true value to the marketplace, parties need to trust that the individual cases regime is efficient, clear, and transparent. More importantly, such a regime must be accessible to market players of all shapes, sizes, and resources.

The Board recognizes that it needs to get a better sense of the role its individual cases regime could play in the copyright marketplace. For this reason, the Board will consult broadly during Phase 2 of its *Modernization Initiative*.

Improving the orphan works regime

Barring exceptions, authorization from the rights owner is required to use a work protected by copyright. When the rights owner cannot be found, section 77 of the *Copyright Act* provides that the Board can issue licenses to those who request it. To obtain such a license, the applicant must demonstrate that reasonable efforts were made to find the rights owner. Licenses granted

by the Board are non-exclusive and valid only in Canada. Since 2018, the Board has received 97 such requests, an average of 22 per year. The applications received span all types of works, from music to photographs and excerpts of television shows.

The Board continuously seeks ways to improve the management of its Orphan Works regime, including by providing tools and guidance online to better support applicants in preparing their request. Some aspects are more problematic, such as applications seeking to use works found online (e.g., a YouTube video) which may not qualify as “publication” as defined in the *Act*.

As part of Phase 2 of the *Modernization Initiative*, the Board will continue to explore ways to increase the efficiency of the regime to support the wider use of copyright-protected works, including indigenous works. This will include consultations and discussions with federal partners and a wide range of stakeholders to identify pragmatic solutions to challenges mentioned above, including works found online and the impact of the extension of the term of protection introduced in the *Act* in 2022.

Reflecting on the Board of the future


Despite positive early results in favour of more timely and efficient decision-making by the Board, other strategic and structural changes will likely be needed if the Board is to be able to properly support the copyright marketplace in the future. The Board is not the only Canadian institution with a market regulation role to reflect on its capacity to play such a role. In Canada, as elsewhere, so-called market framework laws and the institutions guaranteeing their implementation, are often shaken by rapid economic changes. For example, the Government of Canada recently led a major consultation on the [future of competition policy in Canada](#), including the role and responsibilities of the Competition Bureau.

The stakes are significant: if the Board becomes less involved in the marketplace, for example if collective societies decide that negotiating directly with users is a better use of their resources than participating in Board processes, how will the public interest be protected? How will the Board obtain the information and data it requires to properly assess and understand the competitive environment? In this situation, even a highly efficient and transparent Board may not be in a position to play the role it was given by Parliament.

For this reason, in Phase 2, the Board will begin a forward-looking reflection and will open discussion spaces with its national and international contacts with the goal of having proposals to submit upon the next review of the *Act*. These proposals could, for example, address the Board's role in regard to agreements between rights-holders and users, or the value of determining minimum and maximum prices for the tariffs, similar to practices established in other regulated markets.

This forward-looking reflection will also explore ways to expand the Board's expertise in copyright economics and be more accessible and more useful to the parties in their negotiations or as participants in Board proceedings. The Board will also take steps to establish partnerships with other national and international organizations, such as the [Competition Bureau](#), the [Canadian Radio Television and Telecommunications Commission \(CRTC\)](#), the [UK Intellectual Property Office](#) and the [US Copyright Office](#), to share best practices and pool data collection and market analysis tools related to the use of copyrighted content.

The results of these reflections will be shared with Parliament as a follow up to the INDU Committee recommendations of the [Statutory Review of the Copyright Act](#) concerning the economics of copyright (Recommendation 3); the collection of data on the economic impacts of copyright legislation in Canada (Recommendation 4); and increasing the transparency of collective rights management to the benefit of rights-holders and users through the tariff-setting process (Recommendation 35).



The Board's reforms launched in 2019 as part of phase 1 of the *Modernization Initiative*, have shed light on some of the limits of the Canadian legislative framework for effective regulation of the copyright market as it stands. They have prompted a small-scale revolution in an ecosystem where all players are concerned about their rights and want to thrive, and are also challenged by market regulation model designed for a completely different era.

This reflection must continue with all stakeholders to define the future of the economic regulation of the copyright market in Canada. The Board will focus on this new initiative over the next few years with a view to publishing a complete report in three years, in 2026.