

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

**Date** 2020-08-07

**Citation** *SOCAN Tariff 3.C (2018-2022)*, 2020 CB 008

**Member** Nathalie Théberge

**Proposed Tariffs Considered** SOCAN Tariff 3.C: Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns And Similar Establishments – Adult Entertainment Clubs (2018-2020)  
SOCAN Tariff 3.C: Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns And Similar Establishments – Adult Entertainment Clubs (2021-2022)

### **Approval of Proposed Tariffs**

**As**

***SOCAN Tariff 3.C – Adult Entertainment Clubs (2018-2022)***

### **REASONS FOR DECISION**

## **I. OVERVIEW**

### **TARIFFS CONSIDERED**

[1] The Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed the following proposed tariffs, applicable to adult entertainment clubs, for approval by the Copyright Board:

- Statement of Proposed Royalties to Be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works (2018-2020), (2017) C Gaz Supplement, Vol 151, No 17;
- Statement of Proposed Royalties to Be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works (2021-2022), (2019) C Gaz Supplement, Vol 153, No 20 (together, the “Proposed Tariffs”).

[2] For the following reasons, we find that *SOCAN Tariff 3.C – Adult Entertainment Clubs (2018-2022)*, as altered, meets the requirement of being fair and equitable and as a result, we approve it.

## II. BACKGROUND

[3] SOCAN Tariff 3.C authorizes users to perform any or all of the works in SOCAN's performing rights repertoire in Adult Entertainment Clubs.

[4] The Copyright Board last approved Tariff 3.C on May 6, 2017, for the years 2013-2017, following a written hearing between SOCAN, a collective society administrating copyright in musical works, and objectors Restaurants Canada and the Hotel Association of Canada (HAC), who represented certain adult entertainment clubs operating on their premises. An inflationary adjustment was applied resulting in a fixed rate of 4.7 cents per day per capacity (during 2015-2017) paid to SOCAN.

[5] SOCAN filed the Proposed Tariffs with the Copyright Board on March 31, 2017, and March 28, 2019. The Proposed Tariffs were published in the *Canada Gazette* on the dates indicated above, and prospective users and their representatives were given notice of their right to file objections to the Proposed Tariffs. The HAC was the only objector to the Proposed Tariffs, for the years 2021-2022.

[6] On January 28, 2020, the Board asked SOCAN why the following provision in the terms and conditions regarding audit, present in the 2013-2017 tariff, was removed from the Proposed Tariffs:

The licensee may request that the examination be made by an independent auditor chosen by the licensee from a list of at least three auditors furnished by SOCAN. In such a case, only the auditor so appointed need be allowed access to the licensee's records. If the audit discloses that the licence fee owed to SOCAN has been understated by more than 10 per cent, the licensee shall pay the auditor's fees.

[7] In response, SOCAN explained that it removed that provision to mirror the wording of SOCAN's other tariffs, implying that its other tariffs did not include such a provision.

[8] On February 11, 2020<sup>1</sup>, the HAC withdrew its objection to the Proposed Tariffs for the years 2021-2022. The Board received no other objections for the years 2018 to 2022. Since HAC withdrew its objection, the proposed tariffs are now unopposed for the years 2018-2022.

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<sup>1</sup> Letter from Kathleen Simmons to Secretary General, Copyright Board (11 February 2020) Re: [CB-CDA 2020-005] SOCAN Tariff 3.C for the years 2018, 2019-2020, 2021-2022.

### III. ANALYSIS

[9] The Proposed Tariffs set out royalties that are unchanged from the last approved Tariff 3.C. (for 2013-2017), where the fee payable by the establishment is 4.7 cents per day, multiplied by the capacity (seating and standing) authorized under the establishment's liquor licence or any other document issued by a competent authority for this type of establishment.

[10] Regarding the removal of the paragraph in the audit terms and conditions, the result of this change is that a licensee can no longer choose an independent auditor (from a list provided by SOCAN) when SOCAN exercises its right to audit the licensee's books and records. When an audit discloses an underpayment of more than 10 per cent, the licensee is obligated to pay the auditor's fees. SOCAN explained the removal of the clause as a way to make the Proposed Tariffs consistent with the SOCAN Tariff 3.A (2018) and 3.B (2018-2020) proposals, among others.

[11] The Board generally agrees with the principle of consistency across similar tariffs<sup>2</sup>. It is possible that administering this clause imposes costs on SOCAN, which would explain why it would like to remove it. It is also likely that the effect of removing the clause would be minimal, since the Proposed Tariffs compute royalties based on operating days and capacity. These figures are easily determined, meaning that the scope of the audit would likely be small and the choice of auditor is likely irrelevant.

[12] The Board has continuously approved Tariff 3 with an independent auditor clause as far back as CAPAC Tariffs 3.A and 3.B (1990) and PROCAN Tariffs 3.A and 3.B (1990). It is a unique clause that only appears in SOCAN Tariffs 3.A, 3.B, and 3.C. When it first approved SOCAN Tariff 3.C (1995), the Board received evidence about challenges present in the relationship between SOCAN and club owners, and decided to maintain the independent auditor clause.<sup>3</sup>

[13] The Board provided SOCAN with the opportunity to explain why users would be unaffected by the removal of the clause. SOCAN did not provide any indication that the situation, observed in 1995, has changed or that users would be unaffected by the loss of the benefit in the clause. As a result, we have no basis to assess whether removing the clause would be inconsequential for the users.

[14] However, we note that the former objectors have not raised the clause as an issue and we have received no further comments on the matter.

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<sup>2</sup> *SOCAN Tariff 17.A – Pay, Specialty and Other Services by Broadcasting Distribution (1996-2000)* (16 February 2001) Copyright Board Decision at p 6.

<sup>3</sup> *SOCAN – Various Tariffs [16 (1994-1996); 3.B and 3.C (1995); 3.A, 4, 5.B and 14 (1995-1996); 1.A (1995-1997); 2.B, 2.C, 5.A, 7, 8, 9, 10, 11.B, 12, 13, 15, 18, 20, and 21 (1996)]* (20 September 1996) Copyright Board Decision at p 8.

#### **IV. REASONS FOR THE DECISION**

[15] A comparison of the Proposed Tariffs to Tariff 3.C (2013-2017) indicates that the royalty rate is the same. We are not aware of any changes in the market that would lead us to conclude that this rate is no longer fair or equitable. In addition, in the context of decreased economic activity due to the COVID-19 pandemic in 2020, this rate is self-adjusting since it is based on the number of days a business is in operation.

[16] Regarding the auditor clause, in the absence of evidence that would demonstrate that its removal would have no adverse effects on the users and that the sense of fairness and balance of the relationship with the collective would not be diminished, we conclude that the clause should be reinstated.

[17] SOCAN has proposed to remove the same clause from Tariffs 3.A and 3.B, for which proceedings are pending. At the time of examination, we will expect the parties to offer sufficient evidence that will assist us in determining whether tariffs without that clause preserve that sense of fairness and balance.

#### **V. CONCLUSION**

[18] For the reasons described above, we approve the Proposed Tariffs with alteration as *SOCAN Tariff 3.C – Adult Entertainment Clubs (2018-2022)*. Compared with SOCAN Tariff 3.C (2013-2017), the royalty rate in the Proposed Tariffs is unchanged. The terms and conditions also mirror the 2013-2017 Tariff and the Approved Tariffs shall include a clause where the licensee may choose an independent auditor.