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Member René Côté

Proposed Tariffs SOCAN Tariff 4.B: Live Performances at Theatres or Other Places of Entertainment – Classical Music Concerts (2018)

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SOCAN Tariff 4.B: Live Performances at Theatres or Other Places of Entertainment – Classical Music Concerts (2022-2024)

Approval of Proposed Tariffs

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SOCAN Tariff 4.B – Live Performances at Theatres or Other Places of Entertainment – Classical Music Concerts (2018-2024)

REASONS FOR DECISION

I. INTRODUCTION

[1] The Society of Composers, Authors and Music Publishers of Canada (“SOCAN”) is a collective society that manages public performing rights of musical works on behalf of Canadian and foreign songwriters, composers and music publishers. SOCAN filed a series of proposed tariffs with the Copyright Board for live performances of public classical music concerts for the years 2018, 2019, 2020-2021 and 2022-2024, more precisely Tariff 4.B.1 – Per concert licences, Tariff 4.B.2 – Annual licence for orchestras and Tariff 4.B.3 – Annual licence for presenting organization.

[2] For the following reasons, we find that SOCAN Tariff 4.B for classical music concerts for the period of 2018-2024 is fair and equitable as proposed, subject to a few adjustments to be made to Tariffs 4.B.1 and 4.B.3 proposals, and to the proposed Tariff 4.B.2 royalty rates for the year 2018. Consequently, we approve these tariff proposals.

II. CONTEXT

A. BACKGROUND

[3] The tariffs for the public performance of music in concert halls were among the first to be approved in Canada by the Copyright Appeal Board – the Copyright Board of Canada predecessor – and date back to 1939. At that time, there was no difference made between classical music concerts and popular music concerts. This distinction was only introduced in 1967.¹

[4] In 1983, the Copyright Appeal Board set the royalty rate for classical music concerts at 25 per cent of the royalty rate for popular music concerts, its own rate being set at 1 per cent of gross receipts from ticket sales. The Copyright Appeal Board added that this should not be viewed as signifying that it considered classical music concerts to be worth less than those of popular music, but rather that this distinction is dictated by the observation that only a fraction of the works performed in classical music concerts belong to the repertoire of copyright-protected works.² It should be noted that the determination of this 25 per cent adjustment of the rate for popular music concerts or 0.25 per cent of gross receipts from ticket sales does not originate from precise data submitted by the parties to the case; this was only an estimate provided by the Copyright Appeal Board.

[5] The Copyright Board's decision in the *SOCAN – Various Tariffs, 1992-1994* modified this adjustment after noticing a difference regarding protected music performed during classical music concerts.

In 1983, the rate was set on the assumption that for classical music concerts approximately one quarter of music played was protected. The record of these proceedings contradicts this assumption. During the first half of 1993, 37 per cent of music (in duration) played during ACO [Association of Canadian Orchestras] concerts was protected, and 61 per cent in other concerts. [...] Applying that percentage to the rate set for popular music concerts yields 1.3 per cent.³

[6] The Board then set the royalty for popular music concerts at 2.2 per cent of gross receipts from ticket sales and at 1.3 per cent of gross receipts from ticket sales for classical music concerts (4.B.1) or slightly less than 60 per cent of the tariff for classical music concerts compared to popular music concerts.

[7] It is in this 1994 Board decision that the orchestra tariff (4.B.2) and presenter tariff (4.B.3) first appear, but only for the year 1994. As a matter of fact, unbeknownst to the Board or its predecessor,

¹ For the history of *SOCAN – Tariff 4*, see *Statement of Royalties to be Collected for the Performance or the Communication by Telecommunication in Canada of Dramatico-Musical or Musical Works in 1992, 1993 and 1994*, (12 August 1994), Copyright Board, at pp 24–28 [*SOCAN – Various Tariffs, 1994*], online : <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366522/index.do?q=Various+Tariffs>>

² Final Report of the Copyright Appeal Board for the 1983 Calendar Year, (26 May 1983), at p 13.

³ *SOCAN – Various Tariffs* (1994), *supra* note 1, at pp 52–53.

an agreement between one of the collective societies that preceded SOCAN and the Association of Canadian Orchestras⁴ (ACO) had been in place since about ten years.⁵ The Board then approved Tariff 4.B.2 where the rate is based on the number of performances offered (including the concerts during which no work that belongs to SOCAN's repertoire is played) and on the orchestra's annual budget. However, the Board noted the following:

This formula has its limitations. Orchestras with the same budget pay different prices for their music, according to the number of performances they offer. A tariff based on a percentage of the orchestra's budget or ticket sales, set at a rate that accounts for the relative use of protected music over the whole season, may alleviate this problem while offering the same convenience as the formula proposed by the parties.⁶

[8] Regarding Tariff 4.B.3, it materialized following representations by the Canadian Association for the Performing Arts (CAPACOA) to the Board. It is an annual licence for presenters of classical music concert series. The royalty rate is set at 0.75 per cent of gross receipts from ticket sales for all events, including those during which no work that belongs to SOCAN's repertoire is played.

As the tariff would require that a fee be paid for events in which all music played is in the public domain, those events should be taken into account in assessing the music use patterns of the industry. The only information on the record of these proceedings which takes into account these events is the figure offered for ACO members in Exhibit SOCAN-3, according to which protected music represents 37 per cent, in duration, of all music performed at all ACO events. It is not unreasonable to assume that music use patterns for presenters are similar. Applying that percentage to the rate set for popular music concerts yields a percentage of 0.77 per cent.⁷

[9] With regard to the classical music concerts tariff (4.B.1) and the presenters tariff (4.B.3) from 1994 to 1997, as well as for the period 1998 to 2002, SOCAN asked that the rates be based on those applicable to popular music concerts. The Board responded by announcing that it challenged this assumption. The Board stated:

[T]he link between the classical and popular music concert tariffs should be loosened. The markets appear different. The financial challenges encountered are different in each sector of the concert industry. The revenue structures are also very different.⁸

[10] In 2001, the Board added that it wished to establish a royalty related to classical music in a more independent manner.⁹ In this decision, the Board progressively brings, over a period of five

⁴ Now Orchestras Canada.

⁵ *SOCAN – Various Tariffs*, (1994), *supra* note 1, at p 54.

⁶ *Ibid.* at p 55.

⁷ *Ibid.* at pp 58–59. (This rate was set at 0.75 per cent.) *Ibid.* at p 60.

⁸ *Statement of royalties for public performance of music – SOCAN 1994-1997*, (20 September 1996), Copyright Board, at p 21. [Statement of royalties for public performance – SOCAN 1994-1997], online : <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366531/index.do>>

⁹ *Statement of royalties to be collected by SOCAN for the public performance or the communication to the public by*

years, the royalty rates for classical music concerts (4.B.1) to 1.56 per cent from 1.3 per cent. For its part, the royalty rate for the annual classical music concert series (4.B.3) is raised from 0.75 per cent of gross receipts from ticket sales to 0.96 per cent.

[11] Only Tariff 4.B.2 followed a different course which will not necessarily be linked to the evolution of tariffs for popular music concerts. In fact, this tariff was based on an agreement between SOCAN and Orchestras Canada to increase the royalty rate paid by Canadian orchestras for the years 2008-2012¹⁰ and 2013-2014.¹¹

[12] In different decisions about Tariff 4.B since 1994, the Board occasionally deplored the lack of data presented by SOCAN to justify its proposed tariff. Hence, in 2001, the Board stated that “[t]he record as it relates to classical music concerts is, to say the least, superficial.”¹² It added:

The Board recognizes that the royalties attributable to all classical music concerts do not exceed \$500,000. This necessarily has an impact on how much SOCAN may reasonably spend to compile data. The evidence in these proceedings concerning the use of protected music in these concerts is nevertheless very superficial. The Board would have preferred to have more detailed analyses that would allow it to make verifications in respect of each concert and that would include, for comparison purposes, events where only public domain music is used. It may be that the data concerning orchestras subject to Tariff 4.B.2 are sufficiently sound to be used as a starting point for these calculations.¹³

[13] A good part of the dissatisfaction mentioned by the Board during the last decades is due to the lack of data on the percentage of public-domain, classical-music works that are performed in concerts. The last estimate of the percentage of copyright-protected music dates back to a 1993 study¹⁴, that is 28 years ago. One of the public-domain characteristics is that it expands in time with works or even musical arrangements by composers who have been deceased for more than 50 years.

[14] Of course, composers of contemporary classical music add to the repertoire of works protected by copyright, but we simply point out the evolving nature of the public domain content and the necessity for the Board to obtain anew information related to the content of classical music concerts that is protected by copyright.

telecommunication, in Canada, of musical or dramatico-musical work (1998-2002), (15 June 2001), Copyright Board, at p 10, [Tariffs 4.A, 4.B.1, 4.B.3, 5.B – Concerts – 1998-2002], online : <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/fr/item/366557/index.do>>

¹⁰ *Statement of royalties for public performance of musical works – SOCAN* (20 March 2008) Copyright Board, para 42, (The decision on Tariff 4.B.2 relates to the 2008-2012 period.), online : <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/fr/item/366614/index.do?q=20+mars+2008>>

¹¹ *SOCAN Tariff 4 - Concerts (2009-2014)*, (25 July 2014), Copyright Board Decision at p 66. (The decision on Tariff 4.B.2 relates to the 2013-2014 period.), online: < <https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366748/index.do?q=Tariff+4>>

¹² *SOCAN – Tariffs 4.A, 4.B.1, 4.B.3, 5.B - Concerts*, (1998-2002), *supra* note 9, at p 10.

¹³ *Ibid.* at p 15.

¹⁴ *SOCAN – Various Tariffs*, 1994, *supra* note 1, at p 59.

B. THE PRESENT MATTER

[15] Proposed tariffs for individual classical music concerts were published for the years 2018, 2019, 2020-2021 and 2022-2024. Restaurants Canada was the only one who objected to the proposed tariffs for the years 2018¹⁵ and 2019¹⁶, and that without providing an explanation. In a letter dated February 10, 2020, Restaurants Canada informed the Board that it was withdrawing its objection for proposed Tariff 4.B.2 for the years 2018, 2019 and 2020-2021. In its notice of December 16, 2020, CB-CDA 2020-056, the Board asked Restaurants Canada to confirm in writing its intention to participate in the current approval process. Restaurants Canada did not respond to this notice by the deadline, January 15, 2021, and was thus deemed to have ceased to participate in the approval process of Tariff 4.B.

[16] In its Notice CB-CDA 2021-018, dated March 5, 2021, the Board asked SOCAN to explain the reason why the royalties for Tariff 4.B.2 for 2018 are different from those approved for 2015-2017, while these are identical to those proposed for the years 2019, 2020-2021 and 2022-2024. In a letter dated March 5, 2021, SOCAN answered that it had already notified the Board that an error had been made during the drafting process of Tariff 4.B.2 for 2018 and that royalties for 2018 should have been the same as those proposed for the years 2019 to 2024.

[17] In its Notice CB-CDA 2021-042 dated August 19, 2021, the Board sought to update the 1993 data on the share of works protected by copyright, performed during classical music concerts. Its purpose was to assess the share of protected works compared to the share of works in the public domain. It therefore asked SOCAN as well as Orchestras Canada and CAPACOA (that is, the main representatives of the users of the tariffs at hand) to provide quantitative data, but also to answer the following question:

To the extent that SOCAN's classical music repertoire has diminished, should the rate in Tariff 4.B.2 and Tariff 4.B.3, which is calculated by taking into account all concerts, including concerts where no work of SOCAN's repertoire is performed, be adjusted and if so, how?

[18] Only SOCAN and CAPACOA responded to the Notice. In its response, SOCAN recognized that with the passage of time protected works do fall into the public domain, but it argues that this situation is balanced by the creation of new copyright-protected works. SOCAN adds:

Also, many orchestras and presenting organizations are increasingly mandated to present Canadian content, which leads to their events having a higher percentage of copyright-protected music relative to traditional (primarily older European) classical repertoire than events in the past.¹⁷

¹⁵ Restaurants Canada letter dated 28 June 2017. Objection to proposed Tariffs 4.B.1, 4.B.2 and 4.B.3 for 2018.

¹⁶ Restaurants Canada letter dated 27 June 2018. Objection to proposed Tariff 4.B.1 for 2019.

¹⁷ SOCAN, Response to CB-CDA notice 2021-047 (1 October 2021). [SOCAN response, 1 October 2021] SOCAN's response provides data for the years 2009 to 2018 showing that 43% of concert time under Tariff 4.B.2 is allotted to copyright-protected music. For Tariff 4.B.3, this proportion is 53%.

[19] SOCAN explains that it receives a substantial number¹⁸ of lists of works presented during classical music concerts by users of Tariffs 4.B.2 and 4.B.3 and that these lists are examined by its service responsible for distributing the royalties collected by SOCAN. To do so, the lists are analyzed as to the status of the work (being part of SOCAN's repertoire or not), as well as its duration. The data provided by SOCAN cover a ten-year period, from 2009 to 2018 and its analysis is for 2011-2018.

The data shows [sic] that the amount of copyright-protected music used at classical music concerts as a percentage of total music used, based on duration, has remained generally consistent over the past decade and, to the Board's question, consistent with the "37% in duration" figure for 1993 that was in evidence before the Board in the above-noted Decision.

[20] Finally, SOCAN points out that the clause specifying that concerts that do not present works belonging to SOCAN's repertoire must be included in the calculation of the royalty has been in place since nearly four decades; that it simplifies the management of both tariffs and that it does not result in encouraging the use of fewer copyright-protected works.

[21] CAPACOA's response, of October 1, 2021, mentions to the Board the lack of data regarding the percentage of works from SOCAN's repertoire presented by Tariff 4.B.2 and 4.B.3 users. CAPACOA adds:

But should a revised ratio match exactly the proportion of protected vs public domain works performed? Not necessarily. Tariff rate decisions shouldn't reward or encourage the performance of public domain works over works that are still under copyright. Even if the actual ratio was, hypothetically, as low as 10 per cent, it would be reasonable for the Copyright Board to set the rates based on a higher ratio, in order to encourage the programming and performance of more protected contemporary music works.¹⁹

[22] The Board is pleased to have obtained data supporting its conclusions in the current tariff approval process for classical music concerts and thanks SOCAN and CAPACOA for their responses.

III. ISSUE

[23] The sole issue in the current proceeding is to determine whether proposed tariffs for classical music concerts are fair and equitable. We examine particularly the clauses which state that an orchestra's programming or a presenter's artistic season are, in accordance with Tariffs 4.B.2 and 4.B.3, subject to annual royalty payments, whether music performed during their concerts belongs to SOCAN's repertoire of works or not.

¹⁸ Canadian orchestras transmit lists of works performed during classical music concerts 56 and 65% of the time, according to data provided by SOCAN for the years 2015 to 2019, while for presenters of classical music concerts, this percentage would be between 16 and 56%. *Ibid.*

¹⁹ CAPACOA, Response to CB-CDA notice 2021-047 (1 October 2021).

IV. ANALYSIS

A. TARIFF FOR INDIVIDUAL CONCERTS (4.B.1)

[24] The first tariff to be analyzed is Tariff 4.B.1 which relates to classical music in individual concerts. The proposed tariffs are unchanged with respect to royalty rates compared to the last approved tariff, a rate that is set at 1.56 per cent of gross receipts from ticket sales or, for a free concert, at 1.56 per cent of fees paid to singers, musicians, dancers, conductors and other artists, subject in both cases to a minimum fee of \$35 per concert.

[25] Since the proposed rates match those previously approved for the same use, these rates represent the best proxy that is applicable to the tariff period covered here. We have no information that would make us question it.

[26] We have decided, however, to slightly modify the text of the terms and conditions for the sake of clarity. As a matter of fact, the introductory text of the proposed tariff states that:

For a licence to perform, by means of performers in person *at a concert* in the year 2018, any or all of the works in SOCAN’s repertoire, at concerts or recitals of classical music [...]. [Our emphasis]

[27] The first reference to the words “at a concert” is unnecessary and we have decided to delete it from the tariff. The paragraph would thus read: “For the performance, by means of performers in person, during the years 2018 to 2024, of any or all the works in SOCAN’s repertoire, at concerts or recitals of classical music [...]” This change to the tariff wording does not lead to any changes in its practical application. Furthermore, as we have recently observed in another matter, we are deleting references to the term “licence” in order to make a distinction between the terms “tariff” and “licence.”²⁰

[28] It is worth mentioning that the main royalty in Tariff 4.B.1 adjusts automatically to the public-health measures that government authorities may have adopted during the COVID-19 pandemic. Indeed, cancelled events do not generate royalties and the decline in box-office receipts resulting from these public-health measures, such as the limitation in capacity for halls where classical music concerts are presented, will adjust downwards the fees to be paid by users according to the decline in box-office receipts. With regards to minimum fees, their amount is small enough to justify their retention in the context of a pandemic.

²⁰ *SOCAN Tariff 9 – Sporting Events (2018-2023)*, (1 October, 2021), 2021 CDA 9, Copyright Board, para 30, online: <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/512205/index.do?q=tariff+9+socan>> See also *York University v Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32.

B. ANNUAL ROYALTY TARIFF FOR ORCHESTRA (4.B.2)

[29] We already alluded to the particular circumstances of the creation of this tariff following an agreement between the ACO and SOCAN, without the Board or its predecessor being informed (see *supra* para 7). The relations between SOCAN and Orchestras Canada (ACO's successor) appear to be cordial, since several tariff proposals were agreed to over the last forty years. During this period, however, the rates doubled compared to those adopted in 1994 by the Board and these rates increase depending on orchestras' annual budgets. The more their budget increases, the higher the royalty per orchestra. For the period under review, no increase is proposed and the terms and conditions remain unchanged. No objection was raised by Orchestras Canada, or by any of its members.

[30] We were concerned by the lack of data provided by SOCAN to support its proposed tariffs. As the last data provided by SOCAN date from 1993, we questioned SOCAN regarding the percentage of works from its repertoire performed during classical music concerts offered by Canadian orchestras. SOCAN measured this percentage by analyzing the lists of works performed by Tariff 4.B.2 and 4.B.3 users during the years 2011-2019. These lists, created from different sources, including users themselves, are in effect random, in the sense that they are unrelated to the calculation of royalties payable. Based on those lists, for the concerts for which it distributed royalties to its members, SOCAN analyzed the average percentage of copyright protected music weighted by the duration of the musical work. The percentage therefore shows the share of protected works among the total of works performed during the studied period. The average of this share—ranging between 43 et 53%—is stable and consistent with the 37% percentage relied upon by the Board in the past. An adjustment may have been warranted had the percentage been lower than 37%.

[31] We consider that the method brought forward by SOCAN is sound from a statistical perspective, given that the analyzed sample is random and its weighting is based on duration. We also accept the argument put forward by SOCAN that this clause makes it easier for both SOCAN and users to manage the tariff. The facts that Orchestras Canada did not present submissions and supported tariff proposals in the past that included this clause seem to reinforce SOCAN's claims in this regard.

[32] In light of the above, we find that no further adjustment would be justified to take account of the proportion of public domain music in the orchestras' annual programming.

[33] Therefore, in relation to the royalties in the proposed tariffs, they do not represent a particular problem, since they are not increased relative to the last approved tariff. These royalties represent the best proxy that is applicable to the tariff period in question. We have no information that would lead us to question it. As we noted above (see *supra* para 16), the error in the proposed tariff for 2018 is corrected to bring the royalties to the same level as that of other years. For 2018 to 2024, SOCAN's proposed royalties – as shown in the table below – are approved.

| Orchestra Annual Budget | Fee × Total Number of Concerts |
|--------------------------------|---------------------------------------|
| \$0 to \$100,000 | \$73 |
| \$100,001 to \$500,000 | \$117 |
| \$500,001 to \$1,000,000 | \$191 |
| \$1,000,001 to \$2,000,000 | \$238 |
| \$2,000,001 to \$5,000,000 | \$398 |
| \$5,000,001 to \$10,000,000 | \$436 |
| More than \$10,000,000 | \$477 |

[34] Since the royalties for the current tariff are based on the number of concerts, the tariff will adjust automatically to the impact of the measures taken by government authorities to fight the COVID-19 pandemic, as long as they are in force. Therefore, there are no specific measures to adopt to take into account the impact of the pandemic on tariff users.

C. ANNUAL LICENCE FOR PRESENTING ORGANIZATIONS (4.B.3)

[35] As mentioned above, Tariff 4.B.3 was created following representations made by CAPACOA to the Board (see *supra* para 8). If the terms and conditions of the tariff are similar to those applicable to orchestras, the tariff structure differs from this model and is closer to that of individual concerts. However, contrary to the rates used for popular music concerts that are identical for both the annual and concert royalties²¹, the rates differ for classical music concerts.

[36] Indeed, while we previously observed (see *supra* para 10) that the rate is 1.56 per cent for individual concerts, it is 0.96 per cent for an annual licence for presenters. These tariffs have been in force since 2002 and have not been adjusted since.²² No increase is proposed for the 2018-2024 period. Since the proposed royalties correspond to those previously approved for the same use, these rates also represent the best proxy applicable for the tariff period covered here. We have no information that would lead us to question it. On the contrary, given the data provided by SOCAN regarding the proportion of protected works in comparison to that of public domain works performed during a presenter's artistic season, we maintain the rate proposed by SOCAN in relation to Tariff 4.B.3 for the same reasons put forward in relation to proposed Tariff 4.B.2.

[37] As we do in the case of Tariff 4.B.1, we modify the text of the terms and conditions for the sake of clarity, as follow:

To perform, by means of performers in person in the years 2018-2024, any or all of the works in SOCAN's repertoire during a series of concerts or recitals of classical music [...]

²¹ In both cases, the royalty rates are set to 3 per cent of gross receipts from ticket sales for concerts with a paying audience, excluding all applicable taxes, subject to a minimum fee per concert of \$35 or of 3 per cent of fees paid to singers, musicians, dancers, conductors and other artists participating to a free concert, subject to this same minimum of \$35.

²² See *Statement of royalties for public performance – SOCAN 1998-2002*, *supra* note 9.

[38] For reasons explained above, we are deleting the reference to the term “licence”.

[39] For the same reasons as mentioned above regarding the annual royalty tariff for orchestras, no measures are necessary to account for the impact of the COVID-19 pandemic, since the main royalties will adjust automatically to the amount of presenter activities, as well as to the level of revenue from their concerts. With respect to the minimum fee, its amount is small enough to justify its retention in the context of a pandemic.

V. CONCLUSION

[40] For the above-mentioned reasons, we approve the proposed tariffs under consideration as *SOCAN Tariff 4.B: Live Performances at Theatres or Other Places of Entertainment – Classical Music Concerts (2018-2024)*.

[41] We make a minor correction to the text of the terms and conditions of Tariff 4.B.1 and 4.B.3 for the sake of clarity and precision, as well as a correction to the rate of proposed Tariff 4.B.2 for 2018 in relation to the published rate.