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Member René Côté

Proposed Tariffs Considered SOCAN Tariff 3.A – Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns, and Similar Establishments - Live Music, 2018
SOCAN Tariff 3.A – Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns, and Similar Establishments - Live Music, 2019
SOCAN Tariff 3.A – Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns, and Similar Establishments - Live Music, 2020-2021
SOCAN Tariff 3.A – Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns, and Similar Establishments - Live Music, 2022-2024

Approval of Proposed Tariffs

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SOCAN Tariff 3.A – Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns, and Similar Establishments - Live Music (2018-2024)

REASONS FOR DECISION

I. INTRODUCTION

[1] The Society of Composers, Authors and Musical 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 four proposed tariffs with the Copyright Board for the live performance, in Canada, or musical or dramatico-musical works from its repertoire in cabarets, cafes, clubs and similar establishments, for the years 2018, 2019, 2020-2021 and 2022-2024.

[2] For the following reasons, we conclude that SOCAN proposed tariffs 3.A (2018, 2019, 2020-2021 and 2022-2024) are fair and equitable, subject to a change to be made to the minimum annual fee for the years 2020 and 2021, which is lowered by 50% due to measures adopted by competent authorities in the context of the COVID-19 pandemic. We are making some changes to the tariff terms and conditions, particularly by accepting a change related to the conditions for auditing a tariff user's books and records at SOCAN's request by eliminating the option for the user to request an independent auditor chosen from a list of at least three names.

II. CONTEXT

[3] SOCAN Tariff 3.A allows a user (cabaret, cafe, club, cocktail bar, dining room, lounge, restaurant, roadhouse, tavern, and similar establishments) to perform in public, by means of performers in person, the works from its repertoire, at any time and as often as desired.

[4] On May 5, 2017, the Board approved SOCAN Tariff 3.A for the years 2013 to 2017.¹ The fees set out in the last approved tariff for the years 2015 to 2017 are identical to those set out in the four proposed tariffs under review, as described below, and had been subject to an inflation adjustment that was accepted by the Board. The result of this inflation-based adjustment focused on the minimum annual fee that increased from \$83.65 for the years 2011-2012 and 2013-2014 to \$89.76 for the years 2015-2017.

[5] On March 31, 2017, March 28, 2018, March 28, 2019, and October 15, 2020, SOCAN filed proposed tariffs related to Tariff 3.A for the years 2018, 2019, 2020-2021 and 2022-2024, respectively. The proposed tariffs for the 2018, 2019 and 2020-2021 periods were duly published in the *Canada Gazette* on April 29, 2017, May 5, 2018, and May 18, 2019. The proposed tariff for the 2022-2024 period was duly published on the Board's website on October 30, 2020.

[6] SOCAN's proposed tariffs for the years 2018, 2019, 2020-2021 and 2022-2024 were identical to the last approved tariff for the years 2015 to 2017. The fee payable is 3 per cent of the "compensation for entertainment" paid in the year covered by the licence, subject to a minimum fee of \$89.76. The "compensation for entertainment" means the total amounts paid to musicians, singers, or performers that will be paid by the tariff users or by all other sources. Payments are made on January 31 of each year, based on the compensation due for the music performed the previous year, or on an estimate of the compensation to be paid for the beginning year. No later than January 31 of the following year, the licensee shall file a report, with SOCAN, of the actual compensation for entertainment paid during the previous year and an adjustment of the licence fee shall be made accordingly. If the fee due is less than the amount paid, SOCAN shall credit the licensee with the amount of the overpayment.

¹ *SOCAN – Various Tariffs 2007-2017* (5 May 2017), CB-CDA 2017-038 (reasons), online : CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366759/index.do>>.

A. OBJECTORS' POSITION

[7] The Retail Council of Canada objected to the proposed tariff for the year 2018, while the Hotel Association of Canada and Restaurants Canada objected to the proposed tariffs regarding the four periods under review.

[8] On July 8, 2021, the Board informed the parties that it was about to start the consideration of the proposed tariffs for the years 2018 to 2024.² By means of Notice CB-CDA 2021-040, the Board indicated that it was extending the consultation deadline and was aware that the proposed tariffs may not be adequate in view of the COVID-19 pandemic. It added that it intended to take this into account in its review of the proposed tariffs. The Board also asked the Objectors to file detailed grounds of objections and for SOCAN to respond to these grounds.

[9] On September 15, 2021, the Board received the grounds for objection filed jointly by the Objectors.³ Essentially, they are asking that Tariff 3.A be adjusted to take the COVID-19 pandemic into account. They acknowledge that the tariff automatically self-adjusts according to revenues,⁴ but are asking for a reasonable percentage reduction of the minimum annual fee, i.e. \$89.76, which applies to smaller establishments; this would take into account business restrictions related to the pandemic. The Objectors do not explain what they mean by “small establishments” or what reduction percentage would be adequate. The Objectors are indicating that they cannot be precise about the period of application for these adjustments as it is impossible to determine when the pandemic will end and when things will return to normal for the users of Tariff 3.A. In an appendix to their submission, the Objectors included the preliminary information regarding the closing periods in force in the different jurisdictions during the pandemic.

B. SOCAN'S RESPONSE

[10] On October 1, 2021, SOCAN filed its response to the Objectors' representations.⁵ It argues that no adjustment should be made to the proposed tariffs under review for the pandemic period for the following reasons.

[11] On the one hand, SOCAN asserts that the pandemic's effects on users are difficult to quantify because health measures were different from one jurisdiction to another, and often from one municipality to the other. SOCAN asserts that the minimum annual fee for Tariff 3.A has always been low.⁶ For example, for a period of almost 30 years up to 1992, this annual fee was increased

² Notice CB-CDA 2021-034 (July 8, 2021).

³ Letter from Gabriel Van Loon dated 15 September 2021, in response to Notice CB-CDA 2021-040. The grounds of objection were filed jointly by the three objectors.

⁴ Instead, the amount of the fee is based on the compensation for entertainment and on expenses rather than on the revenues.

⁵ Letter from SOCAN dated 1 October 2021 in response to Notice CB-CDA 2021-040 and to joint comments from the objectors, at p 3 [hereafter SOCAN letter – 1 October 2021].

⁶ *Ibid.*

from \$80 to \$89.76 to account for small adjustments related to inflation. SOCAN asserts that the adjustments made to this fee are lower than if the Board had used its own method to take inflation into account during the same period.

[12] On the other hand, SOCAN asserts that the Board confirmed several times that the annual minimum fees are fair and equitable and are set to cover the minimum fees that are necessary to manage the tariff and reflect the intrinsic value of musical works in its repertoire. Furthermore, SOCAN notes that the Board has already determined that the minimum annual fees should not be so low that their collection would become irrational or economically impossible. SOCAN did not indicate which reduction would make the collection of minimum annual fees would be irrational or economically impossible.

[13] Finally, although SOCAN is opposed to it, if the Board decided to implement adjustments to take the pandemic into account, it is asking the Board to limit these to the years 2020 and 2021 and also for the Board to provide it with the opportunity of making representations on any rates adjustment before their implementation.

III. ISSUES

[14] Three issues seem to emerge from the four tariff proposals under consideration. The first is to determine if the rates and conditions in the proposed tariffs can be used as a basis for establishing a fair and equitable tariff for the years 2018 to 2024.

[15] The second is to determine if adjustments should be made for the years covered by the COVID-19 pandemic. If so, the following sub-questions should also be addressed: what form should these adjustments take? and to which years should these adjustments apply? If applicable, should we consult SOCAN about the adjustments?

[16] The third issue relates to the terms and conditions of the proposed tariffs and more specifically to the clause on the choice of an auditor and the removal of the notion of a licence from the general provisions of the tariff.

IV. ANALYSIS

A. APPLICABLE RATES

[17] For the entire period covered by the four proposed tariffs under review, no increase is proposed in relation to the rates of the last approved tariff. Since the proposed royalties correspond to those previously approved for the same use, these rates represent the best applicable benchmark for the tariff period in question. We have no information that would lead us to question it. However, for the years 2020 to 2022, those affected by the COVID-19 pandemic, the question arises as to whether the rates of the minimum annual fee in the proposed tariffs, although identical to the last approved rates, are fair and equitable.

[18] There is no doubt that the users covered by Tariff 3.A have been severely affected by the COVID-19 pandemic since March 2020. Indeed, as a result of measures adopted by the competent authorities, these establishments were forced to close for varying periods of time. Once authorized to reopen, they had to operate while applying the prescribed health measures, such as limiting capacity or requiring proof of vaccination against COVID-19 from customers. In short, for many 3.A establishments, operating conditions were anything but normal.

[19] Some tariffs are structured in such a way that no adjustment is required for longer or shorter business closures. This is particularly the case for tariffs that depend entirely on the number of concerts actually given and the revenue received from these concerts, or, as in this case, on a percentage of sums received by the singers, musicians and other performers. In many cases, the fees paid by the establishments are automatically adjusted.⁷ That is the case here, except with respect to the minimum annual fee.

[20] Tariffs with minimum annual fees are less suited to the exceptional conditions that have prevailed since the start of the COVID-19 pandemic. Hence, the Board decided to reduce the minimum annual fees by approximately 50 per cent for SOCAN Tariff 7 (Skating rinks) for the years 2020 and 2021.⁸

Indeed, the amount of the minimum fee is not nominal compared to other minimum fees, which are not related to music use. Because the minimum fee in this case appears intended to cover more than the tariff administration costs, and therefore is intended to compensate for some level of use, it is appropriate to reduce it to account for a reduction of use due to the pandemic.⁹

[21] For the same reasons, we are reducing the minimum annual fee by 50 per cent and we set it at \$44.88. We will apply this reduction of the minimum annual fee for the years 2020 and 2021 as SOCAN suggests and as was the case for SOCAN Tariff 7.¹⁰ However, we believe that the usual minimum fee should be reinstated for 2022 due to the easing of the measures already decreed by the authorities concerned.

[22] SOCAN asked to be consulted about any potential decrease in royalties due to the measures adopted by the authorities during the COVID-19 pandemic.¹¹ In this regard, the Board informed SOCAN in Notice CB-CDA 2022-023, dated 21 April 2022, that it did not see the need to consult

⁷ *SOCAN Tariff 4.B – Live Performances at Concert Halls, Theatres or Other Places of Entertainment - Classical Music Concerts (2018-2024)* (26 November 2021), 2021 CB 11 (reasons), online : CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/516586/index.do>>, at paras 28 (4.B.1), 34 (4.B.2) and 39 (4.B.3). [hereafter SOCAN – Tariff 4.B (2018-2024)].

⁸ The minimum annual fee decreases from \$111.92 to \$56. See *SOCAN – Tariff 7, Skating Rinks (2018-2022)* (6 August 2021), 2021 CB 7 (reasons), online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/500977/index.do>>, para 12 [hereafter SOCAN – Tariff 7 (2018-2024)].

⁹ *Ibid* at para 11.

¹⁰ *Ibid* at para 12.

¹¹ Letter from SOCAN dated 1 October 2021, *supra* note 5, at 5.

it on the question of changes to the minimum annual fee. At the same time, the Board, in accordance with article 2a) of *Time Limits in Respect of Matters Before the Copyright Board Regulations*,¹² informed the parties that the last date to file their submissions was set for 6 May 2022. On that date, the parties reiterated the submissions that they had previously made.

B. TERMS AND CONDITIONS OF THE TARIFF

[23] In respect of the terms and conditions of the tariff, SOCAN proposes the withdrawal of a clause in relation to the choice of an independent auditor in case SOCAN would require access to the books and records of a tariff user. This clause provides that:

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.¹³

[24] In its Notice CB-CDA 2021-034, the Board asked SOCAN about the suggestion of withdrawing this clause from Tariffs 3.A and 3.B. In its response, SOCAN indicated that such a clause exists only in SOCAN Tariffs 3.A, 3.B and 3.C, which represents only a small percentage of its tariffs and that the search for uniformity in similar tariffs is a legitimate objective. SOCAN had requested for this clause to be withdrawn from Tariff 3.C (2018-2022), but the Board had refused this request in 2020.¹⁴ SOCAN also makes the following points:

If the Board is, perhaps, attempting to ascertain whether there might be some prejudice to licensees by the removal of the wording, SOCAN would say no. SOCAN can confirm, based on record available while the staff are working remotely, that since 2013, no tariff 3 licensee (...) has availed itself of the right to ask for an independent auditor to be appointed.¹⁵

[25] It is worth noting that SOCAN's arguments, in its July 16, 2021 letter, were received by all Tariff 3.A Objectors. The Objectors could very well have objected to the withdrawal of this clause in the tariff proposals, but they did not.

[26] In the absence of objections and due to the fact that it is highly unlikely that harm will be caused to users of the tariff, we accept the withdrawal of this clause from Tariff 3.A proposals under consideration.

¹² SOR/2020-264.

¹³ *SOCAN – Various Tariffs for Public Performance of Music, 2007-2017*. Supp. to C Gaz, 6 May 2017, Tariff 3.A, at 9.

¹⁴ *SOCAN Tariff 3.C – Adult Entertainment Clubs (2018-2022)* (7 August 2020), 2020 CB 008 (reasons), online : CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/483924/index.do>>.

¹⁵ Letter from SOCAN dated 16 July 2021 in response to Notice CB-CDA 2021-034.

[27] Furthermore, as the Board has done in other decisions,¹⁶ we remove references to “licenses” from the “General Provisions” found in the proposed tariffs, to differentiate between the terms “tariff” and “licence”.

[28] Indeed, in its *York*¹⁷ decision, the Supreme Court analyzed some interrelations between the concepts of tariff and licence. In doing so, it concluded that subsection 68.2(1) of the *Copyright Act*, as it stood before the 2019 modifications, did not enable Access Copyright to collect the royalties set in a tariff approved by the Board in accordance with section 70.15 from a user who had chosen not to be bound by a licence to the conditions set out in the approved tariff.

[29] Although this case does not raise the issue at the heart of the *York* decision, which dealt with the issue of “mandatory tariff”, the analysis made by the Court of the concepts of tariff and licence is useful, since it highlighted the distinct roles of the Board and the collective societies. Where the Board approves tariffs, collective societies grant licences. Even though a collective society grants licences under the conditions stated in an approved tariff, if requested by a user, it remains that “tariff” and “licence” are distinct concepts. For this reason, a tariff that is approved by the Board should not refer to the concept of licence.

[30] Furthermore, we removed the clause in the proposed tariffs stating that SOCAN shall have the right at any time to terminate a licence for breach of terms and conditions upon 30 days’ notice in writing. In addition to the reasons mentioned above, we strike out this paragraph entirely as it pertains to language of an individual contractual licence rather than a tariff. This also touches upon copyright liability and provisions in the Act governing remedies against tariff users. As such, it is a compliance and enforcement issue rather than a tariff certification issue¹⁸. However, it should be noted that the removal of this tariff clause and the deletion of the concept of licence do not modify in any way the scope of the tariff.

[31] Finally, as we are reducing by 50 per cent the minimum fees for the years 2020 and 2021, some users will have overpaid SOCAN. Consequently, we are adding the text below to the following clause, which we emphasize:

No later than January 31 of the following year, the user shall file with SOCAN a report of the actual compensation paid for entertainment during the previous year and an adjustment of the fee shall be made accordingly. Any money owed shall then be paid to SOCAN; if the fee due is less than the amount paid, *including due to the reduction of the minimum fee by 50 per cent*

¹⁶ See *SOCAN Tariff 9 – Sports Events (2018-2023)* (1 October 2021), 2021 CB 9 (reasons), at para 30. See also *SOCAN – Tarif 4.B (2018-2024)*, *supra* note 7 para. 27.

¹⁷ *York University v Canadian Copyright Licensing Agency* (30 July 2021), 2021 SCC 32, online : SCC <<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18972/index.do>>. See also section 66.501 of the *Copyright Act*.

¹⁸ *SOCAN Tariff 21– Recreational Facilities Operated by a Municipality, School, College, University, Agricultural Society or Similar Community Organizations, 2013-2020* (7 December 2018), CB-CDA 2018-222 (reasons), online : CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/367464/index.do>>, at para 18.

for the years 2020 and 2021, SOCAN shall credit the user with the amount of the overpayment.

V. CONCLUSION

[32] Based on the above-mentioned reasons we approve the proposed tariffs under the title *SOCAN Tariff 3.A – Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns, and Similar Establishments - Live Music (2018-2024)*. The royalty rates remain unchanged in relation to those of SOCAN Tariff 3.A (2015-2017), except for the rates of the minimum annual fee, which is reduced by 50 per cent, i.e. \$44.88, for the years 2020 and 2021. We accept the withdrawal of the clause that authorized the choice of an independent auditor when SOCAN requests access to the books and records of a tariff user. In addition, we are modifying the general provisions of the tariff to remove the term “licence” and are removing a clause that has no place in a tariff.