

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

**Date** 2022-08-26

**Citation** *SOCAN Tariff 8 – Receptions, Conventions, Assemblies and Fashion Shows (2018-2022)*, 2022 CB 9

**Member** Katherine Braun

**Proposed Tariffs** SOCAN Tariff 8 – Receptions Conventions, Assemblies and Fashion Shows 2018

**Considered** SOCAN Tariff 8 – Receptions Conventions, Assemblies and Fashion Shows 2019-2020  
SOCAN Tariff 8 – Receptions Conventions, Assemblies and Fashion Shows 2021-2022

### **Approval of Proposed Tariffs**

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*SOCAN Tariff 8 – Receptions, Conventions, Assemblies, and Fashion Shows (2018-2022)*

### **REASONS FOR DECISION**

#### **I. INTRODUCTION**

[1] This proceeding considers three proposed tariffs filed with the Copyright Board of Canada (“the Board”) by the Society of Composers, Authors, and Music Publishers of Canada (SOCAN) in respect of the royalties to be paid for the public performance of musical works in SOCAN’s repertoire, at a reception, convention, assembly, and fashion show. These proposed tariffs were filed for the years 2018, 2019-2020, and 2021-2022 (“the Proposed Tariffs”).

[2] Restaurants Canada, the Hotel Association of Canada, and the Retail Council of Canada are participating in this proceeding, together (“the Objectors”).

[3] The *Copyright Act* (“the Act”) provides that the Board shall “fix royalty and levy rates and any related terms and conditions under the Act that are fair and equitable.”<sup>1</sup> The rates and related terms and conditions provided for in the Proposed Tariffs are identical to those of the last approved tariff. After due consideration, I conclude that the last approved tariff can serve as a basis for establishing a fair and equitable tariff in this proceeding.

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<sup>1</sup> *Copyright Act*, RSC 1985, c C-42. [Act], s. 66.501.

[4] I find that the royalties and related terms and conditions set out in the Proposed Tariffs are fair and equitable. For the reasons that follow, the Proposed Tariffs are approved, with minor modification, as a single tariff under the title *SOCAN Tariff 8 – Receptions, Conventions, Assemblies, and Fashion Shows (2018-2022)*.

## **II. OVERVIEW**

### **A. LAST APPROVED TARIFF**

[5] The Board last approved *SOCAN Tariff 8 (2013-2017)* on May 5, 2017.<sup>2</sup> For the years 2013-2014, SOCAN proposed that the tariffs remain unchanged to the last approved tariff. For the years 2015-2017, SOCAN proposed an inflation adjustment, which was approved by the Board. This resulted in an increase of 7.3 per cent to the approved tariffs' rates.

### **B. PROPOSED TARIFF**

[6] SOCAN filed the Proposed Tariffs for 2018 on March 31, 2017; for 2019-2020 on March 29, 2018; and for 2021-2022 on March 28, 2019. The Proposed Tariffs were published in the *Canada Gazette* on April 29, 2017, May 5, 2018, and May 18, 2019, respectively.

### **C. PROCEDURAL HISTORY**

[7] In Notice CB-CDA 2021-040, the Board informed the parties that it was ready to consider the Proposed Tariffs and invited Objectors to file detailed submissions explaining their objections to the Proposed Tariffs. A joint submission from the Objectors was received on September 15, 2021.<sup>3</sup>

[8] In general, the Objectors do not take issue with the proposed rates. However, Objectors claim that, while appearing to be self-adjusting, the tariff is not responsive to lower authorized capacity owing to public health measures during a pandemic. They note that an event that normally entertained 100 guests, may have been capped at 20 guests because of pandemic capacity limits. Objectors argue the 1-100 tier creates an overcharge, imposing higher costs on some events forced to operate at reduced attendance. To address their claim, the Objectors propose creation of a new lower tier of 1-50 attendees, with a corresponding lower rate. No issues were raised concerning other tariff rates.

[9] Objectors also request that the Proposed Tariffs be amended to clarify that “capacity” refers to not only physical capacity based on the size of room or seating availability, but also the “true capacity”, which would reflect attendance limitations arising from public health orders or other ordinances imposed during a pandemic.

[10] SOCAN disputes the need for a new 1-50 tier, claiming that the 1-100 tier does not overcharge events with reduced attendance. It notes that the 1-100 tier has been in place since 2002 and that royalties are based on a per-event basis<sup>4</sup> - where no events are held, no royalty is paid. SOCAN

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<sup>2</sup> *SOCAN – Various Tariffs 2007-2017* (6 May 2017), (reasons), online : CB <<https://decisions.cb-cda.gc.ca/cb-cda/certified-homologues/en/item/366481/index.do?q=SOCAN+3A+2015>>.

<sup>3</sup> Letter from Gabriel Van Loon in response to Notice CB-CDA 2021-040 (15 September 2021).

<sup>4</sup> Letter from SOCAN in response to Notice CB-CDA 2021-040 (1 October 2021).

notes that the Board previously certified the 1-100 tier as a ‘minimum’ tier, in recognition that SOCAN incurs costs to administer its tariffs, such as issuing a licence, and that a minimum fee should be set at a level to justify its collection.<sup>5</sup>

[11] SOCAN submits that addition of ‘true capacity’ is not necessary and that it already invoices users based on reduced capacity arising from pandemic-related public health orders. SOCAN claims it is compliant with the current wording of the tariff, which provides that room capacity, both seating and standing, is to be established by reference to the “establishment’s liquor licence or any other document issued by a competent authority for this type of establishment.”

### **III. ISSUES**

[12] Having reviewed the submissions, I have identified three issues for consideration:

1. Are the rates set out in the Proposed Tariffs fair and equitable?
2. Is a new attendance tier required to account for effects of the pandemic period?
3. Should the definition of “capacity” be modified?

### **IV. ANALYSIS**

#### **A. ARE THE RATES SET OUT IN THE PROPOSED TARIFFS FAIR AND EQUITABLE?**

[13] I find that the last approved tariff can serve as a basis for a fair and equitable tariff in this proceeding. Approved tariffs are presumed to be fair for the period and subject-matter for which they are approved, particularly when there has been no change in the relevant market. The Proposed Tariffs provide for the same scope, royalties, and related terms and conditions as those fixed in the last approved tariff, thus creating no change. I am not aware of any market changes since the last approval tariff that would contest approval of the Proposed Tariffs as fair and equitable. Further, no modifications to the Proposed Tariffs were identified. Therefore, I find that the rates set out in the Proposed Tariffs are fair and equitable for the years under consideration.

#### **B. IS A NEW ATTENDANCE TIER REQUIRED TO ACCOUNT FOR EFFECTS OF THE PANDEMIC PERIOD?**

[14] Information provided by the Objectors notes that tourism spending on domestic and international accommodation declined significantly during the pandemic period, and that hotel occupancy levels fell significantly, to a national average of less than 10%. Many hotels were forced to reduce their staff by 50-80%, eliminating tens of thousands of jobs. Objectors argue that, while hotels may not have been forced to close owing to public health orders, numerous travel and capacity restrictions had the same net effect. They suggest that event cancellations in the early 2021 would continue in 2022, estimating that a recovery in the industry to pre-pandemic levels is unlikely before 2025.<sup>6</sup>

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<sup>5</sup> *Ibid*, at page 3.

<sup>6</sup> Letter from Gabriel Van Loon (15 September 2021), at page 9.

[15] In their submission, the Objectors raise concerns about the impacts from forced closures and reduced capacity owing to the pandemic. They argue that a 1-50 tier with a lower corresponding rate, would ease the burden of pandemic restrictions. While it is understandable that information for pandemic years may not be complete, the Objectors do not offer evidence specific to events targeted by the tariff, which could offer an informed understanding of any impacts they claim. Nor did the Objectors suggest any lower rates for the proposed 1-50 tier. While some information was provided related to the hotel industry, it was only marginally helpful, since events covered by the tariff may take place in hotels as well in a variety of other venues, which were not covered in the submitted information.

[16] SOCAN argues that a new 1-50 tier is not warranted and that the tariff is a royalty-per-event, so where no events are held, no royalty is required. SOCAN also disputes the claim that the 1-100 tier overcharges users, noting that it is a minimum tier and was approved in past Board decisions.

[17] Having reviewed all the submissions, I am of the view that a new 1-50 tier is not warranted. While the pandemic period may have impacted activities targeted by the tariff, namely receptions, assemblies, conventions, and fashion shows, the tariff is a royalty-per-event based on venue capacity. Where no events are held, no royalty is required, so users are not required to pay. Second, in their call for a smaller tier and corresponding lower rate, the Objectors failed to provide evidence about reduced event attendance owing to pandemic capacity limits. They cite the example of a gathering that may have normally engaged 100 guests but was capped at 20 guests because of public health measures. But, prior to the pandemic, an event with 20 guests would have paid the same royalty as an event with 99 guests under the 1-100 tier. Finally, royalties for the 1-100 tier in the Proposed Tariffs are identical to those in the last approved tariff and as such, the minimum tier should be set at a level to recognize that SOCAN incurs costs to administer its tariffs.

### **C. SHOULD THE DEFINITION OF “CAPACITY” BE MODIFIED?**

[18] Modification to the definition of ‘capacity’ is not required in my view. The Proposed Tariffs allow for room capacity (seating and standing) as authorized under the establishment’s liquor license or other document issued by a competent authority for that type of establishment. I concur with SOCAN that public health notices and orders (or similar document limiting a room’s capacity due to the pandemic) may be considered a “document issued by a competent authority” under the tariff. SOCAN submits that it has been invoicing users in recognition of reduced capacity owing to pandemic capacity limits. SOCAN notes that an event that would normally be included under the 101-300 tier but fell into the lower 1-100 tier in response to capacity limits, would have been billed at the lower rate.

### **V. TARIFF WORDING**

[19] Two modifications to the Proposed Tariffs are made.

[20] Firstly, reference to the word "licence" is removed to distinguish between the terms “tariff” and “licence”, as has been done in recent Board decisions.

[21] In the York decision,<sup>7</sup> the Supreme Court analysed the interrelationship between the concepts of tariff and licence. In doing so, it concluded that subsection 68.2(1) of the Act, as it read prior to the 2019 amendments, did not empower Access Copyright to collect royalties set by a tariff approved by the Board under s 70.15, from a user who had chosen not to be bound by a licence on the terms and conditions set out in the approved tariff.

[22] While this case does not raise the issue at the heart of the York decision, which was the issue of the "compulsory tariff", the Court's analysis of the concepts of tariff and licence is useful in highlighting the distinct roles of the Board and collectives. While the Board approves tariffs, collective societies grant licences. Although a collective society must grant licences on the terms and conditions set out in an approved tariff if a user requests it, the fact remains that tariff and licence are distinct concepts. For this reason, a tariff approved by the Board cannot refer to the concept of a licence.

[23] Secondly, the paragraph providing that SOCAN shall have the right at any time to terminate a licence for breach of terms or conditions upon 30 days' notice in writing is removed, consistent with the *SOCAN Tariff 21 – Recreational Facilities (2013-2020)* decision.<sup>8</sup>

[24] I am striking out this paragraph in its entirety, as it touches on the area of liability and the provisions of the Act applicable to remedies against users governed by a tariff. Therefore, it is a question of compliance and enforcement of the tariff, rather than a question of approval. The scope or application of the tariff is not changed as a result of these modifications.

## **VI. DECISION**

[25] In making my determination, I examined the submissions filed by the parties in respect of the Proposed Tariffs. I find that the last approved tariff can serve as a basis for establishing a fair and equitable tariff in this proceeding, as rates and related terms and conditions are unchanged in the Proposed Tariffs. No modification to rates is indicated to account for the pandemic.

[26] I am satisfied that the royalties and related terms and conditions set out in the Proposed Tariffs are fair and equitable. I therefore approve the Proposed Tariffs with minor modification, as a single tariff under the title, *SOCAN Tariff 8 – Receptions, Conventions, Assemblies and Fashion Shows (2018-2022)*.

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<sup>7</sup> *York University v Canadian Copyright Licensing Agency* (30 July 2021), 2021 SCC 32, online: SCC <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18972/index.do>>.

<sup>8</sup> *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.