

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Citation *SOCAN Tariff 3.C (2023-2025)*, 2022 CB 13
Member Nathalie Théberge
Proposed Tariff Considered SOCAN Tariff 3.C – Adult Entertainment Clubs (2023-2025)

Approval of Proposed Tariff
As
SOCAN Tariff 3.C – Adult Entertainment Clubs (2023-2025)

REASONS FOR DECISION

I. OVERVIEW

[1] This decision relates to a tariff proposed by the Society of Composers, Authors and Music Publishers of Canada (SOCAN): Tariff 3.C – Adult Entertainment Clubs (the “Proposed Tariff”).

[2] The Proposed Tariff covers performances in public of the musical works and dramatico-musical works in SOCAN’s repertoire for the years 2023 to 2025.

[3] No objections were filed in regard of this Proposed Tariff.

[4] After reviewing the evidence, I find that a tariff based on the Proposed Tariff is fair and equitable, and approve it with modifications to reflect the actual inflation rate, expressed as the percentage change in the Consumer Price Index (“CPI”) between January 2014 and December 2021.

II. BACKGROUND

[5] On November 10, 2021,¹ the Board asked SOCAN to provide a Notice of Grounds for its Proposed Tariff, which it filed on December 15, 2021.

[6] No objections were filed in regards to the Proposed Tariff and, as such, the Notice of Grounds filed by SOCAN is the only evidence submitted in this proceeding.

[1] The previously approved tariff for the years 2018 to 2022 fixed the royalty rate at 4.7 cents per day, multiplied by the seating and standing capacity authorized under the establishment's liquor licence.² Users were required to file annual reports on their authorized capacity and the number of days in operation. The Board had fixed the same rate and reporting requirements for the years 2015 to 2017.³

[2] The Proposed Tariff for the years 2023 to 2025 includes a royalty rate of 5.57 cents per day per capacity, which is an increase of 0.87 cents per day per capacity from the previously approved tariff. SOCAN explains that the proposed increase is based on inflation and calculated according to the Board's established inflationary adjustment methodology.

[3] Like the previously approved tariff, the Proposed Tariff includes the requirement to submit annual reports on authorized capacity and the number of days in operation. SOCAN submits that this information allows it to calculate royalties. SOCAN describes users as clubs, bars, cabarets, etc. that feature adult entertainment accompanied by recorded music.

III. ISSUES

[4] In reviewing the evidence, I considered three issues:

1. Whether the previously approved tariff is an appropriate proxy for the Proposed Tariff;
2. Whether an inflationary adjustment is appropriate; and
3. Whether other changes should be made to the text of the Proposed Tariff.

¹ *Various SOCAN Tariffs*, Order CB-CDA 2021-053 (10 November 2021).

² *SOCAN Tariff 3.C – Adult Entertainment Clubs (2018-2022)* (7 August 2020), 2020 CB 008 (reasons), online : CB <<https://decisia.lexum.com/cb-cda/decisions/en/item/483924/index.do?q=2020+cb+008>> [*SOCAN 3.C (2018-2022)*].

³ *SOCAN – Various Tariffs 2007-2017* (05 May 2017), CB-CDA 2017-038 (reasons), online : CB <<https://decisia.lexum.com/cb-cda/decisions/en/item/366759/index.do?q=CB-CDA+2017-038>>.

IV. ANALYSIS

A. ISSUE 1 - WHETHER THE PREVIOUSLY APPROVED TARIFF IS AN APPROPRIATE PROXY FOR THE PROPOSED TARIFF

[5] I find that the previously approved tariff is an appropriate proxy in this proceeding.

[6] The Board has frequently held that it is appropriate—absent reasons to the contrary—to use the previously approved tariff as a proxy of what could be fair.⁴

[7] In recent decisions, the Board has identified changes in the relevant market as one potential indicator of whether an adjustment to the royalty rate is appropriate or necessary.

[8] The previously approved tariff was issued on August 7, 2020.⁵ In this proceeding, SOCAN has not proposed any market-based changes to the royalty rates beyond the adjustment for inflation and has not mentioned any other changes to the market.

[9] Since there is no information on the record that points to market-based changes (or at least no significant ones) relevant to the consideration of this Proposed Tariff, I have no reason to question the appropriateness of the proxy.

B. ISSUE 2: WHETHER AN INFLATIONARY ADJUSTMENT IS APPROPRIATE

[10] I approve an inflationary adjustment to the Proposed Tariff of 16.98% , which translates to a royalty rate of 5.50 cents per day per capacity and is slightly lower than the royalty rate proposed by SOCAN.

[11] SOCAN submits that its proposed increase to the royalty rate, compared to the previously approved tariff, is an adjustment to account for inflation “based on the Board’s established inflationary adjustment methodology”.⁶ SOCAN does not say which years and months, nor which data series it included in its calculation. It proposes an inflationary adjustment of 18.58 per cent.

[12] The Board has found in the past that adjustments for inflation were appropriate as they preserved the purchasing power of rights owners. In some circumstances, as noted in *CBC Radio*

⁴ See e.g., *SOCAN Tariff 9 – Sports Events (2018-2023)* (1 October 2021), 2021 CB 9 (reasons) [*SOCAN 9 (2018-2023)*]; *SOCAN Tariff 22.G – Game Sites (2007-2019)* (5 August 2022), 2022 CB 7 (reasons); *CBRA Media Monitoring Tariffs (2023-2025)* (25 March 2022), 2022 CB 2 (reasons).

⁵ *SOCAN 3.C (2018-2022)*, *supra* note 2.

⁶ Notice of Grounds for Proposed Tariff SOCAN 3.C (2023-2025) (15 December 2021), online : CB < <https://cb-cda.gc.ca/sites/default/files/inline-files/NOGPT%20-%202022-01-10%20-%20SOCAN%20Tariff%203.C%20%282023-2025%29.pdf>>

(2006-2011), failing to adjust royalty payments for inflation would allow it to erode the value of music.⁷ I find this statement to be valid in this proceeding as well.

[13] I also find that the Board's established methodology, with an adjustment period from January 2014 to December 2021, is an appropriate approach to calculate the inflationary adjustment in this proceeding.

[14] In *CBC Radio (2006-2011)*, the Board ruled that it would be preferable to measure inflation as the percentage change in CPI between January of the first year and December of the last year of the period for which an adjustment is needed.⁸ I believe that this approach continues to be the simplest and most direct way to calculate the rate of inflation and reduce the risk of errors. Furthermore, it is a familiar approach for parties⁹ and the general public.¹⁰

[15] I find it appropriate to continue using Statistics Canada's Consumer Price Index monthly series for Canada, all-items, as mentioned in past decisions of the Board¹¹ and I further specify using data series that are not seasonally adjusted and not adjusted for taxes.¹² In my view, this data series reflects the actual values of all types of goods and services as it does not include intermediary seasonal adjustment or transformation, nor does it exclude any specific types of goods or services. As such, I find that it is the most representative, most relevant and least distorted series for our purposes.

[16] The Board's approach has been to calculate the rate of inflation from the last time an adjustment was applied to the most recently available full-year of data.¹³ This aligns with s. 68.1(2) of the *Copyright Act*, where a proposed tariff's effective period is expressed in calendar years.¹⁴ It is also in keeping with the principle of using known values to adjust for inflation instead of

⁷ *SOCAN, Re: Sound – Tariff for CBC Radio 2006-2011* (8 July 2011), (reasons), online : CB <<https://decisia.lexum.com/cb-cda/decisions/en/item/366708/index.do>>, at para 83 [*CBC Radio (2006-2011)*].

⁸ See *ibid* at para 91; *SOCAN – Various Tariffs 2007-2017* (5 May 2017), CB-CDA 2017-038 (reasons) at para 7.

⁹ See e.g. *Re: Sound Tariff 3 – Background Music 2010-2015* (1 September 2017), CB-CDA 2017-091 (reasons), at para 103.

¹⁰ See Bank of Canada, "Inflation Calculator" (website) online: <<https://www.bankofcanada.ca/rates/related/inflation-calculator/>>, (the Bank of Canada and other reputable organizations use this methodology to calculate inflation. The only difference is that the Bank of Canada's online inflation calculator covers the period from April to April for each year, whereas I calculate the rate of inflation from January to December).

¹¹ *Application to fix royalties for a licence and its related terms and conditions (SODRAC v CBC, 2008-2012 [Redetermination])* (26 June 2020), 2020 CB 001 (reasons), online : CB <<https://decisions.cb-cda.gc.ca/cb-cda/1/en/item/481691/index.do>>, at para 109 (for all-items); *CBC Radio 2006-2011*, supra note 8 at para 84 (for monthly).

¹² Statistics Canada, "Consumer Price Index, monthly, not seasonally adjusted" (Table 18-10-0004-01) online: <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1810000401&pickMembers%5B0%5D=1.2&cubeTimeFrame.startMonth=12&cubeTimeFrame.startYear=2013&cubeTimeFrame.endMonth=12&cubeTimeFrame.endYear=2021&referencePeriods=20131201%2C20211201>>.

¹³ See e.g. *SOCAN – Various Tariffs 2007-2017*, supra note 8 at paras 5-6.

¹⁴ *Copyright Act*, RSC 1985 c C-42. [*Copyright Act*].

forecasting inflation.¹⁵ Although SOCAN did not specify an adjustment period, I find that it should start on January 2014 and end on December 2021, the most recently available full-year of data. The Board last adjusted SOCAN 3.C in 2017, increasing the tariff rate for 2015 to 2017 to reflect inflation for the period between 2005 and 2013.¹⁶

[17] The cumulative inflation rate for this period is 16.98%, which translates into a royalty rate of 5.50 cents per day per capacity. SOCAN proposed a royalty rate of 5.57 cents per day per capacity, which is an inflationary increase of 18.58% and in my view, an over-estimation. It is not surprising that the proposed increase differs from the real inflation as data was not available for August to December 2021 when SOCAN filed their tariff proposals on October 15, 2021.¹⁷

C. ISSUE 3: WHETHER OTHER CHANGES SHOULD BE MADE TO THE TEXT OF THE PROPOSED TARIFF

[18] The Proposed Tariff includes references to “licences” and “licensees”. I remove these references because, under the *Copyright Act*, when seized of proposed tariffs, the Board’s mandate is to fix royalty rates and related terms and conditions in approved tariffs.¹⁸ The Board’s mandate in approving tariffs does not include the issuance of licences. According to the Supreme Court of Canada in *York v Access Copyright*,¹⁹ it is the role of collective societies to issue licences for collectively managed rights. Proceeding this way is in line with recent decisions,²⁰ and does not change the scope of the application of the tariff.

[19] The Proposed Tariff includes a “General Provisions” section. SOCAN’s practice in the past was to file several tariff proposals in a single document. This section, applicable to all tariff proposals, was traditionally located at the beginning of the document. Although SOCAN filed the Proposed Tariff separately, it included this same General Provisions section. The section includes provisions made redundant by the removal of licence language, such as definitions of “licence” and “licence to perform”. I remove these provisions. Doing so does not alter the scope of the tariff.

[20] Additionally, the General Provision section include a provision that royalties are payable upon granting of the licence, and a statement that SOCAN has the right to terminate a licence for breach of the licence terms and conditions. These provisions touch on the area of liability and the provisions of the *Act* applicable to remedies against users governed by a tariff. Therefore, it is a

¹⁵ See e.g. *SOCAN 9 (2018-2023)*, *supra* note 4 at para 17; *NRCC Tariff 3 – Background Music 2003-2009* (20 October 2006), (reasons), at paras 143-147; *Re: Sound Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment* (21 July 2017), CB-CDA 2017-076 (reasons), at paras 18-21.

¹⁶ *SOCAN – Various Tariffs 2007-2017*, *supra* note 8 at paras 4-8.

¹⁷ *Copyright Act*, *supra* note 14, s 68 (collectives file proposed tariffs on October 15 of the second year before the year in which the proposed tariff is to take effect—that is, 14 months in advance).

¹⁸ *Ibid*, s 66.501.

¹⁹ See *York University v Canadian Copyright Licensing Agency*, 2021 SCC 32 (for a discussion of the distinct role of the Board to approve tariffs and collective management societies to grant licences).

²⁰ See e.g. *SOCAN Tariff 18 – Recorded Music for Dancing (2018-2022)*, 2022 CB 04 at paras 40-42.

question of compliance and enforcement of the tariff rather than a question of approval. I remove these provisions, which will not alter the scope of the tariff.

[21] Finally, the remaining provisions describe the calculation of interest and that amounts are exclusive of any taxes. Similar to other recently approved tariffs,²¹ I move these two provisions to the “Terms and Conditions” section at the end of the tariff.

V. CONCLUSION

[22] After reviewing the evidence, I approve the Proposed Tariff with a modification to the royalties of 5.50 cents per day per capacity to reflect an adjustment for cumulative inflation of 16.98 %, and with other minor adjustments to the wording and order of the tariff provisions. I approve it as *SOCAN Tariff 3.C – Adult Entertainment Clubs (2023-2025)*.

²¹ See e.g. *ibid* at para 39.