

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2022-09-23
Citation *SOCAN Tariffs 12.A and 12.B (2023-2025)*, 2022 CB 15
Member Nathalie Théberge
Proposed Tariffs SOCAN Tariff 12.A – Theme Parks, Ontario Place Corporation and Similar Operations (2023-2025)
Considered SOCAN Tariff 12.B – Canada’s Wonderland and Similar Operations (2023-2025)

Approval of Proposed Tariffs

As

SOCAN Tariff 12.A – Theme Parks, Ontario Place Corporation and Similar Operations (2023-2025)

and

SOCAN Tariff 12.B – Canada’s Wonderland and Similar Operation (2023-2025)

REASONS FOR DECISION

I. OVERVIEW

[1] This decision relates to two tariffs proposed by the Society of Composers, Authors and Music Publishers of Canada (SOCAN): Tariff 12.A for theme parks, Ontario Place, and similar operations and Tariff 12.B for Canada’s Wonderland and similar operations (the “Proposed Tariffs”).

[2] The Proposed Tariffs 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 the Proposed Tariffs.

[4] After reviewing the evidence, I find that tariffs based on the Proposed Tariffs are fair and equitable, and approve them 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, 2021¹, the Board asked SOCAN to provide a Notice of Grounds for its Proposed Tariffs, which it filed on December 15, 2021.

[6] No objections were filed in regard to the Proposed Tariffs and, as such, the Notices of Grounds filed by SOCAN are the only evidence submitted in this proceeding.

A. TARIFF 12.A – THEME PARKS, ONTARIO PLACE CORPORATION AND SIMILAR OPERATIONS

[7] The previously approved tariff 12.A, for the years 2018 to 2022,² fixed a royalty rate of \$2.59 per 1,000 persons in attendance on days on which music is performed, rounded to the nearest 1,000, plus 1.5 % of live music entertainment costs. Users were required to report their estimated attendance and costs for each year as well as reporting actual attendance and costs for the previous year. The Board had fixed the same rate and reporting requirements for the years 2015-2017.³

[8] The Proposed Tariff 12.A for the years 2023 to 2025 includes a royalty rate of \$3.07 per 1,000 persons per day plus 1.5 % of live music entertainment costs. This is an increase of \$0.48 per 1,000 persons compared to the previously approved tariff. SOCAN did not propose an increase to the portion of the rate expressed as a percentage of costs. It explains that the proposed increase is based on inflation and calculated according to the Board's established inflationary adjustment methodology. SOCAN identifies an additional change to the tariff wording to remove references in the scope of the tariff to Tariffs 4 and 5 in keeping with the Board's *Practice Notice on Filing of Proposed Tariffs*.⁴ It describes users as theme parks that are similar to Ontario Place, such as the Toronto Zoo.

B. TARIFF 12.B – CANADA'S WONDERLAND AND SIMILAR OPERATIONS

[9] The previously approved tariff 12.B, for the years 2018 to 2022,⁵ fixed a royalty rate of \$5.60 per 1,000 persons in attendance on days on which music is performed, rounded to the nearest 1,000, plus 1.5 % of live music entertainment costs. Users were required to report their estimated attendance and costs for each year as well as reporting actual attendance and costs for the previous year. The Board had fixed the same rate and reporting requirements for the years 2015-2017.⁶

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

² *SOCAN Tariffs 12.A – Theme Parks, Ontario Place Corporation and Similar Operations and 12.B – Paramount Canada's Wonderland Inc and Similar Operations (2018-2022)* (21 May 2021), 2021 CB 4 (reasons), online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/497473/index.do>> [*SOCAN 12.A and 12.B (2018-2022)*].

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

⁴ *Practice Notice on the Filing of Proposed Tariffs* (5 October 2021), PN 2019-004 rev. 1, at p 2 online: <https://cb-cda.gc.ca/en/procedure/practice-notices> [PN 2019-004 rev. 1].

⁵ *SOCAN 12.A and 12.B (2018-2022)*, *supra* note 2.

⁶ *SOCAN – Various Tariffs (2007-2017)*, *supra* note 3.

[10] The Proposed Tariff 12.B for the years 2023 to 2025 includes a royalty rate of \$6.64 per 1,000 persons per day plus 1.5 % of live music entertainment costs. This is an increase of \$1.04 per 1,000 persons compared to the previously approved tariff. SOCAN did not propose an increase to the portion of the rate expressed as a percentage of costs. It explains that the proposed increase is based on inflation and calculated according to the Board's established inflationary adjustment methodology. SOCAN identifies an additional change to the tariff wording to remove references in the scope of the tariff to Tariffs 4 and 5 in keeping with the Board's *Practice Notice on Filing of Proposed Tariffs*.⁷ It describes users as operators of theme parks, including Canada's Wonderland.

III. ISSUES

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

1. Whether the previously approved tariffs are appropriate proxies for the Proposed Tariffs;
2. Whether inflationary adjustments are appropriate; and
3. Whether other changes should be made to the text of the Proposed Tariffs.

IV. ANALYSIS

A. ISSUE 1 - WHETHER THE PREVIOUSLY APPROVED TARIFFS ARE APPROPRIATE PROXIES FOR THE PROPOSED TARIFFS

[12] I find that the previously approved tariffs are appropriate proxies in this proceeding.

[13] 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.⁸ In recent decisions, the Board has identified changes in the relevant market as one potential indicator of whether an adjustment to the rate is appropriate or necessary.

[14] The previously approved tariffs were issued on May 22, 2021.⁹ 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. Of note, both Proposed Tariffs contain the same rate of 1.5 % of live music entertainment costs as in the previously approved tariffs.

⁷ PN 2019-004 rev. 1, *supra* note 4 at p 2.

⁸ See *e.g.*, *SOCAN Tariff 9 – Sports Events (2018-2023)* (1 October 2021), 2021 CB 6 [*SOCAN 9 (2018-2023)*]; *SOCAN Tariff 22.G – Game Sites (2007-2019)* (5 August 2022), 2022 CB 7; *CBRA Media Monitoring Tariffs (2023-2025)* (25 March 2022), 2022 CB 2.

⁹ *SOCAN 12.A and 12.B (2018-2022)*, *supra* note 2.

[15] 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 proxies.

B. ISSUE 2: WHETHER INFLATIONARY ADJUSTMENTS ARE APPROPRIATE

[16] I approve an inflationary adjustment of 16.98 % to the flat rate of per 1,000 persons in both Proposed Tariffs. For Tariff 12.A, I approve a royalty rate of \$3.03 per 1,000 persons per day. For Tariff 12.B I approve a royalty rate of \$6.55 per 1,000 persons per day. Both approved rates are slightly lower than those proposed by SOCAN.

[17] SOCAN submits that its proposed increases to the royalty rates, compared to the previously approved tariffs, are adjustments to account for inflation “based on the Board’s established inflationary adjustment methodology”.¹⁰ SOCAN does not say which years and months, nor which data series it included in its calculation. In both tariffs it proposes an inflationary adjustment of 18.58 %.

[18] 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 (2006-2011)*, failing to adjust royalty payments for inflation would allow it to erode the value of music.¹¹ I find this statement to be valid in this proceeding as well.

[19] I 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.

[20] 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.¹² I believe that this approach continues to be the simplest and most direct way to calculate the rate of inflation and reduces the risk of errors. Furthermore, it is a familiar approach for parties¹³ and the general public.¹⁴

¹⁰ Notice of Grounds for Proposed Tariff SOCAN 12.A and SOCAN 12.B (2023-2025) (15 December 2021).

¹¹ *SOCAN, Re: Sound – Tariff for CBC Radio 2006-2011* (8 July 2011), (reasons), online : CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366708/index.do>>, at para 83 [*CBC Radio (2006-2011)*].

¹² See *ibid* at para 91; *SOCAN – Various Tariffs (2007-2017)*, *supra* note 3 at para 7.

¹³ See e.g. *Re: Sound Tariff 3 – Background Music 2010-2015* (1 September 2017), CB-CDA 2017-091 (reasons) at para 103.

¹⁴ 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).

[21] 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 Board¹⁵ and I further specify using data series that are not seasonally adjusted and not adjusted for taxes.¹⁶ 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.

[22] 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.¹⁷ This aligns with s. 68.1(2) of the *Copyright Act*, where a proposed tariff's effective period is expressed in calendar years.¹⁸ It is also in keeping with the principle of using known values to adjust for inflation instead of forecasting inflation.¹⁹ 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 Tariffs 12.A and 12.B in 2017, increasing the tariff rate for 2015 to 2017 to reflect inflation for the period between 2005 and 2013.²⁰

[23] The cumulative inflation rate for this period is 16.98 %. For Tariff 12.A this translates into a royalty rate of \$3.03 per 1,000 persons per day. For Tariff 12.B it translates into a royalty rate of \$6.55 per 1,000 persons per day. SOCAN proposed rates of \$3.07 and \$6.64 respectively, which is an inflationary increase of 18.58 % and in my view, an over-estimation. It is not surprising that the proposed increases differ from the real inflation as data was not available for August to December 2021 when SOCAN filed their tariff proposals on October 15, 2021.²¹

¹⁵ *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/en/item/481691/index.do>>, at para 109 (for all-items); *CBC Radio (2006-2011)*, *supra* note 11 at para 84 (for monthly).

¹⁶ 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=2013|201%2C2021|201>>.

¹⁷ See e.g. *SOCAN – Various Tariffs (2007-2017)*, *supra* note 3 at paras 5-6.

¹⁸ *Copyright Act*, RSC 1985 c C-42 [*Copyright Act*].

¹⁹ See e.g. *SOCAN 9 (2018-2023)*, *supra* note 8 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.

²⁰ *SOCAN – Various Tariffs (2007-2017)*, *supra* note 3 at paras 4-8.

²¹ *Copyright Act*, *supra* note 18, 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).

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

[24] SOCAN proposed changes to clarify that the tariffs do not apply to concerts for which a separate or additional admission charge is made in addition to any charge for entrance. I approve this change because it is in accordance with the Board’s *Practice Notice of Filing of Proposed Tariffs*.²² I decline, however, to approve a provision proposed by SOCAN in both tariffs stating that such concerts are subject to another SOCAN tariff. I am not seized of those other tariffs.

[25] The Proposed Tariffs include 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.²³ 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*,²⁴ it is the role of collective societies to issue licences for collectively managed rights. Proceeding this way is in line with recent decisions²⁵ and does not change the scope of the application of the tariff.

[26] The Proposed Tariffs include 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 Tariffs 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 tariffs.

[27] 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 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.

[28] Finally, the remaining provisions describe the calculation of interest and that amounts are exclusive of any taxes. Similar to other recently approved tariffs,²⁶ I move these two provisions to the “Terms and Conditions” section at the end of the tariff.

²² PN 2019-004 rev. 1, *supra* note 4.

²³ *Copyright Act*, *supra* note 18, s 66.501.

²⁴ 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).

²⁵ See e.g. *SOCAN Tariff 18 – Recorded Music for Dancing (2018-2022)* (3 June 2022), 2022 CB 4 (reasons), at paras 40-42.

²⁶ *Ibid* at para 39.

V. CONCLUSION

[29] After reviewing the evidence, I approve Tariffs 12.A and 12.B with respective royalty rates of \$3.03 and \$6.55 per 1,000 persons in attendance on days on which music is performed, rounding to the nearest 1,000 persons plus 1.5 % of live music entertainment costs. These modifications reflect an adjustment for cumulative inflation of 16.98 %. I also approve other minor modifications to the wording and order of the tariff provisions. I approve the Proposed Tariffs as *SOCAN Tariff 12.A – Theme Parks, Ontario Place Corporation and Similar Operations (2023-2025)* and *SOCAN Tariff 12.B – Canada’s Wonderland and Similar Operation (2023-2025)*.