Copyright Board Canada

Commission du droit d'auteur Canada

Date	2023-09-08
Citation	*SOCAN Tariff 22.A (2014-2018)*, 2023 CB 5
Member	The Honourable Luc Martineau
Proposed Tariffs Considered	SOCAN Tariff 22.A – Online Music Services (2014) SOCAN Tariff 22.A – Online Music Services (2015) SOCAN Tariff 22.A – Online Music Services (2016) SOCAN Tariff 22.A – Online Music Services (2017) SOCAN Tariff 22.A – Online Music Services (2018)

Application to Exclude Certain Acts from the Approved Tariff

REASONS FOR DECISION

I. OVERVIEW

[1] SOCAN filed an application (the "Application")[1] to exclude from the approved tariff certain acts set out in the following proposed tariffs: SOCAN Tariff 22.A – Online Music Services ("OMS") for the years 2014, 2015, 2016, 2017 and 2018 (the "Proposed Tariffs").

[2] The Application is approved. It meets the criteria in the *Copyright Act* (the "Act")[2], and does not merit an award of costs, as had been requested by some Parties.

II. BACKGROUND

[3] The acts which SOCAN seeks to exclude from the Proposed Tariffs are communications of musical works by on-demand streams and recommended streams, including such streams by a hybrid service (as these terms are defined in the Proposed Tariffs).

[4] Online communications of musical works in audiovisual content (i.e., "music videos") are not part of the Application.

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[1] SOCAN, Application to Amend Proposed Tariff SOCAN 22.A for the Years 2014-2018, 12 April 2023. [Application]

[2] *Copyright Act*, RSC, 1985, c. C-42, sec. 69(b). [Copyright Act]

[5] The Application was filed after the oral hearing in the *Online Music Services (SOCAN: 2007-2018)* proceeding (the "OMS Proceeding"), in which on the Proposed Tariffs were being considered, was completed.

[6] The only comments or objections in relation to the Application were filed by Pandora (an objector to the Proposed Tariffs) and SiriusXM Canada (an intervener in the OMS Proceeding)("SiriusXM"). They do not oppose the Application. However, they request that costs be awarded against SOCAN for the untimely Application. It was described as an abuse of SOCAN's right to withdraw a portion of the Proposed Tariffs.

[7] SiriusXM also argued that the Application had spillover implications on the evaluation of another proposed tariff (namely Tariff 22.B, which relates to online communications of musical works by a satellite radio service). These submissions are outside of the scope of the Application, and may be addressed in the decision on the remaining Proposed Tariffs' approval.

III. ISSUES

[8] We need to decide whether the Application meets the criteria in the Act, as well as whether costs should be awarded. We consider three issues:

1. Has the applicant given sufficient notice?
2. Has the impact of the Application on all persons who paid royalties been considered?
3. Should costs be awarded in the present case?

IV. ANALYSIS

A. ISSUE 1: HAS THE APPLICANT GIVEN SUFFICIENT NOTICE?

i. Finding

[9] One of the conditions to a successful application is that SOCAN has provided sufficient public notice of its intention to make the Application.[3]

[10] We find that SOCAN has provided sufficient public notice.

ii. Submissions

[11] SOCAN explains the steps it took to meet this condition, as follows.

[12] On February 22, 2023, SOCAN published a "Notice of Intent to Amend the Proposed Tariffs" (the "Notice"), in English and in French, on its website at www.socan.com[4] and on the website for its magazine publication, Words and Music, at www.socanmagazine.ca. It also featured that magazine publication on the homepage of its main website.

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[3] *Ibid* sec. 69.1(1)(a).
[4] See Application, *supra* note 1, Schedule "D".

[13] The same day, SOCAN informed the Board of its intention to make this application. SOCAN provided the Board with copies of the Notice, in English and French, and requested that the Board publish the Notice on its website.[5]

[14] As a courtesy, SOCAN copied its February 22, 2023, email to all current participants in the OMS Proceeding and all persons who, to SOCAN's knowledge, were former participants in the OMS Proceeding.

[15] On February 23, 2023, the Board published a copy of the Notice on its website, in English and French.[6]

[16] On February 27, 2023, SOCAN republished the Notice, in English and French, on the www.socanmagazine.ca website to ensure that the magazine publication remained featured on the homepage of its main website.[7]

[17] The Notice explains the nature and purpose of the Application in plain language. It contains hyperlinks to the Proposed Tariffs on the Board's website and states that any inquiries may be submitted to SOCAN at an email address provided in the Notice. The Notice states that SOCAN intended to make its application during the week of March 26, 2023.

[18] SOCAN states that it has not received any comments, objections, or inquiries in response to the publication of the Notice or its distribution by email.

iii. Consideration

[19] The Board's previous decisions on applications to withdraw a proposed tariff have found that the posting of a notice on a collective society's and on the Board's website is an adequate means of providing public notice. Furthermore, the Board in these decisions concluded that doing so for 30 days or more was a sufficient period of time.[8]

[20] We follow the same approach in this case.

[21] We accept that SOCAN has provided public notice for at least 30 days, in the manner it describes. We further note that SOCAN has complied with the Board's *Practice Notice on Filing an Application to Withdraw a Proposed Tariff* (the "Withdrawal Practice Notice").[9] It has provided the requested information[10] in support of its application.[11]

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[5] *Ibid*, Schedule "E".
[6] *Ibid*, Schedule "F".
[7] *Ibid*, Schedule "G".
[8] *CSI Online Music Services Tariff (2014-2018)*, 2022 CB 3 (25 March 2022), online : CB <https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/520904/index.do>. [*CSI OMS (2014-2018)*]
[9] *Practice Notice on Filing an Application to Withdraw a Proposed Tariff* (22 August 2022), PN 2022-008, online: <https://cb-cda.gc.ca/sites/default/files/inline-files/PN-008%20-%20Withdrawal%20of%20Proposed%20Tariff_0.pdf> .
[10] For ex., screenshots or other electronic copies of, or links to, any notice posted on, as applicable, the collective's website; and any electronic platform commonly used by the affected users, such as a trade— or association— specific website.
[11] See Application, *supra* note 1, Schedules "D" and "G".

B. ISSUE 2: HAS THE IMPACT OF THE APPLICATION ON ALL PERSONS WHO PAID ROYALTIES BEEN CONSIDERED?

i. Finding

[22] We find that the impact of the Application on all persons who paid royalties that would not be payable if the Application were approved has been properly considered.[12]

ii. Law

[23] The Act requires that the Board be satisfied that every person who, in respect of the proposed effective period, has paid royalties that would not be payable if the application were approved has:

i) consented to the application

ii) received a refund of the royalties, or

iii) entered into an agreement under subsection 67(3) that covers the act, repertoire or proposed effective period that is the subject of the application.[13]

[24] This ensures that no payments are made for acts permitted by tariff provisions that are not approved.

iii. Submissions

[25] SOCAN defines four groups of users:

a. Group 1 - Users who have entered into agreements with SOCAN prior to the Application

[26] SOCAN submits that Group 1 is not concerned by the Application because the royalties would be payable under pre-existing agreements even if the Application is approved. Except for one relating to a single user, copies of the agreements have been filed prior to the hearing

b. Group 2- Users who have entered into agreements with SOCAN for the purpose of the Application

[27] SOCAN has provided the list of users in Group 2. SOCAN explains that these users have agreements that have the same effect as Group 1 agreements: They bind the user even if the Application is approved. As a result, SOCAN submits that the Withdrawal Practice Notice does not apply, which means that agreements with Group 2 users need not be filed.

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[12] Copyright Act, *supra* note 2.
[13] *Ibid*.

[28] Alternatively, SOCAN submits that Group 2 agreements cover the act, repertoire or proposed effective period that is the subject of the Application. As such, they meet one of the statutory conditions for approval.[14]

c. Group 3 - Users that have received refunds for the purpose of the Application

[29] SOCAN identifies Group 3 users who have received a refund. SOCAN states that it provided a refund to each Group 3 users either by posting a credit to their SOCAN royalty account, with immediate effect, or a cheque to their mailing address.

[30] SOCAN submits that the posting of a credit is a sensible and practical way to effect the delivery and receipt of a refund, reducing transaction costs for all parties. SOCAN underscores that it provided each user with the option to receive the refund directly, rather than in the form of a credit.

[31] SOCAN delivered notices of the refunds to each Group 3 users. Copies of SOCAN's letters to each user were filed with the Application.[15]

[32] SOCAN's refund program was divided into two subgroups: less active payors and active payors.

[33] Less active payors, who would be less likely to draw down the full amount of the credit quickly, were offered two options: have a credit on their SOCAN account for five years and receive a direct refund upon request, or receive a refund of the unused credit portion at an earlier date.[16] Only one user from this subgroup accepted the credit. All others were sent a refund by cheque.[17]

[34] Active payors also had the option of a credit or a refund by cheque. All of them received a refund in the form of a credit posted to their SOCAN royalty account.

[35] SOCAN submits that the refund requirement set out in the Act[18] is satisfied in relation to Group 3 users.

d. Group 4 - Users that are no longer in existence or are inactive

[36] SOCAN explains that one user has been dissolved and another is no longer active.

[37] One user is a corporation that has been dissolved. SOCAN filed documents to evidence asset liquidation and corporate dissolution.[19]

[38] Relying on prior decisions on the same type of issue, SOCAN submits that this user ought not to be taken into account in the Board's consideration of the Application.

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[14] *Ibid*, sec. 69.1(1)(b)(iii).
[15] See Application, *supra* note 1, Schedule "N".
[16] *Ibid*, Schedule "N".
[17] *Ibid*, Schedule "O".
[18] Copyright Act, *supra* note 2, sec. 69.1(1)(b)(ii).
[19] See Application, *supra* note 1, Schedules "P" and "Q".

[39] The other user was acquired by another online music service. The latter operated the newly acquired brand under a SOCAN licence. The licence was based on a tariff different from the one at hand. The service under that brand was discontinued in 2020.

[40] SOCAN posits that those services are not relevant to the Application.

iv. Consideration

[41] We have analyzed the submissions and reviewed all the information contained in the Application's schedules.

[42] With respect to agreements in existence prior to the Application (**Group 1** agreements), they take precedence over any approved tariff (s. 74 of the Act). Royalties are payable even if the Application were approved. Such royalties are therefore not relevant to the Application.[20]

[43] With respect to **Group 2** agreements, they satisfy the condition in the Act if they "cover[s] the act, repertoire or proposed effective period that is the subject of the application."[21]

[44] We note that Group 2 agreements are classified as highly confidential. The Withdrawal Practice Notice provides that in such a case, they need not be filed, but the collective must provide—at least—a description of the acts, repertoire, and period covered by those agreements.

[45] SOCAN has duly satisfied this requirement in its Application for Group 2 users.

[46] With respect to **Group 3** users (refunds), SOCAN has provided refund cover letters. This is consistent with the Withdrawal Practice Notice, which requires filing correspondence or other statements of affected users confirming or demonstrating that they have received a refund of the royalties from the collective.

[47] The majority of Group 3 users received a cheque.[22]

[48] Other Group 3 users received a credit note applied to their SOCAN account.[23] The question is whether a "credit note" can be considered as analogous to a "refund" under the Act? While "refund" is not defined in the Act, and its meaning may not typically include a credit, all Group 3 users had the option to choose between a credit and a refund. The credit option was efficient for those identified as "active licensees": Because of their historical and ongoing usage and payments, SOCAN expected that the credit would be fully utilized by such users quickly.

[49] A strict reading of the refund requirement (as set out in subparagraph 69.1(1)(b)(i) of the Act) is likely counterproductive when—as such is the case—users are unopposed to a refund in the form of a credit note. Moreover, the credits were effective immediately, and unconditional. Users were provided a copy of an invoice receipt showing the credit to their account. In effect, other than

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[20] Copyright Act, *supra* note 2, sec. 69.1(1)(b), does not apply when royalties are paid under a different source of obligation.
[21] *Ibid,* sec. 69.1(1)(b)(iii).
[22] See Application, *supra* note 1, Schedule "O".
[23] *Ibid*, Schedule "N".

transaction costs, there is little difference between a refund and a credit note for users who are frequent or high-royalty payors. Finally, a credit respects the purpose of the provision since, in effect, no royalties will have been paid under the portion of the Proposed Tariffs that is withdrawn.

[50] In terms of **Group 4** users (i.e., entities that have been dissolved or are no longer active), as the Board has done in similar situations,[24] we accept the copies of the Certificate of Surrender and a State of Delaware corporate report as evidence of dissolution.[25] The principle is that—as dissolved entities—they ought not to be considered in the consideration of this application.

[51] Regarding the user which was acquired by another user, licensed under a different tariff, and no longer active, we agree that, one way or another, royalties associated with this user are not relevant to this application.[26]

[52] In conclusion, all applicable statutory conditions have been satisfied.

C. ISSUE 3: SHOULD THE BOARD AWARD COSTS?

i. Finding

[53] We find that a costs award is not warranted in the present circumstances.

ii. Request for costs

[54] Pandora argues that SOCAN seeks to withdraw the core of its proposed tariff only after requiring the Board, Pandora, and the interveners to go through an entire contested hearing. Pandora does not oppose SOCAN's application but requests that the order granting the application include a requirement that SOCAN pay Pandora's costs "thrown away."

[55] Pandora adds the following arguments. First, SOCAN's application continues a pattern of untimely and unprincipled attempts to avoid an informed consideration of the tariff it proposed, each blind to the waste of resources caused by its conduct.

[56] Second, SOCAN offers no explanation or justification for the timing of its application. Indeed, its purported reasons are consistent only with a much earlier withdrawal.

[57] Third, SOCAN remains unhappy about the challenges mounted against its proposed tariff and seeks withdrawal as a means of nullifying those challenges.

[58] Fourth, while the Act entitles SOCAN to withdraw portions of its proposed tariff, it does not shield SOCAN from the consequences of its abusive exercise of that right. Pandora argues that there can and should still be consequences for SOCAN arising from the unjustified lateness of its withdrawal.

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[24] *CSI OMS (2014-2018)*, *supra* note 8.
[25] See Application, *supra* note 1, Schedule "Q".
[26] *Ibid*.

[59] Pandora submits that the Board should order SOCAN to pay costs to Pandora for the hundreds of thousands of dollars in costs wasted in connection with what SOCAN now says was an unnecessary hearing in the OMS Proceeding. Pandora further claims that the Board has both the express and implied jurisdiction to do so in the present exceptional circumstances.

[60] SiriusXM urges the Board to consider an award of costs to Pandora, Apple and SiriusXM, all of whom incurred unnecessary expenses as a result of SOCAN's decision to put the Board and the participants through a long hearing, and only then decide to withdraw 22.A. SiriusXM argues that, under s. 66.7 of the Act, the Board has "with respect to … other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record." Superior courts have the inherent power to award costs on a discretionary basis when the occasion calls for it, even when such powers are not explicitly identified in those courts' rules.

iii. Response

[61] SOCAN argues that the request for costs by Pandora and SiriusXM is unprecedented and unwarranted. It suggests that even if the Board has the power to award costs, this is not an appropriate case in which to do so.

[62] According to SOCAN, it has validly exercised a statutory right to apply to amend its Proposed Tariffs within the period prescribed by statute. It did so promptly upon satisfying the statutory criteria. It is reasonable for a collective society to choose no longer to pursue a proposed tariff that, due to changes in the market, would no longer serve a practical purpose. This promotes efficiency for the collective society, its members, and all stakeholders by, among other things, avoiding ongoing steps and efforts, including potential judicial review proceedings. SOCAN argues that Parliament's statutory scheme, which was amended in 2019 to permit it to enter into licence agreements with users and to withdraw tariffs, suggests that such conduct ought to be encouraged, not penalized.

[63] According to SOCAN, the request for costs also violates the Board's commitment to the principles of predictability, transparency, and fairness. There is no express authorization or indication in the Act or its regulations, or in the Board's Rules of Practice and Procedure, practice notices, or jurisprudence, that the Board has the power to, or will, award costs. All available information—including reports commissioned by the Government of Canada—indicates that the Board is unable to award costs. Thus, even if the Board is empowered to award costs, no collective society, objector, or intervener could have either a legitimate expectation that the Board might make an award of costs between parties or notice of the factors that might lead the Board to do so.

[64] In any event, even if the Board has a general power to award costs, SOCAN argues that it lacks the power to do so as a direct or indirect consequence of an application under section 69 of the Act, for which the Board's jurisdiction is limited to examining whether the statutory criteria are satisfied.

[65] SOCAN further notes that Pandora and SiriusXM are not prejudiced by SOCAN's application. Objectors and interveners participate in a tariff proceeding with knowledge that, because of section 69, a tariff might not be approved. According to SOCAN, this is similar to the

risk to a collective society, in view of the decision of the Supreme Court of Canada in *York University v. Access Copyright*, that, if a tariff is approved, users might decline to be licensed on its terms. Finally, SOCAN argues that neither Pandora nor SiriusXM would have used any Tariff 22.A approved by the Board in any event: Pandora did not offer its services to the Canadian public during the tariff period, and has not done so at any time since, while SiriusXM would be subject to Tariff 22.B once that tariff is approved.

iv. Consideration

[66] The Act provides that

> [t]he Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its decisions and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.[27]

[67] Other tribunals also have powers granted to them by similar "superior court of record" provisions. ("SCR Provision") A provision very similar to that of the Copyright Board's was interpreted by the Federal Court of Appeal in the reference *National Energy Board Act (Can.)* ("*National Energy Board"*).[28] In that decision, the Federal Court of Appeal held that the powers of the National Energy Board, as defined in its SCR Provision, were those of a superior court of record *only* in relation to *evidence gathering*.[29] The SCR Provision did not grant a power to award costs outside evidence-gathering related situations.[30]

[68] However, as Pandora emphasizes, the role of costs has evolved since the *National Energy Board* decision. Costs are now not only a means to compensate winners but also a means "to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious" or "as a tool in the furtherance of the efficient and orderly administration of justice."[31]

[69] Moreover, even if the Board's SCR Provision does not explicitly grant the Board to award costs, Courts have long recognized that the Board has certain implicit powers.[32] It is also well

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[27] Copyright Act, *supra* note 2.

[28] *National Energy Board Act (Can.) (Re)*, 1986 CanLII 4033 (FCA), [1986] 3 FC 275, interpreting the following provision: "The Board has, with respect to the attendance, swearing and examination of witnesses, *the production and inspection of documents*, the enforcement of its orders, the entry upon and inspection of property and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record." (emphasis added to identify the difference with the *Act*'s provision)

[29] "Such powers may be characterized as evidence-gathering powers. I do not think of the power to award costs as being ejusdem generis with such powers", *National Energy Board* at para 8.

[30] In contrast, see general powers of a superior court of record vested in a tribunal in *Kaloti v. Canada (Minister of Citizenship and Immigration) (C.A.)*, 2000 CanLII 17123 (FCA), [2000] 3 FC 390.

[31] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, para 25.

[32] For ex., *CTV Television Network Ltd. v. Canada (Copyright Board) (C.A.)*, 1993 CanLII 2922 (FCA), [1993] 2 FC 115: "I firmly believe that the Board possesses the incidental powers which are necessary and inexorably linked to the exercise of its function which is of fixing the rates which the performing rights societies can charge. This may entail deciding preliminary or collateral issues and questions of fact or of law."

established that the Board is the master of its own procedure.[33] This entails protecting the tribunal's process from abuse.[34]

[70] The power to control one's process may include the power to award costs. In the case of *R. v. Fercan Developments Inc*.[35] (*Fercan*), the role of a provincial court was compared to that of a superior court. The Ontario Court of Appeal concluded:

> Therefore, even though a provincial court does not have any inherent jurisdiction, it does have the authority to control its own process. Though that power comes through an implied grant of power rather than inherent jurisdiction, I see no reason why a provincial court's authority to control its own process should not provide the same power to award costs.[36]

[71] In any case, the issue of whether the Board has an implicit power to award costs is a live issue only if the facts at hand warrant the awarding of costs. We underscore that a decision to award costs is discretionary.

[72] The Board would not award costs in the traditional sense, to reward a winner for some of the legal costs it incurred. In a regulatory process, administered in the public interest, there is no winner or loser.

[73] Instead, Pandora has asked for costs on the basis of abuse of process. Thus, we would only do so if SOCAN's application actually constituted an abuse of process or an unnecessary procedural step. This is not the case.

[74] The Application explains that, at the time of the hearing, SOCAN had entered licence agreements with six online music service providers, but that an additional 18 users had operated pursuant to the continuation of rights under *SOCAN Tariff 22.A (2008-2010)* and *(2011-2013)* during the proposed tariff period. ("the Interim Tariff Users").

[75] The Application then explains the developments that took place after the hearing. In particular, it was not until after the hearing that SOCAN concluded licence agreements with six of the Interim Tariff Users. Having done so, SOCAN then provided refunds to the remaining Interim Tariff Users and moved promptly to file its application. (Among the 12 remaining Interim Tariff Users, one is no longer active and the other constituted a dissolved corporation. As such, no agreement could be concluded and no refund could be issued.)

[76] We agree that SOCAN has explained the timing and rationale for its application. We also agree that there is no basis for Pandora's suggestion that the Application was in any way motivated by dissatisfaction with the presentation of SOCAN's case at the hearing.

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[33] For ex., *Canadian Broadcasting Corp. v. SODRAC 2003 Inc*., 2015 SCC 57, [2015] 3 S.C.R. 615, para 94: "I do not, however, attempt to dictate the procedures the Board must follow in its licence proceedings, as it enjoys the discretion to set its own procedures and practices in each case, subject to its regulations as approved by the Governor in Council: *Copyright Act*, s. 66.6(1)."

[34] *Canada (Human Rights Commission) v. Canada Post Corp. (F.C.)*, 2004 FC 81 (CanLII), [2004] 2 FCR 581 at para 15; upheld on appeal: *Canadian Human Rights Commission v. Canada Post Corp*., 2004 FCA 363 (CanLII).

[35] *R. v. Fercan Developments Inc.*, 2016 ONCA 269 (CanLII).

[36] *Ibid* at para 53.

[77] We cannot identify any element of bad faith that would warrant an award of costs.

[78] Costs are unwarranted under present circumstances.

V. DECISION

[79] SOCAN Application is approved. As such, acts of communication to the public by telecommunication of musical works by on-demand streams and recommended streams, including such streams by a hybrid service (as these terms are defined in the Proposed Tariffs) are excluded from the approved tariff for all of the proposed effective period.

[80] Pandora's and SiriusXM's request for costs is dismissed.