

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Member Katherine Braun
Proposed Tariff Considered SOCAN Tariff 11.A – Circuses, Ice Shows, Fireworks Displays, Sound and Light Shows, Dance Shows and Similar Events (2023-2025)

Approval of Proposed Tariff

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***SOCAN Tariff 11.A – Circuses, Ice Shows, Fireworks Displays,
Sound and Light Shows and Similar Events (2023-2025)***

REASONS FOR DECISION

I. OVERVIEW

[1] This proceeding considers one proposed tariff 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 its repertoire, at circuses, ice shows, fireworks displays, sound and light shows, dance shows, and similar events for the years 2023 to 2025 (the “Proposed Tariff”).

[2] The Canadian Association for the Performing Arts (CAPACOA) is participating in this proceeding.

[3] Having reviewed the evidence on record, the Board finds that the previously approved tariff can serve as a basis to approve a fair and equitable tariff in this proceeding, subject to modifications.

[4] For the reasons that follow, the Board approves the Proposed Tariff, with modifications.

II. BACKGROUND

A. THE MOST RECENTLY APPROVED TARIFF

[5] *SOCAN Tariff 11.A, 2018-2022*¹ set a royalty rate of 1.6 per cent of gross receipts from ticket sales (exclusive of sales and amusement taxes), subject to a minimum fee of \$66.37 per event. No music use reporting requirements were specified in the Tariff.

B. THE PROPOSED TARIFF

[6] On October 15, 2021, SOCAN filed the Proposed Tariff, which covers the same activities as the last approved tariff, with a new addition of dance shows.² Like the last approved tariff, the Proposed Tariff specifies no reporting requirements.

[7] The Proposed Tariff includes a royalty rate of 1.6 per cent of gross receipts from ticket sales (exclusive of sales and amusement taxes), subject to a minimum fee of \$78.70 per event. This represents an 18.58% increase compared to the last approved tariff. SOCAN explains the proposed increase is reflective of inflation and calculated according to the Board's established inflation adjustment methodology.

C. PROCEDURAL HISTORY

[8] On November 10, 2021, the Board asked SOCAN to file a Notice of Grounds for Proposed Tariff for various proposed tariffs filed on October 15, 2021, including the Proposed Tariff.³ The Order also signalled that SOCAN could reply to an objection within 14 days of its receipt.

[9] SOCAN filed its Notice of Grounds for Proposed Tariff on December 15, 2021. It was published along with the Proposed Tariff, on the Board's website on January 10, 2022.

[10] On December 20, 2021, the Board advised potential users that if they wished to file objections to any proposed tariffs filed by SOCAN on October 15, 2021, they would be required to file a Notice of Grounds for Objection.⁴ CAPACOA filed an objection to the Proposed Tariff and a Notice of Grounds for Objection on February 9, 2022.⁵ SOCAN did not file a response to CAPACOA's objections.

[11] The Board advised parties on December 23, 2022⁶ that it was ready to proceed with a written hearing on the Proposed Tariff and fixed January 18, 2023 as the final day to file written submissions. SOCAN submitted its comments on January 18, 2023.

¹ *SOCAN Tariff 11.A (2018-2022)*, 2020 CB 010-T (August 8, 2020), C Gaz Supplement Vol. 154 No. 32.

² See *SOCAN – Various Tariffs 1997-2003* (reasons) (July 31, 1999) and *SOCAN – Various Tariffs 1997-2003* (approved tariff) (July 31, 1999) C Gaz Supplement Vol. 133, No. 31 : The list of activities covered by Tariff 11.A remains unchanged since 1998. Before 1998, Tariff 11.A covered ice shows and circus. Fireworks displays and sound and light shows were added in 1999 to the tariff for 1998 and 1999.

³ Order of the Board, CB-CDA 2021-053 (November 10, 2021).

⁴ Directive on Notice of Grounds for Objection, CB-CDA 2021-058 (December 21, 2021).

⁵ Letter from CAPACOA in response to Order CB-CDA 2021-053, February 9, 2022 and CAPACOA, Notice of Grounds for Proposed Tariff SOCAN 11.A (2023-2025), February 9, 2022.

⁶ Order of the Board CB-CDA 2022-068 (December 23, 2022).

III. ISSUES

[12] After reviewing the evidence on record, we have identified four issues to consider:

1. Is the previously approved tariff an appropriate proxy for the Proposed Tariff?
2. Should dance shows be included in the list of activities covered by the Proposed Tariff?
3. What should the adjustment for inflation be?
4. Are other changes to the wording of the Proposed Tariff appropriate?

IV. ANALYSIS

A. ISSUE 1: IS THE PREVIOUSLY APPROVED TARIFF AN APPROPRIATE PROXY FOR THE PROPOSED TARIFF?

[13] The Board finds that the previously approved tariff can serve as an appropriate proxy in this proceeding.

[14] The Board has frequently held that it is appropriate – absent reasons to the contrary – to use the last approved tariff as a proxy for what could be fair when a proposed tariff does not differ substantially from the most recently approved tariff. In recent decisions, the Board has identified changes in the relevant market as a potential indicator of whether an adjustment to royalty rates is appropriate or necessary.⁷

[15] The last tariff was approved on August 8, 2020. The Proposed Tariff is very similar; the percentage-based rate approach and terms and conditions (that is, the reporting requirements and audit provision), are identical to the last approved tariff. There is no information on the record suggesting that a change in the market has occurred.

[16] Therefore, we have no reason to question the appropriateness of the previously approved tariff serving as a proxy in this proceeding.

B. ISSUE 2: SHOULD DANCE SHOWS BE INCLUDED IN THE LIST OF ACTIVITIES COVERED BY THE PROPOSED TARIFF?

[17] The Board concludes that dance shows should not be added to the list of activities covered by the Proposed Tariff.

[18] The November 10, 2021 Order requesting SOCAN to file a Notice of Grounds for Proposed Tariff, was the first time that the Board requested a collective society to file such grounds. This filing is intended to provide potential users with information to enable them to determine whether they would object to a proposed tariff and, if so, on what basis. The Order provided that

⁷ See e.g. *SOCAN Tariff 9 – Sports Events (2018-2023)* 2021 CB 9 (October 1, 2021); *SOCAN Tariff 22.G – Game Sites (2007-2019)* 2022 CB 7 (August 5, 2022).

SOCAN was to identify and explain all changes made to its proposed tariff, compared to the last approved tariff, and to describe the expected effects of such changes.

[19] SOCAN notes in its Notice of Grounds for Proposed Tariff, that it added dance shows to the list of events covered by the Proposed Tariff, although no explanation for this change was provided.

[20] CAPACOA objects to the addition of dance shows in the Proposed Tariff. It notes that SOCAN currently licenses dance shows under Tariff 8 (Receptions, Conventions, Assemblies and Fashion Shows). CAPACOA is concerned that for large dance shows, the royalties payable under the Proposed Tariff (based on a percentage of gross receipts from sales tickets) would be higher than those currently payable under Tariff 8, which is a fee per event based on room capacity. CAPACOA also claims that the royalty structure of the Proposed Tariff is not suited for contemporary dance companies. The audience for such shows tends to be very small and dance companies often present a series of short performances on a given day. CAPACOA is concerned that dance companies would be subject to cumulative minimum fees.

[21] On January 18, 2023, the Board received a submission from SOCAN addressing its inclusion of dance shows in the list of events covered by the Proposed Tariff. SOCAN claims that the Tariff 11.A structure is the most suitable to account for the various types of dance shows.⁸ It notes that the manner in which music is used in dance shows is very similar to how music is used in the other events covered by the Proposed Tariff. SOCAN maintains that at times, music is even more fundamental and more extensively used in dance shows than in non-dance events covered by the Proposed Tariff.

[22] SOCAN also explains that in 2016, in the absence of a tariff that targeted dance shows, it proposed to its users to apply Tariff 4.A (Popular Music Concerts) to certain dance shows, such as “So You Think You Can Dance”. However, users expressed concerns with applying Tariff 4.A royalties to dance shows and SOCAN instead applied Tariff 8 royalties to these types of events. SOCAN claims that this was intended as an interim measure, and that it eventually concluded that dance shows had a closer similarity with events covered by Tariff 11.A, and therefore, decided to include dance shows in the Proposed Tariff.

[23] Finally, in terms of royalty comparison, SOCAN asserts that it would only be in rare instances that royalties payable under the Proposed Tariff would be higher than royalties payable under Tariff 8.

[24] Having reviewed all submissions on the record, the Board does not approve the inclusion of dance shows in the list of activities covered by the Proposed Tariff. While, in certain cases, royalties payable under the Proposed Tariff could be higher than those payable under Tariff 8,⁹ the decision not to include dance shows is only in part reflective of the foregoing.

⁸ Professional or amateur performances, ticketed or free-admission events, large or small venues, etc. See SOCAN submissions, January 18, 2023 at 1-2.

⁹ As an example, the royalty payable under Tariff 8 for a free event with dancing is \$44.13 when room capacity is comprised between 1 to 100, while the royalty payable for the same event under the proposed minimum fee in Tariff 11.A would be \$78.70.

[25] In our opinion, SOCAN's arguments in support of adding dance shows to the list of events covered in the Proposed Tariff are not supported by evidence. SOCAN did not demonstrate how the use of music in dance shows is similar to the use of music in other events covered by the Proposed Tariff. Nor did SOCAN clearly explain why music in dance shows should be valued in the same manner as music used in other events covered by the Proposed Tariff.

[26] Moreover, SOCAN noted in its submission that it initially intended to apply SOCAN Tariff 4.A royalties to certain dance shows, but instead, applied SOCAN Tariff 8 royalties for a period of five years, and then proposed to include dance shows under the Proposed Tariff. SOCAN offered no evidence on the results of applying Tariff 8 to dance shows over the five years to explain the switch to the Proposed Tariff. It remains unproven that the Proposed Tariff is the appropriate tariff for dance shows.

C. ISSUE 3: WHAT SHOULD THE ADJUSTMENT FOR INFLATION BE?

[27] The Board fixes an inflationary adjustment of 18.58% to the last approved minimum fee. This adjustment results in an annual minimum fee of \$78.70 per event, which is the fee proposed by SOCAN in the Proposed Tariff.

[28] In its Notice of Grounds for Proposed Tariff, SOCAN submits that its proposed rates are in line with the Tariff 11.A rates that have remained unchanged since 2015. SOCAN notes that its proposed inflationary adjustment of 18.58% was calculated according to the Board's established methodology for inflationary adjustment. However, SOCAN does not indicate for which months or years, nor which data series it used to carry out its calculations.

[29] Inflationary adjustments are appropriate because they preserve the purchasing power of right holders. The absence of such adjustments would lead to an erosion in the value of royalties levied by collective societies through tariffs.

[30] The Board's recent approach has been to calculate the inflation rate as the percentage change in the CPI (Consumer Price Index) between January of the first year and December of the last full year of available data. In general, the calculation begins after the last period for which an inflationary adjustment was made. In our opinion, this approach continues to be the simplest and most direct method of calculating the rate of inflation. Also, this method remains a familiar approach for parties and the general public. It also complies with the principle of using known values to adjust for inflation, rather than expected values.

[31] Although SOCAN did not establish an adjustment period, we conclude that it should start in January 2014 and finish in December 2022, which is the last full year of available data. The cumulative inflation rate for this period is 24.37%. While higher than SOCAN's proposed adjustment, the Board approves the 18.58% inflation adjustment proposed by SOCAN, for the following reasons.

[32] The Board generally refrains from approving rates that are much higher than those proposed, on the grounds that this could constitute a breach of procedural fairness for those affected by a proposed tariff, where such a potential breach could not be cured by additional notice and consideration of further submissions by affected parties.

[33] The purpose of publishing a proposed tariff is to:

- inform users that a collective society filed such a proposal;
- provide notice to the users of the proposed rates and terms; and
- permit them to object, if necessary, within the prescribed timeframe.¹⁰

[34] The decision to object or not is based, in part, on the rates and terms of the proposed tariff, as they were published. The Board cannot assume that a user who decided not to object would have made the same decision had the user known that rates higher than those published would be ultimately approved. However, a clear indication that inflationary increases are sought may alleviate this concern.

[35] In the decision *Tariff for the Retransmission of Distant Television Signals, 2014-2018*,¹¹ the collective societies asked during the proceeding, in relation to some of the years of the applicable period, for the approval of significantly higher royalties than those provided for in the proposed tariff published in the *Canada Gazette*. The Board refused to approve higher rates than those provided in the proposed tariff, on the grounds that this could result in prejudice to affected persons and thus undermine procedural fairness.¹² On judicial review of that decision, the Federal Court of Appeal concluded that the approval of rates higher than those proposed did raise procedural fairness issues and that the Board did not err in capping the royalties at the proposed rates.¹³ It is noteworthy that the increase in that proceeding was not based on inflation.

[36] Based on similar considerations of procedural fairness, the Board caps the royalties at the amounts proposed by SOCAN and, using an inflationary increase of 18.58%, approves an annual minimum fee of \$78.70 per event.

[37] The Board recognizes that the approved minimum fee does not reflect the full inflation rate for the applicable inflation calculation period. Therefore, the Board notes that when SOCAN files its next proposed tariff for these activities, it may take this into account. In particular, SOCAN may include in any inflation adjustment, the difference between the inflation adjustment the Board uses in this decision and the actual inflation rate during the January 2014 - December 2022 period.

D. ISSUE 4: ARE CHANGES TO THE WORDING OF THE PROPOSED TARIFF APPROPRIATE?

[38] In approving the Proposed Tariff, the Board makes the following modifications:

1. “Dance-shows” are not approved for inclusion in the Proposed Tariff and the words “dance shows” have been struck from the Proposed Tariff.
2. We are removing the “General Provisions” section of the Proposed Tariff, which includes

¹⁰ *Copyright Act*, RSC, 1985, c C-42, s 68.2 and 68.3. [Act]

¹¹ *Tariff for the Retransmission of Distant Television Signals 2014-2018*, CB 2019-056 (August 2, 2019).

¹² *Ibid* at para 234.

¹³ *Bell Canada v Copyright Collective of Canada*, 2021 FCA 148, at paras 88 and 95.

references to “licence” and “licensee”. These references are removed 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.¹⁴ The Board’s mandate in approving tariffs does not include the issuance of licences. As decided by the Supreme Court in *York v. Access Copyright*,¹⁵ it is the role of collective societies to issue licences. These changes do not alter the scope of the tariff.

3. We have deleted the clause stating that SOCAN may terminate any licence at any time upon 30 days written notice for breach of the licence terms and conditions. We are striking out this clause as it touches on the area of liability and the provisions of the *Copyright Act* applicable to remedies against users governed by a tariff. Therefore, it is a question of compliance and enforcement of a tariff rather than a question of approval.¹⁶
4. We have included a new “Terms and Conditions” section to address the remaining matters in the former “General Provisions” section, including the provisions pertaining to the calculation of interest and taxes.

V. DECISION

[39] Having reviewed the evidence on record, the Board finds that that the Proposed Tariff can serve as a basis to approve a fair and equitable tariff, subject to modification noted above. The Board is satisfied that the royalty rate and related terms and conditions set out in the Proposed Tariff are fair and equitable.

[40] The Board therefore approves the Proposed Tariff, with modifications, under the title *SOCAN Tariff 11.A – Circuses, Ice Shows, Fireworks Displays, Sound and Light Shows and Similar Events (2023-2025)*.

¹⁴ Act, *supra* note 10, ss 66.501 and 70(1).

¹⁵ *York University v Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32.

¹⁶ See *SOCAN Tariff 21 – Recreational Facilities Operated by a Municipality, School, College, University, Agricultural Society or Similar Community Organizations 2013-2020, CB 2018-222* (December 7, 2018) at para 18.