



[CB-CDA 2024-098]

ORDER OF THE BOARD

Matter: Tariff SOCAN 2.D - CBC Television Services (2015-2025)

November 25, 2024

I. SUMMARY

[1] On November 15, 2024, SOCAN wrote to the Board asking to vary Order **CB-CDA 2024-089**.

[2] The *Copyright Board Rules of Practice and Procedure* (the “*Rules*”) provide that “[a] party may submit a request to the case manager to vary a case management order made under rule 31.” (Rule 32(1)). They further provide that “[t]he case manager may vary the order if there are compelling reasons to do so.” (Rule 32(3)).

[3] For the reasons below, I believe there are no compelling reasons to do so, and the request is denied.

II. BACKGROUND

[4] A case management conference (“CMC”) was held on October 23, 2024, to discuss next steps. In attendance were SOCAN’s external and in-house counsel, as well as CBC’s external counsel.

[5] One of the “issues” to be discussed at the October 23, 2024, CMC, was “[w]hether SOCAN can ask for increases to base royalties by invoking a ground that were not disclosed in its notice of grounds?” (see joint CMC agenda sent by CBC counsel on October 18, 2024).

[6] The items on the agenda were the following:

1. Issues in play (SOCAN perspective)

1. Whether the *status quo* plus inflation is an appropriate way to set the royalty, and
2. If not, how should the Board go about applying its original formula (i.e. what data? Any adjustments?)

2. Issues in play (CBC perspective)

Base Royalties

1. Whether SOCAN can ask for increases to base royalties by invoking grounds that were not disclosed in its notice of grounds?
2. If the answer to #1 is yes, then what should be the calculation model for base royalties?
3. Should an inflationary adjustment be applied?
4. Should SOCAN be granted a second royalty based on a percentage of CBC's advertising revenues?

Adjustments

5. Repertoire usage adjustment
6. Chain of title audit adjustment (independent of the reproduction audit)
7. Adjustments to royalty rate to reflect:
 1. Declining industry discount
 2. Public interest factors
3. Settlement discussions and Board facilitation of same.
4. Joint position on litigation scheduling and next steps in the file.
5. Joint request for a Proceeding Details page for this tariff.

[7] During the CMC, several agenda items were discussed, including whether a Notice of Grounds for Proposed Tariff is “binding.” SOCAN indicated that the initial basis for a tariff proposal may evolve after arguments are exchanged and considered by SOCAN. Furthermore, SOCAN argued that it should not be expected that it includes all possible explanations in the initial Notice of Grounds.

[8] On November 4, 2024, as Case Manager, I issued Order CB-CDA 2024-089 (the “Order”), permitting SOCAN to file a new explanation for its proposed tariff.

[9] On November 15, 2024, SOCAN wrote to the Board, raising concerns with the Order. It wrote:

to the extent the November 4 Order constitutes the Board's ruling on the issue of whether Notices of Grounds are binding, the parties were denied procedural fairness: the Board did not provide notice that it would make a substantive ruling on the issue at the CMC and the parties were not provided an opportunity to make meaningful submissions before it did so.

[10] SOCAN requests clarification of the Order and, to the extent that SOCAN correctly interpreted the Order regarding whether Notices of Grounds are “binding,” that the Order be varied by removing paragraphs 4 to 7. According to SOCAN, this would allow either the Board

to hold general consultations on the issue or the parties to file complete submissions on the issue in keeping with procedural fairness. Otherwise, SOCAN considers that—in effect—it was taken by surprise by the Order as it was not expecting a formal, final, ruling on the issue and did not have the opportunity to make appropriate submissions during the CMC. SOCAN also argues that if the Order limits its options in this matter, it could be unfair given the retroactivity of it.

III. RULING

Order CB-CDA 2022-024

[11] SOCAN filed its notice of grounds for proposed Tariff No. 2.D – Television - Canadian Broadcasting Corporation (2015, 2016, 2017, 2018, 2019, 2020–2022, 2023-2025) on July 4, 2022, pursuant to Order CB-CDA 2022-024.

[12] The latter provided—inter alia—that:

The Notice of Grounds for Proposed Tariffs must include an explanation of how all proposed royalty rates—including any minimum fees—in the corresponding Proposed Tariffs were determined.

The explanation should be clear and detailed enough to permit the Board and users to understand the general basis for the royalty rates and royalty structure.

The explanation should include any relevant details on any source for the royalty rate and rate structure, including any minimum fees (e.g. previously approved tariff, licensing agreements, theoretical or economic model, estimates, hypotheses). If there is no such source, this must be indicated. If the proposed royalty rates or structure differ from the identified source, explain how the adjustment was determined (e.g. inflation, gradual adjustments, changes in the market) (paragraphs 4-6).

[13] Order CB-CDA 2022-024 explained that, at the time, one of the reasons for asking collective societies to file Notices of Grounds for Proposed Tariffs was to provide the Board with “information from the parties in order to set its docket, including determining the type of hearing required and next steps in its consideration of the proposed Tariffs.” (paragraph 2)

Order CB-CDA 2024-089

[14] In Order CB-CDA 2024-089, I expressed the view that a Notice of Grounds for Proposed Tariff is crystallized once filed.

[15] Importantly, the Order goes on to state that a Notice of Grounds does not prevent a collective society from providing “another explanation for its proposed tariff.” Rather, “[i]ts ability to do so will be constrained by the rules of procedural fairness.”

[16] Having found no issues of procedural fairness, I granted SOCAN the permission to file additional substantive explanations for its proposed tariff.

[17] Since the Parties stated that this needed to be addressed prior to the Parties filing a Statement of Issues (Rules 24 and 26), I expect that any additional explanations SOCAN may file will inform the content of the Statement of Issues.

No compelling reason to vary

[18] The issue as to whether SOCAN can provide explanations that were not included in its Notice of Grounds for Proposed Tariff (“alternative” or “additional” explanations) is a procedural issue. It was one of many items discussed at the CMC. The Parties’ representations were sufficient for me to make the Order.

[19] In its request to vary, SOCAN has not shown it will be prejudiced by the Order. On the contrary, the Order affords SOCAN the opportunity to provide alternative explanations for its tariff proposal.

[20] I note that the Order is restricted to the particular situation in this matter: two parties attempting to put together a Statement of Issues. Furthermore, in terms of SOCAN’s claims of “retroactivity”, I note that the Order does not change what Order CB-CDA 2022-024 required SOCAN to do. It just required collective societies to be transparent about their grounds, as they were at the time they were filed. Last, since SOCAN’s Notice of Grounds were filed pursuant to a Board order, the Order CB-CDA 2024-089 should not be understood as a direct interpretation of the Rules.

[21] I therefore find no compelling reasons to vary the Order.

IV. NEXT STEPS

[22] In its submissions SOCAN requests that—in the event that the Board declines its request to vary the Order—a two-week extension to the November 15, 2024, deadline to file and serve its new explanation for its proposed tariffs be granted. Accordingly, the deadline for SOCAN to submit such explanation is **Monday, December 9, 2024**.

René Côté
Case Manager