

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date of Decision	2004-03-19
Date of Reasons	2004-06-18
Citation	FILES: Public Performance of Musical Works 1998 to 2007
Regime	Public Performance of Musical Works <i>Copyright Act</i> , subsection 68(3)
Members	Mr. Stephen J. Callary Mrs. Sylvie Charron Ms. Brigitte Doucet
Proposed Tariffs Considered	1.A, 1.B, 2.B, 2.C, 3, 4.B.2, 5.A, 6, 7, 8, 10, 11, 12, 13, 14, 15, 18, 20 and 21

Statement of Royalties to be collected by SOCAN for the public performance or the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works

Reasons for Decision¹

I. INTRODUCTION

Pursuant to paragraph 67.1(1) of the *Copyright Act* (the “*Act*”), the Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed with the Board statements of proposed royalties for the public performance, or the communication to the public by telecommunication, in Canada, of musical or dramatico-musical works for the years 1998 to 2007.

These statements were published in the *Canada Gazette* on October 18, 1997, June 13, 1998, May 29, 1999, May 13, 2000, April 14, 2001, May 11, 2002 and April 19, 2003. At the same time, the Board notified prospective users and their representatives of their right to file objections to the proposed tariffs within the required period of time.

In the fall of 1998, the Board initiated an examination process of various tariffs which had raised

¹ The relevant tariffs have already been certified and published in the *Canada Gazette* on March 20, 2004.

many complaints or objections, particularly by the Canadian Restaurant and Foodservices Association (“CRFA”), the Hotel Association of Canada (“HAC”) and several small rural communities in Alberta. In general, these users complained of the unfairness of having to pay royalties under several distinct tariffs (Tariffs 3.A, 3.B, 8, 15.A, 18 and 20) for music use in the same premises, and of the excessive financial burden of having to pay cumulative minimum fees, either for several events or tariffs. As we will see later, these questions have given rise to what are commonly known as the “multiple licensing” issues.

The decision that the Board is releasing today follows a Board decision of July 30, 1999 ² in which it certified a certain number of SOCAN tariffs, including several that involved multiple licensing issues. In order to minimize the administrative difficulties for SOCAN, the Board proceeded to certify until 1998 some of the tariffs raising those issues and postponed to later the examination related to the substantive concerns.

This decision is the result of a long process that has not always been productive. Parties engaged in lengthy negotiations, extending in some cases over several years. Some have resulted in agreements, while others have failed. Hearings dealing with multiple licensing issues were finally held on February 4 to 6, 2002. A number of various additional questions were raised throughout this process, such as the very notion of and justification for minimum fees and the adjustment of rates to account for inflation. This decision establishes, in regard to these questions, certain principles on which the Board relies in order to certify many of SOCAN’s tariffs.

Further to a request SOCAN made in a letter dated May 9, 2002, the Board merged the examination of Tariff 18 (Recorded Music for Dancing) with that of the multiple licensing issues. The hearing on Tariff 18 was held on June 17 and 18, 2003.

The reasons that follow deal with the following tariffs which raise multiple licensing issues:

For the years 1998 to 2004

Tariff 18 (Recorded Music for Dancing)

Tariff 20 (Karaoke Bars and Similar Establishments)

For the years 1999 to 2004

Tariff 3.A (Cabarets, Cafes, Clubs, etc. – Live Music)

Tariff 3.B (Cabarets, Cafes, Clubs, etc. – Recorded Music Accompanying Live Entertainment)

Tariff 5.A (Exhibitions and Fairs)

² *Statement of Royalties to Be Collected by SOCAN for the Performance or Communication by Telecommunication, in Canada, of Musical or Dramatico-musical Works for Tariffs 8 and 10 (in 1997 and 1998), 3.A, 3.B, 5.A, 7, 13 and 15.A (in 1998), 1.A, 1.B, 2.B, 3.C, 11, 12.A, 14, 15.B and 21 (in 1998 and 1999), 4.B.2 (from 1998 to 2002), 13.B and 13.C (in 1999) and 6 (from 1999 to 2003), www.cb-cda.gc.ca/decisions/m30071999-b.pdf, (1999) 87 C.P.R. (3d) 527.*

Tariff 7 (Skating Rinks)

Tariff 8 (Receptions, Conventions, etc.)

Tariff 10.A (Parks, Parades, Streets and Other Public Areas – Strolling Musicians and Buskers; Recorded Music)

Tariff 10.B (Marching Bands; Floats with Music)

Tariff 15.A (Background Music in Establishments Not Covered by Tariff No. 16 – Background Music)

For the years 2000 to 2004

Tariff 21 (Recreational Facilities Operated by a Municipality, School, College, University, Agricultural Society or Similar Community Organizations)

These reasons also deal with the following tariffs, which do not raise multiple licensing issues:

For the years 1998 to 2003

Tariff 12.B (Paramount Canada's Wonderland and Similar Operations)

For the years 1998 to 2007

Tariff 2.C (Société de télédiffusion du Québec)

For the years 1999 to 2004

Tariff 13.A (Public Conveyances – Aircraft)

For the years 2000 to 2002

Tariff 1.A (Commercial Radio)

For the years 2000 to 2004

Tariff 1.B (Non-commercial Radio other than the Canadian Broadcasting Corporation)

Tariff 2.B (Ontario Educational Communications Authority)

Tariff 3.C (Adult Entertainment Clubs)

Tariff 11.A (Circuses, Ice Shows, Fireworks Displays, Sound and Light Shows and Similar Events)

Tariff 11.B (Comedy Shows and Magic Shows)

Tariff 12.A (Theme Parks, Ontario Place Corporation and Similar Operations)

Tariff 13.B (Passenger Ships)

Tariff 13.C (Railroad Trains, Buses and Other Public Conveyances, Excluding Aircraft and Passenger Ships)

Tariff 14 (Performance of an Individual Work)

Tariff 15.B (Background Music in Establishments Not Covered by Tariff No. 16 – Telephone Music on Hold)

For the years 2003 to 2007

Tariff 4.B.2 (Live Performances at Theatres or Other Places of Entertainment – Classical Music Concerts, Annual Licence for Orchestras)

For the year 2004

Tariff 6 (Motion Picture Theatres)

II. MULTIPLE LICENSING ISSUES: BACKGROUND

A. INITIAL PARTICIPANTS

Since the spring of 1998 and over the years, the Board has received many letters of comments, particularly from small rural communities in Alberta, and petitions reporting problems in the application of various SOCAN tariffs. Generally speaking, these users were asking that the following characteristics be considered when establishing tariffs that apply to them:

- The activities in question are of a local nature, non-commercial and organized by volunteers in the interest of improving the quality of life in these communities;
- The activities are organized for the purpose of raising funds that are used for community purposes. Generally, very few people attend these activities, and the requirement to pay fees can lead to the cancellation of some of them;
- Having identical tariffs for uses of music that involve widely varying numbers of participants is perceived as unfair;
- The minimum fees per event are perceived as unfair;
- The fact that the same facility must pay for the acquisition of several different licences is considered unfair.

In a letter dated November 4, 1998, in which it informed SOCAN of the procedure it intended to follow in this matter, the Board merged these arguments into three major issues:

- The excessive burden on users who have to pay fees under several tariffs for different uses of music in the same premises;
- The unfairness of minimum fees for small users;
- The unfair structure of Tariff 8, which is a fixed rate per event, irrespective of the number of events in the year or the number of participants at a particular event.

Even though the small communities had not filed formal objections, the Board formally invited them to regroup and participate, as interveners with full participatory rights, in the process it was establishing at that time to deal with these issues.

The Township of Middlesex Centre (“Middlesex”) objected to various tariffs which applied to it, particularly Tariffs 8 and 21. It thought Tariff 8 was too high and Tariff 21 hard to administer.

The Canadian Association of Fairs and Exhibitions (“CAFE”) also objected to a number of tariffs for 2003 (Tariffs 3.A, 4, 5.A, 9, 11.A, 18 and 21), but informed the Board, on January 16, 2003, that it was withdrawing its objection.

Also, the Normanby Recreation Committee (“Normanby”) objected to proposed Tariffs 7 and 8 for 2000, 2003 and 2004. The Corporation of the Township of West Grey (“West Grey”) objected to these same tariffs for 2003. This decision takes their comments into account. The *Corporation des propriétaires de bars, brasseries et tavernes du Québec* also objected to a number of proposed tariffs for the year 2000, but withdrew its objection in September 2001.

Finally, CRFA and HAC objected to several proposed tariffs applying to the activities of restaurants, bars, clubs and hotels, in particular Tariffs 8 and 18. The Board invited them as well to participate as interveners in the examination of the multiple licensing issues.

In a letter dated April 12, 1999, the Board informed SOCAN that it considered itself seized of the multiple licensing issues which, in the Board’s view, involved Tariffs 3.A, 3.B, 5.A, 7, 8, 9, 10.A, 10.B, 15.A, 18, 19, 20 as well as indirectly Tariff 21 which combines activities targeted by several of the individual tariffs. Other tariffs might raise similar issues, but the Board chose to focus attention on those, which seemed to be of particular interest to small rural communities. The Board confirmed as well that the Alberta Association of Agricultural Societies (“AAAS”) had become the main advocate for these communities, and that CRFA and HAC would act as interveners with full participatory rights in the multiple licensing matter.

B. NEGOTIATIONS AMONG THE PARTIES

SOCAN and AAAS subsequently engaged in discussions in an effort to find some mutually acceptable solutions to the problems identified by the communities. These discussions extended over a long period of time and led to the identification of a number of elements that might have been included in an overall agreement.

1. The tariffs applicable to the activities of these communities are Tariffs 4 (Concerts), 8 (Receptions, Conventions, etc.), 19 (Fitness Activities) and 21 (Recreational Facilities). Tariffs 5 (Exhibitions and Fairs), 7 (Skating Rinks) and 9 (Sports Events) are also likely to apply to some of their activities.
2. SOCAN’s current policy is not to ask for royalties in regard to non-profit community activities organized by volunteers. The parties had agreed that this policy should be publicized more widely, as it applies to a very large share of community activities.
3. SOCAN and AAAS agreed that the minimum fees for specific tariffs applicable to exhibitions and amateur rodeos are not excessive, but are unfair because the price remains the same, irrespective of the importance of the activity.
4. The communities perceive a problem with the application of Tariff 8 to small-scale

community activities that do not qualify for a royalty exemption under the SOCAN policy described above. The parties agree to explore the possibility of including these activities under Tariff 21.

5. At the request of the communities, SOCAN agrees to recognize explicitly that Tariff 21 encompasses amateur rodeo activities.
6. Finally, the question of fitness activities held in recreational facilities operated by a municipality or agricultural society is also problematic for these communities. SOCAN initially proposed that a portion of these activities be made the subject of a request for exemption, a request that would probably be accepted. SOCAN also proposed to include these activities in Tariff 21. In return, SOCAN suggested that the Tariff 21 rate be increased to \$240 (compared with the rate of \$150 certified for 1999).

Despite all these discussions, which the parties considered productive and encouraging, no agreement was reached. On October 21, 2001, AAAS withdrew from the process, arguing that it did not have sufficient resources to participate in the hearings. However, the rural communities continued to send letters of complaints and comments to the Board, which considers them as part of the record.

Parallel to this, SOCAN started discussions with Middlesex, which argued that Tariff 21 is hard to administer since the definition of revenue used in computing the allowable maximum³ necessitates taking into account information about the revenues generated by those who lease the municipal recreational facilities. But only the lessees, and not Middlesex, have this information. The discussions with SOCAN resulted in an agreement in January 2002 on amendments to the terms and conditions of Tariff 21. Under this agreement, SOCAN agreed to add activities covered by Tariffs 8 and 19 to those covered in Tariff 21. SOCAN also agreed to redefine the revenues that determine whether one is eligible to be licensed under the tariff.

Middlesex agreed for its part to comply with the terms of Tariff 21 and to withdraw its objection, which it did in a letter dated January 30, 2002.

Between 1992 and 1997, SOCAN had also reached agreements with CRFA and HAC. These agreements set specific rates for Tariffs 3 (Cabarets) and 18 (Discotheques), as well as Tariff 20 (Karaoke Bars) in the case of CRFA alone. These agreements also provided that the members of the two associations could make a single payment to obtain a licence covering multiple uses of music in the same room. This payment was determined by the sum of the cost of the most expensive individual licence and the minimum of the second licence. These terms and conditions did not apply to users who made late payments. Although SOCAN was asking the Board to certify the rates pursuant to the terms of the agreements, there was never any request to include the terms and conditions themselves in the text of the tariff.

Of all the initial interveners, the only ones who participated in the Board's hearings on the multiple licensing issues, therefore, are CRFA and HAC.

³The tariff specifies a maximum amount of gross admission receipts for all activities covered by the tariff. Beyond this allowable maximum, the user can no longer obtain the Tariff 21 licence and must obtain a licence under the individual tariffs for each of these activities.

C. QUESTIONS BEFORE THE BOARD IN THIS MATTER

The small rural communities in Alberta raised a number of questions that the Board grouped under three themes that are the subject of decisions in these proceedings. These three themes are the fairness of minimum fees, the burden of multiple licences and the structure of Tariff 8. Within the framework of the hearings, SOCAN proposed that the Board use a new methodology in adjusting tariffs to account for inflation. Although the evidence was heard at a different time, SOCAN's Tariff 18 is also part of the multiple licensing issue. These reasons deal with those two issues as well.

These are tariffs that, considered individually, do not generate very large amounts. However, the total royalties generated by all the tariffs raising multiple licensing issues are not negligible. Table 1, appended to this decision, indicates that they totalled almost \$7.5 million in 2000. The table also indicates that Tariffs 8, 3.A and 18 are the three tariffs that generated the highest amounts of royalties.

III. MINIMUM FEES

A. BACKGROUND

The Board has long been concerned with the issue of minimum fees. For example, in its decision of December 7, 1990⁴ dealing with the concert tariff, the Board reduced the minimum fee per event from \$33 to \$10 per collective society (there were two collectives at the time), in the belief that the amount then proposed imposed an excessive burden on events with very low or no receipts. In the Board's view, the societies' transaction costs, the receipts that these rates generate and their potential effect on compliance with the tariffs were factors that it had to take into account in setting minimum royalty rates.

In a subsequent decision dealing with the same tariff,⁵ the Board kept the minimum fee at \$20 (being the sum of the amounts payable to each society that had by then merged to form SOCAN), no evidence having been presented by SOCAN in this regard. However, the Board continued to be concerned with the issue of minimum fees and reiterated the importance of considering the same factors in their determination.

On September 15, 2000, in its decision dealing with Tariff 9 (Sports Events),⁶ the Board eliminated the minimum fee for this tariff. However, it attributed this elimination to a problem of structure specific to this tariff, and listed the following principles that could be used in setting minimum fees:

⁴ *Statement of Royalties to Be Collected by CAPAC and PROCAN for the Performance in Canada of Dramatico-musical or Musical Works in 1990*, www.cb-cda.gc.ca/decisions/m07121990-b.pdf.

⁵ *Statement of Royalties to Be Collected by SOCAN for the Performance or Communication by Telecommunication in Canada of Musical or Dramatico-musical Works for Tariffs 4, 5.B, 9 and 11(in 1992 to 1994), 1.B, 7, 8 and 19 (in 1993 and 1994) and 3, 5.A, 10, 12, 13.A, 14, 15.B, 18, 20 and 21 (1994)*, www.cb-cda.gc.ca/decisions/m12081994-b.pdf, (1994) 58 C.P.R. (3d) 79.

⁶ *Statement of Royalties to Be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-musical Works - Tariff 9 (Sports Events)*, www.cb-cda.gc.ca/decisions/m15092000-b.pdf, (2000) 9 C.P.R. (4th) 36.

- The fees should not be so low that their collection is irrational or impossible economically;
- The licence has some intrinsic minimum value;
- The minimum fee should reflect a balance between SOCAN's actual costs and the royalties otherwise payable absent such fee; and
- The tariff structure should be tailored to the business model of the industry concerned.

Finally, in its decision of June 15, 2001 dealing with Tariff 4,⁷ the Board kept the minimum fee at the same level, but said it was concerned by the fact that this fee seems to apply to half of the events. The Board also stated that if SOCAN cannot establish that the tariff structures it proposes are efficient, it can expect that the minimum fee will be eliminated.

B. POSITION OF THE PARTIES

CRFA and HAC did little to explain their positions on the issue of minimum fees. It was primarily the small rural communities and the Board which, having raised this issue, led SOCAN to propose some options.

SOCAN tabled a report prepared by Mr. Dale Orr describing the economic principles which should be used in setting reasonable minimum fees. In Mr. Orr's opinion, these fees should be based on the criterion of economic efficiency. This means that minimum fees should represent the average administrative cost to SOCAN of issuing a licence. To this should be added all the fixed administrative costs and the costs of distribution to rights holders. If this principle is not being followed, Mr. Orr argues, there is cross-subsidization among the user groups of different sizes, from the largest to the smallest. This results in an unfair and inefficient situation.

C. ANALYSIS

In these proceedings, SOCAN filed some new data (see Table 2, appended) that allow a more accurate assessment of the structures of the various tariffs. Thus, it was noticeable that for all Tariff 4 categories, only one third of the licences were issued at the minimum rate. This proportion is comparable to what can be observed for a number of other tariffs, and does not appear to be particularly problematic. In light of the new data supplied by SOCAN, it can now be stated that there was no basis for the fears expressed by the Board in its decision of June 2001 dealing with Tariff 4.⁸

However, the Table 2 data highlight some tariffs where the proportion of licences issued at the minimum rate seems to be particularly high.

These data are insufficient, however, and do not allow the Board to correctly assess the relevance of the structure of the tariffs concerned. This issue is the subject of further comments later on in this decision.

⁷ *Statement of Royalties to Be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-musical Works - Tariffs 4.A, 4.B.1, 4.B.3, 5.B (Concerts) in 1998, 1999, 2000, 2001 and 2002*, www.cb-cda.gc.ca/decisions/m15062001-b.pdf, (2001) 13 C.P.R. (4th) 45.

⁸ *Ibid.*

The Board is convinced of the importance of maintaining minimum fees. An excessive reduction, or elimination of the minimums, while clearly favouring the small users, is generally unfair even if, in some particular cases, there might not be other solutions.⁹ The Board accepts SOCAN's arguments that such a decrease or elimination would make the collection of fees from small users unprofitable and would be equivalent to issuing a free licence. In the Board's opinion, it is reasonable that the minimum fee allow SOCAN to recover a portion of the costs incurred through the issuance of a licence.¹⁰ The Board is therefore of the opinion that the administrative cost incurred by SOCAN when issuing its licences should be one of the factors to be considered in establishing minimum fees. However, it cannot be the only factor. In particular, the minimum fees should also reflect the intrinsic value of SOCAN's music and repertoire.

Although the Board recognizes the importance of minimum fees, it nevertheless wishes, in these proceedings, to list three principles that are of particular relevance when establishing the level of a minimum fee. Already, in a decision dated July 31, 1991¹¹ dealing with several SOCAN tariffs, the Board expressed concern about the internal coherence and the horizontal harmonization of the tariffs, while recognizing that the rationalization of the tariffs under these principles was a task for the longer term. The Board wishes to reiterate the importance that SOCAN's tariffs reflect the following principles:

i. Principle # 1: Internal coherence

The minimum fee for a particular tariff should reflect the entire structure of this tariff and the characteristics of the users to which it applies. The minimum fee should be adjusted so that the number of users that pay it is neither proportionally too high nor too low.

It is impossible to establish a precise target percentage of the number of users who should pay the minimum fee. However, the Board wrote in a previous decision:¹²

“Given the lack of any evidence on this issue and CAPACOA's apparent acquiescence on the subject, the Board agrees to maintain a minimum rate of \$20 per concert for the time being. Nevertheless, it remains concerned that one half of all licensed events pay the minimum for their SOCAN licence. As SOCAN already knows, it is often the case that the greater the percentage of minimum fee licences, the less the relevance of a tariff formula.”

The Board still believes that, generally speaking, it should be concerned about the structure of a tariff once more than one half of the users covered by the tariff pay the minimum fee. Such a proportion could indicate that the qualification criteria for the minimum fee are too broad and ought to be tightened. Concern about the structure of a tariff is also in order if very few or no users qualify for the minimum.

When a tariff structure must be revised because an excessive number of users qualify for the minimum rate, several approaches are possible. The first is simply to reduce the amount of the

⁹ Tariff 9 (Sports Events), as mentioned earlier in this decision, is one such example.

¹⁰ See Exhibit SOCAN-21.

¹¹ *Statement of Royalties to Be Collected by SOCAN for the Performance in Canada of Dramatico-musical or Musical Works in 1991*, www.cb-cda.gc.ca/decisions/m31071991-b.pdf, (1991) 37 C.P.R. (3d) 385.

¹² *Supra* note 7, page 14.

minimum fee. The second, to the degree that sufficient evidence is produced as to the true value of the music, consists of increasing the principal rate. The third approach is to apply to the tariff structure a combination of the first two. The circumstances of each case will dictate which of the approaches should be adopted.

ii. Principle # 2: Horizontal harmonization

The minimum fees should reflect the intrinsic value of music for users, as well as SOCAN's administrative costs in issuing a licence. It may be expected, therefore, that there will be some harmonization of the minimum fees among the different tariffs, especially when similar uses of the music are involved.

There could be conflict between the two principles. In that case, the minimum fee should establish a balance between them.

iii. Principle # 3: Annual licence

In the case of those tariffs where licences are issued for an event, an annual licence also comprising a minimum fee should be available. This annual licence would limit the impact of maintaining minimum fees on small users by enabling them to accrue events on an annual basis and thereby pay a lower fee than what they would pay if the tariff were applied to each of the events. This licence should be so formulated as to be available only to small users.

Such a licence is now being proposed by SOCAN in the case of Tariffs 4 and 9. SOCAN could also add such a licence to some of its forthcoming tariff proposals, for example to Tariff 5.A (Exhibitions and Fairs).

IV. ADJUSTMENT TO REFLECT INFLATION

A. BACKGROUND

A February 18, 1993 decision dealing with various SOCAN tariffs¹³ was the last time the Board considered the issue of adjustment of fixed tariffs¹⁴ to account for inflation. It concluded that while inflation is but one factor among others in adjusting tariffs, it is desirable to allow some adjustment for inflation in the fixed amounts of the tariffs. In its decision, the Board adjusted the tariffs for 1992 and left it to SOCAN to propose adjustments for later years.

Since music is an input, the Board indicated that it thought the tariffs should follow the prices of the other inputs in the economy. Consequently, the Industrial Product Price Index (IPPI)

¹³ *Statement of Royalties to Be Collected by SOCAN for the Performance in Canada of Dramatico-musical or Musical Works in 1992 (Tariff items 2.B, 2.C, 3, 7, 8, 12, 14, 15.A, 16, 18, 19 and 20)*, www.cb-cda.gc.ca/decisions/m18021993-b.pdf, (1993) 47 C.P.R. (3d) 289.

¹⁴ By fixed tariff, the Board means tariffs in which rates are expressed in dollars. These tariffs alone should be adjusted since tariffs expressed as a percentage of revenues or receipts are themselves subject to ongoing and automatic adjustment. For example, tariffs expressed as a percentage of gross receipts evolve parallel to those receipts. Gross receipts adjust by themselves to the prevailing inflation in the relevant markets (which is not necessarily identical with inflation as measured by the CPI). Adjusting a tariff expressed as a percentage would amount to a double adjustment of the tariff to take account of inflation.

appeared to be the best index to use in adjusting tariffs.

However, because this index is little known to rights holders and music users alike, the Board came to the conclusion that it is preferable to use the Consumer Price Index (CPI) to adjust tariffs, while correcting it to ensure that its fluctuations during the 1980s corresponded to those of the IPPI. Since the CPI percentage increase during this period exceeded the IPPI percentage increase by an average of 2 per cent per year, the Board determined that tariff adjustments should be based on the annual increase in the CPI less 2 per cent.

Because of the economic conditions since the establishment of this methodology, however, SOCAN has never been able to request any meaningful adjustment. Between 1993 and 2002, the annual rate of increase in the CPI averaged 1.75 per cent, and exceeded the 2 per cent mark only very slightly in some years.

B. POSITION OF THE PARTIES

In these proceedings, SOCAN made a proposal to the Board concerning the appropriate methodology for adjusting tariffs so as to account for inflation. The report prepared by Professor Abraham Hollander presents this proposal.

Mr. Hollander argues that economic efficiency does not presuppose that input prices must all vary at the same rate. Consequently, the use of the IPPI to adjust the tariffs, as adopted by the Board in its 1993 decision,¹⁵ is not justified. According to Mr. Hollander, the CPI is the most suitable basis for adjustment if the Board's objective is to protect SOCAN's members from erosion of their purchasing power.

Furthermore, Mr. Hollander argues that if the objective is to achieve an adjustment consistent with the adjustment that occurs automatically in the case of tariffs established as a percentage of receipts, the "live staged performances" and "recreational infrastructures" sub-indexes of the CPI should be used. These indexes reproduce, probably better than any other index published by Statistics Canada, the evolution in the prices used by persons subject to the fixed tariffs.

According to Mr. Hollander, the adoption of the recommended approach would warrant an increase for 2002 of 8.16 per cent in all tariffs and tariff components expressed in dollars. This adjustment is based on the evolution in the price sub-indexes between January 1999 and October 2000.

The objectors, for their part, did not present any proposal on this issue or comment on SOCAN's proposal.

C. ANALYSIS

It must be conceded, at the outset, that, after ten years, the rule used in 1993 (CPI less 2 per cent) no longer serves its purpose. The idea was to use the CPI for reasons of convenience, while subtracting 2 percentage points so that its variations would track those of the IPPI as closely as possible. During the 1990s, this relationship between the two indexes was reversed, with the

¹⁵ *Supra* note 13.

annual increase in the CPI being on average 1 percentage point below that of the IPPI. Even if the Board continued to think that the tariffs should follow the trend in the IPPI, it would nevertheless have to change the rule.

The Board also accepts SOCAN's argument that economic efficiency does not mean that the prices of all inputs must vary in lockstep. Economic efficiency means, rather, that the price of a good varies with its cost of production. Since the CPI reflects a wider basket that includes services, it constitutes a better approximation of the "cost of production" of SOCAN licences than the IPPI. The Board is therefore abandoning the rule it established in 1993.

However, the Board believes it is preferable to use the overall CPI rather than certain subcomponents, as SOCAN proposes. Because the subcomponents proposed by SOCAN are based on a small sampling, they could be subject to substantial variations, both upward and downward. Tariffs subject to the rule proposed by SOCAN would therefore also be subject to such variations. The Board favours greater stability in the tariffs and opts for the overall CPI. Also in the interest of promoting relative stability of tariffs, the Board elects to use the average annual variation in the CPI¹⁶ rather than the monthly variation over 12 months. However, a certain percentage should be subtracted from the average annual variation of the overall CPI, for a number of reasons.

First, the tariff inflation adjustment rule must ensure some balance between music users and copyright owners represented by SOCAN. Since this rule allows some tariff increases without any other change in market conditions, it seems fair to ensure that the gains are not necessarily attributed in full to the owners. In the economy as a whole, an individual's compensation seldom increases automatically with inflation. When there is an automatic adjustment, it is usually a partial one. Beyond this partial adjustment, the additional increase in an individual's compensation depends on the individual's ability to increase his or her productivity and work efforts. It should be the same for a collective.

Second, although SOCAN's tariffs account for only a very small share of the overall CPI, the tariff adjustment rule should not itself be a source of increase or maintenance of inflation in a particular sector of the economy. If, for example, the inflation adjustment brings about a general increase in fees in a particular year, this increase could be entirely passed on to the costs of halls or ticket prices, which would soon be translated into a general increase in prices in that economic sector. The risks of such a situation occurring can be reduced by subtracting a percentage from the CPI.

There is little quantitative information that can be used to determine the percentage to be deducted from the annual variation in the CPI. However, in light of the above arguments, it is fair to fix that percentage at 1 per cent, or about one half of the average annual rate of increase in the CPI during the last decade.

This decision therefore adjusts the fixed tariffs by a percentage equal to the average annual variation of the CPI less 1 per cent. Added to this are two rules that the Board has chosen to apply in this instance.

¹⁶ The annual mean variation corresponds to the percentage variation between the average of the index over the twelve months of a calendar year and this average for the twelve preceding months.

First, to carry out the adjustment, the Board used data from the calendar year preceding by two years the year for which the proposed tariff is filed. This approach allows SOCAN, if it so desires, to use this decision in requesting further inflation adjustments in the future, since these are the most recent data available when the time comes for SOCAN to file its tariff proposals. The adjustment for 2002 is therefore based on the 2000 data, the adjustment for 2003 on the 2001 CPI, and so on.

Second, SOCAN requested an inflation adjustment for 2002 and 2004 without any adjustment being specifically requested for 2003. The Board however considers that in the circumstances the adjustment requested for 2004 takes into account 2003 and 2004. Consequently, the adjustment made by the Board for 2004 takes account of the fluctuations in the CPI over two years. In doing so, in a period of low inflation, SOCAN may think of filing multiyear tariffs without adjustment for inflation while being able to expect, if it so requests, that the adjustment that will come later will reflect the fluctuation in the CPI for the multiyear tariff period as a whole.¹⁷ Needless to say, this approach would substantially simplify the task of both SOCAN and the Board, as well as the life of the music users.

According to Statistics Canada data, the annual mean variation in the CPI is 2.7 per cent in 2000, 2.6 per cent in 2001 and 2.2 per cent in 2002.¹⁸ The adjustments for inflation that the Board is applying to the various SOCAN tariffs are therefore 1.7 per cent in 2002 and 2.8192 per cent in 2004, considering that this adjustment combines the years 2003 and 2004.

V. MULTIPLE LICENCES

A. POSITION OF THE PARTIES

The excessive burden imposed on users by the need to pay fees for several different types of licences, whether or not for the same premises, is an argument often raised by the participants in this file. However, they are unable to supply any data on the actual burden of these multiple licences.

HAC argues that the very low profitability of the industry should be taken into account in the determination of the SOCAN tariffs. Among the major factors behind this low profitability, Mr. Pollard cited the events of September 11, 2001, the war in Iraq, SARS, and the antismoking and anti-drunk driving campaigns. CRFA and HAC also maintain that SOCAN's current tariffs are too complex, and that a single tariff should apply to their industry as a whole.

Although the associations maintain that the agreements with SOCAN were extremely complex and did not really solve the problems of multiple licences, they nevertheless said they were prepared to have them reflected in the tariffs, provided the users who make late payments are not penalized.

SOCAN, for its part, does not accept the associations' position and claims that the various uses

¹⁷ That being said, it is quite possible for the Board to adopt a multiyear tariff which would include, as a tariff condition, a formula that can account for inflation during the tariff period. This tariff might or might not be subject to some public notice conditions, again as conditions of the tariff.

¹⁸ These data are available, in particular, on the following website: www.statcan.ca/english/Pgdb/econ46.htm

of music by the associations' members are in fact complementary and do not involve any overlap, and that each generates additional benefits for the users. Accordingly, the licences should not be sold at a discount.

SOCAN is not prepared to renew the agreements it had with the associations. On the one hand, these agreements were signed in part for reasons not directly related to the tariffs themselves. On the other hand, SOCAN had hoped that, with these agreements, the number of users complying with the tariffs would increase. Since it is very costly for SOCAN to try to obtain payment by individual users, it may be to its advantage to negotiate an agreement that includes effective reductions in tariffs if this generates a greater number of users who comply. SOCAN argues, however, that in retrospect, the reduction in rates granted to the associations was too great, and there was never any increase in compliance with the tariff.

Moreover, SOCAN claims that very few users have problems related to multiple licences. For example, in 2000, 2,615 users had more than one licence for one of Tariffs 3, 8, 15.A, 18 and 20, or only 16 per cent of the total licences issued for these tariffs. Furthermore, 84 per cent of all users with multiple licences had paid fees for two tariffs, and only 14 per cent and less than 2 per cent, respectively, for three and four tariffs.

SOCAN argues that there is simply no basis to grant a discount to users who are members of the associations.

B. ANALYSIS

The Board believes that for each distinct type of music use, the user should pay SOCAN the price of the appropriate licence. Thus, some users may have to combine some amounts payable for the acquisition of several licences. But the evidence on file shows that only a minority of users have to acquire more than one licence from SOCAN. Furthermore, in the case of these multiple licence users, the evidence has failed to demonstrate, in the Board's opinion, that they are faced with major problems. The following four areas will however be the subject of comment or intervention by the Board.

First, the undue burden imposed on users by the complexity of the SOCAN tariff structure has been raised in this case. A user who wants to acquire a licence from SOCAN must select from a range of different licences the one that is appropriate for the particular type of music it uses. As the distinctions among the different types of music uses are not always very clear, the choice may sometimes prove difficult. However, the Board does not think these difficulties are insurmountable. It recognizes the very laudable efforts SOCAN has recently made to make its Website readily accessible to users, and to simplify the licence acquisition forms. The Board encourages SOCAN to continue its efforts, and in particular to assist users in selecting the appropriate licences. Such simplification might even encourage a larger number of users to comply with the legal obligation imposed on them by the Act to procure a licence from SOCAN when they use music that is part of its repertoire. In this regard, CRFA and HAC should play a more important role by facilitating the dissemination of information to their members and encouraging them to acquire licences. More particularly, the Board wishes to note the lack of cooperation with SOCAN demonstrated by CRFA and hopes that this association will agree in future to play a more active role in this area.

Second, in recognition of the overlapping that could result from the acquisition of more than one licence by the same user, the Board would be favourable to having the parties consult with each other in an attempt to reach a proposal for a new multifunctional tariff for several different uses of music in the same hall. This tariff might comprise certain features similar to those that were part of the agreement that existed from 1992 to 1997 between SOCAN and the two associations. This tariff could combine the major activities of the members of CRFA and HAC, possibly those subject to Tariffs 3.A, 3.B, 8, 15.A, 18 and 20 or a subset of them, and might for example include a discount when there is more than one type of music use that involves some degree of overlapping in a single room.

This is not about a new single tariff that would apply to all the different types of music use in the industry and would merge several tariffs into one, as the objectors requested. The Board is not convinced of the merits of that request, which, while possibly easier to administer, could result in an inefficient cross-subsidization between users. The multifunctional tariff proposal that the Board would like to receive from the parties would instead combine certain types of music uses that would continue to be subject, in parallel fashion, to their individual tariffs. It is only when there are multiple uses in the same hall that the user could opt for this new tariff.

It can be hoped that such a tariff, assuming that all parties participate in its development, would be simpler to administer and would increase the number of complying users. Here again, the Board stresses the important role CRFA and HAC would have to play in order to ensure that their members comply with the *Act*.

The Board might itself have certified such a tariff, if it had had the necessary information to do so. In the absence of such information, it can only strongly encourage the parties to propose one. It will be recalled that it was pursuant to a proposal by the Ontario Recreation Facilities Association (“ORFA”) that the Board, in a decision dated August 12, 1994,¹⁹ certified Tariff 21 for the first time.

Third, as we will see later, Tariff 8 (Receptions, Conventions, etc.) which the Board certifies, takes into account certain problems raised by the objectors, namely, that the tariff for small events with dancing is too high and the tariff structure does not take into account the capacity of the rooms in which the functions are held.

Fourth, Tariff 21 (Recreational Facilities), which the Board certifies, takes into account some of the concerns of the small rural communities in Alberta. Although they did not participate in the hearings, SOCAN itself has over the years made the changes to its Tariff 21 proposals that were discussed with AAAS and on which there was agreement, albeit no overall agreement between them. The Board certifies these changes.

Thus, SOCAN proposes for 2000 and 2001 the same Tariff 21 as the one certified by the Board for 1999, but proposes for 2002 to increase the annual fee from \$150 to \$180, while expanding the scope of the tariff, which now includes, in addition to the activities subject to Tariffs 7, 9 and

¹⁹ *Statement of Royalties to Be Collected by SOCAN for the Performance or Communication by Telecommunication in Canada of Musical or Dramatico-musical Works for Tariffs 4, 5.B, 9 and 11(in 1992 to 1994), 1.B, 7, 8 and 19 (in 1993 and 1994) and 3, 5.A, 10, 12, 13.A, 14, 15.B, 18, 20 and 21 (in 1994)*, www.cb-cda.gc.ca/decisions/m12081994-b.pdf, (1994) 58 C.P.R. (3d) 79.

11, the activities covered by Tariffs 5.A, 8 and 19. The allowable maximum for gross admission receipts from the activities is increased from \$12,500 to \$15,000. In 2003, pursuant to the agreement reached with Middlesex, SOCAN proposes that the allowable maximum apply to the licensee's gross revenues (essentially composed of rental costs, according to SOCAN) instead of gross admission receipts for the activities held in the facilities. Since, according to SOCAN, this new definition involves much lower revenues, it simultaneously proposes a reduction of the allowable maximum to \$12,500, but failed, according to Middlesex, to obtain its approval on this alteration. In 2004, SOCAN proposes to increase the annual fee to take account of inflation.

For the years 2000 to 2002, the Board certifies the tariff as proposed by SOCAN, the two objectors (Middlesex and ORFA) having withdrawn their objections. The Board considers that the changes certified for 2002 respond to the problems raised by the small rural communities.

Several new objectors appeared in 2003, objecting to the lowering of the allowable maximum to \$12,500, combined with an expansion in the coverage of the tariff to a number of activities. The objectors maintain that the lowering of the allowable maximum will prevent them from taking advantage of the expansion in the tariff coverage. The Canadian Recreation Facilities Council adds, however, that the new definition of revenues proposed by SOCAN is broader since it now potentially includes several new categories such as revenues from sponsorships and revenues from the sale of alcoholic beverages. This new broader definition could prevent a larger number of users from gaining access to this tariff.

The Board wishes to note, first, that lowering the allowable maximum proposed by SOCAN for 2003 is based only on the change in definition of revenues that enter into the calculation of the allowable maximum, and is not concurrent with the expansion of the tariff coverage. The latter had been proposed by SOCAN in 2002, and was then accompanied by an increase in the allowable maximum.

SOCAN thinks the new definition of revenues for the calculation of the allowable maximum implies lower revenues, while the objectors argue the opposite. In the absence of additional evidence on this question, the Board certifies the tariff for 2003 as proposed by SOCAN (including the new definition of revenues), while maintaining the allowable maximum at its 2002 level, i.e. \$15,000.

In 2004, to take account of inflation, the Board is applying its adjustment to both the annual fee, which goes from \$180 to \$185.07, and the allowable maximum, which goes from \$15,000 to \$15,422.88.

VI. TARIFF 8 (RECEPTIONS, CONVENTIONS, ASSEMBLIES AND FASHION SHOWS)

A. BACKGROUND

The latest certification of Tariff 8 is dated July 30, 1999,²⁰ and covered the years 1997 and 1998.

²⁰ *Statement of Royalties to Be Collected by SOCAN for the Performance or Communication by Telecommunication, in Canada, of Musical or Dramatico-Musical Works for Tariffs 8 and 10 (1997 and 1998) 3.A, 3.B, 5.A, 7, 13 and 15.A (1998), 1.A, 1.B, 2.B, 3.C, 11, 12.A, 14, 15.B and 21 (1998 and 1999), 4.B.2 (1998 to 2002), 13.B and 13.C*

This certification was made in the absence of any specific objection to the tariff. However, there had been some general objections earlier by various associations with respect to the multiple licensing issues.

In that decision, the Board was already referring to numerous complaints or objections by, *inter alia*, CRFA, HAC and AAAS. The Board wrote, concerning AAAS:

“In addition, AAAS raises the fact that the use of music in Tariff 8 for receptions and conventions allows for a fixed rate per event, notwithstanding the number of events per year or the number of participants to each of these events.”²¹

Under this certified tariff, the operator of the premises pays in advance for each reception, convention or assembly, or for each day a fashion show is held, \$28.75 if the event does not include dancing, and \$57.55 if it does. These rates, and the tariff structure, have been the same since 1991.

B. PROPOSED TARIFFS AND POSITION OF THE PARTIES

During the hearings on this matter, SOCAN presented its proposed tariff for 2002. At SOCAN's request, and since the objectors agree, the Board will consider as an integral part of this matter the entire period for which the tariff has not yet been certified, i.e. from 1999 to 2004.

Thus, for 1999, SOCAN is proposing a Tariff 8 identical to the existing tariff for 1998. For 2000 and 2001, SOCAN still proposes the same rates but alters the terms of payment. Instead of prepayment of the amounts owing for each event, SOCAN proposes that the payments now be made on a quarterly basis.

There were a number of objectors for these years. The County of Wetaskiwin objected to the proposed tariff for 1999 on the ground that it is unfair that rates do not vary according to the number of participants at an event, since this means that events of relatively lesser importance are more burdensome. This objector was later represented by AAAS. CRFA and HAC are also objectors for that year.

Normanby objects to the proposed tariff for 2000. It argues that the tariff represents an excessive share of its gross revenues, and that the size of the facilities should be taken into account in the determination of the rates. It also objects to the high administrative cost of having to collect these fees, and submits that responsibility for payment of these fees should be with the disc-jockeys or musicians, and not the operator of the hall.

For 2001, Ms. Sally Doucet, from a small community in Nova Scotia, and Middlesex object to the tariff. They argue that the tariff represents an excessive share of their gross revenues. Middlesex also objects to the administrative burden that the collection of the fees imposes on them. Gorge Vale Golf Club and Royal Towers Hotel also object to the tariff for 2001, claiming that the administrative burden of collecting SOCAN fees is too high and that they should not have to bear it. Finally, CRFA also objected for that year.

(1999) and 6 (1999 to 2003), www.cb-cda.gc.ca/decisions/m30071999-b.pdf, (1999) 87 C.P.R. (3d) 527.

²¹ *Ibid*, page 4.

For 2002, SOCAN proposes the following Tariff 8, which includes some significant changes:

Room Capacity (Seating and Standing) Nombre de places (debout et assises)	Fee Per Event Redevances exigibles par événement	
	Without Dancing/Sans danse	With Dancing/Avec danse
1 - 100	\$28.75	\$45.00
101 - 300	\$57.55	\$92.00
301 - 500	\$88.75	\$138.90
Over/plus de 500	\$108.90	\$170.00

The other aspects of the tariff remain the same, including the quarterly terms of payment. According to SOCAN, the new structure now includes a rate that varies according to capacity, which responds to some problems raised by the objectors. Moreover, the proposed rate for events with dancing for small users (with a capacity of between 1 and 100 persons) is lower than it was before (\$45 instead of \$57.55). SOCAN maintains that a large number of users are in that category and may consequently benefit from this lower rate. However, the rates for the larger users are significantly increased.

SOCAN also argues that because the reports of activities and payments may now be made on a quarterly basis, the administrative costs are reduced for both users and SOCAN.

Furthermore, SOCAN notes that under the changes it has proposed in Tariff 21, Tariff 8 events are now covered by Tariff 21. Small community users who avail themselves of Tariff 21 could therefore avoid paying Tariff 8 fees.

Middlesex and ORFA object to the proposed tariff for 2002. ORFA later withdraws its objection in a letter to the Board dated October 18, 2001. Middlesex also withdraws its objection after signing the agreement with SOCAN on Tariff 21, discussed earlier in these reasons.

For 2003, SOCAN proposes exactly the same tariff as for 2002. Two objections were filed, one by Normanby and one by West Grey, in terms very similar to those of other objectors for previous years.

For 2004, SOCAN proposes to retain the same structure but to increase the rates by 4.83 per cent over 2003, an adjustment to reflect inflation.

Only Normanby objected to this tariff for 2004. This objection essentially repeats the arguments they already expressed in the past. They add, however, that it is unfair to pay a rate based on the capacity of a hall when the hall is often only partially occupied.

During the hearings, CRFA argued that Tariff 8 was much too high in comparison with Tariff 18. CRFA argues that the dance portion of Tariff 8 should be a percentage of Tariff 18 (Discotheques), and that the non dance portion of Tariff 8 should be a percentage of Tariff 15.A (Background Music).

The Board rejects CRFA's request that Tariff 8 be set as a proportion of Tariffs 15.A and 18. On the one hand, CRFA did not submit sufficient information to the Board to allow analysis of this request. On the other hand, although comparisons between the various tariffs are useful and even desirable, they should not necessarily lead to tariffs that are dependent on each other. The factors that justify a change in one tariff do not always warrant a corresponding change in another tariff that is related to it.

C. ANALYSIS

In the Board's opinion, the changes to Tariff 8 proposed by SOCAN take into account, to a large degree, the main arguments advanced by the various objectors to this tariff over the years.²² For example, the quarterly terms of payment proposed by SOCAN since 2000 should help to reduce the burden of administering the tariff.

The objectors have also characterized as unfair the tariff structure, which consists of a fixed amount per event and does not vary according to the number of participants. The Board accepts the objectors' position that the tariff should vary according to the size of the event. However, the Board feels that monitoring and auditing the number of participants involves a complex and costly process. The Board believes that SOCAN's proposal to vary the fee per event according to the capacity of the halls is a solution to this problem.

For 1999, 2000 and 2001, the Board certifies the tariffs as proposed by SOCAN, except for 1999, where it instead adopts, as a simplifying measure, the quarterly payment provision.

For 2002 and 2003, the Board adopts both the new quarterly payment provisions and the new tariff structure geared to the capacity of the hall where the event is held, as proposed by SOCAN. However, the Board thinks this new structure should not generate total fees significantly in excess of what the certified tariff for 1998 generated. The tariff proposed by SOCAN, however, includes a lower rate for only one category: events with dancing in premises that can accommodate up to 100 persons. For all other categories, the rates are either the same or (in some cases up to three times) higher. The Board is of the view that this proposed tariff would have generated total fees that are significantly higher.

It would have been important that the Board be able to assess the impact of SOCAN's proposed tariff, particularly on the total fees it would generate. Absent any evidence that allows it to obtain such an assessment, the Board prefers to certify a tariff that comprises, in relation to what SOCAN proposes, lower rates for a greater number of small users, while providing some increases for the larger ones.

The evidence on file, while tenuous, tends to show that the average user is in the category of

²² SOCAN's Tariff 8 is very often the subject of complaints and comments by users of banquet halls, the general public and even members of Parliament or provincial legislatures. The number of these complaints and comments generally exceeds what the Board normally receives in regard to any other tariff. However, this may, at least in part, reflect the much greater number of events for which a payment must be made to SOCAN under this tariff than under any other tariff.

halls with a capacity of 101 to 300 places. Since the Board tries to keep constant the total fees the tariff generates, it certifies for these average users the rates that existed previously, which have been the same since 1991. Users with a smaller capacity hall will see their rates decline while those with larger halls will see them increase.

The tariff the Board certifies for 2002 and 2003 is as follows:

Room Capacity (Seating and Standing) Nombre de places (debout et assises)	Fee Per Event Redevances exigibles par événement	
	Without Dancing/Sans danse	With Dancing/Avec danse
1 - 100	\$20.00	\$40.00
101 - 300	\$28.75	\$57.55
301 - 500	\$60.00	\$120.00
Over/plus de 500	\$85.00	\$170.00

The hall capacity categories that the Board uses in the certified tariff are those initially proposed by SOCAN. The Board accepts them, for lack of any evidence whatsoever on the question. However, it hopes to receive, in a forthcoming proceeding, the information that would enable it to gauge the degree of relevance of these categories.

The rates the Board certifies for the category of halls with a capacity of 101 to 300 places correspond on average to about 15¢ per place for events without dancing and 30¢ per place for events with dancing. For the category of halls with a capacity of 1 to 100, the Board certifies rates that correspond to higher amounts per place. In doing so, the Board wishes to acknowledge, as it did earlier in the section dealing with minimum fees, that SOCAN incurs certain costs in issuing a licence and that these costs should be considered in determining the tariffs. The Board also wishes to avoid a situation in which excessively low tariffs would not justify their collection.

In the case of halls that can accommodate more than 500 persons, the tariff the Board certifies for events with dancing virtually corresponds to a threefold increase. Based on the financial data submitted by the objectors at the hearings, which described the situation of commercial facilities, the Board thinks the users have the ability to pay this increase. On the one hand, the amount of the fee still remains relatively small compared with the revenues that the events with dance in halls of this capacity can generate. On the other hand, the operator of such halls is generally able to get the ultimate users to pay the tariff amount. The Board thinks the latter are equally able to pay this increase.

The ratio between the rates for events with and without dancing is two to one. The SOCAN tariff proposal increased the rates for events without dancing by a higher percentage, without any justification in this respect. The Board does not adopt this approach and holds to the two to one ratio which existed already in the previous certified Tariff 8.

Some objectors said they were concerned by the amount, excessive in their view, of the payments under Tariff 8 as a percentage of their revenues. The tariff the Board certifies responds

to this concern by establishing lower rates for halls with a lower capacity. The small operators may, to a significant degree, accordingly benefit from a lower rate. Moreover, as stated previously, small Tariff 8 users who qualify for Tariff 21 have an additional means to reduce the burden that they might face with Tariff 8.

In the Board's opinion, the tariff it certifies in this decision is not an increase but rather a restructuring. The Board believes the new tariff will generate total fees that should not differ very much from the amount generated by the current applicable tariff, i.e. about \$2.4 million (see Table 1). The Board expects that in future proceedings SOCAN will be able to provide it with the total amount of fees (and the amounts per category) that this new tariff will have generated compared to the previous tariff. If it deems appropriate, the Board may wish to alter the rates it is now certifying in light of this information.

For 2004, SOCAN proposes an adjustment of the rates to reflect inflation. The Board grants this adjustment but does so in accordance with the methodology adopted earlier in this decision. Thus, an increase of 2.8192 per cent (see the section on the inflation adjustment) is applied to the rate that the Board certifies for 2004:

Room Capacity (Seating and Standing) Nombre de places (debout et assises)	Fee Per Event Redevances exigibles par événement	
	Without Dancing/Sans danse	With Dancing/Avec danse
1 - 100	\$20.56	\$41.13
101 - 300	\$29.56	\$59.17
301 - 500	\$61.69	\$123.38
Over/plus de 500	\$87.40	\$174.79

VII. TARIFF 18 (RECORDED MUSIC FOR DANCING)

SOCAN is asking that the years 2003 and 2004 be included in the tariff certification period. The Board accepts SOCAN's request, as the parties agree, and certifies Tariff 18 for the period 1998 to 2004.

The last certification of this tariff dates back to 1997. The tariff the Board then certified was consistent with the agreement reached between SOCAN, CRFA and HAC for the period 1992 to 1997. This tariff, which set rates for an annual licence, was as follows:

For establishments with 100 clients or less Pour les établissements de 100 clients ou moins		
Months of Operation Mois d'opération	1 to 3 Days of Operation 1 à 3 jours d'ouverture	4 to 7 Days of Operation 4 à 7 jours d'ouverture
6 months or less 6 mois ou moins	\$184.44	\$258.25
More than 6 months Plus de 6 mois	\$258.25	\$372.13
For establishments with more than 100 clients		

Pour les établissements de plus de 100 clients
20 per cent more than the fees established above, for every 20 additional clients 20 pour cent de plus que les redevances établies ci-dessus, par tranche de 20 clients additionnels

A. POSITION OF THE PARTIES

For the reasons mentioned below, SOCAN thinks Tariff 18 should be significantly increased and proposes the following rates for 2002:

For establishments with 100 clients or less Pour les établissements de 100 clients ou moins		
Months of Operation Mois d'opération	1 to 3 Days of Operation 1 à 3 jours d'ouverture	4 to 7 Days of Operation 4 à 7 jours d'ouverture
6 months or less 6 mois ou moins	\$260	\$650
More than 6 months Plus de 6 mois	\$520	\$1,300
For establishments with more than 100 clients Pour les établissements de plus de 100 clients		
20 per cent more than the fees established above, for every 20 additional clients 20 pour cent de plus que les redevances établies ci-dessus, par tranche de 20 clients additionnels		

To enable users to absorb this increase more easily, SOCAN proposes to spread the rate increase over the five years between 1998 and 2002. It also proposes that the retroactive payments owed for 1998-2002 be paid off annually, without interest, over the five-year period between 2003 and 2007.

SOCAN proposes to keep the 2003 rates constant at their 2002 level, and to increase the 2004 rates only to account for inflation, i.e. by 4.83 per cent.

SOCAN generally argues that the current tariff is largely underestimated. It compares this underestimation to the one the Board previously recognized in an earlier decision on Tariff 9 (Sports Events).²³

SOCAN argues that this underestimation of Tariff 18 becomes apparent when it is compared to Tariff 3.C, which applies to adult entertainment clubs. For example, an establishment that can accommodate 200 persons pays between \$2,184 and \$3,066 under Tariff 3.C. An establishment with the same capacity pays only \$744 under Tariff 18. SOCAN says it receives complaints from Tariff 3.C licensees that it is unfair that Tariff 18 licensees, that they see as competitors, have to pay so little. SOCAN alleges that the proposed increase will reduce these iniquities.

SOCAN further argues that the proposed increase would have only a modest impact on the users' financial situation. The proposed fees would increase from the present monthly average of \$50 to

²³ *Statement of Royalties to Be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works - Tariff 9 (Sports Events)*, www.cb-cda.gc.ca/decisions/m15092000-b.pdf, (2000) 9 C.P.R. (4th) 36.

\$125, which would continue to be a small share of the total operating costs of these establishments, and a very small amount compared to other costs associated to music.

CRFA argues that SOCAN's proposed tariff, which corresponds to an average increase of 139 per cent in the average fees paid by the establishments, is exaggerated. Furthermore, CRFA considers that the "acceleration clause", which increases the fees payable in terms of capacity over and above 100 persons (20 per cent more for every additional 20 persons) is unreasonable and should be revised downward. CRFA proposes that it be 20 per cent more for every additional 100 persons.

CRFA says SOCAN's claim that the increase in the tariff would have few consequences on the financial situation of the establishments subject to Tariff 18 is false. It does not take into account the generally low profitability of the industry, the establishments in rural areas with much lower revenues and the establishments with marginal profitability.

Finally, CRFA argues that there is no tariff sufficiently similar to Tariff 18 to establish a comparison, and that Tariff 3.C definitely cannot be used as a valid comparison since these are two types of music use that are completely different.

HAC, for its part, argues that SOCAN has to demonstrate that the value of recorded music for dance purposes has increased, which it has not done. HAC likewise says that the profitability of the industry is particularly low at present, for a number of reasons referred to earlier in these reasons. Given this difficult financial situation, HAC argues that a major increase in Tariff 18 fees would have a significant impact on the industry's profits and could result in the closure of many establishments.

B. ANALYSIS

The Board accepts SOCAN's position on the underestimation of Tariff 18. It does appear unfair that a discotheque pays on average only \$50 per month for a licence allowing it to have access to the music that is so crucial to its operations, especially when this amount is compared to other expenses (such as the sound system, the DJ equipment and services, etc.) incurred by the users with regard to music use. Moreover, even if objectors are right that the comparison between Tariff 3.C and Tariff 18 is not ideal, the Board nevertheless believes that it is a useful reference indicating a certain degree of underevaluation of Tariff 18. The Board therefore applies a correction to this tariff to better reflect the value of this type of music use.

Consequently, for all establishments open from 1 to 3 days per week, the Board certifies for 2002 the rates as proposed by SOCAN which comprise increases of about 40 per cent and 100 per cent for establishments operating 6 months or less, and more than 6 months per year, respectively. Thus the base rates (those for establishments with 100 clients or less) increase from \$184.44 to \$260 for the first category, and from \$258.25 to \$520 for the second. These rates will apply to a majority of users (see Table 3, appended).

For all establishments open 4 to 7 days per week, the Board certifies lower rates than those proposed by SOCAN. The certified rates comprise increases of about 100 per cent and 180 per cent for establishments operating 6 months or less, and more than 6 months per year, respectively, compared with the 152 per cent and 249 per cent proposed by SOCAN for these

categories. The base rates increase therefore from \$258.25 to \$520 for the first category, and from \$372.13 to \$1,040 for the second.

SOCAN proposed some larger increases for the category of establishments open 6 months or less per year and from 4 to 7 days per week than for the category of establishments open more than 6 months per year and from 1 to 3 days per week. SOCAN thereby moved away from the approach taken in the 1997 tariff, in which the rate for these two categories was the same. Absent any evidence on this question, the Board rejects SOCAN's proposal and maintains the equality of the rates between these two categories of establishments.

The Board accepts the views of the objectors that the increases in the base rates are too rapid when an establishment can accommodate more than 100 clients. The progression in the certified tariff for 1997 doubles the rate for each additional 100 clients after the first 100 clients. The Board now certifies a slower progression, which doubles the rate for each additional 200 clients after the first 100 clients.

The Board thinks the changes should result in an average monthly rate for all establishments of about \$80 in 2002. The total fees generated by the tariff should amount to close to \$2 million for that year, a little less than double what the tariff was previously generating.

The Board is aware that the tariff it certifies constitutes a significant correction, but nonetheless considers that the resulting rates are fair and equitable, and remain at reasonable levels.

As proposed by SOCAN, the Board agrees to spread the increase in the rates over the five years between 1998 and 2002. It does so by distributing the tariff increase equally over these years.

Finally, for 2004, the Board adjusts the rates to take account of inflation. For the period 1998 to 2004, the Board therefore certifies the following rates:

For establishments of 100 clients or less Pour les établissements de 100 clients ou moins			
Months of Operation Mois d'opération	Year Année	1 to 3 Days of Operation 1 à 3 jours d'ouverture	4 to 7 Days of Operation 4 à 7 jours d'ouverture
6 months or less 6 mois ou moins	1998	\$200	\$311
	1999	\$215	\$363
	2000	\$230	\$415
	2001	\$245	\$468
	2002	\$260	\$520
	2003	\$260	\$520
	2004	\$267.33	\$534.66
More than 6 months Plus de 6 mois	1998	\$311	\$506
	1999	\$363	\$639
	2000	\$415	\$773
	2001	\$468	\$906
	2002	\$520	\$1,040
	2003	\$520	\$1,040
	2004	\$534.66	\$1,069.32
For establishments with more than 100 clients Pour les établissements de plus de 100 clients			

10 per cent more than the fees established above, for each additional 20 clients 10 pour cent de plus que les redevances établies ci-dessus, par tranche de 20 clients additionnels
--

Furthermore, the Board notes SOCAN's proposal that the retroactive payments owed for 1998-2002 be paid off annually, without interest, over the five-year period between 2003 and 2007.

VIII. CERTIFICATION OF THE OTHER TARIFFS IN THE MULTIPLE LICENCING FILE

The Board certifies the following tariffs, applying adjustments of 1.7 per cent in 2002 and 2.8192 per cent in 2004 to account for inflation pursuant to the methodology adopted in this decision. Although they are part of the multiple licencing file, Tariffs 9 (Sports Events) and 19 (Fitness Activities; Dance Instruction) are the subject of specific objections and are not certified in this decision. They will be addressed later. The Board therefore certifies the following tariffs:

For the years 1998 to 2004

Tariff 20 (Karaoke Bars and Similar Establishments)

The most recent tariff certified by the Board for 1997 set rates of \$148.80 per year for an establishment open 3 days or less per week, and \$214.41 for an establishment open more than 3 days per week. SOCAN's proposal for the years 1998 to 2004 includes some relatively large increases, i.e. \$161 and \$232, respectively, in 1998, \$174 and \$250 in 1999 and \$186 and \$268 for the period 2000 to 2003. Finally, it proposes rates of \$194.98 and \$280.94 for 2004, which it has adjusted for inflation. Although there are no objections to this tariff, SOCAN, at the Board's request, justified the proposed increases essentially as follows, in a letter dated July 9, 1999.

Karaoke first appeared in establishments in the early 1990s and has since become very popular. It is now a clearly defined type of music use and very popular with clients of these establishments. The value of the music for this type of use is now comparable to the uses under Tariffs 4 and 18. The increases proposed by SOCAN for 1998, 1999 and 2000 are therefore necessary, SOCAN says, to reflect this increased value of karaoke. The Board agrees with SOCAN on these points and certifies Tariff 20 as proposed, except for 2004 where the Board applies its inflation adjustment.

For the years 1999 to 2004

Tariff 3.A (Cabarets, Cafes, Clubs, etc. – Live Music)

Tariff 3.B (Cabarets, Cafes, Clubs, etc. – Recorded Music Accompanying Live Entertainment)

Tariff 5.A (Fairs and Exhibitions)

Tariff 7 (Skating Rinks)

Tariff 10.A (Strolling Musicians and Buskers; Recorded Music)

Tariff 10.B (Marching Bands; Floats with Music)

Tariff 15.A (Background Music in Establishments Not Covered by Tariff No. 16 – Background Music)

SOCAN is proposing only inflation adjustment increases for these tariffs. Some were the subject of specific objections, later withdrawn. The Board certifies these tariffs, applying an inflation adjustment for 2002 and 2004 pursuant to the methodology adopted in this decision.

Tariff 7 triggered specific objections for the years 2000, 2003 and 2004. The objectors, Normanby and West Grey, basically argue that the minimum fee for this tariff constitutes an excessively large share of their revenues.

Although the minimum fees may, in some particular circumstances, constitute a major share of the users' revenues, their existence is no less important for all the reasons listed above. The data the Board has examined in fact showed that a large proportion of users seemed to be paying only the minimum for this tariff, and that this could justify a change in the structure of the tariff. For the time being, the Board prefers to maintain the minimum fee at its present level, for two reasons. First, the Board is unable to satisfy itself, based on the available information, that the percentage of users who appear to be paying the minimum fee of \$99.75 does not also include those that organize events without an admission charge and have to pay an annual fixed fee for the same amount. Second, the Board does not have sufficient information to be able to estimate the minimum fee level that would restore, to an acceptable level, the percentage of users who pay this fee. The Board thinks this question should be given careful attention in a future instance.

IX. CERTIFICATION OF SOME SOCAN TARIFFS THAT ARE NOT PART OF THE MULTIPLE LICENSING FILE

The Board certifies the following tariffs:

For the years 1998 to 2003

Tariff 12.B (Paramount Canada's Wonderland and Similar Operations)

Paramount Canada's Wonderland objected to SOCAN's proposed tariff for the years 1998 and 2004. In a letter to the Board dated August 2, 2001, this objector informed the Board of the withdrawal of its objection for 1998. As of the date of this decision, however, the objection to the 2004 tariff was still in place. The Board therefore certifies the tariff for the years 1998 to 2003, with an adjustment to account for inflation in 2002.

For the years 1998 to 2007

Tariff 2.C (Société de télédiffusion du Québec)

The Board certifies this tariff in accordance with the agreements reached between the parties for this period.

For the years 1999 to 2004

Tariff 13.A (Aircraft)

For the years 1999 to 2004, SOCAN proposed no change to Tariffs 13.A.1 and 13.A.2 other than an adjustment to account for inflation in 2002 and 2004. However, as of 1999, SOCAN added a new component to this tariff, Tariff 13.A.3 in regard to music as part of audiovisual presentations aboard an aircraft.

The Air Transport Association of Canada objected to this tariff in 2000 and 2003. Air Canada objected in 2004. In a letter to the Board dated February 19, 2004, SOCAN offered to withdraw its proposed tariffs for the years 1999 to 2004 and asked that the tariff be certified for these years as it was for 1998. SOCAN also said it was prepared to propose the same tariff for 2005. The objectors have accepted SOCAN's proposal in a letter to the Board dated March 16, 2004; the Board therefore certifies this tariff for the years 1999 to 2004, as per the agreement between the parties

For the years 2000 to 2002

Tariff 1.A (Commercial Radio)

This tariff is certified for the years 2000, 2001 and 2002 in accordance with the terms of an agreement reached between SOCAN and the Canadian Association of Broadcasters which covered the period 1998-2002.

For the years 2000 to 2004

Tariff 1.B (Non-commercial Radio other than the Canadian Broadcasting Corporation)

For the years 2000 to 2004, SOCAN proposes the same tariff as the most recent one certified in 1999. Only the CKUW radio station objected in 2003. It contends that non-commercial radio stations should be exempted from all payments of fees. In reply to this argument, SOCAN submits in a letter dated September 6, 2002, that the Board does not have jurisdiction to exempt certain users from the payment of these fees. The Board agrees with SOCAN's position and certifies the tariff as proposed for the years 2000 to 2004.

Tariff 2.B (Ontario Educational Communications Authority)

This tariff proposal for the years 2000 to 2004 is identical to the last tariff certified in 1999 and is not the subject of any objection. The Board certifies it as proposed.

For the years 2000 to 2004

Tariff 3.C (Adult Entertainment Clubs)

Tariff 11.A (Circuses, Ice Shows, Firework Displays, Sound and Light Shows and Similar Events)

Tariff 11.B (Comedy Shows and Magic Shows)

Tariff 12.A (Theme Parks, Ontario Place Corporation and Similar Establishments)

Tariff 13.B (Passenger Ships)

Tariff 13.C (Railroad Trains, Buses and Other Public Conveyances, Excluding Aircraft and Passenger Ships)

Tariff 15.B (Background Music in Establishments Not Covered by Tariff No. 16 – Telephone Music on Hold)

For all these tariffs, SOCAN only proposes adjustments to account for inflation in 2002 and 2004. Two of these tariffs, Tariffs 3.C in 2000 and 11.A in 2003, were the subject of objections that were subsequently withdrawn. The Board therefore certifies these tariffs as proposed by SOCAN, applying the adjustment for inflation adopted by the Board for the years 2002 and 2004.

Tariff 14 (Performance of an Individual Work)

For the years 2000 to 2003, SOCAN proposes the same tariff as the one certified for 1999. In 2004, SOCAN proposes a tariff adjusted for inflation. This tariff was not the subject of any objection. The Board therefore certifies it, applying its adjustment for inflation in 2004.

For the years 2003 to 2007

Tariff 4.B.2 (Live Performances at Theatres or Other Places of Entertainment – Classical Music Concerts, Annual Licence for Orchestras)

For the period 2003 to 2007, SOCAN proposes some gradual increases in its tariff. On January 13, 2004, Orchestras Canada confirmed to the Board that these rates reflected the terms of an agreement reached with SOCAN. The Board therefore certifies the tariff in accordance with that agreement.

For 2004

Tariff 6 (Motion Picture Theatres)

An agreement covering the period 2004 to 2008 was reached between SOCAN and the Motion Picture Theatre Associations of Canada. However, SOCAN had filed this tariff only for the year 2004. The Board therefore certifies Tariff 6 for 2004 only, in accordance with the agreement.



Claude Majeau
Secretary General

X. APPENDIX

Table 1 Statistics on SOCAN licences for tariffs included in the multiple licences file, in 2000

Tariff	Number of licences issued	Total fees collected
Tariff 3.A (Cabarets, Cafes, Clubs, etc. – Live Music)*	4,061	\$2,145,057
Tariff 3.B (Cabarets, Cafes, Clubs, etc. – Recorded Music Accompanying Live Entertainment)*	304	\$193,356
Tariff 5.A (Exhibitions and Fairs)**	453	\$52,000
Tariff 7 (Skating Rinks)*	884	\$111,300
Tariff 8 (Receptions, Conventions, Assemblies and Fashion Shows)**	2,793	\$2,432,000
Tariff 9 (Sports Events)**	133	\$145,000
Tariff 10.A (Parks, Parades, Streets and Other Public Areas – Strolling Musicians and Buskers; Recorded Music)**	263	\$30,000
Tariff 10.B (Parks, Parades, Streets and Other Public Areas – Marching Bands; Floats with Music)*	87	\$5,024
Tariff 15.A (Background Music in Establishments Not Covered by Tariff No. 16 – Background music)*	5,274	\$763,679
Tariff 18 (Recorded Music for Dancing)**	1,862	\$1,193,000
Tariff 19 (Fitness Activities)*	1,488	\$261,173
Tariff 20 (Karaoke Bars and Similar Establishments)**	569	\$98,000
Tariff 21 (Recreational Facilities Operated by a Municipality, School, College, University, Agricultural Society or Similar Community Organizations)**	244	\$38,000
TOTAL	18,415	\$7,467,589

Source: Exhibit SOCAN-8

* SOCAN data as of March 2002

** SOCAN data as of September 2001

Table 2 Statistics on SOCAN licences that have a minimum fee, in 2000

Tariff	At minimum rates		Above minimum rates		Total	
	Number of licences (% of total)	Fees \$ (% of total)	Number of licences (% of total)	Fees \$ (% of total)	Number of licences	Fees \$
3.A (Cabarets, Cafes, Clubs, etc. – Live Music)	1,312 (32%)	105,266 (5%)	2,749 (68%)	2,039,791 (95%)	4,061	2,145,057
3.B (Cabarets, Cafes, Clubs, etc. – Recorded Music)	79 (26%)	4,740 (2%)	225 (74%)	188,616 (98%)	304	193,356

4.A (Popular Music Concerts)	5,242 (31%)	103,790 (2%)	11,807 (69%)	5,302,571 (98%)	17,049	5,406,361
4.B.1 (Classical Music Concerts)	1,624 (56%)	32,021 (17%)	1,275 (44%)	151,212 (83%)	2,899	183,233
6 (Motion Picture Theatres)	209 (11%)	21,017 (5%)	1,649 (89%)	362,719 (95%)	1,858	383,736
7 (Skating Rinks)	760 (86%)	75,917 (68%)	124 (14%)	35,383 (32%)	884	111
10.B (Marching Bands)	53 (61%)	1,645 (33%)	34 (39%)	3,339 (67%)	87	4,984
11.A (Circuses, etc.)	19 (35%)	1,174 (1%)	35 (65%)	91,017 (99%)	54	92,191
13.B (Passenger Ships)	10 (45%)	540 (16%)	12 (55%)	2,745 (84%)	22	3,285
13.C (Trains, Buses, etc.)	0	0	2 (100%)	378 (100%)	2	378
15.A (Background Music)	2,388 (45%)	215,476 (28%)	2,886 (55%)	548,193 (72%)	5,274	763,669
16 (Music Suppliers)	27 (68%)	750,524 (86%)	13 (32%)	122,444 (14%)	40	872,968
19 (Fitness Activities)	694 (47%)	44,416 (17%)	794 (53%)	216,757 (83%)	1,488	261,173

Source: Exhibit SOCAN-8

Note: The data for Tariffs 10.B, 11.A, 13.B, 13.C and 16 reflect the SOCAN information as of March 2002, while the other tariffs reflect the information as of January 2002. For Tariff 4, the number of licences refers to the number of events. Tariff 16 comprises two categories (industrial premises and other premises), which each have their minimum fee and their principal rate. For this tariff, 13 of the 40 users paid both the minimum fee for one category and the principal rate for the other, which complicates the interpretation of the table percentages.

Table 3 Number of Tariff 18 licences, by category and capacity, 2002

Number of patrons	6 months or less of operation		More than 6 months of operation		Total
	1 to 3 days of operation	4 to 7 days of operation	1 to 3 days of operation	4 to 7 days of operation	
0 - 100	310	2	310	49	671
101 - 200	121	15	535	128	799
201 - 300	36	6	225	104	371
301 - 400	9	2	111	57	179
401 +	20	2	98	57	177
Total	496	27	1,279	395	2,197

Source: Update to Exhibit SOCAN-10