Copyright Board Canada

Commission du droit d'auteur Canada

Date	2015-03-27
Citation	File: Public Performance of Sound Recordings
Regime	Collective Administration of Performing Rights and of Communication Rights *Copyright Act*, subsection 68(3)
Members	The Honourable William J. Vancise Mr. Claude Majeau Mrs. Jacinthe Théberge
Proposed Tariffs Considered	Re:Sound Tariff No. 6.B – Use of Recorded Music to Accompany Fitness Activities, 2008-2012

Statement of Royalties to be collected for the performance in public or the communication to the public by telecommunication, in canada, of published sound recordings embodying musical works and performers' performances of such works

Reasons for decision

I. INTRODUCTION

[1] On July 6, 2012, the Board certified Re:Sound Tariff No. 6.B (Use of Recorded Music to Accompany Physical Activities), 2008-2012 (the "*Tariff 6.B*").[1] *Tariff 6.B* targets most forms of physical activities including, but not limited to, activities in fitness centres, fitness classes and group exercises, dance instruction and skating. *Tariff 6.B* requires fitness centres to pay an annual flat fee to Re:Sound for each venue where recorded music in Re:Sound's repertoire is used in conjunction with physical activities.

[2] In its decision, the Board found the expert evidence filed by Re:Sound and the Objectors unreliable and rejected the royalties proposed by the Parties.[2] The Board also rejected the Society

---

[1] *Re:Sound Tariff No. 6.B (Use of Recorded Music to Accompany Physical Activities) 2008-2012* (July 7, 2012).
[2] *Re:Sound Tariff No. 6.B – Use of Recorded Music to Accompany Physical Activities, 2008-2012* (6 July 2012) Copyright Board Decision (hereinafter the "July 6, 2012 Decision") at para 162.

of Composers, Authors and Music Publishers of Canada (SOCAN) Tariff 19 (Fitness Activities and Dance Instruction) as an appropriate benchmark. However, since the evidence demonstrated that Re:Sound was entitled to a tariff, the Board decided to base royalty rates for some of the targeted activities on an average of the payments made by fitness centres under confidential licensing agreements with SOCAN (the "SOCAN Agreements"). The Board used only some of the SOCAN agreements pertaining to the largest fitness centres and dance class providers, which were provided by SOCAN to the Board at its request. Copies of the SOCAN Agreements were not provided to the Parties and were not discussed during the hearing.

[3] On August 7, 2012, Re:Sound filed an application for judicial review before the Federal Court of Appeal (FCA) to set aside *Tariff 6.B* and remit the matter to the Board for a redetermination of the proposed statement of royalties. The application was opposed by the Fitness Industry Council of Canada (FIC) and Goodlife Fitness Centres Inc. (Goodlife), the two objectors to Re:Sound's proposed *Tariff 6.B.*

[4] Re:Sound's application was made on the grounds that the Board committed three errors in certifying *Tariff 6.B.* First, Re:Sound argued that the Board breached its duty of procedural fairness by basing the tariff on a ground that was not considered during the hearing and on evidence that Re:Sound did not have the opportunity to address. Second, Re:Sound argued that the Board erred in law in interpreting the *Copyright Act* (the "*Act"*) finding that royalties under section 19 of the *Act* should be based only on the percentage of the number of sound recordings for which the performer or maker has authorized Re:Sound to collect royalties on their behalf. Third, Re:Sound argued that the Board established an unreasonably low quantum of royalties payable to Re:Sound under *Tariff 6.B.*

[5] On February 24, 2014, the FCA rendered its decision.[3] It granted Re:Sound's application in part and set aside the decision of the Board approving *Tariff 6.B* for breach of the duty of fairness, in so far as it applies to royalties for the performance in public of recorded music to accompany fitness classes, dance instruction and other physical activities.

[6] The Court found that a breach of duty of fairness had occurred as a result of the Board basing its decision on a ground that could not reasonably have been anticipated by those affected and that they did not have an opportunity to address. Specifically, that ground was the discounted amounts paid to SOCAN under individual licensing agreements by users to which SOCAN Tariff 19 applied, which were not discussed during the hearing. The Parties did not have an opportunity to make submissions on whether the SOCAN Agreements relied upon by the Board were an appropriate proxy for the value of recorded music in the context of fitness classes and dance instruction.

---

[3] *Re:Sound v. Fitness Industry Council of Canada and Goodlife Fitness Centres Inc.*, 2014 FCA 48.

[7] The Court remitted the matter for redetermination by the Board after the Parties have had an opportunity to address the appropriateness of the ground on which the Board based its decision.

[8] Elements of *Tariff 6.B* related to fitness classes, dance instruction, and other physical activities for which no specific rate has been set have therefore to be redetermined and certified. The FCA decision left *Tariff 6.B* untouched as it relates to the use of recorded music as background music in fitness areas and for skating. The language of the Court clearly conveys that it granted the application only with respect to the use of the SOCAN Agreements as a basis for setting royalties. The royalties based on the SOCAN Agreements are for the performance in public of recorded music to accompany fitness classes, dance instruction, and other physical activities. This last group of physical activities excludes the performance in public of recorded music as background music in fitness areas and for skating for which specific rates were set.[4] Furthermore, those rates were not in any way based on the SOCAN Agreements.[5]

[9] The Court also ruled, given its remittance for redetermination, that it was not necessary to consider Re:Sound's allegation that royalty rates, for the use of recorded music during fitness classes, dance instructions and other physical activities, were unreasonably low.

[10] On March 7, 2014, Re:Sound informed the Board that it had reached an agreement with FIC and Goodlife on the rates and terms of a tariff to replace *Tariff 6.B.* The agreement (the "*Settlement Tariff*") was filed by Re:Sound on March 21, 2014. Re:Sound, in concert with FIC and Goodlife, asked that the Board certify the *Settlement Tariff* as proposed. We address the Parties' request later in these reasons. The rates and terms of the *Settlement Tariff* differ significantly from *Tariff 6.B,* differences which will be explained in the analysis section.

[11] On March 12, 2014, Re:Sound asked that the Board issue, pursuant to section 66.51 of the *Act*, an interim decision maintaining the same rates and the same terms as *Tariff 6.B.* FIC and Goodlife did not oppose the application. On April 17, 2014, the Board granted Re:Sound's application for an interim decision and issued an interim tariff with the same terms as *Tariff 6.B,* except for provisions relating to skating, which remained as final.[6]

[12] On April 7, 2014, the Board, in accordance with the FCA's instructions, provided to the Parties copies of the SOCAN Agreements it received from SOCAN and upon which the Board had based its July 6, 2012 decision. The Board also provided the Parties the SOCAN agreements it considered but did not use as a basis for its decision. The Board invited the Parties to comment on the appropriateness of using these agreements as a basis for establishing the royalty rates for

---

[4] *Supra* note 1, ss 2 and 4.
[5] *Supra* note 2 at paras 128-133 for background music and para 176 for skating.
[6] *Re:Sound Tariff No. 6.B – Use of Recorded Music to Accompany Physical Activities, 2008-2012* (17 April 2014) Interim Copyright Board Decision.

the performance in public of recorded music to accompany fitness classes, dance instruction and other physical activities.

[13] On May 23, 2014, the Parties filed their submissions on the appropriateness of the SOCAN Agreements. FIC and *Goodlife*'s joint submission incorporated by reference their respective position before the FCA during the judicial review proceedings and commented on the suitability of the *Settlement Tariff* filed with the Board on March 21, 2014. Re:Sound's submission raised several issues with the SOCAN Agreements, compared them with the *Settlement Tariff* and commented on the Board's jurisdiction to consider the *Settlement Tariff*. All Parties asked the Board to certify the *Settlement Tariff* as proposed.

[14] In its Notice of June 2, 2014, the Board invited the Parties to provide additional comments on the issue of the Board's jurisdiction to consider and certify the *Settlement Tariff*. FIC and Goodlife affirmed their support for the Board's jurisdiction to do so in their submissions dated June 9, 2014. Re:Sound did not provide further comments on that issue as it had already addressed the issue in its previous submissions.

[15] The Parties, through a Notice of the Board dated November 21, 2014, were invited to comment on the Board's preliminary view that the February 24, 2014 decision of the FCA upheld *Tariff 6.B* as it applies to background music. On December 5, 2014, FIC and Goodlife confirmed that they deferred to the Board's discretion on this question. Re:Sound, while arguing that background music was not upheld by the decision of the FCA, deferred as well to the Board's discretion on that issue.

II. ANALYSIS

A. JURISDICTION OF THE BOARD

[16] In its February 24, 2014 judgment, the FCA said:

> [81] Since the tariff set by the Board was based entirely on a methodology not raised as an issue at any point in the decision-making process, *Tariff 6.B* cannot stand. The matter must be remitted to the Board for redetermination of the royalties payable for the use of recordings of musical works in fitness classes after it has disclosed to the parties any information that it alone has on the ground on which it based its decision and has provided the Parties with an opportunity to address it.
>
> […]
>
> [128] For all of the above reasons, I would allow Re:Sound's application for judicial review and set aside the decision of the Board approving *Tariff 6.B* for breach of the duty of fairness, in so far as it applies to royalties for the performance in public of recorded music to accompany fitness classes, dance instruction, and other physical activities for which no specific rate has been set. I would also remit the matter to the Board for redetermination after

> the parties have had an opportunity in accordance with the duty of fairness to address the appropriateness of the ground on which the Board based its decision. [Our emphasis]

[17] The FCA remitted the case to the Board with the directions it deemed appropriate pursuant to sections 28(2) and 18.1(3)(*b*) of the *Federal Courts Act*. Therefore, the Board initiated this proceeding to permit the Parties to address the appropriateness of the ground on which the Board based its decision. Such instructions directly affect the Board's jurisdiction for the redetermination process.

[18] The Board's findings on all other issues, such as the reasonableness and reliability of the expert evidence originally put forth by the Parties and the rates certified by the Board for skating and for background music in fitness areas, were not disturbed by the FCA decision. Those findings remain and the resulting conclusions will not be revisited.

[19] The status of the *Settlement Tariff* filed with the Board after the FCA remitted the case to the Board for redetermination following its decision on the application for judicial review has to be considered taking into account established legal principles.

[20] In *Canada (Commissioner of Competition) v. Superior Propane Inc.*,[7] Justice Rothstein set out the basic obligation to comply with a Court's direction as a matter of *stare decisis* and legal duty.

> "The principle of *stare decisis* is, of course, well known to lawyers and judges. Lower courts must follow the law as interpreted by a higher coordinate court. They cannot refuse to follow it: *Re Canada Temperance Act, Re Constitutional Questions, Re Consolidated Rules of Practice*, 1939 CanLII 58 (ON CA), [1939] 4 D.L.R. 14 at 33 (Ont. C.A.), aff'd reflex, [1946] 2 D.L.R. 1 (S.C.C.); *Woods Manufacturing Co. v. Canada (Attorney General)*, 1951 CanLII 36 (SCC), [1951] S.C.R. 504 at 515. This principle applies equally to tribunals having to follow the directions of a higher court as in this case. On redetermination, the duty of a tribunal is to follow the directions of the reviewing court."[8]

[21] This principle was also recently confirmed by the Supreme Court of Canada in *Régie des rentes du Québec v. Canada Bread Company Ltd.*[9]

[22] This redetermination is not a *de novo* proceeding, and as such, the scope of arguments and evidence is limited. Any deviation from the instructions from the FCA on the issue(s) to be redetermined by the Board could raise jurisdictional issues. Therefore, we reviewed and considered the file and the written submissions made by the Parties that were relevant to the redetermination of this matter, pursuant to the direction of the FCA.

---

[7] [2003] 3 F.C. 529.
[8] *Ibid* at para 54.
[9] [2013] 3 SCR 125 at para 46.

[23] Re:Sound provided submissions on the Board's jurisdiction to consider the *Settlement Tariff*, which were endorsed by FIC and Goodlife. Re:Sound argued that the *Settlement Tariff* did not constitute new evidence but rather a resolution reached by all Parties that the Board had the jurisdiction to consider in its redetermination. Furthermore, Re:Sound argued that the FCA decision imposed no limitation on the information and factors the Board may consider as part of its redetermination. While we do not completely agree with the reasoning of the Parties, we will, for reasons set out below, consider the *Settlement Tariff* in our redetermination.

B. COMPOSITION OF THE PANEL FOR REDETERMINATION

[24] The redetermination must be undertaken according to the directions of the Federal Court of Appeal and is, therefore, limited in scope. Where a reviewing court deems a complete redetermination necessary, it clearly indicates it and explains why it so concludes. It has not done so here. The directions of the Court did not state that a differently constituted panel of the Board proceed with the redetermination. Such directives are often provided in cases where the reviewing court finds an appearance of bias. This was not the case here.

[25] The administrative law principle that "*he who hears must decide*" applies in this instance. As a result, we find that the original panel that rendered the July 6, 2012 decision is seized of the matter and it is the panel that undertook the redetermination at hand.

C. PARTIES' SUBMISSIONS ON THE ISSUE RAISED BY THE FCA'S DECISION

i. Re:Sound

[26] Re:Sound's comments, submitted on May 23, 2014, on the appropriateness to use of the SOCAN Agreements can be summarized as follows:

1. The SOCAN Agreements are not representative of either the Canadian fitness industry or the participants in this proceeding. Only two agreements apply to fitness venues and one of these agreements does not apply to fitness classes.
2. The SOCAN Agreements are discounted to account for administrative efficiencies resulting from licensing multiple users through a single licence. If SOCAN Tariff 19's rate of $2.14 times the average number of participants per week per room is the formula applied to the agreements, then the implicit average number of participants per week per room is much lower than what evidence suggests.
3. The Board's methodology in setting the flat fees as the average of the rates under the SOCAN Agreements is flawed as it does not account for the relative representativeness of each fitness chain or their market share.
4. Setting a flat fee for dance instruction smaller than the rate for fitness classes is inconsistent with Re:Sound's evidence in this proceeding that recorded music is integral to dance classes. Furthermore, many of the SOCAN Agreements indicate that the fee applies per instructor and not per venue as the Board concluded.
5. The SOCAN Agreements represent confidential, non-precedential, private agreements

with individual users for efficiency and enforceability reasons and do not reflect the value of music with some agreements providing that they do not constitute an admission to the value of music.

6. The tariff's flat fees for fitness classes, dance instruction and other physical activities do not reflect the different types of fitness venues (size, number of classes, etc.) and their use of music.
7. The rates set in the SOCAN Agreements reflect data compiled for the year 2007.
8. Many of the SOCAN Agreements are undated, unsigned, expired or in an unusual form (email or letter).

[27] Some of Re:Sound's comments were related to and included information designated as confidential within the SOCAN Agreements, and as such we cannot make specific reference to them in this decision. We have however considered them.

[28] The Board was aware of most of the issues raised in Re:Sound's comments and, in fact, referred to a number of those in its reasons for the July 6, 2012 decision. Also, some comments (points 1, 7 and 8 above) relate to agreements that were considered but rejected by the Board as grounds for its decision.

[29] We do however address a few of the arguments raised by Re:Sound. With respect to point 2 above, the calculations and projections of Re:Sound related to the average number of participants. While not necessarily unreasonable *per se*, they are based on assumptions that we cannot verify due to the lack of necessary information. Furthermore, having originally discarded SOCAN Tariff 19 as a suitable proxy for *Tariff 6.B*,[10] we cannot use it in our interpretation or evaluation of the SOCAN Agreements, although we appreciate that they may well reflect an underestimation of the average weekly attendance in fitness centres.

[30] On the other hand, we agree that some of the SOCAN Agreements were structured in such a way that a fee applies per instructor and not per venue as the Board previously concluded.

ii. FIC and Goodlife

[31] The joint submissions of FIC and Goodlife filed on May 23, 2014, on the issue of appropriateness of using the SOCAN Agreements as a basis for the Tariff, were peculiar. First, they stated that while they appreciated the opportunity to comment, they declined to do so. Then, they added that they take no position contrary to the position they took before the FCA during the judicial review proceeding, where they opposed the application for judicial review filed by Re:Sound, arguing, *inter alia*, that there were no breach of duty of fairness in the original process before the Board and that it was appropriate for the Board to use the SOCAN Agreements. Then, FIC and Goodlife urged the Board to certify the *Settlement Tariff* filed on March 21, 2014.

---

[10] *Supra* note 2 at para 147.

Finally, FIC and Goodlife endorsed the submissions made by Re:Sound regarding the use of the SOCAN Agreements, which contends that the use of the SOCAN Agreements was wholly inappropriate for setting the rates in this case.

[32] Given the comments filed by Re:Sound regarding the SOCAN Agreements, combined with the evidentiary shortcomings already identified in the July 6, 2012 decision, we find that maintaining a rate based on the SOCAN Agreements for the use of recordings of musical works in fitness classes, dance instruction and other physical activities, even with some adjustments, is not appropriate. We therefore reject the SOCAN Agreements as an appropriate benchmark. However, a tariff should be certified for the reasons stated in the July 6, 2012 decision, which need not be repeated here.[11] The Board finds itself back in the same difficult situation it was in before in this case, namely that we do not have usable evidence pertaining to the value of several activities targeted by the subject tariff. However, given the fact that we are required to set a tariff in this proceeding, we will consider the *Settlement Tariff*.

[33] Notwithstanding some issues that we will address later, we take comfort in the following aspects of the *Settlement Tariff*.

[34] First, all the Parties involved in the proceeding propose and support the *Settlement Tariff*. This aspect is even more important in a case such as this one where the Parties have taken quite opposite and obviously contradictory positions throughout the process.

[35] Second, from FIC's and Goodlife's perspective, the industry's best interests lie in the certainty, stability and finality the *Settlement Tariff* offers.[12] Although such certainty and stability are mostly prospective in nature in the present matter, they are important considerations.

[36] Third, since we have rejected the SOCAN Agreements as a basis for any rates in the tariff, we are in a difficult position given that Re:Sound is entitled to a tariff for the use of sound recordings in fitness and dance classes, that we are required to certify one, but that we do not have any usable evidence pertaining to the value of such tariff.

[37] The *Settlement Tariff* does however provide us with a basis for setting a tariff, which we consider fair and equitable. In the present circumstances, the exercise of the Board's inherent discretion to consider the *Settlement Tariff*, under the aforementioned situation created by the absence of reliable evidence, is both reasonable and desirable.

---

[11] *Ibid* at paras 161-165.
[12] FIC and Goodlife joint submissions, submitted on May 23, 2014 at 2.

D. THE SETTLEMENT TARIFF

[38] The *Settlement Tariff* filed with the Board on March 21, 2014 which is agreed to and supported by all Parties must be examined to determine its use as a basis for establishing a tariff.

[39] First, it is important to set out the differences between the rates and terms of the *Settlement Tariff* and those which were contained in *Tariff 6.B*.

[40] The *Settlement Tariff* contains a list of definitions that is not part of *Tariff 6.B* for the years 2008 to 2012. The terms "dance class", "fitness activity", "fitness class", "fitness venue", "member", "skating venue", "third-party music supplier", "venue" and "year" are defined in the *Settlement Tariff*. In our opinion, the addition of these definitions is not problematic and could in fact make the administration of the tariff easier, and we include them in the tariff. However, the definitions for "fitness class" and "skating venue" contain language affecting how the tariff would apply to skating, a change that is beyond the scope of this redetermination. We therefore decline to include them as submitted.

[41] The application sections of the tariff under the *Settlement Tariff* and *Tariff 6.B* are similar but use different wording. The *Settlement Tariff* is more specific regarding the uses of recorded music it does not cover. In addition, the *Settlement Tariff* does not explicitly incorporate Re:Sound Tariff 3 (Use and Supply of Background Music). This is a significant difference because *Tariff 6.B* uses Re:Sound Tariff 3 to set the royalties for the use of recorded music in fitness areas.

[42] As noted above, in our opinion the FCA decision on Re:Sound's application for judicial review did not affect the Board's decision with respect to the use of recorded music for both skating and as background music in fitness areas. The breach of procedural fairness found by the FCA pertains solely to the rates that were based on the SOCAN Agreements, namely for the performance in public of recorded music to accompany fitness classes, dance instruction, and other physical activities for which no specific rate has been set. Both the use of recorded music for skating and as background music in fitness areas had specific rates set in *Tariff 6.B* and those rates were not based on the SOCAN Agreements. Therefore, terms of the *Settlement Tariff* dealing with such activities exceed the Board's jurisdiction in this redetermination. Even though the Board, in its interim decision dated April 17, 2014, stated that only the provisions of *Tariff 6.B* unaffected by the FCA decision were those pertaining to skating, on further analysis and consideration of that decision we find that the provisions pertaining to background music were not void either, for reasons expressed herein.

[43] The Parties expressly withdrew the proposed revisions to section 6 of the *Settlement Tariff* dealing with skating in light of the FCA decision to "uphold the Tariff as it applies to skating."[13]

[44] The *Settlement Tariff* specifies that it is subject to the exception set out in subsection 69(2) of the *Copyright Act*. Although this is not strictly necessary, we will include it in the tariff for the purpose of clarity.

[45] In *Tariff 6.B*, royalties payable to Re:Sound are divided into four categories:

- Background Music (fitness);
- Fitness Classes;
- Skating; and,
- Dance Instruction and Other Physical Activities.

Those categories no longer exist under the *Settlement Tariff*. Instead, royalties are payable under three categories:

- Fitness venues;
- Fitness Classes and Dance Classes; and,
- Skating venues.

[46] The first category of the *Settlement Tariff*, Fitness venues, corresponds to the same activities and uses of recorded music as the first category of the certified tariff, Background Music (fitness), but it uses different rates and rate bases that are not subject to Re:Sound Tariff 3. As explained previously, changes to this category of uses are beyond the Board's jurisdiction for this redetermination and will not be included.

[47] The second category of the *Settlement Tariff* corresponds to activities subject to the second and fourth categories found in *Tariff 6.B*, namely fitness classes, dance instruction and skating lessons. Those three activities are not subject to the same rates as they were in *Tariff 6.B*; rather than being based on a flat fee of $105.74 as in *Tariff 6.B*, the Fitness Classes and Dance Classes category of the *Settlement Tariff* is based on a rate per class per venue.

[48] The third category in both *Tariff 6.B* and the *Settlement Tariff* relate to skating and are identical (further to the withdrawal of the Parties).

[49] The *Settlement Tariff* does not specify royalties payable to Re:Sound for the use of recorded music during other physical activities that could otherwise be subject to the tariff, but in all likelihood, such use would fall within the definition of "fitness activity".

---

[13] Parties' joint submissions, submitted on May 23, 2014 at 4.

[50] The *Settlement Tariff* also proposes minor changes in the administrative provisions that are acceptable and agreed upon by the Parties who would eventually have to abide by them.

[51] A Table in the Appendix shows the main differences between the royalties payable under *Tariff 6.B* and the *Settlement Tariff*. Generally, we estimate that the total royalties payable are higher under the *Settlement Tariff* than pursuant to *Tariff 6.B*. The Parties are aware of this result.[14]

[52] Having decided to certify the *Settlement Tariff*, with some adjustments with respect to the use of recorded music as background music and for skating, we nevertheless have some concerns about the *Settlement Tariff* that are worth mentioning.

[53] First, an agreement with terms and conditions contained in the *Settlement Tariff* could have been proposed by the Parties, prior to the issuance of the Board's July 6, 2012 decision and ideally prior to the hearing, but was not. It was filed with the Board only after the Parties had the benefit of taking into account the Board's final decision on the matter. This could be perceived as the Parties attempting to do indirectly what the law does not permit them to do directly. Also, when an agreement is submitted in the normal course, it permits the Board to understand, for example, the circumstances under which the agreement was negotiated, how the rates were calculated or what other factors impacted the agreement. Such matters are relevant, as Re:Sound acknowledged in its submissions dealing with the SOCAN Agreements.[15]

[54] Second, the *Settlement Tariff* is substantially different from the tariff originally proposed which is the source of this proceeding, or the certified tariff that is currently applicable on an interim basis, since 2012. We have already discussed those differences. Certifying a new tariff with different rates and formulas could create administrative and financial difficulties if Re:Sound decides to collect royalties retroactively as adjustment payments would have to be recalculated. These difficulties could be exacerbated in cases where a user was not represented by the Parties during the negotiation of the *Settlement Tariff*. As such, the balance of convenience could lead Re:Sound to refrain from retroactively collecting royalties from users who have already paid under *Tariff 6.B* and who were not represented by the Parties during the negotiations leading to the *Settlement Tariff*.

[55] Third, when certifying a tariff, the Board must take into consideration not only the parties involved in the proceeding but also eventual users who may be subject to the tariff. The record does show that the two objectors, FIC and Goodlife, represent the majority of fitness venues in Canada; together, they account for over 5,000 fitness venues with over four million members. As

---

[14] *Supra* note 12 at 2.
[15] Re:Sound's submissions, dated May 23, 2014 at 2.

Re:Sound correctly pointed out, the Board has previously held that where a resolution on a tariff is supported by an industry association representing the vast majority of users, the Board "can take for granted that the agreement is in the interest of all users subject to the tariff."[16] However, the tariff will also apply to dance instruction venues. The extent to which they are represented by FIC is unknown, but the lack of evidence prevents us from examining possible fairness issues in respect of the representativeness of these venues.

E. RATES FOR FITNESS AND DANCE CLASSES

[56] Given all the above, we certify terms and conditions reflected in the *Settlement Tariff*, with the necessary adjustments mentioned to remove any reference to the use of recorded music for background music in fitness centres and for skating. The terms and rates relating to the use of background music in fitness venues as a result of the interim decision of the Board dated April 17, 2014 are hereby rendered final.

III. TARIFF WORDING

A. DEFINITIONS

[57] The definitions included in the tariff are essentially the ones proposed by the parties, except for the adjustments made necessary given that the use of recorded music as background music in fitness areas and for skating were not subject to this redetermination proceeding.

B. RATES NOT SUBJECT TO THIS REDETERMINATION

[58] Since we were not seized of the issues of the use of recorded music as background music in fitness areas and for skating activities in the current redetermination, the provisions of *Tariff 6.B* dealing with those activities remain in force and are unchanged. Therefore, sections 4 and 6 in the tariff are identical to sections 2 and 4, respectively, of *Tariff 6* as certified by the Board on July 7, 2012.

C. TRANSITIONAL PROVISIONS

[59] The tariff contains certain transitional provisions made necessary because it replaces the tariff previously certified by the Board for the same activities, and applies retroactively. Since the royalties payable pursuant to this tariff will differ from the royalties payable pursuant to the previously certified tariff, multiplying interest factors need to be applied to the difference. As stated before, we believe the tariff will generally result in higher royalties payable. However, to account for the possibility that some users may end up owing less than under the previously

---

[16] *SOCAN Various Tariffs* (29 June 2012) Copyright Board Decision at para 30.

certified tariff, multiplying factors will apply to both royalties owed and excess royalty payments.

Gilles McDougall
Secretary General

APPENDIX

Table: Main differences between the applicable rates for *Tariff 6.B* and the *Settlement Tariff*

Tariff 6.B (2008-2012), as certified on July 7, 2012		***Settlement Tariff*, 2008-2012**	
Use of Music/Activities	**Royalties payable**	**Use of Music/Activities**	**Royalties payable**
Background Music (Fitness) In areas with weight training, cardiovascular training, circuit training and other similar activities, other than fitness classes.	- 3.2% of the amount paid to subscribe to a third-party music supplier, or - 0.0831¢ per admission.	**Fitness venues** In all areas within a fitness venue other than during a fitness or dance class, including weight training, cardiovascular training, circuit training and other fitness activities, as well as in change rooms, hallways, offices and lobby areas.	- 3.2% of the amount paid to subscribe to a third-party music supplier, or - $50 per year if fewer than 1,000 members, $250 if between 1,000 and 5,000 members or if membership is not tracked, $500 if more than 5,000 members.
Fitness Classes During fitness classes.	Flat fee of $105.74 per year per venue.	**Fitness Classes and Dance Classes, including skating lessons**	Amount per class: 31.0¢ (2008) 31.9¢ (2009) 32.8¢ (2010) 33.8¢ (2011) 34.8¢ (2012)
Dance Instruction and Other Physical Activities	Flat fee of $23.42 per year per venue.		
Skating	- 0.44% of the gross receipts from admissions, subject to a minimum of $38.18. - Flat fee of $38.18 per year per venue if no admission fee is charged.	**Skating venues, excluding skating lessons**	- 0.44% of the gross receipts from admissions, subject to a minimum of $38.18. - Flat fee of $38.18 per year per venue if no admission fee is charged.