

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

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**Citation** *SOCAN 22.D.3 (2007–2018)*, 2020 CB 003

**Members** The Honourable Luc Martineau  
René Côté  
Nathalie Théberge

**Proposed Tariffs Considered** SOCAN Tariff No. 22.4 – Audiovisual Webcasts (2007)  
SOCAN Tariff No. 22.4 – Audiovisual Webcasts (2008)  
SOCAN Tariff 22.D – Audiovisual Webcasts (2009)  
SOCAN Tariff 22.D – Audiovisual Webcasts (2010)  
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SOCAN Tariff 22.D – Audiovisual Webcasts (2013)

***SOCAN 22.D.3 (2007-2018)(Re)***

**JURISDICTIONAL RULING**

**I. DECISION**

[1] This Ruling addresses two issues that have arisen regarding the Board’s jurisdiction to consider a number of proposed tariffs engaged by the Settlement filed jointly in June 2018 by SOCAN, members of the Canadian Association of Broadcasters (CAB), and a group of broadcast distribution undertakings (the BDUs).

[2] The part of the Settlement pertaining to this Ruling is entitled “*SOCAN 22.D.3*” (the Settlement Tariff). It covers the communication of works to the public in connection with the operation of an audiovisual service allied with a Broadcast or BDU Service licensed under SOCAN Tariff 2.A or 17, for the years 2007–2018.

[3] The first issue is whether the Board is deprived of its jurisdiction to consider the activities included in the Settlement Tariff, by virtue of the Settlement Tariff engaging proposed tariffs that the Board has already approved. On this issue, we conclude that the Settlement Tariff does engage

portions of proposed tariffs that the Board has already approved under the title *SOCAN 22.D.1 (2007–2013)*, and that the Board therefore lacks jurisdiction with respect to these.

[4] The second issue is whether the Board nonetheless retains jurisdiction to consider the components of the Settlement Tariff pertaining to the activities of the members of CAB for all years encompassed by the Settlement Tariff. We conclude that it does.

## II. OVERVIEW

[5] The difficulties in this matter arise because, in July 2014, the Board issued a tariff for the years 2007–2013 covering communication of works to the public in connection with the operation of an audiovisual service and its authorized distributors (*SOCAN Tariff No. 22.D.1 Internet – Online Audiovisual Services (2007-2013)*). This tariff (the Approved Tariff), was one of the tariffs issued as a result of the Board’s consideration of the following proposed tariffs (the “Proposed Tariffs”):

- *SOCAN Tariff No. 22.4 – Audiovisual Webcasts (2007)*;
- *SOCAN Tariff No. 22.4 – Audiovisual Webcasts (2008)*;
- *SOCAN Tariff 22.D – Audiovisual Webcasts (2009)*;
- *SOCAN Tariff 22.D – Audiovisual Webcasts (2010)*;
- *SOCAN Tariff 22.D – Audiovisual Webcasts (2011)*;
- *SOCAN Tariff 22.D – Audiovisual Webcasts (2012)*; and
- *SOCAN Tariff 22.D – Audiovisual Webcasts (2013)*.

[6] The activities it covers overlap with those included in the Settlement Tariff for the same years. In addition, while CAB initially participated in proceedings culminating in the issuance of *SOCAN Tariff No. 22.D.1 (2007–2013)*, it later did not participate, and it appears that its activities were not intended to be encompassed in that Tariff.

## III. ISSUES

[7] The two issues to be determined in this ruling are:

- a. whether the Board is deprived of its jurisdiction to consider the activities included in the Settlement Tariff that are covered by the Approved Tariff because the Board has already certified a tariff respecting those activities in *SOCAN Tariff 22.D.1 (2007–2013)*; and,
- b. if so, whether the Board nonetheless retains jurisdiction to consider the components of the Settlement Tariff pertaining to the activities of the members of CAB for all years encompassed by the Settlement Tariff.

## IV. ANALYSIS

### A. THE BOARD LACKS JURISDICTION (FUNCTUS OFFICIO)

[8] We conclude that the Board does not have the jurisdiction to consider, as part of its determination and approval of the Settlement Tariff, those proposed tariffs engaged by it that have already been approved as part of the Approved Tariff. What is known as the doctrine of *functus officio* precludes us from doing so.

[9] In general terms, the *functus officio* doctrine precludes an administrative tribunal, once it has rendered its final decision, from altering that decision (with some exceptions that do not apply here): *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848; and *Canadian Association of Film Distributors and Exporters v. Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc.*, 2014 FCA 235. For the Board, at this stage, to consider and approve proposed tariffs on the basis of a settlement that incorporates a different royalty rate than that previously fixed by the Board for those proposed tariffs, would be tantamount to our doing just that.

[10] In Notice 2018-204, the Board stated that its preliminary view is that the Settlement Tariff engages the Proposed Tariffs (as well as some additional tariffs relating to the webcast of television signals). No comments were received in response.

[11] As noted above, the Settlement Tariff applies to communications by means of audiovisual streaming services “allied” with a broadcast television or distribution undertaking service licensed under earlier *SOCAN Tariffs 2.A* and *17. SOCAN Tariff 22.D.1 (2007–2013)* covers communications in connection with the operation of an online audiovisual service and its authorized distributors. Both Tariffs apply to the years 2007-2013 (although the Settlement Tariff also engages proposed tariffs for the ensuing years, 2014-2018).

[12] While the Approved Tariff is worded somewhat broadly and may have some differences in nuance, we conclude that the proposed tariffs engaged by it and by the Settlement Tariff for the years 2007-2013 are the same, and therefore attract the application of the *functus officio* doctrine. To the extent the activities in the Approved Tariff are reflected in the Settlement Tariff, we are not able to revisit them and, therefore, are not able to consider the terms of the Settlement Agreement as it relates to those activities.

### B. ACTIVITIES RELATING TO MEMBERS OF CAB ARE EXCLUDED FROM THE EFFECT OF THE RULING

[13] While CAB initially participated in the proceedings culminating in the issuance of *SOCAN Tariff 22.D.1 (2007–2013)*, it later did not participate, and it appears that its activities were not intended to be encompassed in that Tariff. However, the Approved Tariff does not expressly

exclude CAB members from its application, and some explanation is required to explain why CAB's members are not covered.

[14] The *SOCAN Tariff 22.D.1* (which, again, is the Approved Tariff) is the product of a settlement. The process leading up to that settlement began when the Board ruled, in April 2011, that it would consider together a number of outstanding tariffs then being proposed by SOCAN. These proposed tariffs included the *SOCAN 22.4* (2007, 2008) and *22.D* (2009, 2010, 2011, 2012, 2013) tariffs ultimately incorporated into the Approved Tariff. The resulting proceeding was subsequently referred to by the Board as *SOCAN Tariffs 22.D and 22.G (2007-2011)*. CAB was one of the objectors participating in that proceeding.

[15] Following a debate between SOCAN and CAB over whether CAB's activities were properly included in that proceeding, the Board concluded that they were not. In a Ruling dated May 14, 2012, the Board determined that the royalties payable by a CAB member that is subject to *SOCAN Tariff 2.A* or *17* for its non-simulcast, audiovisual transmissions in 2007 to 2011 would not be determined as part of the proceeding. CAB members would continue to pay royalties under a tariff for earlier years.

[16] In November 2012, SOCAN informed the Board that it had reached an agreement with the remaining objectors for online audiovisual services, and filed an agreement that included a settlement tariff entitled "SOCAN Tariff 22.D.1," covering the years 2007-2013. This period was two years longer than what was originally covered by the proceeding and therefore applied in two years for which the Board's earlier ruling had not excluded CAB. It was unclear whether CAB was or was not included for the additional years 2012-2013.

[17] In its commentary accompanying the filing of *SOCAN 22.D.1*, however, SOCAN advised that this settlement was "not intended to apply to the CAB or its members" and confirmed that the settlement agreement "did not involve the CAB". Nonetheless, a Board request for comments from objectors on March 26, 2013, indicated that the Board remained unclear on CAB's status for the years 2012-2013. In that request, the Board identified CAB as "excluded for the years 2007-2013; objector for the years 2012-2013."

[18] In its response to that request, SOCAN re-affirmed its position, noting that CAB members were continuing to pay royalties under the prior tariff and advising that SOCAN and CAB intended to negotiate a separate tariff for the CAB members' online audiovisual services. SOCAN stated expressly that "if the Board decides to certify [...] *SOCAN Tariff 22.D.1*, that tariff should not be applicable to the CAB and its members".

[19] On July 19, 2014, the Board certified *SOCAN Tariff 22.D.1 (2007-2013)*. In its accompanying reasons, the Board noted CAB's position that the Tariff did not apply to its members and acknowledged that CAB wished to maintain its objection while negotiating a separate tariff for the

CAB members' online audiovisual services "which will be a carve-out for the CAB members from Tariff 22.D.1."

[20] On the basis of the circumstances outlined above, we are satisfied, and conclude, that the certification of the Approved Tariff was not intended to apply to CAB members and does not deprive the Board of its jurisdiction to consider the proposed tariffs engaged by the Approved Tariff as they may apply to entities that were CAB members during the period 2007-2013 and that were the subject of either *SOCAN Tariff 2.A* or *SOCAN Tariff 17*. At the very least, CAB and its members had a legitimate expectation that it would be the case, and it would be unfair to hold otherwise.

## V. CONCLUSION

[21] For the foregoing reasons, the Board rules that:

- a. To the extent the activities covered by the Approved Tariff are reflected in the Settlement Tariff, the Board does not have the jurisdiction to consider those portions of the Settlement Tariff, with the exception of their potential application to CAB members.
- b. For clarity, this Ruling is only in respect of proposed tariffs that were considered in the proceeding leading to the Approved Tariff and not other proposed tariffs for those same years that may be engaged by the Settlement Tariff, namely:
  - SOCAN Tariff 22.5 – Webcasts of Television Station Signals (2007, 2008);
  - SOCAN Tariff 22.E – Webcasts of Television Station Signals (2009, 2010, 2011, 2012);
  - and
  - SOCAN Tariff 22.F – Webcasts of Television Station Signals (2013).

[22] We recognize that this Ruling may have implications for the Settlement itself. For that reason, the Board will issue a Notice to permit parties to the Settlement to comment on the status of the Settlement, in light of this decision.