

Copyright Board
Canada



Commission du droit d'auteur
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Member René Côté

Proposed Tariffs SOCAN Tariff 18 – Recorded music for dancing, 2018
SOCAN Tariff 18 – Recorded music for dancing, 2019-2020

Considered SOCAN Tariff 18 – Recorded music for dancing, 2021-2022

Approval of Proposed Tariffs

as

SOCAN Tariff 18 – Recorded music for dancing (2018-2022)

REASONS FOR DECISION

I. INTRODUCTION

[1] The Society of Composers, Authors and Musical Publishers of Canada (SOCAN) is a collective management society that manages public performing rights of musical works on behalf of Canadian and foreign songwriters, composers and music publishers. SOCAN filed three proposed tariffs with the Copyright Board for the public performing, in Canada, of recorded musical or dramatico-musical works in its repertoire for dancing, for the years 2018, 2019-2020 and 2021-2022.

[2] For the following reasons, we conclude that SOCAN's Tariff 18 proposals – Recorded music for dancing (2018, 2019-2020 and 2021-2022) are fair and equitable subject to a number of changes to be made to the terms and conditions of the tariff. More precisely, we approve the proposals with a modification to the royalty rates that are reduced by fifty per cent for the years 2020 and 2021 due to health measures adopted by competent authorities in the context of the COVID-19 pandemic and we are therefore adding a mechanism for the reimbursement of overpayments.

II. CONTEXT

[3] SOCAN Tariff 18 allows users (bars, cabarets, restaurants, taverns, clubs, dining rooms, discotheques, dance halls, ballrooms and similar premises) to perform publicly musical works in its repertoire by means of recorded music for dancing by patrons, at any time and as often as desired.

[4] The Board approved SOCAN Tariff 18 for the years 2013 to 2017 on May 5, 2017.¹ The royalties and conditions set out in the latest approved tariff for the years 2015 to 2017 are identical to those provided for in the three proposed tariffs under consideration, as described below.

[5] On March 31, 2017, March 29, 2018 and March 28, 2019, SOCAN filed proposed tariffs related to SOCAN Tariff 18 for the years 2018, 2019 to 2020 and 2021 to 2022, respectively. The proposed tariffs were duly published in the *Canada Gazette* on April 29, 2017, May 5, 2018 and May 18, 2019.

A. PROPOSED ROYALTY RATES

[6] The royalties and conditions set out for the three proposed tariffs are identical. The royalties vary according to the number of months per year and the number of days per week that the premises are open. The rates apply to the premises accommodating no more than 100 patrons. For more than 100 patrons, the royalties are adjusted upwards, as shown below.

Proposed rates for 2018, 2019-2020, 2021-2022

- a. Premises accommodating no more than 100 patrons:

	Premises open 1 to 3 days/week	Premises open 4 to 7 days/week
Premises open 6 months or less/year	\$286.85	\$573.69
Premises open more than 6 months/year	\$573.69	\$1,147.38

- b. Premises accommodating more than 100 patrons:

Premises accommodating between 101 and 120 patrons, the licence owner shall pay 10 per cent more than the fee set out in paragraph (a). For each subsequent capacity increase of up to 20 patrons, a further increase of 10 per cent of the fees set out in paragraph (a) shall be payable.

¹ *SOCAN – Various Tariffs, 2007-2017* (5 May 2017), 2017 CB 038 (Reasons), online: CDA <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366759/index.do>>. In relation to the royalties for the years 2013 and 2014, the royalties for years 2015 to 2017 were adjusted upwards to reflect inflation.

[7] With regard to the terms and conditions, the proposed tariffs provide that the royalties shall be paid at the latest on January 31 of the year covered by the licence, together with a report indicating the number of patrons that these premises can accommodate.

B. OBJECTORS' POSITION

[8] The Hotel Association of Canada and Restaurants Canada objected to the proposed tariffs for the three periods under review. The Retail Council of Canada objected to the proposed tariff regarding 2018. On March 11, 2022, the Board was informed of its intention to no longer participate.

[9] On July 8, 2021, the Board informed the parties that it was about to begin its consideration of proposed tariffs for the years 2018 to 2022.² It indicated being aware that the proposed tariffs may not be adequate in view of the COVID-19 pandemic and that it intended to take this into account in their examination. It also asked the objectors to file detailed grounds of objection and for SOCAN to respond to these grounds.

[10] On September 15, 2021, the Board received the objections filed jointly by the objectors.³ They are asking that Tariff 18 be adjusted to take the COVID-19 pandemic into account. They are asking this to be done in the form of an adjustment to the annual royalty pro rata that would take into account the closing periods of the premises and the limits to their capacity, as imposed by the competent authorities. The objectors are indicating that they cannot be precise about the period of application for these adjustments as it is impossible to determine when the pandemic will end and when things will return to normal for the users affected by Tariff 18. In an appendix to their submission, the objectors included preliminary information regarding the closing periods in force in the different jurisdictions during the pandemic.

C. SOCAN'S RESPONSE

[11] On October 1, 2021, SOCAN filed its response to the objectors' submissions.⁴ It argues that no adjustment should be made to the proposed tariffs under review for the pandemic period for the following reasons.

[12] On the one hand, SOCAN asserts that the pandemic's effects on users are difficult to quantify because health measures were different from one jurisdiction to another, and often from one municipality to the other. It further asserts that the Board is not in a position to implement adjustments that would be fair and equitable for each of the intended users due in part to the absence of precise data for each jurisdiction on the value of the music, its use, the number of

² Copyright Board Notice [CB-CDA 2021-035] (8 July 2021). In its July 30, 2021 Notice [CB-CDA 2021-040], the Board extended the deadline given to the parties to present their comments.

³ Letter from Gabriel Van Loon in response to Notice [CB-CDA 2021-040] (15 September 2021).

⁴ Letter from SOCAN in response to Notice [CB-CDA 2021-040] (1 October 2021).

organized events and the number of participants. In these circumstances, any adjustment would amount to speculation.

[13] On the other hand, SOCAN asserts that there should be no adjustment made because the fee structure for Tariff 18 already includes two adjustments: one for premises open six months or less a year, and one for those open three days a week or less. According to SOCAN, this structure allows to take into account the closure periods that occurred during the pandemic and, thus, no further change is required. Hence, an establishment that would have had to close for a period of six to eleven months would pay the reduced fee applicable to premises open six months or less a year. Similarly, an establishment that has been open more than six months during a pandemic year would pay the higher fee, i.e. that which applies to all premises open more than six months a year, whether it be open seven or twelve months.

[14] SOCAN explains that although the Board could have, for many years, approved rates that would have been adjusted for each day or month of operation, it chose instead to approve a structure by "range" of months and days of operation, believing this to be a fair structure. In its view, any additional level of granularity in the calculation of royalties would be impossible to achieve in the absence of expert evidence which would demonstrate that the value of music has decreased during the pandemic.

[15] Finally, although SOCAN opposes it, should the Board decide to make adjustments to take account of the pandemic, it asks the Board to limit these to the years 2020 and 2021. It also asks the Board to give it the opportunity to comment on any adjustments to the rates before they enter into force.

[16] In this regard, on February 25, 2022, the Board informed SOCAN that it did not see the need to consult it on the issue of rate adjustments.⁵ At the same time, in accordance with Section 2a) of *Time Limits in Respect of Matters Before the Copyright Board Regulations*,⁶ the Board informed the parties that the last date to present their submissions was March 11, 2022. On that date, the parties reaffirmed their previous comments.

III. ISSUES

[17] Two issues emerge from the analysis of these three tariff proposals. The first is to determine if the rates and conditions in the proposed tariffs can be used as a basis for establishing a fair and equitable tariff for the years 2018 to 2022.

[18] The second is to determine if adjustments should be made for the years covered by the COVID-19 pandemic. If so, the following sub-questions should also be addressed: what form should these adjustments take? and to which years should these adjustments apply?

⁵ Notice of the Copyright Board [CB-CDA 2022-012] (25 February 2022).

⁶ *Time Limits in Respect of Matters Before the Copyright Board Regulations* (SOR/2020-264).

IV. ANALYSIS

A. APPLICABLE RATES

[19] For the entire period covered by the three tariff proposals under review, no increase is proposed. Since the proposed royalties correspond to those previously approved for the same use, these rates represent the best applicable benchmark for the tariff period in question. We have no information that would lead us to question it. However, for the years 2020 to 2022, those affected by the COVID-19 pandemic, the question arises as to whether the rates in the proposed tariffs, although identical to the last approved rates, are fair and equitable.

[20] There is no doubt that the users covered by Tariff 18 have been severely affected by the COVID-19 pandemic since March 2020. Indeed, as a result of measures adopted by the competent authorities, these establishments were forced to close for varying periods of time. Once authorized to re-open, they had to operate while applying the prescribed health measures such as limiting capacity or requiring proof of vaccination against COVID-19 from customers. In short, for many Tariff 18 establishments, operating conditions were anything but normal.

[21] Some tariffs are structured in such a way that no adjustment is required for longer or shorter business closures. This is particularly the case for tariffs that depend on the number of concerts actually given and the revenue received from these concerts. In those cases, the rates paid by the establishments are automatically adjusted.⁷ That is not the case here. Tariffs with threshold-based rates, such as Tariff 18, or with minimum annual fees are less suited to the exceptional conditions that have prevailed since the start of the COVID-19 pandemic. Hence, the Board decided to reduce the minimum annual fees by approximately 50% for SOCAN Tariff 7 – Skating rinks for the years 2020 and 2021.⁸

[22] SOCAN argues that the Tariff 18 rate structure allows for the pandemic to be taken into account because it already incorporates two adjustments, one for the number of months open in a year, the other for the number of days open in a week. We disagree for the following reasons.

[23] The Tariff 18 rate structure requires the payment of royalties in January on a prospective basis, for the current year. SOCAN's argument could be valid in normal times, as the establishment would pay the appropriate fee on January 31 based on the number of months and the number of days it is *normally* open and *scheduled* to be open. However, during a pandemic, users are unable, at the beginning of a year, to predict the closure periods to which they will be subjected by public

⁷ *SOCAN Tariff 4.B – Live Performances at Theatres or Other Places of Entertainment – Classical Music Concerts, 2018-2024* (26 November 2021), 2021 CB 11 (Reasons), online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/516586/index.do>>, at paras 28 (4.B.1), 34 (4.B.2) et 39 (4.B.3).

⁸ The minimum annual fee is reduced from \$111.92 to \$56. See *SOCAN – Tariff 7, Skating Rinks, 2018-2022* (6 August 2021), 2021 CB 7 (Decision), online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/500977/index.do>>, para 12 [hereafter *SOCAN – Tariff 7 (2018-2024)*].

health authorities and are therefore unaware of the information that would normally be used to calculate the fees due.

[24] SOCAN also sees no problem with the fact that an establishment normally open 12 months a year, which would have been forced to close for 5 months (and therefore would have been open for 7 months) pays the same fee as if it had been open all year. It argues that this situation is not unique to the pandemic but to the fact that rates are determined by "range". It also points out that the Board has in the past found such a structure to be fair and equitable.

[25] In our view, this statement is questionable. The issue here is not whether a "range" structure is fair or not. The question is whether it is fair for an establishment that is closed for several months to have to pay the same fee as if it had not been closed, given that these closures are the result of imposed health restrictions and not of a freely made choice.

[26] On the other hand, the objectors are asking the Board to adjust the fees on a pro rata basis to take account of periods when establishments had to close and periods when they were able to re-open, but at reduced capacity.⁹ It should be noted that they gave no indication of the concrete way in which this could be done.

[27] In our view, the objectors' proposal regarding the form of the adjustment cannot be accepted for the following reasons.

[28] The objectors' proposal is practically impossible to implement. The following example illustrates why. Let us take the case of an establishment with a usual capacity of 150 patrons and whose annual fee is therefore increased. How would the fee be calculated if, in the same pandemic year, the establishment closed successively for several months, then allowed to reopen at reduced capacity (e.g. 75 patrons¹⁰), and finally allowed to reopen at full capacity?

[29] Moreover, even if it were possible to implement such a proposal, the calculations that users would have to make to determine the fee to be paid would be very complex and the risk of error would be high.

[30] That said, we agree with the objectors that the pandemic has had such an impact on users, and on the use of music in Tariff 18 establishments, that an adjustment to royalties must be made. However, given the difficulties associated with the objectors' proposal, we need to determine what form this adjustment should take.

[31] It is particularly difficult to find a way to accurately determine the impact of the pandemic on all users of Tariff 18 as the periods when establishments had to be closed, or only open for outdoor

⁹ Objectors' submissions(15 September 2021), at 2.

¹⁰ There is no rate increase of a capacity of 100 patrons or less.

dining, or for take-out or delivery differed from province to province and sometimes even from municipality to municipality within a province.

[32] Moreover, rules concerning the reduction of the number of patrons that can be accommodated in an establishment, the wearing of masks, as well as the rules of social distancing (respecting a distance of two metres) made it particularly difficult for dance activities to take place even when establishments could be opened at full or half capacity or with a maximum number of patrons. In particular, these health rules have had a strong impact on the activities offered by certain types of establishments that use recorded music for dancing purposes, as these activities were mostly cancelled.

[33] Given the difficulty of arriving at a formula that can take into account all the factors we have just described, we believe that a simple formula that is applicable to all and does not involve complex, personalised calculations should be used. Just as the Board decided in SOCAN's tariff for skating rinks,¹¹ we are reducing the fees payable by Tariff 18 users by 50% for the years 2020 and 2021. However, we are of the opinion that the usual rates should be reinstated for the year 2022 due to the relaxations already decreed by the authorities concerned.

B. TERMS AND CONDITIONS OF THE TARIFF

[34] Under Tariff 18, royalties are paid on January 31 of each year. This means that users will have paid for the years 2020 and 2021, in January of each of those years, the "normal" royalties and not the 50% reduced royalties. Royalties will have been overpaid to SOCAN. Therefore, a mechanism must be built in to deal with the overpayments.

[35] To this end, a clause is added to the tariff stating that any user who has overpaid royalties for the years 2020 and 2021 must send SOCAN, no later than October 3, 2022, a notice indicating:

- the name and coordinates of the establishment and of its operator;
- the amounts of paid royalties for 2019 (as this year is used as a reference to calculate the overall royalties reduced by 50%);
- the amount of royalties paid in 2020 and in 2021;
- the royalties that should have been paid to SOCAN in accordance with the approved rates for 2020 and 2021;
- the overpayment paid to SOCAN.

¹¹ SOCAN – Tariff 7 (2018-2022), *supra* note 8.

[36] In addition, the tariff provides that if the user has made an error in calculating the overpayment, SOCAN must notify the user within a reasonable time of receipt of the notice and inform the user of the amount of the overpayment that SOCAN believes to be correct.

[37] The user may deduct the overpayment from the next payment due. Overpayments do not bear interest.

[38] The advantage of providing that the user may deduct the overpayment from the next instalment due is that it is a simple mechanism to apply; in effect, it avoids the need for SOCAN to make numerous refunds. With respect to interest, we believe that overpayments should not bear interest, as they are not the result of an error by SOCAN, but rather of a reduction in royalties in the exceptional context of the pandemic.

[39] Moreover, at the time of the 2018 tariff filing, SOCAN's practice was to file dozens of tariff proposals in a single document.¹² A section entitled "General Provisions", applicable to all tariff proposals, was located at the beginning of the document. Since tariff proposals must now be filed in a separate, stand-alone document containing all the terms and conditions applicable to that tariff proposal,¹³ we have incorporated the relevant paragraphs of the "General Provisions" (which relate to interest and taxes) into a section entitled "Terms and Conditions", thus adding to the other terms and conditions of Tariff 18.

[40] In addition, as the Board has done in other recent decisions, we are deleting references to the words "licence" and "licensee" from the proposed tariffs in order to distinguish the terms "tariff" and "licence".

[41] Indeed, in the *York* decision,¹⁴ the Supreme Court analysed the interrelationship between the concepts of tariff and licence. In doing so, it concluded that subsection 68.2(1) of the *Copyright Act*, as it read prior to the 2019 amendments, did not empower Access Copyright to collect royalties set by a tariff approved by the Board under s 70.15 from a user who had chosen not to be bound by a licence on the terms and conditions set out in the approved tariff.

[42] While this case does not raise the issue at the heart of the *York* decision, which was the issue of the "compulsory tariff", the Court's analysis of the concepts of tariff and licence is useful in highlighting the distinct roles of the Board and collectives. While the Board approves tariffs, collective management societies grant licences. Although a collective management society must

¹² For example, in 2017, SOCAN filed tariff proposals for nearly 50 tariffs in a single document. See Statement of Proposed 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, published in the *Canada Gazette*, Part 1, April 29, 2017.

¹³ See *Practice Notice on Filing of Proposed Tariffs* (Amended 5 October 2021), PN 2019-004 rev. 1, online: CB <https://www.cb-cda.gc.ca/sites/default/files/inline-files/PN%202019-004%20rev.%201%20-%20Filing%20of%20Proposed%20Tariffs%20%28EN%29.pdf>.

¹⁴ *York University v Canadian Copyright Licensing Agency* (30 July 2021), 2021 SCC 32, online: <[https://scc-csc-csc/en/item/18972/index.do](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18972/index.do)>.

grant licences on the terms and conditions set out in an approved tariff if a user requests it, the fact remains that tariff and licence are distinct concepts. For this reason, a tariff approved by the Board cannot refer to the concept of a licence.

[43] Furthermore, we have deleted the clause in the proposed tariffs stating that SOCAN may terminate any licence at any time upon 30 days' written notice for breach of the licence terms and conditions. In addition to the reasons discussed above, we are striking out this paragraph in its entirety as it touches on the area of liability and the provisions of the Act applicable to remedies against users governed by a tariff. Therefore, it is a question of compliance and enforcement of the tariff rather than a question of approval.¹⁵ It should be noted, however, that the deletion of this clause from the tariff, as well as the deletion of the concept of a licence, does not alter the scope of the tariff.

[44] Finally, we have also deleted the reference to SOCAN Tariffs 4 and 8. This is because the scope and terms and conditions of a tariff must be clearly defined and easily determined from the tariff itself. Moreover, reference to another tariff may make it impossible to determine the scope and terms and conditions of the tariff. This deletion is consistent with *Practice Notice on Filing of Proposed Tariffs*¹⁶ and reflects what has been done in recent Board decisions.

V. CONCLUSION

[45] For the above reasons, we approve the proposed tariffs as *SOCAN Tariff 18 – Recorded music for dancing (2018-2022)*. The royalty rates remain unchanged from those previously approved for the years 2015-2017, except for the royalty rates for the years 2020 and 2021, which are reduced by 50%. We are making several changes to the terms and conditions of the tariff from the 2013-2017 tariff to establish the overpayment framework, to reflect the disappearance of the general provisions that applied to the 2013-2017 tariff, to remove references to the concept of a licence, and to eliminate the reference to SOCAN Tariffs 4 and 8.

¹⁵ See *SOCAN Tariff 21 – Recreational Facilities Operated by a Municipality, School, College, University, Agricultural Society or Similar Community Organizations, 2013-2020* (7 December 2018), CB-CDA 2018-222 (Reasons), online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/367464/index.do>>, at para 18.

¹⁶ *Practice Notice on Filing of Proposed Tariffs* (14 August 2019), PN 2019-004, online: CB <https://cb-cda.gc.ca/sites/default/files/2020-06/PN-2019-004.pdf>.