

Copyright Board
Canada



Commission du droit d'auteur
Canada

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Citation *SOCAN Tariffs 10.A and 10.B (2023-2025)*, 2022 CB 6

Member Nathalie Théberge

Proposed Tariffs SOCAN Tariff 10.A – Parks, Parades, Streets and Other Public Areas - Strolling Musicians and Buskers; Recorded Music, 2023-2025

Considered SOCAN Tariff 10.B – Parks, Parades, Streets and Other Public Areas - Marching Bands; Floats with Music, 2023-2025

Approval of Proposed Tariff

As

SOCAN Tariff 10.A – Parks, Parades, Streets and Other Public Areas - Strolling Musicians and Buskers; Recorded Music (2023-2025)

and

SOCAN Tariff 10.B – Parks, Parades, Streets and Other Public Areas - Marching Bands; Floats with Music (2023-2025)

REASONS FOR DECISION

I. OVERVIEW

[1] This decision relates to two tariffs proposed by the Society of Composers, Authors and Music Publishers of Canada (“SOCAN”): Tariff 10.A for strolling musicians and buskers and Tariff 10.B for marching bands and floats in parades with music (jointly, the “Proposed Tariffs”).

[2] The Proposed Tariffs cover performances in public of the musical works and dramatico-musical works in SOCAN’s repertoire for the years 2023 to 2025.

[3] No objections were filed in regard of these two Proposed Tariffs.

[4] After reviewing the evidence, I find that tariffs based on the Proposed Tariffs to be fair and equitable and approve them, with modifications to the royalties to reflect the actual change in the Consumer Price Index (“CPI”) between January 2014 and December 2021, and other minor changes to improve clarity.

II. BACKGROUND

[5] On October 15, 2021, SOCAN filed two Proposed Tariffs for performances by strolling musicians or buskers, of recorded music in parks, streets or other public areas (Proposed Tariff 10.A); and performances by marching bands or floats with music participating in parades (Proposed Tariff 10.B).

[6] On November 10, 2021, the Board requested that SOCAN file a Notice of Grounds for each of its two Proposed Tariffs,¹ which it did on December 15, 2021. The two Notices of Grounds were published on the Board's website, along with the Proposed Tariffs, on January 10, 2022.²

[7] No objections were filed in regard to the Proposed Tariffs and, as such, the Notices of Grounds for the Proposed Tariffs filed by SOCAN are the only evidence submitted in this proceeding.

[8] The previously approved tariff 10.A, for the years 2018 to 2022, included a rate of \$34.93 for each day on which music is performed, up to a maximum fee of \$239.21 in any three-month period, and no reporting requirements.³ The previously approved tariff 10.B, for the years 2018 to 2022, included a rate of \$9.42 for each marching band or float with music, subject to a minimum fee of \$34.93 per day, and no reporting requirements. Of note, both previously approved rates were unchanged from the tariffs approved for the preceding period, 2013-2017.⁴

[9] The Proposed SOCAN Tariff 10.A for 2023-2025 includes a royalty rate of \$41.42 per day subject to a maximum fee of \$283.66 in any three-month period, with respective increases of \$6.49 and \$44.45, compared to the last approved tariff. SOCAN explained that the proposed increase to the royalty rate is based on inflation and calculated according to the Board's established inflation adjustment methodology. SOCAN identifies an additional change to the tariff wording to remove a reference in the scope of the tariff to Tariff 4 in keeping with the Board's *Practice Notice on Filing of Proposed Tariffs*.⁵

¹ Copyright Board Order CB-CDA 2021-053 (10 November 2021).

² *SOCAN Tariff 10.A – Parks, Parades, Streets and Other Public Areas – Strolling Musicians and Buskers; Recorded Music 2023-2025* (10 January 2022), Proposed Tariff, online: CB <https://cb-cda.gc.ca/sites/default/files/inline-files/PROTAR%20-%20SOCAN%20Tariff%2010.A%20%282023-2025%29%20-%20EN_0.pdf>; *SOCAN Tariff 10.B – Parks, Parades, Streets and Other Public Areas – Marching Bands; Floats with Music 2023-2025* (10 January 2022), Proposed Tariff, online: CB <https://cb-cda.gc.ca/sites/default/files/inline-files/PROTAR%20-%20SOCAN%20Tariff%2010.B%20%282023-2025%29%20-%20EN_1.pdf>.

³ *SOCAN Tariff 10.A – Strolling Musicians and Buskers; Recorded Music and 10.B – Marching Bands; Floats with Music (2018-2022)* (4 September 2020), 2020 CB 013 (reasons).

⁴ *SOCAN – Various Tariffs 2007-2017* (5 May 2017), CB-CDA 2017-038 (reasons) [*SOCAN Various Tariffs 2007-2017*].

⁵ *Practice Notice on the Filing of Proposed Tariffs* (5 October 2021), PN 2019-004 rev. 1 at p 2 online: <https://cb-cda.gc.ca/sites/default/files/inline-files/PN%202019-004%20rev.%201%20-%20Filing%20of%20Proposed%20Tariffs%20%28EN%29.pdf>

[10] The Proposed SOCAN 10.B Tariff for 2023-2025 includes a royalty rate of \$11.17 per band or float subject to a minimum fee of \$41.42 per day, with respective increases of \$1.75 and \$6.49, compared to the last approved tariff. SOCAN explains that the proposed royalty increase is based on inflation and on the Board's established inflation adjustment methodology. issues

III. ISSUES

[11] In reviewing the evidence, I considered three issues:

1. Whether the previously approved tariffs are appropriate proxies for the Proposed Tariffs;
2. Whether an inflationary adjustment is appropriate; and
3. Whether other changes should be made to the text of the Proposed Tariffs.

IV. ANALYSIS

A. ISSUE 1: WHETHER THE PREVIOUSLY APPROVED TARIFFS ARE APPROPRIATE PROXIES FOR THE PROPOSED TARIFFS

[12] I find that the previously approved tariffs are appropriate proxies for the Proposed Tariffs.

[13] In the past, the Board has held that it is appropriate to use the last-approved tariff as a proxy to assess the fairness of a proposed tariff.⁶ In doing so, it looked at changes in the relevant market as one potential indicator of when it may not be appropriate to use the last-approved tariff as a proxy.

[14] SOCAN has not proposed any market-based changes to the royalty rate compared to the last approved tariffs, aside from an adjustment for general inflation. This leads me to believe that no market changes (or at least significant ones) relevant to the consideration of these tariffs has occurred. Additionally, there is no information on the record that would lead me to question the appropriateness of the proxies.

B. ISSUE 2: WHETHER AN INFLATIONARY ADJUSTMENT IS APPROPRIATE

[15] I find that an inflationary adjustment, as SOCAN requests, is appropriate. However, I modify the proposed increase to reflect the actual percentage change in CPI between January 2014 and December 2021.

[16] The Board has found in the past that inflationary adjustments are justified because they preserve the purchasing power of rights owners. As noted in *CBC Radio (2006-2011)*, failing to adjust royalty payments for inflation allows inflation to erode the value of music.⁷

⁶ See e.g., *SOCAN Tariff 9 – Sports Events (2018-2023)* (1 October 2021), 2021 CB 9 (reasons) [*SOCAN 9 (2018-2023)*].

⁷ *SOCAN, Re: Sound – Tariff for CBC Radio 2006-2011* (8 July 2011), reasons, at para 83 [*CBC Radio 2006-2011*].

[17] I find that this statement continues to apply.

[18] SOCAN's Proposed Tariffs include an adjustment to account for inflation "based on the Board's established inflation adjustment methodology".⁸ However, SOCAN does not say which years and months nor which data series it included in its calculation, simply proposing an adjustment of 18.58 per cent for both tariffs.

[19] I support using the Board's established methodology, as long as the data series used in the calculation is clear, which is not the case here.

[20] The Board has taken several approaches to inflationary adjustments over the years.⁹ Most recently, in *CBC Radio (2006-2011)*, the Board ruled that it would be preferable to measure inflation as the percentage change in CPI between January of the first year and December of the last year of the period for which an adjustment is needed.¹⁰

[21] I find this approach to be still valid as it is the simplest and most direct way to calculate inflation, in addition to reducing risk of errors. Furthermore, it is a familiar approach for parties¹¹ and the general public.

[22] Accordingly, I find that the appropriate period for calculating the adjustment is the period from January 2014 to December 2021 because the period of the last inflationary adjustment for these tariffs ended in 2013¹² and the most recent full-year of CPI series available is 2021.

[23] I also find it appropriate to continue using Statistics Canada's Consumer Price Index monthly series for Canada, all-items, as mentioned in past decisions of the Board¹³ and I further specify using data series that are not seasonally adjusted and not adjusted for taxes.¹⁴ In my view, this data

⁸ Notice of Grounds for Proposed *Tariff: SOCAN Tariff 10.A – Parks, Parades, Streets and Other Public Areas – Strolling Musicians and Buskers; Recorded Music 2023-2025* (15 December 2021); Notice of Grounds for Proposed *Tariff: SOCAN Tariff 10.B – Parks, Parades, Streets and Other Public Areas – Marching Bands; Floats with Music 2023-2025* (15 December 2021).

⁹ See *CBC Radio 2006-2011*, *supra* note 7 at paras 82-91; *SOCAN – Various Tariffs 1998-2007* (18 June 2004), reasons, at p 10-13 (Annual average CPI – 1%); *SOCAN – Various Tariffs [2.B, 2.C, 3, 7, 8, 12, 14, 15.A, 16, 18, 19, 20] 1992* (18 February 1993), reasons, at p 2-4 (Annual average CPI – 2%); *CAPAC, PROCAN – Various Tariffs [Part II] 1990* (7 December 1990), reasons, at p 3-4 (Industrial Product Prices Index).

¹⁰ See *CBC Radio 2006-2011*, *supra* note 7 at para 91; see also, *SOCAN – Various Tariffs 2007-2017*, *supra* note 4 at para 7.

¹¹ See e.g. *Re: Sound Tariff 3 – Background Music 2010-2015* (1 September 2017), CB-CDA 2017-091 (reasons) at para 103.

¹² *SOCAN Various Tariffs 2007-2017*, *supra* note 4 at para 6.

¹³ *Application to fix royalties for a licence and its related terms and conditions (SODRAC v CBC, 2008-2012 [Redetermination])* (26 June 2020), 2020 CB 001 at para 109 (for all-items); *CBC Radio 2006-2011*, *supra* note 7 at para 84 (for monthly).

¹⁴ Statistics Canada, "Consumer Price Index, monthly, not seasonally adjusted" (Table 18-10-0004-01) online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1810000401&pickMembers%5B0%5D=1.2&cubeTimeFrame.startMonth=12&cubeTimeFrame.startYear=2013&cubeTimeFrame.endMonth=12&cubeTimeFrame.endYear=2021&referencePeriods=20131201%2C20211201>.

series better reflects the actual values of all types of goods and services as it does not include intermediary seasonal adjustment or transformation, nor does it exclude any specific types of goods or services. As such, it is the most representative, most relevant and least distorted series for our purposes.

[24] Based on this approach, I find that the inflation increase for this period should be 16.98 per cent, which is lower than what SOCAN proposed. Specifically, the table below outlines the proposed and approved rates for each of the Proposed Tariffs.

Table : Proposed and Approved Royalties

	Proposed Rates	Approved Rates
SOCAN 10.A	\$41.42 per day \$283.66 maximum	\$40.86 per day \$279.82 maximum
SOCAN 10.B	\$11.17 per float \$41.42 minimum	\$11.02 per float \$40.86 minimum

[25] Indeed, given the legislative requirement that collective societies file proposed tariffs no later than October 15 of the second calendar year before the year in which the proposed tariff is to take effect,¹⁵ SOCAN may not be able to submit tariff proposals based only on real data. Because there is a two-month delay in Statistics Canada’s publication of CPI data, it is expected that the last available data to collective societies will be August of the year that a proposed tariff is filed—generally, 16 months before the tariff comes into force.¹⁶

[26] Despite this, I continue to follow the principle of using known inflation values.¹⁷ While parties may need to forecast data between August and December in the year that they file a proposed tariff, the Board calculates the rate of inflation based on the last available full-year of data at the time it approves the tariff. Doing so reflects the actual change in inflation over time.

C. ISSUE 3: WHETHER OTHER CHANGES SHOULD BE MADE TO THE TEXT OF THE PROPOSED TARIFFS.

[27] The following changes are made to the text of the Proposed Tariffs to improve overall clarity and coherence, specifically:

- Removing references to “licences” and “licensees”. Under the *Copyright Act*, the Board’s mandate in approving tariffs does not include the issuance of licences. It is the role of collective societies to issue licences for collectively managed rights, as described by the

¹⁵ *Copyright Act* RSC 1985 c C-42, s 68.

¹⁶ Pursuant to *ibid*, s. 68, collective societies file tariffs no later than October 15 of the second year before the year in which the proposed tariff is to take effect—that is, 14 months in advance.

¹⁷ See e.g. *SOCAN 9 (2018-2023)*, *supra* note 6 at para 17; *NRCC Tariff 3 – Background Music 2003-2009* (20 October 2006), reasons, at paras 143-147; *Re:Sound Tariff 6.C – Use of Recorded Music to Accompany Adult Entertainment 2013-2018* (21 July 2017), CB-CDA 2017-076 (reasons), at paras 18-21.

Supreme Court in *York v Access Copyright*.¹⁸ This is in line with recent decisions¹⁹ and does not change the scope of the application of the tariff.

- Removing clauses in the “General Provisions” section made redundant by the removal of licence language, such as definitions of “licence” and “licence to perform”.
- Removing clauses in the “General Provisions” section that deal with compliance and enforcement of the tariff. These matters are outside the Board’s jurisdiction. These clauses include a provision that fees are payable upon granting of the licence, and a statement that SOCAN has the right to terminate a licence for breach of the licence terms and conditions. Removing such clauses does not change the scope of the tariff.
- Placing the two clauses describing the calculation of interest and that amounts are exclusive of any taxes in a “Terms and Conditions” section at the end of the tariffs, similar to other recent Board decisions.²⁰

V. CONCLUSION

[28] After reviewing the evidence, I approve the Proposed Tariffs for 2023-2025 with modifications to the royalties to reflect a cumulative inflation adjustment of 16.98% and other minor changes to improve clarity, and I approve them as *SOCAN Tariff 10.A – Parks, Parades, Streets and Other Public Areas - Strolling Musicians and Buskers; Recorded Music (2023-2025)* and *SOCAN Tariff 10.B – Parks, Parades, Streets and Other Public Areas - Marching Bands; Floats with Music (2023-2025)*.

¹⁸ See *York University v Canadian Copyright Licensing Agency* (30 July 2021), 2021 SCC 32 (for a discussion of the distinct role of the Board to approve tariffs and collective management societies to grant licences).

¹⁹ See e.g. *SOCAN Tariff 18 – Recorded Music for Dancing (2018-2022)* (3 June 2022), 2022 CB 04 (reasons), at paras 40-42.

²⁰ See e.g. *ibid* at para 39.