

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2022-08-26
Citation *SOCAN Tariff 20 (2018-2022)*, 2022 CB 11
Member René Côté
Proposed Tariffs Considered SOCAN Tariff 20 – *Karaoke Bars and Similar Establishments*, 2018-2020
SOCAN Tariff 20 – *Karaoke Bars and Similar Establishments*, 2021-2022

Approval of Proposed Tariffs

As

SOCAN Tariff 20 – Karaoke Bars and Similar Establishments (2018-2022)

GROUNDS FOR DECISION

I. INTRODUCTION

[1] The Society of Composers, Authors and Musical Publishers of Canada (SOCAN) is a collective society that manages public performing rights of musical works on behalf of Canadian and foreign songwriters, composers and music publishers. SOCAN filed two proposed tariffs with the Copyright Board for live performances, in Canada, of musical or dramatico-musical works from its repertoire by means of karaoke machines at karaoke bars and similar establishments for the years 2018 to 2020 and 2021 to 2022.

[2] For the following reasons, we conclude that SOCAN'S Tariff 20 proposals – Karaoke Bars and Similar Establishments (2018-2020 and 2021-2022) are fair and equitable, subject to a 50% rate reduction for the years 2020 and 2021, due to the COVID-19 pandemic, and several changes in the tariff wording. These changes relate to the introduction of a mechanism for the reimbursement of overpayments, the removal of the word "licence" and a clause that has no place in a tariff.

II. CONTEXT

A. LAST APPROVED TARIFF

[3] SOCAN Tariff 20 allows a user, a bar or a similar establishment to perform in public musical works from its repertoire, at any time and as often as desired, by means of karaoke machines at the disposal of clients in this establishment.

[4] The Board approved SOCAN Tariff 20 for the years 2013 to 2017 on May 5, 2017.¹ The royalties and terms and conditions set out in the last approved tariff for the years 2015 to 2017 are identical to those provided for in the two proposed tariffs under consideration, as described below.

B. SOCAN'S PROPOSED TARIFFS FOR THE YEARS 2018 TO 2022

[5] On March 31, 2017, and March 29, 2019, SOCAN filed proposed tariffs related to its Tariff 20 for the years 2018 to 2020 and 2021 to 2022, respectively. The proposed tariffs were duly published in the *Canada Gazette* on April 29, 2017, and May 18, 2019.

[6] The royalties vary with the number of days per week during which the establishment is open and are payable at the latest on January 31 of the year covered by the tariff.

Proposed Rates for 2018-2022

Establishments operating with karaoke no more than three days a week	Establishments operating with karaoke four to seven days a week
\$205.20	\$295.68

C. OBJECTORS' POSITION

[7] The Hotel Association of Canada and Restaurants Canada object to the proposed tariffs for the two periods under consideration.

[8] On July 8, 2021, the Board informed the parties that it was about to start the examination of the proposed tariffs for the years 2018 to 2022.² It indicated being aware that the proposed tariffs

¹ SOCAN – *Various Tariffs 2007-2017* (5 May 2017), CB-CDA 2017-038 (reasons), online: CB <<https://decisia.lexum.com/cb-cda/decisions/en/item/366759/index.do>>. With respect to royalties for the years 2013 and 2014, those for the years 2015 to 2017 were adjusted upwards to reflect inflation.

² Copyright Board Notice CB-CDA 2021-036 (8 July 2021). In its July 30, 2021, notice CB-CDA 2021-040, the Board extended the time allowed to the parties to present their submissions.

may not be adequate in view of the COVID-19 pandemic and that it would take this into account in its consideration of these proposed tariffs. It also asked the objectors to file detailed grounds for objection and asked SOCAN to provide a response to those grounds.

[9] On September 15, 2021, the Board received the grounds for objection from the objectors, filed jointly.³ In essence, they are asking for an adjustment to Tariff 20 to take into account the COVID-19 pandemic. They ask that this be done in the form of a pro rata adjustment of the annual fee that would take into account the periods of establishment closure and their capacity limits, imposed by the competent authorities. The objectors state that they cannot specify for what period of time these adjustments should apply on the grounds that it is impossible to determine when the pandemic will end and when a return to normal for the Tariff 20 users will occur. As an appendix to their submissions, the objectors attached preliminary information as to the closure periods in effect in various jurisdictions during the pandemic.

D. SOCAN'S RESPONSE

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

[11] On one hand, SOCAN submits that the effects of the pandemic on users are hard to quantify, due to the variance of health measures between jurisdictions and, often, between municipalities. It also asserts that, in the absence of precise data for each jurisdiction on the value of music, its use, the number of events held and the number of people attending these events, the Board is not in a position to make fair and equitable adjustments for each of the intended users. In these circumstances, any adjustment would amount to speculation.

[12] On the other hand, SOCAN argues that there should be no adjustment as the fee structure for Tariff 20 already integrates an adjustment for establishments that are operating three days a week or less. According to SOCAN, this structure takes into account closure periods and the non-use of music by an establishment. For example, an establishment operating less than three days a week as of the month of June will pay the same annual fee as one that is open for less than three days a week during the whole year.⁵

[13] SOCAN explains that although the Board could have, for many years, approved rates that would have been adjustable for each day of operation, it decided instead to approve a structure by "range" of opening days, considering that this was an equitable structure. In its opinion, any additional level of granularity in the calculation of fees would be impossible to manage in the absence of expert evidence proving that the value of music decreased during the pandemic.

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

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

⁵ *Ibid*, p 4.

[14] Finally, if the Board decides to implement some adjustments to take the pandemic into account, although SOCAN is opposed to it, it is asking the Board to limit them to the years 2020 and 2021. It is also asking the Board to allow it the possibility of making representations on the rates before their implementation.

[15] In this regard, on June 10, 2022, the Board informed SOCAN that it did not see the necessity of consulting it on the question of rate adjustments.⁶ At the same time, the Board, in accordance with section 2a) of the *Time Limits in Respect of Matters Before the Copyright Board Regulations*,⁷ informed the parties that the last date to file their submissions was set for June 27, 2022.

[16] In their response to the June 10 Notice, the objectors repeated their comments presented in their correspondence of 15 September 2021.⁸ As for SOCAN, it asserts that the introduction of an adjustment to take the effects of the COVID-19 pandemic into consideration in relation to Tariff 20 would require a consultation of the parties.⁹

III. ISSUES

[17] Two issues stand out from the analysis of these two proposed tariffs. The first consists in determining if the rates, as well as the terms and conditions provided for in the proposed tariffs, can serve as a foundation for the setting of a just and equitable tariff for the years 2018 to 2022.

[18] The second consists in determining whether adjustments should be applied to the years of the COVID-19 pandemic. If so, the following questions should also be examined: What form should these adjustments take? To what years should the adjustments apply?

IV. ANALYSIS

A. APPLICABLE RATES

[19] No increase is proposed for the entire period covered by the two proposed tariffs. Since the proposed royalties correspond to those previously fixed for the same use, these rates represent the best applicable proxy for the tariff period covered here. 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 fixed rates, are fair and equitable.

B. RATES DURING THE COVID-19 PANDEMIC

[20] There is no doubt that the users covered by Tariff 20 were severely affected by the COVID-19 pandemic since March 2020. Indeed, due to measures adopted by the competent authorities,

⁶ Notice of the Copyright Board, CB-CDA 2022-031 (10 June 2022).

⁷ *Time Limits in Respect of Matters Before the Copyright Board Regulations*, SOR/2020-264.

⁸ Letter from Kathleen Simons in response to the Notice CB-CDA 2022-031 (27 June 2022).

⁹ Letter from Mathew Estabrooks in response to the Notice CB-CDA 2022-031 (27 June 2022).

these establishments were, for varying periods of time, forced to close. Once authorized to reopen, they were forced to operate by applying prescribed health measures, such as reducing their capacity or requiring COVID-19 vaccination proof from their clients. Thus, for many establishments covered by Tariff 20, operating conditions were all but normal.

[21] Some tariffs are structured in such a way that no adjustment is required during longer or shorter closures of the establishments. This is particularly the case for the tariffs which depend on the number of concerts actually given and the revenues received from these concerts. In this case, the rates paid by the establishments are automatically adjusted.¹⁰ This is not the case here. The tariffs whose rates are set according to the number of opening days per week as is the case for Tariff 20 or that provide for minimal annual fees are less adaptable to the exceptional conditions that prevailed since the beginning of the COVID-19 pandemic. For this reason, the Board decided to reduce the minimum annual fees by nearly 50% for SOCAN Tariff 7 – Skating Rinks, for the years 2020 and 2021.¹¹

[22] SOCAN asserts that Tariff 20's structure makes it possible to take the pandemic into account, because it already integrates an adjustment related to the number of days of opening per week. We do not agree, for the following reasons.

[23] Tariff 20's structure requires payment of royalties in January, prospectively for the current year. SOCAN's argument could be valid in normal circumstances, since the establishment would pay on January 31 the appropriate royalty based on their regular and scheduled opening days. However, in a pandemic period, users are not in a position, at the beginning of the year, to foresee the closure periods ordered by public health authorities and do not possess the information that would normally allow the calculation of the due royalties.

[24] SOCAN asserts that the "range" structure was considered by the Board in the past to be fair and equitable. According to SOCAN, with this structure, periods of closure and of non-use of music by an establishment are taken into account. For example, an establishment that was open less than three days a week as of the month of June in any given year will pay the same annual royalty as one that was open for less than three days a week during the whole year.

[25] In our view, this statement is questionable. The issue here is not whether a "range" structure is equitable or not. The issue is whether it is equitable for an establishment that was closed for several months to have to pay the same royalty as if it had not been closed, given that these closures resulted from health restrictions imposed on them and not from their free choice.

¹⁰ See *SOCAN Tariff 4.B – Live Performances at Concert Halls, Theatres, and Other Places of Entertainment – Classical Music Concerts 2018-2024* (26 November 2021), 2021 CB 11 (reasons), at paras 28 (4.B.1), 34 (4.B.2) and 39 (4.B.3).

¹¹ *SOCAN – Tariff 7 Skating Rinks (2018-2022)* (6 August 2021), 2021 CB 7 (reasons), online : CB < <https://decisia.lexum.com/cb-cda/decisions/en/item/500977/index.do?q=2021+CB+7>>, at para 12 [hereafter SOCAN – Tariff 7 (2018-2024)]. The minimum annual fee decreases from \$111.92 to \$56.

[26] On the other hand, the objectors are asking the Board to adjust the royalties in the form of a pro rata to take into account the periods of imposed closure of the establishments and those where they were allowed to open, with reduced capacity. It should be noted that the objectors did not provide any indication on how this could be done in practice. In our view, the objectors' proposal related to the form of adjustment cannot be retained, as it is nearly impossible to apply.

[27] Indeed, how would the payable royalties be calculated if, in the same pandemic year, a karaoke bar would be successively closed for several months, then authorized to reopen with reduced capacity, and finally allowed to reopen at full capacity? Besides, should such a proposal be implemented, the calculations to be done by users to determine the payable royalties would be very complex and the risk of error very high.

[28] Having said this, we agree with the objectors that the pandemic did have such an impact on the users and on the use of music in establishments covered by Tariff 20 that an adjustment to the royalties must be made. However, given the difficulties associated with the objectors' proposal, we need to determine what form this adjustment should take.

[29] It is particularly difficult to find a way to establish with precision the pandemic's impact on all Tariff 20 users, insofar as the periods when the establishments had to close differ from province to province, and sometimes even between municipalities in the same province.

[30] Furthermore, rules on the reduction of the number of customers who can be accommodated by an establishment, the wearing of masks, the verification of the vaccine status and the particular health measures adopted for karaoke bars made it difficult to use karaoke machines during the COVID-19 pandemic.

[31] Faced with the difficulty of arriving at a formula that could take all these factors into account, we believe that a simple formula which is applicable to all and does not involve complex and personalized calculations should be used.

[32] As the Board decided in the case of SOCAN's tariff for skating rinks¹² and in the case of SOCAN's tariff on recorded music for dancing,¹³ we are reducing the royalties payable by the users of Tariff 20 by 50% for the years 2020 and 2021. This reduction sets the royalties for the pandemic years at \$102.60 for an establishment that operates three days a week or less, and at \$147.84 for an establishment that operates four to seven days a week. We believe that the regular rates must be re-established for the year 2022, given the easing of the rules already declared by the relevant authorities.

¹² *Ibid.*

¹³ *SOCAN – Tariff 18, Recorded Music for Dancing 2018-2022* (3 June 2022), 2022 CB 4 (reasons), online : CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/520915/index.do>>. at para 33.

C. MANAGING OVERPAYMENTS

[33] In accordance with Tariff 20, royalties are paid each year on January 31, which means that users will have paid, for the years 2020 and 2021 in January of those years, the “normal” royalties and not those reduced by 50%. Therefore, there will have been overpayments to SOCAN. Hence, a mechanism must be integrated to manage these overpayments.

[34] To do so, a clause was added to the tariff, stipulating that any user having overpaid royalties for the years 2020 and 2021 will have to send SOCAN, by 15 November 2022, a notice indicating:

- the name and coordinates of the establishment and of its operator;
- the royalty amounts paid for 2019 (since that year serves as reference to calculate the total royalty reduced by 50%);
- the amount of royalties paid in 2020 and 2021;
- the royalties that should have been paid to SOCAN, according to the approved tariffs for 2020 and 2021; and
- the overpayment amount paid to SOCAN.

[35] Furthermore, the tariff provides that if a user made an error in the calculation of the overpayment, SOCAN must inform the user within a reasonable period from the reception of the notice and provide information as to the amount of overpayment it deems right.

[36] The user will then deduct the overpayment from the next payment. Overpayments do not bear interest.

[37] The advantage of providing that the user may deduct the overpayment from the next instalment is that this is a simple mechanism to apply; in fact, it saves SOCAN from having to make numerous repayments. As for the interests, we believe that the overpayments should not bear interest, as they are not caused by SOCAN’s error, but by a reduction in royalties in an exceptional pandemic context.

D. TERMS AND CONDITIONS OF THE TARIFF

[38] At the time of filing the proposed tariff for 2018-2020, SOCAN’s practice was to file dozens of proposed tariffs in a single document. A heading entitled “General Provisions”, applicable to all proposed tariffs, appeared at the beginning of the document. Given that proposed tariffs must henceforth be filed in a separate, stand-alone document containing all the terms and conditions applicable to this proposed tariff,¹⁴ we integrated under one heading, under the title “Terms and

¹⁴ *Practice Notice on Filing of Proposed Tariffs* (Modified 5 October 2021), PN 2019-004 rev 1, online : CB <<https://cb-cda.gc.ca/en/procedure/practice-notices>>.

Conditions” the pertinent paragraphs from “General Provisions” that are now added to the other terms and conditions of Tariff 20.

[39] In addition, as the Board has done so recently in other decisions, we are deleting references to the words “licence” and “licensee” in the proposed tariffs, to distinguish between the words “tariff” and “licence”.

[40] Indeed, in the *York*¹⁵ decision, the Supreme Court analyzed the interrelation between the concepts of tariff and licence. In doing so, it concluded that subsection 68.2(1) of the *Copyright Act*, as it stood before the 2019 modifications, did not authorize Access Copyright to collect royalties through a tariff approved by the Board according to section 70.15, from a user who chooses not to be bound by a licence on the terms stated in the approved tariff.

[41] Although this case does not raise the issue at the heart of the *York* decision, which dealt with the question of "mandatory tariff," the Court's analysis of the concepts of tariff and licence is useful, as it highlights the distinct roles of the Board and the collectives. While the Board approves tariffs, the collectives grant licences. Although a collective must grant licences under the conditions stated in an approved tariff if a user requests it, the fact remains that the concepts of tariff and licence are distinct. For this reason, a tariff approved by the Board should not refer to the concept of licence.

[42] Furthermore, we deleted the clause, in the proposed tariffs, stating that SOCAN may, at any time, terminate a licence upon 30 days’ notice in writing for breach of terms. In addition to the reasons mentioned above, we delete this paragraph entirely as it touches on the area of liability and the provisions of the *Act* applicable to remedies against users governed by a tariff. It is therefore a question of compliance and enforcement of the tariff rather than a question of approval.¹⁶ It should be noted that the deletion of this tariff clause, as well as the deletion of the concept of licence, does not modify in any way the scope of the tariff.

V. CONCLUSION

[43] For the reasons mentioned above, we approve the proposed tariffs as *SOCAN Tariff 20 – Karaoke Bars and Similar Establishments (2018-2022)*. The royalty rates remain unchanged in relation to those previously fixed for the years 2015-2017, except for 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 in relation to 2013-2017, to set a framework regarding overpayments, to

¹⁵ *York University v Canadian Copyright Licensing Agency* (30 July 2021), 2021 SCC 32, online: SCC < <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18972/index.do>>.

¹⁶ 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), at para 18.

take into account the deletion of the general provisions related to the 2013-2017 tariff and to remove references to the concept of licence.