

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

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**Member** René Côté

**Proposed Tariffs Considered** SOCAN Tariff 3.B – Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns and Similar Establishments - Recorded Music Accompanying Live Entertainment, 2018-2020  
SOCAN Tariff 3.B – Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns and Similar Establishments - Recorded Music Accompanying Live Entertainment, 2021-2022  
SOCAN Tariff 3.B – Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns and Similar Establishments - Recorded Music Accompanying Live Entertainment, 2023-2025

### **Approval of Proposed Tariffs**

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***SOCAN Tariff 3.B – Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns and Similar Establishments - Recorded Music Accompanying Live Entertainment (2018-2025)***

### **REASONS 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 three proposed tariffs with the Copyright Board for the public performance, in Canada, of recorded musical or dramatico-musical works from its repertoire accompanying live entertainment in a cabaret or a similar establishment, for the years 2018-2020, 2021-2022 and 2023-2025.

[2] Based on the following reasons, we conclude that SOCAN's proposed tariffs 3.B (2018-2020, 2021-2022 and 2023-2025) are fair and equitable, subject to a change to be made to the minimum

annual fee for the years 2020 and 2021, which is lowered by one third due to measures adopted by competent authorities in the context of the COVID-19 pandemic. We are making some changes to the tariff terms and conditions, particularly by accepting a change related to the conditions for auditing a tariff user's books and records by eliminating the option for the user to request an independent auditor chosen from a list of at least three names. Finally, we adjust the minimum annual fee for inflation for the years 2023 to 2025.

## II. CONTEXT

[3] SOCAN Tariff 3.B proposal allows a user (cabaret, cafe, club, cocktail bar, dining room, lounge, restaurant, roadhouse, tavern, and similar establishments) to perform in public, by means of recorded musical works from its repertoire accompanying live entertainment, at any time and as often as desired.

[4] On May 5, 2017, the Board approved SOCAN Tariff 3.B for the years 2013 to 2017.<sup>1</sup> The fees set out in the last approved tariff for the years 2015 to 2017 are identical to those set out in the first two proposed tariffs under review, as described below. Tariff 3.B had been subject to an inflation adjustment that was accepted by the Board for the 2015-2017 period. The result of this inflation-based adjustment was that the annual minimum fee was increased from \$62.74 for the years 2013-2014 to \$67.32 for the years 2015-2017.

[5] On March 31, 2017, March 28, 2019 and October 15, 2020, SOCAN filed proposed tariffs related to Tariff 3.B for the years 2018-2020, 2021-2022 and 2023-2025, respectively. The first two proposed tariffs were published in the *Canada Gazette* on April 29, 2017 and May 18, 2019, while the proposed tariff for 2023-2025 was published on the Board's website on November 3, 2021.

[6] SOCAN's proposed rates for the years 2018-2020 and 2021-2022 are identical to the last approved tariff for the years 2015 to 2017. The rates payable for these two proposed tariffs are 2% of the "compensation for entertainment" paid in the year covered by the tariff, subject to a minimum annual fee of \$67.32. The "compensation for entertainment" means the total amounts paid by the user to the performers, in addition to any other compensation they have received, for the entertainment of which recorded music is an integral part.

[7] For the period 2023-2025, SOCAN proposes to make an inflation adjustment in relation to the minimum annual fee that would increase that fee to \$79.83. The table below illustrates the royalty rates for the three periods under review.

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<sup>1</sup> SOCAN – *Various Tariffs 2007-2017* (5 May 2017), CB-CDA 2017-038 (reasons), online: CB-CDA <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366759/index.do?q=CB-CDA+2017-038>>.

**Table: Proposed Royalty Rates for 2018-2020, 2021-2022 and 2023-2025**

<b>2018-2020 Proposed Rates</b>	<b>2021-2022 Proposed Rates</b>	<b>2023-2025 Proposed Rates</b>
2% of the compensation for entertainment	2% of the compensation for entertainment	2% of the compensation for entertainment
Minimum annual fee: \$67.32	Minimum annual fee: \$67.32	Minimum annual fee: \$79.83

[8] Payments are made on January 31 of each year, based on the compensation due for the music performed the previous year, or on an estimate of the compensation to be paid for the beginning year. No later than January 31 of the following year, the user shall file with SOCAN a report of the actual compensation for entertainment paid during the previous year and an adjustment of the amount due shall be made accordingly. If the amount due is less than the amount paid, SOCAN shall credit the user with the amount of the overpayment.

#### **A. OBJECTORS' POSITION**

[9] The Retail Council of Canada, the Hotel Association of Canada and Restaurants Canada objected to the three proposed tariffs.

[10] On July 8, 2021, the Board informed the parties that it was about to start the examination of proposed tariffs for the years 2018-2020 and 2021-2022.<sup>2</sup> The Board asked the objectors to confirm in writing their intention to participate in this examination at the latest on July 16, 2021. In its CB-CDA Notice 2021-040 on July 30, 2021, the Board indicated that it was extending the consultation period and being aware that the proposed tariffs may not be adequate in view of the COVID-19 pandemic. It added that it intended to take this into account in its examination of the proposed tariffs. The Board also asked the objectors to file detailed grounds of objections and for SOCAN to respond to these grounds.

[11] On September 15, 2021, the Board received the grounds for objection filed by the objectors.<sup>3</sup> Basically, they acknowledge that the proposed tariff, that is 2% of the compensation for entertainment, is generally fair and equitable and that it adjusts automatically to COVID-19 pre-pandemic conditions, while revenues may have fluctuated due to health measures adopted by competent authorities. However, the objectors asked that the minimum annual fee of \$67.32 be adjusted downwards due to pandemic restrictions, particularly in respect of small establishments. The objectors do not explain what they mean by "small establishments" or what reduction percentage would be adequate. 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 3.B.

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<sup>2</sup> Notice CB-CDA 2021-034 (8 July 2021).

<sup>3</sup> Letter from Gabriel Van Loon in response to Notice CB-CDA 2021-040 (15 September 2021). The grounds for objection were filed jointly by the three objectors.

[12] On January 31, 2022, the Board informed the parties it was consolidating proposed tariff 3.B for the years 2023 to 2025 with the two other proposed tariffs<sup>4</sup>. It asked the objectors to explain the grounds for objection to the rates and terms and conditions of the proposed tariff. The Board also asked SOCAN to file its response to comments from objectors at the latest on March 22, 2022.

[13] The objectors argue that it is inappropriate to include in the same consultation the years 2023-2025 and the preceding periods (2018-2020 and 2021-2022).<sup>5</sup> They claim that the Board cannot come to an informed and reasonable decision for future years because of their inability to gather meaningful evidence on the market conditions of the establishments covered by the tariff.

[14] Furthermore, they argue that, even though recent waves of COVID-19 infection are decreasing in intensity and that the authorities are likely to lift health restrictions, the situation remains precarious. Predicting any stability for businesses that use copyrighted works for the purpose of providing economic evidence to determine whether the rates are fair and equitable is extremely difficult at this point.<sup>6</sup>

## **B. SOCAN'S RESPONSE**

[15] On October 1, 2021, SOCAN filed its response to the objectors' submissions<sup>7</sup>. It argues that no adjustment should be made to the proposed tariffs under review for the pandemic period for the following reasons.

[16] 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. SOCAN asserts that the minimum annual fee for Tariff 3.B has always been low.<sup>8</sup> It is set at \$67.32 for the period 2015-2017. SOCAN claims that the adjustment made to this fee for the 2015-2017 period are lower than if the Board had used its own method of taking inflation into account during the same period.

[17] On the other hand, SOCAN asserts that the Board confirmed several times that the annual minimum fees are fair and equitable and are set to cover the minimum fees that are necessary to manage the tariff and reflect the intrinsic value of musical works in its repertoire. Furthermore, SOCAN notes that the Board has already determined that the minimum annual fees should not be so low that their collection would become irrational or economically impossible. SOCAN did not indicate which reduction would make the collection of minimum annual fees irrational or economically impossible.

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<sup>4</sup> Notice CB-CDA 2022-003 (31 January 2022).

<sup>5</sup> It should be noted that the Board did not ask the opinion of the parties on the question of consolidation.

<sup>6</sup> Letter from Kathleen Simmons in response to Notice CB-CDA 2022-003 (1 March 2022). The grounds for objection were filed jointly by the three objectors.

<sup>7</sup> Letter from SOCAN in response to Notice CB-CDA 2021-040 and to joint comments from the objectors (1 October 2021), at p. 3.

<sup>8</sup> *Ibid.*

[18] Finally, although SOCAN is opposed to it, if the Board decided to implement adjustments to take the pandemic into account, it is asking the Board to limit these to the years 2020 and 2021. It also asks that the Board provide it with the opportunity to make submissions on any rate adjustments before their coming into force.

[19] With regard to the proposed tariff for the 2023-2025 period, SOCAN claims that it agrees with joining the examination of the proposed tariff for this period with that of the two previous periods insofar as it considers that the COVID-19 pandemic and the health restrictions are coming to an end. It maintains that the only proposed change to the proposed tariff is the increase by \$12.51 of the minimum annual fee that would be set at \$79.83. SOCAN claims that this increase would occur seven years after the last increase and would take into account the inflation by using the method developed by the Board in its decision related to CBC Radio (2006-2011).<sup>9</sup> In SOCAN's opinion, this small increase is fair and equitable.<sup>10</sup>

[20] While acknowledging the difficulties faced by Tariff 3.B users, SOCAN noted that its members have also been severely affected by the pandemic. As the structure of Tariff 3.B is automatically adjusted on the basis of costs actually incurred in periods of low activity, SOCAN considers that the minimum annual fees are not onerous for the users and should not be reduced during the pandemic period because they reflect the intrinsic value of the music used during this period. It reiterates its request that adjustments for the pandemic be limited to the years 2020 and 2021 in the event that an adjustment is made.

### III. ISSUES

[21] Three issues seem to emerge from the three proposed tariffs being considered. The first is to determine if the rates and terms and conditions of the proposed tariffs can be used as a basis for establishing a fair and equitable tariff for the years 2018 to 2025. Particularly, we will need to consider whether the adjustment for inflation of the minimum annual fee for the 2023-2025 period is fair and equitable.

[22] 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? If applicable, should we consult SOCAN about the adjustments?

[23] The third issue relates to the terms and conditions of the proposed tariffs and more specifically to the provision on the choice of an auditor and the removal of the notion of licence from the tariff.

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<sup>9</sup> SOCAN, *Re: Sound - Tariff for CBC Radio 2006-2011* (8 July 2011), (reasons), online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/certified-homologues/en/item/366426/index.do>>, at paras. 83 and following [hereafter CBC Radio (2006-2011)].

<sup>10</sup> Letter from SOCAN in response to Notice CB-CDA 2022-003 (22 March 2022), at p. 1.

## IV. ANALYSIS

### A. APPLICABLE RATES

[24] For the periods covered by the first two proposed tariffs under review, no increase is proposed in relation to the rates of the last approved tariff. Since the proposed royalties correspond to those previously approved for the same use, these rates represent the best applicable proxy for the tariff period in question. We have no information that would lead us to question them. However, for the years 2020 to 2022, the years most affected by the COVID-19 pandemic, the question arises as to whether the rates of the minimum annual fee in the proposed tariffs, although identical to the last approved rates, are fair and equitable.

[25] There is no doubt that the users covered by Tariff 3.B 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 reopen, they had to apply the health measures prescribed by the competent authorities, such as limiting capacity, requiring patrons to wear a mask or to provide proof of vaccination against COVID-19. In short, for many Tariff 3.B establishments, operating conditions were anything but normal.

[26] Some tariffs are structured in such a way that no adjustment is required for longer or shorter business closures or when capacity is reduced. This is particularly the case for tariffs that depend entirely on the number of concerts actually given and the revenue received from these concerts, or, as in this case, on a percentage of sums received by the persons who play the recorded music during live entertainment. In many cases, the fees paid by the establishments are adjusted automatically.<sup>11</sup>

[27] Tariffs 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 percent for SOCAN Tariff 7 – Skating rinks for the years 2020 and 2021.<sup>12</sup>

Because the minimum fee in this case appears intended to cover more than the tariff administration costs, and therefore is intended to compensate for some level of use, it is appropriate to reduce it to account for a reduction of use due to the pandemic.<sup>13</sup>

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<sup>11</sup> *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) and 39 (4.B.3).

<sup>12</sup> 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, at para. 12.

<sup>13</sup> *Ibid.* at para. 11.

[28] For the same reasons, the Board reduced the minimum annual fee by 50 % and set it at \$44.88 for the years 2020 and 2021 in respect of SOCAN Tariff 3.A, which deals with the same type of establishments but is related to the live performance of musical and dramatico-musical works.<sup>14</sup>

[29] In the case of Tariff 3.B, the minimum annual fee is very low at \$67.32 and a 50 % reduction that would lower it to \$33.66 seems excessive, in particular because it allows a user to play works from SOCAN's repertoire, at any time and as often as desired during live entertainment. If this minimum annual fee is compared with other tariffs where music is not as fundamental as in a cabaret or a similar establishment, it is questionable whether such a reduction is fair and equitable. For example, the minimum annual fee for a skating rink was \$56.00 for the 2020-2021 period. It can be argued that music is not the main attraction that draw skaters. Another example is taken from SOCAN Tariff 11.B for which a unique fee per event is set at \$39.27 for a comedy or magic show where music is only incidental to the event.<sup>15</sup>

[30] For this reason, we are setting at one third the reduction of the minimum annual fee, and we fix it at \$44.88 for the COVID-19 pandemic years, that is 2020 and 2021. Thus, during that period, the minimum annual fee for the public performance of recorded music accompanying live entertainment will be equivalent to the one fixed for live music under Tariff 3.A.

[31] We apply this reduction of the minimum annual fee only for the years 2020 and 2021. In our opinion, the minimum annual fee should be reinstated for the year 2022 due to the easing of restrictions directed by the competent authorities.

[32] SOCAN asked to be consulted about potential reductions in royalties due to measures adopted by the authorities during the COVID-19 pandemic, in its October 1, 2021 letter.<sup>16</sup> In this regard, the Board informed SOCAN in Notice CB-CDA 2022-050, dated August 17, 2022, that it did not see the need to consult it on this issue. At the same time, the Board, in accordance with paragraph 2a) of *Time Limits in Respect of Matters Before the Copyright Board Regulations*,<sup>17</sup> informed the parties that the last date to file their submissions was set for August 31, 2022. On August 30 and 31, 2022, the parties reiterated the submissions that they had previously made.

[33] For the third period under review, i.e. the 2023-2025 period, SOCAN requests an increase of the minimum annual fee to reflect inflation since the last increase came into effect. This is an increase of 18.58 %, which would raise the minimum annual fee from \$67.32 to \$79.83, that is a \$12.51 increase. SOCAN maintains that the proposed adjustment follows the method adopted by the Board in its decision related to Tariff for CBC Radio (2006-2011).<sup>18</sup> Without going into details,

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<sup>14</sup> *SOCAN Tariff 3.A – Live Music (2018-2024)* (5 August 2022), 2022 CB 5 (reasons), online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/520927/index.do?q=2022+CDA+5>>, at para. 21.

<sup>15</sup> *SOCAN Tariff 11.B – Comedy Shows and Magic Shows (2018-2022)* (21 August 2021), 2021 CB-CDA 8-T (tariff), online: CB <[SOCAN Tariff 11.B - Comedy Shows and Magic Shows \(2018-2022\) - Copyright Board of Canada \(cb-cda.gc.ca\)](https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/520927/index.do?q=2021+CB-CDA+8-T)>.

<sup>16</sup> Letter from SOCAN (October 1<sup>st</sup>, 2021).

<sup>17</sup> *Time Limits in Respect of Matters Before the Copyright Board Regulations*, SOR/2020-264.

<sup>18</sup> Letter from SOCAN (22 March 2022), *supra* note 10, at p. 1.

in this decision the Board had stated that the Consumer Price Index (CPI) was the best way to measure inflation to preserve the purchasing power of Canadians and it used the calendar years as reference periods.<sup>19</sup> Using data from Statistics Canada on CPI, we arrive at a rise in inflation of 16.98 % for the period from January 2014 to December 2021, rather than the 18.58 % proposed by SOCAN.<sup>20</sup> By our calculations, the minimum annual fee would increase from \$67.32 to \$78.75, an increase of \$11.43.

[34] In our opinion, this estimate is in accordance with the one the Board has been using for several years and constitutes a just and equitable minimum annual fee.

## **B. TERMS AND CONDITIONS OF THE TARIFF**

[35] Regarding the terms and conditions of the tariff, SOCAN proposes the withdrawal of a provision in relation to the choice of an independent auditor in case SOCAN would require access to the books and records of a tariff user. This provision provides that:

The licensee may request that the examination be made by an independent auditor chosen by the licensee from a list of at least three auditors furnished by SOCAN. In such a case, only the auditor so appointed need be allowed access to the licensee's records. If the audit discloses that the licence fee owed to SOCAN has been understated by more than 10 percent, the licensee shall pay the auditor's fees.<sup>21</sup>

[36] In its Notice CB-CDA 2021-034, the Board asked SOCAN about the suggestion of withdrawing this provision from Tariffs 3.A and 3.B. In its response, SOCAN indicated that such a provision exists only in SOCAN Tariffs 3.A, 3.B and 3.C, which represents only a small percentage of its tariffs and that the search for uniformity in tariffs that are similar is a legitimate objective. SOCAN had requested for this provision to be withdrawn from Tariff 3.C (2018-2022), but the Board had refused this request in 2020.<sup>22</sup> SOCAN also makes the following points:

If the Board is, perhaps, attempting to ascertain whether there might be some prejudice to licensees by the removal of the wording, SOCAN would say no. SOCAN can confirm, based on records available (...) that since 2013, no tariff 3 licensee (...) has availed itself of the right to ask for an independent auditor to be appointed.<sup>23</sup>

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<sup>19</sup> *CBC Radio 2006-2011*, *supra* note 9, at para. 91.

<sup>20</sup> Statistics Canada, Table 18-10-0004-01 Consumer Price Index, monthly, not seasonally adjusted. DOI : <<https://doi.org/10.25318/181000401-eng>>.

<sup>21</sup> *SOCAN – Various Tariffs 2007-2017*, *supra* note 1. (Supp. to Gaz. Off. 6 May 2017, Tariff 3.B, at 10).

<sup>22</sup> *SOCAN Tariff 3.C – Adult Entertainment Clubs (2018-2022)* (7 August 2020), 2020 CB 008 (reasons), online: CB <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/483924/index.do?q=2020+CDA+008>>, at paras. 16-17.

<sup>23</sup> Letter from SOCAN in response to Notice CB-CDA 2021-034 (16 July 2021).



[37] It is worth noting that SOCAN’s arguments, in its July 16, 2021 letter, were received by all proposed Tariff 3.A objectors. The objectors could very well have objected to the withdrawal of this provision in the proposed tariff, but they did not.

[38] In the absence of objections in respect of this issue and due to the fact that it is highly unlikely that harm will be caused to the users of the tariff, we accept the withdrawal of this provision from proposed Tariff 3.B under review as we recently did for Tariff 3.A.<sup>24</sup>

[39] Furthermore, under the [*Copyright*] Act, the Board’s mandate is to fix royalty rates and related terms and conditions in approved tariffs. 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 explained by the Supreme Court of Canada in *York v Access Copyright*.<sup>25</sup> Consequently, we withdraw the references to “licences,” including the paragraph previously found in the general provisions section, that stated that SOCAN could at any time terminate a licence on 30 days’ notice. This does not change in any way the scope of the tariff.

[40] We are also removing the reference to SOCAN Tariff 3.C. This is because the tariff is clearly defined and not misleading with regard to Tariff 3.C that deals with entertainment clubs for adults. This implements the Practice Notice on Filing Proposed Tariffs.<sup>26</sup>

## V. CONCLUSION

[41] Based on the above-mentioned reasons, we approve the proposed tariffs under the title SOCAN Tariff 3.B – Cabarets, Cafes, Clubs, Cocktail Bars, Dining Rooms, Lounges, Restaurants, Roadhouses, Taverns, and Similar Establishments – Recorded Music Accompanying Live Entertainment (2018-2025). The royalty rates remain unchanged in relation to those of SOCAN Tariff 3.B (2015-2017), except for the minimum annual fee, which is reduced by one third and fixed at \$44.88, for the years 2020 and 2021. We accept the increase of the minimal annual fee to account for inflation in respect of the years 2023-2025 and we set it at \$78.75. We accept the withdrawal of the provision that authorized the choice of an independent auditor when SOCAN requests access to the books and records of a tariff user. In addition, we are removing the term “licence”.

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<sup>24</sup> *SOCAN Tariff 3.A (2018-2024)*, *supra* note 14, at para. 26.

<sup>25</sup> *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>>.

<sup>26</sup> Copyright Board of Canada, PN 2019-004 rev. 2.