Copyright Board Canada | Commission du droit d'auteur Canada

CANADA

Date	2023-11-03
Citation	*SOCAN Tariff 13.C (2023-2025), 2023 CB 9*
Member	René Côté
Proposed Tariff Considered	SOCAN Tariff 13.C – Public Conveyances - Railroad Trains, Buses and Other Public Conveyances, Excluding Aircraft and Passenger Ships, 2023-2025

Approval of Proposed Tariff
As
SOCAN Tariff 13.C – Public Conveyances - Railroad Trains, Buses and Other Public Conveyances (2023-2025)

REASONS FOR DECISION

I. OVERVIEW

[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 a proposed tariff with the Copyright Board for the use of recorded musical or dramatico-musical works, in its repertoire in railroad trains, buses, and other public conveyances, excluding aircraft and passenger ships, for the years 2023-2025.

[2] For the following reasons, the Board finds that SOCAN's proposed tariff 13.C (2023-2025) is fair and equitable, subject to various modifications, particularly an adjustment to royalties for inflation. The Board makes these changes to the proposed tariff and approves it.

II. BACKGROUND

A. The most recently approved tariff

[3] The Board approved the most recent Tariff 13.C on August 8, 2020[1] ("*Tariff 13.C 2018-2022*").

[4] *Tariff 13.C 2018-2022* provides that the royalty rate is $1.13 per person per year, based on the authorized passenger capacity of the car, bus or other public conveyance, subject to a minimum annual fee of $67.32. In the context of the COVID-19 pandemic, the Board had included in the tariff a provision that was similar to the one found in Tariff 13.B: if cars, buses, or other means of public conveyance are in operation for less than 12 months per year, the fee payable is reduced by one twelfth for each full month of non-operation.

[5] Regarding the payment of royalties, *Tariff 13.C 2018-2022* states that the licensee shall provide a report indicating the maximum number of passengers authorized and pay SOCAN the resulting royalties no later than January 31 of the year covered by the licence.

B. The proposed tariff

[6] SOCAN filed proposed Tariff 13.C on October 15, 2021, and it was published on the Copyright Board's website.[2] On November 10, 2021, the Board issued an order[3] requiring SOCAN to submit a notice of grounds for the proposed tariff. SOCAN responded with its Notice of Grounds for Proposed Tariff of December 15, 2021, which was published on the Board's website.[4] The Board received no objections to this proposed tariff. On July 11, 2023, the Board indicated that it was ready to render its decision based on the grounds provided by SOCAN.

Description of the Proposed Tariff

[7] The fee payment structure is identical to that of *Tariff 13.C 2018-2022*, i.e., the royalties paid for the current year are based on the maximum number of passengers allowed per car, bus, or other public conveyance, subject to a minimum annual fee. No later than January 31 of the year covered by the licence, the licensee provides a report on the maximum number of passengers authorized and pays SOCAN the royalties due.[5]

---

[1] *SOCAN Tariffs 13.A, 13.B and 13.C – Public Conveyances (2018-2022)* 2020 CB 011-T (August 8, 2020), C Gaz Supplement, Vol. 154, No. 32.
[2] *SOCAN Tariff 13.C – Public Conveyances - Railroad Trains, Buses and Other Public Conveyances, Excluding Aircraft and Passenger Ships (2023-2025)* (Proposed Tariff) (January 10, 2022).
[3] Order of the Board CB-CDA 2021-053, November 10, 2021.
[4] SOCAN, Notice of Grounds for Proposed Tariff for SOCAN Tariff 13.C – Public Conveyances - Railroad Trains, Buses and Other Public Conveyances, Excluding Aircraft and Passenger Ships (2023-2025), December 15, 2021.
[5] *Ibid.*

[8] Royalties have been adjusted for inflation. They would rise from $1.13 to $1.34 per person, while the minimum annual fee would increase from $67.32 to $79.83. In both cases, this represents an increase of 18.58%.

[9] SOCAN is also proposing to remove the clause introduced in Tariff 13.C 2018-2022, whereby the royalties payable would be reduced by one twelfth for each full month during the year in which the cars or buses are operating less than 12 months.

[10] In another proposed change, the proposed tariff now covers communication to the public by telecommunication in addition to public performance, but this addition does not entail any increase in the royalties to be paid by tariff users.

III. QUESTIONS

[11] We identified five issues relating to the proposed tariff that the Board must consider in this proceeding. These issues are as follows:

1. Does the last tariff approved by the Board constitute a sufficient proxy for approving the proposed tariff submitted by SOCAN?
2. Is the addition of communication to the public by telecommunication justified?
3. What should the inflation adjustment be?
4. Is the withdrawal of the clause proposing to reduce the royalties payable for the months where a car or a bus is not operating justified?
5. Are changes to the wording of the proposed tariff necessary?

IV. ANALYSIS

A. ISSUE 1: IS THE LAST APPROVED TARIFF AN APPROPRIATE PROXY?

[12] When a proposed tariff does not differ substantially from the previously approved tariff, the Board may rely on the last-approved tariff as an indication that the proposed tariff is fair and equitable, particularly if there has been no change in the relevant market. We are not aware of any changes in the market related to transportation by railroad trains, buses and other public conveyances, excluding aircraft and passenger ships, partly because no objections have been filed.

[13] The proposed tariff does not differ substantially from *Tariff 13.C 2018-2022*. Furthermore, the terms and conditions of the latter are similar to those of proposed tariff for 2023–2025. The same applies to the tariff structure and the structure of royalty payments, except for the non-operation of a means of transport for an entire month. Royalties have only been increased to reflect inflation, but the calculations of inflation adjustments will be corrected.

[14] As such, we conclude that the proposed tariff can be used as a proxy.

B. Issue 2: Is the addition of communication to the public by telecommunication justified?

[15] In view of changes to the way music is used on board railroad trains, buses and other public conveyances, we believe it is justified to explicitly add communication to the public by telecommunication.

[16] Since SOCAN did not explain this change in its Notice of Grounds for Proposed Tariff, the Board asked it to do so in its Order of November 7, 2022.[6] SOCAN explained that this addition reflects changes in the way music is used on board aircraft, passenger ships, railroad trains and buses, including the way on-demand content is delivered to customers' personal devices via on-board entertainment systems. SOCAN asserts that no increase in royalties is associated with this addition.

[17] In our opinion, the way in which musical content is delivered has evolved in recent years, and this use may involve communication to the public by telecommunication. This change to the text of the tariff therefore seems fair and equitable to us, and we keep it.

C. Issue 3: What should the adjustment for inflation be?

Summary

[18] The proposed tariff seeks an increase in royalties to account for inflation of 18.58%.

[19] In order not to exceed the amounts requested in the proposed tariff, while maintaining its usual method of calculating inflation, the Board sets the inflation adjustment at 16.98%. This amount corresponds to actual inflation for the period beginning January 1, 2014 and ending December 31, 2021.

The Board's Approach to Inflation

[20] The Board has long held the view that fixed royalties should be adjusted for inflation. Indeed, we believe that inflationary adjustments are justified because they preserve the purchasing power of rights holders, and that the absence of such adjustments would erode the value of royalties collected by collective societies through tariffs.

[21] The Board's recent approach to determining the inflation adjustment has been to calculate the percentage change in the CPI between January of the first year requiring adjustment and December of the last full year of data available. In general, the start of the calculation period begins the day after the end of the period used by the Board for its last inflation calculation.

---

[6] Order of the Board CB-CDA 2022-064, November 7, 2022.

[22] In our opinion, this approach continues to be the simplest and most direct way of calculating the inflation rate. Moreover, it is an approach known to the parties. It is also consistent with the principle of using known values rather than future values.

[23] Moreover, this is what SOCAN asks the Board to do in its concluding submissions: the inflation adjustment should be based on the most recent data.

[24] Using the usual calculation method, the calculation period would begin on January 1, 2014, and would end on December 31, 2022. The Board adjusted SOCAN Tariff 13.C for 2015 by increasing the royalties to reflect inflation for the period between 2005 and 2013. No inflationary adjustment has been applied since. December 31, 2022 is the end of the last full year for which data is available.

[25] This approach would lead to an adjustment of 24.37%, which is more than the adjustment requested by SOCAN.

Procedural fairness

[26] In the present case, this approach must be tempered by the fact that the Board generally refrains from approving tariffs higher than those proposed, on the grounds that this could constitute a breach of procedural fairness for those affected by a proposed tariff.[7]

[27] For ease of administration and calculation, the increase we are setting to account for inflation uses data from the most recent full year that does not exceed the amounts in the proposed tariff.

Conclusion on inflationary adjustment

[28] Consequently, the calculation period used by the Board begins on January 1, 2014 and ends on December 31, 2021. This results in an inflationary adjustment of 16.98%. The Board therefore sets the rate at $1.32 per person based on the maximum number of authorized passengers per car, bus, or other public conveyances with a minimum annual fee of $78.75.

D. Issue 4: Is the withdrawal of the clause proposing to reduce the royalties payable for the months where a car or a bus is not operating justified?

[29] We remove the clause that reduces the royalties payable for any full month where a car or a bus is not in operation.

[30] *Tariff 13.C 2018-2022* contained the following clause:

[7] See *Bell Canada v Copyright Collective of Canada*, 2021 FCA 148.

> For railroad trains, buses and other public conveyances, excluding aircraft and passenger ships, operating for less than 12 months in each year, the fee payable shall be reduced by one twelfth for each full month during the year in which no operations occur.

[31] The following clause had been added by the Board in response to the disruption caused by the COVID-19 pandemic. Here is how we justified this change:

> The Board is aware that the COVID-19 pandemic has had unexpected consequences for the transportation industry and that economic activity has been severely disrupted in 2020. In order to ensure tariff royalties remain fair and equitable, we follow the practice of Tariff 13.B and include the condition that the fee paid is prorated on a monthly basis dependent on economic activity – so if a user operates for less than 12 months in each year, the fee payable shall be reduced by one twelfth for each full month during the year in which no operations occur. Inserting such a clause in a multi-year tariff does not affect the total royalties owing in any year in which economic activity operates for all months of the year. Using a full month of inactivity as the benchmark also takes into account the rights holders whose rights are being affected as well by the pandemic.[8]

[32] In its Notice of Grounds for Proposed Tariff of December 15, 2021, SOCAN supported the proposition that this clause must be withdrawn for Tariff 13.C (2023-2025) as follows:

> The tariff wording has been amended to remove the COVID-19 adjustment implemented in the previously approved tariff, namely, that the fee payable is no longer reduced by one twelfth for each full month during the year in which no operations occur. For the years 2023-2025, such COVID-19 adjustment is no longer necessary, and including it for these years would not be fair and equitable.[9]

[33] Unlike public transportation by passenger ships, which is subject to the hazards of winter, forcing passenger transport activities to cease for several months of the year when rivers are covered in ice, rail transportation and transport services by bus are not seasonal activities. Even if the clause that the Board added for the duration of the pandemic was entirely appropriate to the particular situation, the end of the pandemic allows us to return to Tariff 13.C's original wording that did not foresee a reduction for periods of inactivity. Tariff 13.C's wording will therefore be amended to revert to the previous text.

---

[8] *SOCAN Tariffs 13.A, 13.B, 13.C – Public Conveyances (2018-2022)* 2020 CB 011 (August 8, 2020).
[9] SOCAN, Notice of Grounds for Proposed Tariff for SOCAN Tariff 13.C – Public Conveyances - Railroad Trains, Buses and Other Public Conveyances, Excluding Aircraft and Passenger Ships (2023-2025), December 15, 2021.

E. ISSUE 5: ARE CHANGES TO THE WORDING OF THE PROPOSED TARIFF NECESSARY?

[34] Two minor changes also need to be made to the proposed tariff: one eliminating references to the concept of "licence" and the other relating to general provisions. These two changes have no practical impact on the functioning of the tariff.

[35] First of all, under the *Act*, the Board's mandate is to set royalty rates and related terms and conditions. The Board's tariff-setting mandate does not include licensing. Licensing of collectively administered rights is the responsibility of collective societies, as the Supreme Court of Canada pointed out in *Access Copyright v York University*.[10] As a result, we are removing references to the words "licence" and "licensee" from the proposed tariff, including the paragraph found in the general provisions stating that SOCAN may terminate any licence at any time upon a 30-day notice. This change in no way alters the scope of the tariff.

[36] Since proposed tariffs must be filed in a separate, stand-alone document containing all applicable terms and conditions, the section entitled "General Provisions", which covered tariff proposals filed in bulk, is no longer relevant.[11] Paragraphs of this section that are still relevant have been moved to the end of the tariff, while those referring to the licensing concept have been deleted for the reasons mentioned in the previous paragraph.

V. DECISION

[37] For the aforementioned reasons, we approve the proposed tariff with some changes. The royalty rate is adjusted for inflation, rising from $1.13 to $1.32 per person per maximum number of passengers allowed, with the minimum annual fee rising from $67.32 to $78.75. In the terms and conditions section of the tariff, we agree to add communication to the public by telecommunication and to remove the clause allowing the annual fee to be reduced when cars and buses are not operational during an entire month. We integrate what were previously the "General Provisions" common to several tariff proposals, while eliminating references to licences and their holders.

---

[10] *York University v Canadian Copyright Licensing Agency*, 2021 SCC 32.
[11] *Practice Notice on Filing of Proposed Tariffs PN 2019-004 rev. 3* (March 1, 2023).