

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

**Date** 2024-05-03

**Citation** *SOCAN Tariff 4.A* (2018-2024), 2024 CB 2

**Member** René Côté

**Proposed Tariffs Considered** SOCAN Tariff 4.A.1 – Live Performances at Concert Halls, Theatres and Other Places of Entertainment – Popular Music Concerts – Per Event Licence (2018, 2019, 2020-2021, 2022-2024)  
SOCAN Tariff 4.A.2 – Live Performances at Concert Halls, Theatres and Other Places of Entertainment – Popular Music Concerts – Annual Licence (2018, 2019, 2020-2021, 2022-2024)

### **Approval of Proposed Tariffs**

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*SOCAN Tariff 4.A – Popular Music Concerts (2018-2024)*

### **REASONS FOR DECISION**

#### **I. OVERVIEW**

[1] The Society of Composers, Authors and Music 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 in Canada.

[2] SOCAN filed Proposed Tariffs with the Copyright Board in respect of the years 2018, 2019, 2020-2021, and 2022-2024. These Proposed Tariffs cover the performance of musical works by performers in person at popular music concerts.

[3] For the following reasons, the Board finds that SOCAN's Proposed Tariffs are fair and equitable, subject to certain modifications, particularly a clarification of the scope of the tariff. The Board makes these changes to the Proposed Tariffs and approves them as *SOCAN Tariff 4.A – Popular Music Concerts (2018-2024)*.

## II. BACKGROUND

### A. THE MOST RECENTLY APPROVED TARIFF

[4] The Board approved the most recent Tariff 4.A, including its subparts: Tariffs 4.A.1 and 4.A.2 on May 6, 2017.<sup>1</sup> In both *Tariff 4.A.1 (2015-2017)* and *Tariff 4.A.2 (2015-2017)* the royalty payable was 3 per cent, either of gross receipts from ticket sales of paid concerts or of fees paid to singers, musicians, dancers, conductors and other performers during a free concert.

[5] Minimum fees differed between the two subparts. *Tariff 4.A.1 (2015-2017)* provided a per-concert minimum fee of \$35 while *Tariff 4.A.2 (2015-2017)* provided an annual minimum fee of \$60. Reporting requirements differed slightly between the tariffs. Under *Tariff 4.A.1*, users paid the royalty and filed reports no later than 30 days after a concert. Under *Tariff 4.A.2*, at the start of the year users estimated royalties for the current year and filed reports for the previous year.

[6] In *Tariff 4.A (2015-2017)* the Board also, for the first time, approved a definition of “Performers” as including DJs when they are the featured performer and their identity forms part of the material used to promote the event.

### B. THE PROPOSED TARIFFS

[7] SOCAN filed the Proposed Tariffs between March 31, 2017 and October 15, 2020.

#### *The Objectors and a comment*

[8] Six entities filed objections to the Proposed Tariffs. No objections were filed to the 2022-2024 proposed tariff. Three objectors withdrew as participants from the proceeding: Restaurants Canada, CAPACOA and Festivals and Major Events Canada.

**Table 1: Status of Objectors**

Objector(s)	In respect of	Status
4427319 Canada Inc. (“Bal en Blanc”)	2018	Participant
Restaurants Canada	2018, 2019, 2020-2021	Withdrawn
Boots and Hearts <sup>2</sup>	2019	Participant
CAPACOA, <sup>3</sup> jointly with Canadian Live Music Association (“CLMA”) and Festivals and Major Events Canada	2020-2021	CAPACOA and Festivals and Major Events Canada have withdrawn; CLMA remains a participant

<sup>1</sup> *SOCAN Various Tariffs 2007-2017* (approved tariff) (May 6, 2017), C Gaz Supplement, Vol. 151, No. 18.

<sup>2</sup> The objector that filed as Boots and Hearts Ltd. has also filed submissions under the name “Republic Live”.

<sup>3</sup> The Canadian Association for the Performing Arts / l’Association canadienne des Organismes artistiques.

[9] The remaining three objectors are Bal en Blanc, which produces the Bal en Blanc music event in Montreal; Boots and Hearts, which produces the annual Boots and Hearts Music Festival; and CLMA, which represents participants in the live music industry.

[10] Bal en Blanc objects to the inclusion of DJs in the definition of “Performers” and says that the applicable tariff for dance events is not clear.<sup>4</sup> Boots and Hearts objects to the rate base,<sup>5</sup> saying that the Proposed Tariffs are overbroad in their application because the rate base for experiential festivals<sup>6</sup> includes revenues that are not related to music. Although CLMA objected jointly with CAPACOA,<sup>7</sup> it filed joint submissions with Boots and Hearts throughout the proceeding.

[11] The Board also received a letter of comment from the Rideau Association (“Rideau”), an industry association that represents concert venues.<sup>8</sup> Rideau asks the Board to clarify that concert venues are not users under the tariff.

### *Proposed rates and terms*

[12] The structure and rates in the Proposed Tariffs are identical to that of *Tariff 4.A (2015-2017)*. SOCAN proposes the following rates for both Tariffs 4.A.1 and 4.A.2:

- a. 3 per cent of gross receipts from ticket sales of paid concerts; or
- b. 3 per cent of fees paid to singers, musicians, dancers, conductors and other performers during a free concert.

[13] The proposed minimum fees are also identical to the last-approved tariff with a per-concert minimum fee of \$35 in Tariff 4.A.1 and an annual minimum fee of \$60 in Tariff 4.A.2. Finally, the Proposed Tariffs contain the same definition of “Performers” as in the last-approved tariff.

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<sup>4</sup> Objection of 4427319 Canada Inc to SOCAN’s Proposed Tariff 4.A for 2018, 20 June 2017 at pp 1-4 [BeB’s objections].

<sup>5</sup> Objection of Boots and Hearts Limited Partnership to SOCAN’s Proposed Tariff 4.A for 2019, 4 July 2018 [Boots and Hearts’ objection].

<sup>6</sup> Experiential festivals, like Boots and Hearts, “[...] feature both live music and a host of non-music activities and attractions, including overnight camping, large-scale original art installations, games, sports, contests and competitions, craft and farmers’ markets, and food and beverage vendors.” *Ibid* at p 1.

<sup>7</sup> Objection of CAPACOA, the Canadian Live Music Association, and Festivals and Major Events Canada to SOCAN’s Proposed Tariff 4.A for 2020-2021, 17 July 2017.

<sup>8</sup> Letter from Julie-Anne Richard, Rideau Association “Observations de RIDEAU au Projet de tarifs des redevances à percevoir par la SOCAN pour l’exécution en public ou la communication au public par télécommunication, au Canada, d’œuvres musicales ou dramatico-musicales”, 17 January 2023.

### C. PROCEDURAL STEPS TAKEN

[14] The Board began the proceeding by asking SOCAN to respond to the detailed objections of Bal en Blanc, Boots and Hearts and CLMA.<sup>9</sup> SOCAN challenged all of the objections.<sup>10</sup>

[15] The Board then held two informal meetings with the parties. After these meetings, the Board issued an order that identified two key issues raised by the objections of Bal en Blanc and Boots and Hearts and asked the parties to respond to certain questions.<sup>11</sup> SOCAN,<sup>12</sup> Bal en Blanc,<sup>13</sup> and Boots and Hearts with CLMA<sup>14</sup> filed submissions. SOCAN also filed a response to the objectors' submissions.<sup>15</sup>

[16] Based on these filings, the Board asked the parties to comment on draft language that would implement an adjustment to the rate base as well as other minor language changes to the tariff.<sup>16</sup> SOCAN as well as Boots and Hearts and CLMA (together, the "Festival Objectors") filed submissions<sup>17</sup> and responses.<sup>18</sup>

### III. ISSUES

[17] The Board has identified six issues to consider in this proceeding:

1. Is the inclusion of featured DJs in the definition of "performers" justified?
2. Is the scope of the Proposed Tariffs sufficiently clear so that one can easily identify which tariff applies to events that involve recorded music and dancing?
3. Should the rate base be adjusted for experiential festivals that include non-musical amenities in an "all-inclusive" price structure?
4. Is clarifying whether concert venues are users of the tariff appropriate?
5. Can the last-approved tariff serve as a proxy to approve the proposed tariffs?

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<sup>9</sup> Notice of the Board CB-CDA 2021-049, October 22, 2021.

<sup>10</sup> Submissions of Matthew Estabrooks, Counsel for SOCAN, 3 February 2022 "Re: SOCAN Submissions on Tariff 4.A – Pursuant to Board Notice [CB-CDA 2021-049]" [SOCAN's response to objections].

<sup>11</sup> Order of the Board CB-CDA 2023-007, February 9, 2023.

<sup>12</sup> SOCAN submissions, 14 April 2023, "Re: SOCAN Response to Order of the Board dated February 9, 2023 [CB-CDA 2023-007]" [SOCAN's submissions].

<sup>13</sup> Bal en Blanc Submissions, 13 April 2023, "Ordonnance de la Commission [CB-CDA 2023-007]" [BeB's submissions].

<sup>14</sup> Submissions of Canadian Live Music Association and Republic Live, 14 April 2023 [Festival Objectors' submissions].

<sup>15</sup> SOCAN Response, 28 April 2023, "Re: SOCAN Reply to Objectors Pursuant to Order of the Board dated February 9, 2023 [CB-CDA 2023-007]" [SOCAN's response to submissions].

<sup>16</sup> Notice of the Board CB-CDA 2023-042, August 16, 2023 [CB-CDA 2023-042].

<sup>17</sup> SOCAN Submissions, 7 September 2023, "Re: SOCAN Response to Board Notice [CB-CDA 2023-042]" [SOCAN's submissions on tariff language]; Submissions of Canadian Live Music Association and Republic Live, 7 September 2023, "Re: Consultation on Tariff Language", [Festival Objectors' submissions on tariff language].

<sup>18</sup> SOCAN Response, 28 September 2023, "SOCAN's Response to Objectors [CB-CDA 2023-042]", [SOCAN's response to consultation submissions]; Response of Canadian Live Music Association and Republic Live, 28 September 2023, "Consultation on Tariff Language" [Festival Objectors' response to consultation submissions].

6. Are any other changes to the wording of the proposed tariffs necessary?

#### IV. ANALYSIS

##### A. ISSUE 1: IS THE INCLUSION OF FEATURED DJs IN THE DEFINITION OF “PERFORMERS” JUSTIFIED?

[18] The proposed definition of “Performers” as including disk jockeys (“DJs”) is retained.

[19] Bal en Blanc objects to the inclusion of DJs as performers, claiming that doing so expands the scope of the tariff to dance events.<sup>19</sup> SOCAN responds, saying that some events featuring recorded music performed by DJs are concerts.<sup>20</sup> Tariff 4.A, it says, captures the value of music as a foreground element where the performer is the primary focus. SOCAN’s intention in proposing the definition is to resolve any ambiguity that may arise with the increased popularity of electronic dance music (“EDM”) concerts.<sup>21</sup>

[20] We retain the proposed definition of “Performers” for two reasons. First, we find that DJs can be performers under the Proposed Tariffs because a performance occurs when DJs play music. Under the *Copyright Act*, a performance is defined broadly as any acoustic representation of a work by means of any mechanical instrument.<sup>22</sup> Even though DJs may not play traditional instruments or create “live” music they use mechanical instruments, such as CDJs and mixers, to cause acoustic representations to occur.

[21] Second, we find that DJs perform at concerts based on seven photographs provided by SOCAN. Each photograph shows DJs performing on stage in front of audiences. These photographs support SOCAN’s submissions that DJs function the same as headlining singers or bands in that they act as musical performers and are the main draw for the audience.<sup>23</sup> We note that Bal en Blanc does not challenge these submissions.

##### B. ISSUE 2: IS THE SCOPE OF THE PROPOSED TARIFFS CLEAR?

[22] The scope of the Proposed Tariffs is not clear because one cannot easily identify which tariff applies to events that involve recorded music and dancing. The exclusion clause is modified to exclude the performance of recorded music at events held primarily for purposes of dancing.

#### *Context*

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<sup>19</sup> BeB’s objections, *supra* note 4.

<sup>20</sup> SOCAN’s response to objections, *supra* note 10 at p 3.

<sup>21</sup> *Ibid* at p 3.

<sup>22</sup> *Copyright Act*, RSC 1985 c C-42, s. 2 *sub verbo* “performance” [the Act].

<sup>23</sup> SOCAN’s submissions, *supra* note 12 at p 2.

[23] Bal en Blanc submits that the applicable tariff for dance events is no longer clear.<sup>24</sup> It says that SOCAN began applying *SOCAN Tariff 4.A (2015-2017)* to dance events after the Board defined DJs as performers. It thinks that *SOCAN Tariff 18 (2018-2022)*<sup>25</sup> should apply to the dance events it produces.

[24] SOCAN notes that Bal en Blanc’s objections relate to the distinction between the Proposed Tariffs and Tariff 18.<sup>26</sup> It says that this distinction is clear: the Proposed Tariffs apply when the main focus of an event is a performance while Tariff 18 applies when music supports dancing.<sup>27</sup>

[25] To be clear, we make no finding on which tariff applies to the specific events produced by Bal en Blanc. Such questions are factual matters of enforcement and outside the Board’s jurisdiction.<sup>28</sup> Instead, this issue concerns whether the tariff is sufficiently clear as to its scope.

*The scope of the Proposed Tariffs is not clear*

[26] SOCAN and Bal en Blanc provided submissions on criteria that might differentiate a Tariff 4.A concert from a Tariff 18 ball. These submissions can be grouped into three categories. None, however, help clarify the scope of the Proposed Tariffs.

[27] First, SOCAN and Bel en Blanc agree that DJs play recorded music—often dance music—at both concerts and balls.<sup>29</sup> DJs do similar activities at both types of events: they select, play, and mix music, often with the intention of encouraging people to dance.<sup>30</sup> SOCAN acknowledges that a DJ that performs in person at a concert may also play at a venue that is subject to Tariff 18.<sup>31</sup> As a result, we find that the DJ, their intentions, and the genre of music played do not help distinguish between the tariffs.

[28] Second, the word “performer” does not help distinguish between the tariffs. SOCAN says that “a DJ who spins tracks at a venue covered by Tariff 18 is not a performer that presents music to an audience [...] in the sense intended by Tariff 4.A”.<sup>32</sup> Although SOCAN may intend a narrow definition of “performer” that excludes DJs at balls, such a definition is not in the Proposed Tariffs nor has the Board received submissions that could support such a definition. Instead, the Proposed

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<sup>24</sup> BeB’s objections, *supra* note 4 at pp 1-4.

<sup>25</sup> *SOCAN Tariff 18 – Recorded Music for Dancing (2018-2022)* 2022 CB 4-T (June 4, 2022), C Gaz Supplement Vol. 156, No. 23

<sup>26</sup> SOCAN’s response to objections, *supra* note 10 at p 3.

<sup>27</sup> *Ibid* at p 4.

<sup>28</sup> *SOCAN Tariff 21 – Recreational Facilities Operated by a Municipality, School, College, University, Agricultural Society or Similar Community Organizations 2013-2020*, CB-CDA 2018-222 (reasons) (December 7, 2018)[SOCAN Tariff 21 (2013-2020) decision].

<sup>29</sup> SOCAN’s response to objections, *supra* note 10 at p 3; BeB’s submissions, *supra* note 13 at p 1.

<sup>30</sup> SOCAN’s submissions, *supra* note 12 at p 2.

<sup>31</sup> *Ibid* at p 2.

<sup>32</sup> *Ibid*.

Tariffs use the word “performer” to describe a person who causes a performance to occur. This is emphasized in section 2 of the French version of the Proposed Tariffs as “l’exécution et l’autorisation d’exécuter, par des exécutants en personne”. Because the *Act* defines “performance” broadly, we find that the word “performer” cannot distinguish between the tariffs.

[29] Third, concerts can take place at Tariff 18 venues. The Proposed Tariffs apply to “[...] places where entertainment is presented”. Tariff 18 also applies to many of these places, including bars, clubs, discotheques, and dance halls. For example, SOCAN claims that the Bal en Blanc event, which takes place at a discotheque: New City Gas, Montreal, is a concert.<sup>33</sup> As a result, we find that the location or type of venue cannot help distinguish between the tariffs.

[30] The scope of the Proposed Tariffs is not clear. Without modification, both the Proposed Tariffs and Tariff 18 appear to apply when DJs perform recorded dance music at certain venues.

#### *Contributions of attendees*

[31] The Proposed Tariffs differ from Tariff 18 in how attendees participate in the entertainment. This difference helps clarify when each tariff applies. In *SOCAN Various Tariffs (1994-1997)* the Board identified two useful dimensions for comparing SOCAN’s tariffs:<sup>34</sup> first, the role of music in the entertainment being purchased by the attendee and, second, the way the attendee participates in that entertainment. While attendees contribute to the entertainment being purchased under Tariff 18 (by dancing), they simply consume the entertainment under Tariff 4 (by watching the concert).

[32] Key to this typology is the primary purpose of the activity for which the tariff applies in relation to the attendee. At karaoke bars, for example, the primary purpose includes attendee participation. In contrast, at concerts, adult entertainment, circuses, and comedy shows, the primary purpose does not include attendee participation.

[33] SOCAN says that dancing is not and should not be a criterion to distinguish between tariffs because dancing often occurs at concerts.<sup>35</sup> We clarify that the mere presence of dancing does not turn a Tariff 4.A concert into a Tariff 18 ball. Instead, the question should focus on the primary purpose of the event.

[34] Identifying the primary purpose involves a holistic look at the event in question. Considerations that may help identify the primary purpose include how the event is marketed, the attendees’ intentions, and a comparison of the event to other events regularly held at the same location. This last consideration reflects the structure of Tariff 18 as a place-based tariff where royalties are assessed annually based on the number of days the venue operates and the size of the venue. For example, an event that is marketed for the purposes of dancing, where a survey shows

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<sup>33</sup> *Ibid* at p 5.

<sup>34</sup> *SOCAN – Various Tariffs 1994-1997 (reasons)* (September 20, 1996).

<sup>35</sup> SOCAN’s response to objections, *supra* note 10 at p 3.

that attendees purchase tickets to dance, and where similar events are held at that venue on a weekly basis is likely to be an event that is held for the primary purpose of dancing.

[35] Accordingly, we adopt the Board's reasoning in *SOCAN Various Tariffs (1994-1997)* that dancing can be a form of attendee participation and apply this principle to the current proceeding by excluding events held primarily for purposes of dancing.

**C. ISSUE 3: SHOULD THE RATE BASE BE ADJUSTED FOR EXPERIENTIAL FESTIVALS THAT INCLUDE NON-MUSICAL AMENITIES IN AN "ALL-INCLUSIVE" PRICE STRUCTURE?**

[36] An adjustment to the rate base for experiential festivals is denied. Such an adjustment is likely to impose a heavy administrative burden on users that would be disproportionate to what we know of the problem of non-musical amenities being included in the rate base.

*Context*

[37] For paid concerts, the Proposed Tariffs use as a rate base the "gross receipts of ticket sales". The Festival Objectors jointly object to this rate base, saying that substantial parts of experiential festivals are unrelated to musical performances<sup>36</sup> but are included in ticket prices and thus inappropriately captured by the rate base. We refer to these unrelated parts of festivals as "non-musical amenities" and concert tickets that include non-musical amenities as being "all-inclusive".

[38] Bal en Blanc supports the Festival Objectors' submissions and suggests that the rate base for experiential festivals should be the same as that for free events.<sup>37</sup>

[39] SOCAN strongly opposes these submissions, saying that non-musical amenities are secondary to the performance of music at festivals, often sold separately, and lack independent value.<sup>38</sup>

*Non-musical amenities and all-inclusive tickets*

[40] We accept the Festival Objectors' submissions that some experiential festivals sell all inclusive tickets. SOCAN does not contest this point. Instead, SOCAN acknowledges that some festivals sell such tickets, saying that the quantum of revenue to allocate to non-musical amenities is not known,<sup>39</sup> and that allocating revenue in these situations would be difficult to implement.

[41] The record lacks information on non-musical amenities and their characteristics, even though the Board sought such information from the parties. SOCAN says that approximately 200 festivals

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<sup>36</sup> Festival Objectors' submissions, *supra* note 14 at p 2.

<sup>37</sup> BeB's submissions, *supra* note 13 at pp 2-3.

<sup>38</sup> SOCAN's response to objections, *supra* note 10 at pp 1-2.

<sup>39</sup> SOCAN's submissions, *supra* note 12 at p 6; SOCAN's response to submissions, *supra* note 15 at p 4.



and 19,800 concerts pay under Tariff 4.A.1 each year.<sup>40</sup> But we have no information on how many of these festivals or concerts provide non-musical amenities or offer all-inclusive tickets. The Festival Objectors say, in the context of a definition of non-musical amenities, that “fees for non-musical amenities are usually included in the ticket price for the musical element”.<sup>41</sup> But these submissions only speak to pricing behaviour when a festival offers non-musical amenities, they do not speak to the prevalence of such non-musical amenities.

[42] Despite finding that some experiential festivals sell all-inclusive tickets, we cannot make any findings on how often non-musical amenities are included in tickets, how many non-musical amenities are sold this way, or how robust this phenomenon is over time.

### *Proportionality*

[43] The Board asked SOCAN and the Festival Objectors to comment on potential draft tariff language, specifically a definition of non-musical amenities and an adjustment formula.<sup>42</sup> Both parties raised concerns, characterizing the formula as imposing an “extremely heavy administrative burden”<sup>43</sup> and identifying problems with the interpretation and operation of the draft adjustment.

[44] First, the draft formula required users to send a detailed report of costs to SOCAN in order to receive the adjustment. Such reports were necessary to identify and allocate revenue on a case-by-case basis. Both parties say that such a requirement would be onerous and that filing and administering these reports would require users and SOCAN to expend considerable time and effort.<sup>44</sup> Although the parties filed recommendations for reducing this burden,<sup>45</sup> these recommendations are disputed<sup>46</sup> and their chance of success is not clear.

[45] Second, the parties raise concerns with the draft definition of non-musical amenities, agreeing that the definition lacks precision. SOCAN submits that the definition is imprecise and susceptible to subjective application and arbitrary manipulations.<sup>47</sup> The Festival Objectors say that the definition is restrictive and would exclude most non-musical amenities.<sup>48</sup> Although both parties filed lists of amenities they feel should qualify as musical or non-musical, the parties disagree on

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<sup>40</sup> SOCAN’s submissions on tariff language, *supra* note 17 at p 3.

<sup>41</sup> Festival Objectors’ submissions on tariff language, *supra* note 17 at p 2.

<sup>42</sup> CB-CDA 2023-042, *supra* note 16.

<sup>43</sup> Festival Objectors’ submissions on tariff language, *supra* note 17 at p 3; SOCAN’s submissions on tariff language, *supra* note 17 at pp 3, 7.

<sup>44</sup> Festival Objectors’ submissions on tariff language, *supra* note 17 at pp 2-3; SOCAN’s submissions on tariff language, *supra* note 17 at p 3, 7.

<sup>45</sup> See e.g., Festival Objectors submissions on tariff language, *supra* note 17 at pp 2-3, 5-6; SOCAN’s submissions on tariff language, *supra* note 17 at pp 2-3, 7.

<sup>46</sup> Festival Objectors’ response to consultation submissions, *supra* note 18; SOCAN’s response to consultation submissions, *supra* note 18.

<sup>47</sup> SOCAN’s submissions on tariff language, *supra* note 17 at pp 3-5.

<sup>48</sup> Festival Objectors’ submissions on tariff language, *supra* note 17 at pp 1-2.

particular elements. Furthermore, the record is missing a discussion of these amenities and their importance to the organization and presentation of a concert that is necessary to support a clear and precise definition.<sup>49</sup>

[46] Third, as SOCAN points out, the draft formula would have double-counted costs in certain situations.<sup>50</sup> Where a festival sells access to non-musical amenities through both an all-inclusive ticket and a separate fee, the formula would have permitted the festival to apply the costs of the amenity to both sides of a costs ratio. SOCAN suggested potential solutions to this problem, but they are complex and either would impact all users, whether or not they sell all-inclusive tickets, or would involve assumptions with little support from the record.

[47] Accordingly, we find that the draft formula would have imposed a considerable burden to SOCAN and users and presented considerable challenges to implement. We decline to implement the changes proposed by the parties given the lack of specific financial or statistical information on the record.

### *Conclusion*

[48] We decline to approve an adjustment to the rate base for all-inclusive tickets because it would be disproportionate to impose a heavy administrative burden on users and SOCAN when the prevalence or extent of the problem is not quantified.

### **D. ISSUE 4: IS CLARIFYING WHETHER CONCERT VENUES ARE USERS OF THE TARIFF APPROPRIATE?**

[49] The request to clarify whether concert venues are users is denied. The record lacks information to determine that the scope of the tariff excludes concert venues.

[50] Rideau represents certain concert venues. It filed a letter of comment, asking the Board to clarify that its members are not users of Tariff 4.A.<sup>51</sup> Under subrule 53(5) of the *Copyright Board Rules of Practice and Procedure*, the Board must consider any letter of comment it receives.

[51] Rideau identifies two participants in the concert industry: producers and venues. It says that SOCAN considers both to be jointly and severally liable for paying tariff royalties. Rideau's position is that only concert producers are liable. It says that concert venues are not liable because venues do not authorize the performance of musical works. Rideau also filed a legal memorandum prepared by Normand Tamaro that it says supports its views.<sup>52</sup> SOCAN provided brief comments

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<sup>49</sup> SOCAN's response to consultation submissions, *supra* note 18 at p 2.

<sup>50</sup> SOCAN's submissions on tariff language, *supra* note 17 at pp 5-6.

<sup>51</sup> Rideau's comments, *supra* note 8.

<sup>52</sup> Letter from Normand Tamaro, Counsel to Julie-Anne Richard, Rideau Inc, (24 September 2021) "Objet : Règle générale : Socan et Ré:Sonne et la non-opposabilité des Tarifs aux diffuseurs" [Tamaro's legal memo].

saying that the issue raised by Rideau is a matter of liability and enforcement and, thus, outside the Board's jurisdiction.<sup>53</sup>

[52] Authorization, under s. 3 of the *Act*, occurs when a person sanctions, approves, or countenances an act reserved for the rights holder.<sup>54</sup> As the Supreme Court most recently stated in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, authorization is a question of fact that depends on the circumstances of each case.<sup>55</sup> The legal memorandum provided by Rideau emphasizes this point, stating that the question of whether concert venues authorize performances depends on the contractual arrangements between venues and producers.<sup>56</sup> Mr. Tamaro recognizes that a venue owner may be more or less involved in the production of a concert and advises Rideau's members to negotiate contracts with producers that are unambiguous as to copyright liability.<sup>57</sup>

[53] In this proceeding, we do not have sufficient evidence to modify the tariff in a way that could potentially clarify whether concert venues are users for the purposes of this tariff. Such a rule would need to apply to all concert venues that may be covered by the tariff, and the record lacks any industry-wide information that could support such changes. Accordingly, we cannot say whether concert venues authorize performances.

[54] As such, the question of whether an approved tariff applies to a specific person is a matter of enforcement and beyond the Board's jurisdiction.<sup>58</sup>

#### **E. ISSUE 5: CAN THE LAST-APPROVED TARIFF SERVE AS A PROXY TO APPROVE THE PROPOSED TARIFFS?**

[55] Having addressed the issues, above, we find that the last-approved tariff is a usable proxy for what could be fair.

[56] Often, the last-approved tariff is a starting point for the Board's analysis by acting as a proxy of what could be fair and equitable. One reason to question whether the last-approved tariff is an appropriate proxy is if the relevant market has changed. Even then, the proxy need not be thrown out so long as the Board responds to and integrates these changes. In some cases this might involve a rate adjustment, in other cases the Board may integrate the changes without approving an adjustment.

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<sup>53</sup> Email from Matthew Estabrooks, Counsel for SOCAN to the Registrar (18 September 2023) "Re: Notice [CB-CDA 2023-045]".

<sup>54</sup> *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 (CanLII) at paras 104-105.

<sup>55</sup> *Ibid* at paras 103-109, *CCH Canada Ltd v Law Society of Upper Canada*, 2004 SCC 13 (CanLII) at para 38.

<sup>56</sup> Tamaro's legal memo, *supra* note 52 at p 23.

<sup>57</sup> *Ibid*.

<sup>58</sup> SOCAN Tariff 21 (2013-2020) decision, *supra* note 28.

[57] In this current proceeding, the terms and conditions in the Proposed Tariffs mirror the last-approved tariff. Although the Objectors' submissions suggest the market for the performance of music at concerts may have changed, Issues 1 through 3 address and integrate these submissions and any changes they may imply. There is no other information on the record that would lead us to question the appropriateness of the proxy. Accordingly, we adopt the last-approved tariff as a proxy and apply it to find that the Proposed Tariffs, as modified, are fair and equitable.

#### **F. ISSUE 6: SHOULD ANY OTHER CHANGES BE MADE TO TARIFF WORDING?**

[58] Four changes also need to be made to the Proposed Tariffs: removing references to the concept of "licences", clarifying ambulatory references to other tariffs, condensing the two parts of the tariff, and incorporating general provisions into the body of the tariff.

[59] First, 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 pointed out in *Access Copyright v York University*.<sup>59</sup> As a result, we remove references to the words "licence" and "licensee" from the Proposed Tariffs, including the titles of Tariff 4.A.1 and Tariff 4.A.2. This change in no way alters the scope of the tariff.

[60] Second, we clarify what uses are excluded from the Proposed Tariffs. The Proposed Tariffs referred, generally, to activities covered under "Tariff 3.A" and to "Tariff 22" as excluded uses. Such references are ambulatory, meaning that what is excluded could change if the contents of these other tariffs change. We asked the parties to comment on language that describes the specific uses that are covered under these excluded tariffs: communications over the internet and live performances in restaurants and similar venues. The parties were consulted on these changes.<sup>60</sup> SOCAN was the only party to respond. It accepts the proposed language and recognizes that these changes are necessary.<sup>61</sup> Accordingly, we make these clarifications and find that they do not change the scope of the tariffs.

[61] Third, since proposed tariffs must be filed in a separate, stand-alone document containing all applicable terms and conditions and given that SOCAN has filed Tariffs 4.A.1 and 4.A.2 together, we find that these are two subparts of Tariff 4.A. Accordingly, we condense and reorganize these two parts, removing duplicate provisions. Doing so simplifies the tariff and makes administration easier for SOCAN and for users without changing the scope, royalties, or reporting requirements

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<sup>59</sup> *York University v Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32 (CanLII) (holding that the legal effect of tariffs and licences is not the same).

<sup>60</sup> CB-CDA 2023-042, *supra* note 16 at p 4.

<sup>61</sup> SOCAN's submissions on tariff language, *supra* note 17, at p 8.

of the tariff. Users still have the option to elect to pay royalties and file reports on either a per-event or annual basis.

[62] Finally, the section entitled “General Provisions”, which covered tariff proposals filed in bulk, is no longer relevant.<sup>62</sup> 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 above.

## **V. DECISION**

[63] For the above reasons, the Board approves the proposed tariffs with modifications. The Board approves a royalty rate of 3 per cent of the gross receipts from ticket sales for paid concerts and from the fees paid to performers for free concerts. The Board also approves a per-concert minimum fee of \$35 in Tariff 4.A.1 and an annual minimum fee of \$60 in Tariff 4.A.2. In the terms and conditions section, the Board adds an exclusion for events that are held primarily for purposes of dancing. The Board also clarifies other uses that have previously been excluded from the tariff. Finally, the Board integrates what were previously the “General Provisions” common to several tariff proposals, while eliminating references to licences and their holders.

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<sup>62</sup> *Practice Notice on Filing of Proposed Tariffs PN 2019-004 rev. 3* (March 1, 2023).