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November 27, 2023		27 novembre 2023	
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Court File No.

## FEDERAL COURT OF APPEAL

B E T W E E N:

**SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF  
CANADA**

Applicant

and

**SIRIUSXM CANADA INC.**

Respondent

Application under s. 18.1 of the *Federal Courts Act*

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## Notice of Application

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TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at the City of Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the [Federal Courts Rules](#) and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the [Federal Courts Rules](#), information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

November 27, 2023

Issued by: \_\_\_\_\_

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## Application

This is an application for judicial review in respect of the decision of the Copyright Board of Canada (the **Board**) dated October 27, 2023, with the citation 2023 CB 6 (the **Decision**), approving the royalties to be collected by the applicant, the Society of Composers, Authors and Music Publishers of Canada (**SOCAN**), for the communication to the public by telecommunication, in Canada, of musical works in SOCAN's repertoire under *SOCAN Tariff 22.B – Commercial Radio and Satellite Radio (2007-2018)* (**Tariff 22.B**).

The applicant makes application for:

1. A declaration that the Board failed to discharge its duty of fairness in making the Decision.
2. A declaration that the Board acted unreasonably in making the Decision.
3. An order quashing the Decision as it pertains to the royalties payable by satellite radio services pursuant to Tariff 22.B and referring the matter back to the Board to reconsider these aspects of the Decision, with such directions as this Court may consider appropriate.
4. Costs of this application.
5. Such other relief as this Court deems appropriate.

The grounds for the application are:

### The Parties

6. The applicant, SOCAN, is a copyright collective society. SOCAN administers the public performance rights for the musical works in its repertoire.

7. The respondent, SiriusXM Canada Inc. (**SiriusXM**), is the only operator of satellite radio services in Canada.

#### **Tariff History – Tariff 22.B (1996-2006)**

8. Tariff 22.B covers online music uses by a broadcaster that is subject to *SOCAN Tariff 1.A (Commercial Radio Tariff)* and by a satellite radio service that is subject to *SOCAN Tariff 25 (Satellite Radio Services Tariff)* during 2007 to 2018. This application is limited to the portion of Tariff 22.B that applies to satellite radio services.
9. The last approved tariff that covers satellite radio services' online activities is *SOCAN – Tariffs 22.B to 22.G (Internet – Other Uses of Music), 1996-2006* (the **Prior Tariff**), which was approved by the Board on October 24, 2008. At the hearing that led to the approval of the Prior Tariff, the Board heard evidence that the online activities of traditional broadcasters (including satellite radio services) were primarily simultaneous online transmissions of the originating broadcast signal (**simulcasts**).
10. The Prior Tariff sets a royalty rate for the online activities of a satellite radio service that is equal to the royalty rate approved for SOCAN under the *Satellite Radio Services Tariff*, subject to an adjustment that is based on “page impressions” to account for the fact that during the period covered by the Prior Tariff, simulcasts were delivered through a website that allowed users to access a set of webpages, a number of which contained text only. This adjustment referenced the ratio of audio page impressions to all page impressions (the **Page Impression Ratio**) provided by a satellite radio service. If the service did not provide a Page Impression Ratio value to SOCAN, the Prior Tariff provided a default value for it of 0.5.
11. SOCAN filed annual statements of proposed royalties payable for the online activities of, among other things, satellite radio services as Tariff 22 and Tariff 22.B for the years 2007 to 2018 (the **Proposed Tariffs**) pursuant to Part VII.1 (formerly

Part VII) of the *Copyright Act* (the **Act**). Pursuant to the continuation of rights provision of the *Act*, namely s. 73.2 (formerly s. 68.2), the terms of the Prior Tariff operated on an interim basis for 2007 and onward until the Board approved the tariffs proposed by SOCAN for those years.

### **The Proposed Tariffs and Objections**

12. The Proposed Tariffs for the years 2007 to 2013 provided that they did not apply to uses of music covered by other SOCAN tariffs (including the *Satellite Radio Services Tariff*), but that users subject to those other tariffs were required to pay royalties for any online uses of music described in Tariff 22.
13. For the years 2014 to 2018, the Proposed Tariffs proposed to set the royalty rates for the online activities of satellite radio services at the rates applicable to online music services if the satellite radio service provider offered the types of streams that were offered by online music services, and at the rate applicable to satellite radio services if the service provider only offered simulcasts of the satellite signal.
14. The Proposed Tariffs did not contain any adjustment by way of the Page Impression Ratio with respect to satellite radio services.
15. Pursuant to the *Act*, SiriusXM filed objections to the Proposed Tariffs for the years 2014 to 2018.
16. In its Notice of Objection, SiriusXM requested that the Board “hold a public hearing” so that it could “fully present its objections to the Tariffs.” SiriusXM indicated that it “intend[ed] to participate actively in the process leading to the certification of the Tariffs.”

### **Structure of the Board’s Proceeding to Consider the Proposed Tariffs**

17. The Board initiated a proceeding to consider the Proposed Tariffs, along with other tariffs proposed by SOCAN and other collective societies, on October 7, 2017.

18. Pursuant to the Board's Directive on Procedure for the proceeding, SOCAN, together with the other participating collective societies, served written interrogatory questions on the participating objectors, including SiriusXM, on February 14, 2018. In turn, the objectors served written interrogatory questions on SOCAN and the other participating collectives on the same day.
19. In a proceeding before the Board, written interrogatories serve to elicit information and documents from opposing parties. A receiving party may then place these materials before the Board as evidence in support of its case. If desired, a party responding to interrogatories may request that its materials be covered by a confidentiality order. From the collectives' perspective, the interrogatory process is crucial for obtaining information that is solely in the knowledge or possession of the users who object to their proposed tariffs.
20. SOCAN's interrogatories included a set of questions that were to be answered by SiriusXM. These interrogatories sought information from SiriusXM and included questions intended to obtain the following types of information:
  - (a) The nature of SiriusXM's online offerings;
  - (b) The way content is consumed on SiriusXM, both on its conventional service and its online service;
  - (c) How SiriusXM accounts for revenues from its conventional service and its online activities;
  - (d) The tools that SiriusXM has available to monitor content use and revenue generation;
  - (e) The nature and relative proportion of the content streamed on SiriusXM (for example, music vs. talk), and any revenue allocation methodology for any content; and
  - (f) SiriusXM's concrete plans for changes to its existing online offerings or plans for new online offerings.

21. Before it responded to any written interrogatories, SiriusXM wrote to SOCAN on April 12, 2018 indicating its intent to withdraw as an objector. SiriusXM wrote to the Board on April 20, 2018 withdrawing from the proceeding and requesting leave to participate as an intervenor with the following participatory rights:
  - (a) Receive copies of the Board's communications with other parties and vice-versa;
  - (b) Receive a digital copy of the record as filed by other parties; and
  - (c) File written submissions.
22. On April 26, 2018, by its Notice [CB-CDA 2018-092], the Board allowed SiriusXM's request and granted SiriusXM "limited intervenor status" with the rights it requested.
23. On July 24, 2018, the Board suspended the proceeding and vacated the remaining timetable.
24. The Board resumed the proceeding on August 21, 2019 with its Ruling [CB-CDA 2019-061], where it set a timetable for completion of the interrogatory process. SOCAN, the other collectives and the remaining objectors exchanged interrogatories and responses to interrogatories pursuant to the Board's Directive on Procedure.

### **The Board's Hearing and Consideration of the Proposed Tariffs**

25. SOCAN filed its Statement of Case on, among other things, the Proposed Tariffs on November 15, 2021. In its Statement of Case, SOCAN set out its request for certification (the **RFC**) for Tariff 22.B.
26. In the RFC for Tariff 22.B, consistent with the Proposed Tariffs, SOCAN requested that the Board apply the royalty rates for online music services to those online activities of satellite radio services that offer the same types of streams that are offered by online music services and apply the royalty rate in the *Satellite Radio*

*Services Tariff* to the simulcasts of the satellite signal. The RFC also did not include any Page Impression Ratio adjustment for any online activities of satellite radio services.

27. At the hearing for the proceeding, SOCAN repeated its request and additionally, SOCAN presented an alternative proposal with respect to satellite radio services: if the Board were to retain the Page Impression Ratio adjustment element from the Prior Tariff, then the Board should set the default value for the Page Impression Ratio to 1.0, rather than 0.5.
28. SiriusXM filed written submissions in response to SOCAN's statement of case, in which SiriusXM took the position that SOCAN had not led sufficient evidence to establish that the changes it requested to the tariff were justified.
29. SOCAN's reply submissions took issue with SiriusXM's lack of participation in the proceeding, and in particular, SiriusXM's decision to withdraw as an objector and avoid its obligations to provide evidence in response to SOCAN's interrogatory questions.
30. In its responding statement of case, SOCAN made the following submissions about SiriusXM's participation:

SiriusXM takes issue with what it considers a lack of evidence about its service. It is disappointing to see a participant take advantage of the Board's process this way. SiriusXM chose not to participate in the process as an objector; it chose not to advance evidence and it chose not to answer interrogatories. For SiriusXM to now claim that SOCAN's evidence is deficient borders on mockery of the proceeding.
31. Following the filing of written submissions and before the hearing, the Board sought additional submissions from SOCAN and SiriusXM on the RFC for Tariff 22.B as it applied to satellite radio services. Despite its limited intervenor status, SiriusXM filed extensive information about its operations in support of its position against the RFC.

32. SOCAN took issue with SiriusXM's unsupported factual assertions and submitted that "[as] a matter of procedural fairness, the Board should disregard all of SiriusXM's factual assertions."
33. Throughout the proceeding, SOCAN alerted the Board to its position that the Board's process infringed SOCAN's right to be heard and breached the Board's duty to be fair. In particular, SOCAN argued that the Board had breached its duty to be fair by allowing SiriusXM to withdraw as an objector and avoid its obligation to respond to interrogatories, yet remain as a participant with the ability to file unsupported and untestable factual assertions.

### **The Board's Decision**

34. The Board released the Decision on October 27, 2023.
35. In the Decision, the Board refused to approve the changes to Tariff 22.B that SOCAN had sought with respect to satellite radio services. The Board concluded that "the very limited evidence available weighs in favour of retaining the *status quo*, both with respect to the rate and to the rate base."
36. Specifically, the Board ruled that there was no evidence to support the royalty formula set out in SOCAN's RFC, which would be a departure from the royalty formula set out in the Prior Tariff.
37. The Board also ruled that it had insufficient evidence to change the default Page Impression Ratio value from 0.5 to 1.0. In doing so, the Board inferred from SiriusXM's failure to provide information about its ability to measure page impressions for the relevant period that SiriusXM was unable to find this information.
38. The Board expressed its view that "[it] would have been useful to have evidence on several points to support the choice of a given proxy or tariff formula and the appropriate rate base, including:

- The way the content is consumed (for example, by apps on mobile devices; single or multiple webpages);
  - Whether there is any issue of revenues from webcasting blending with the conventional service or equivalently, whether revenues generated for the conventional service and the webcasting business jointly can be disentangled from one another;
  - The nature of the business model (for example, ad-based or subscription-based or mixed; ancillary or not);
  - The available tools to monitor content use and their costs; and
  - The nature and relative proportion of the content streamed (for example, music vs. talk), and the appropriate revenue allocation mechanism, where applicable.”
39. SOCAN had sought this information from SiriusXM through the interrogatory process. SOCAN was deprived of the opportunity to present the “useful evidence” the Board described because SiriusXM withdrew as an objector before it responded to SOCAN’s interrogatories. Nevertheless, the Board permitted SiriusXM to continue to participate as a limited intervenor and allowed it to make factual assertions without participating in the interrogatory process.

### **The Board Breached its Duty to be Fair**

40. The procedural choices made by the Board with respect to SiriusXM’s participation in the proceeding resulted in a process that was procedurally unfair to SOCAN.
41. By permitting SiriusXM’s continued participation (including making submissions and providing evidence) without responding to interrogatories, the Board breached its duty to be fair by denying SOCAN the right to be heard and to meaningfully advance its case.

42. It was also a breach of the Board's duty to be fair to accept SiriusXM's unsupported factual assertions while faulting SOCAN for not providing sufficient evidence in support of its position. The Board failed to provide sufficient reasons for favouring SiriusXM's factual assertions over the information provided by SOCAN.

### **The Board Acted Unreasonably**

43. The Board, through its Order [CB-CDA 2022-048], requested information from SiriusXM about its ability to measure page impressions throughout 2007 to 2018. In response, SiriusXM indicated that it was "consulting internally regarding an answer to the 'page impressions' question and will revert to the Board if it is able to obtain or engineer accurate information relating to the measurement of page impressions from 2007 to 2018."
44. SiriusXM did not provide any additional information to the Board on this point. In the Decision, the Board concluded that since SiriusXM had not communicated with the Board on this subject, SiriusXM was not able to find this information.
45. This conclusion is unreasonable and unfair. It ignores SiriusXM's incentive to avoid providing the Board with this information, and it exacerbates the unfairness to SOCAN that was brought about by the Board's procedural choices regarding SiriusXM's participation.
46. The Board unreasonably concluded that it was unfair to expect SiriusXM to count page impressions. The Prior Tariff, which operated on an interim basis throughout the entire period at issue, contained the Page Impression Ratio adjustment.

This application will be supported by the following material:

1. The Board's decision dated October 27, 2023 and reported as 2023 CB 6.
2. The approved SOCAN Tariff 22.B – Commercial Radio and Satellite Radio (2007-2018).

3. SOCAN's proposed Tariff 22 for the years 2007 to 2013 and Tariff 22.B for the years 2014 to 2018.
4. Relevant excerpts from the Board's record, transmitted pursuant to Rule 318 of the *Federal Courts Rules*.
5. Excerpts of the evidence and written argument before the Board.
6. The affidavits to be filed in this proceeding.
7. Such further and other material as counsel may advise and this Court may permit.

Pursuant to Rule 317 of the *Federal Courts Rules*, the applicant requests the Copyright Board to send a certified copy of all the material that is not in the possession of the applicant but is in the possession of the Copyright Board to the applicant and to the Registry.

November 27, 2023,



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