

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 1991-11-07

Citation FILE: 1991-10

Regime Retransmission of Distant Radio and Television Signals
Copyright Act, Section 66.51

Members Mr. Justice Donald Medhurst
Michel Hétu, Q.C.
Dr. Judith Alexander
Mr. Michel Latraverse

Interim tariffs for the retransmission of distant radio and television signals for 1992

Reasons for decision

On January 1, 1992, interim tariffs for the retransmission of distant radio and television signals shall come into force. Subject to necessary adaptations, their rates, terms and conditions shall be those contained in the television and radio retransmission tariffs published in the Supplement to the *Canada Gazette*, Part I, on October 6, 1990, with such modifications as the circumstances require.

The interim tariffs shall remain in force until the Board certifies final tariffs for 1992.

The collecting bodies shall cause the notice attached to this order to be sent, by telecopier or by mail, to:

- a. all retransmitters that have filed reports under the 1990-91 tariffs;
- b. any other retransmitter that can be readily identified.

Only one notice need be sent to persons or groups of persons controlling more than one system.

A handwritten signature in dark ink, appearing to read 'Philippe Rabot', is written in a cursive style.

Philippe Rabot
Secretary General

NOTICE

DATE:

TO: All retransmitters of distant television and radio signals

OBJECT: Interim tariffs for 1992

The Copyright Board has ordered that you be sent the following notice.

On November 7, 1991, the Copyright Board issued an interim order. As a result, the television and radio retransmission tariffs published in the Supplement to the *Canada Gazette*, Part I, on October 6, 1990, shall continue to have effect after December 31, 1991, until the Board certifies final tariffs for the year 1992.

Consequently, you must continue to comply with the 1990 tariffs and pay retransmission royalties according to the provisions of these tariffs.

Pursuant to paragraph 70.61(2) of the *Copyright Act* (the “*Act*”), nine organizations (“collectives”) have filed with the Board statements of proposed royalties for the retransmission of distant signals for 1992 and subsequent years; the Border Broadcasters’ Collective (BBC); the Canadian Broadcasters Rights Agency Inc. (CBRA); the Canadian Retransmission Collective (CRC); the Canadian Retransmission Right Association (CRRA); the Copyright Collective of Canada (CCC); FWS Joint Sports Claimants, Inc. (FWS); the International Olympic Committee (IOC); the Major League Baseball Collective of Canada, Inc. (MLB); the Society of Composers, Authors and Music Publishers of Canada (SOCAN).

The Board caused the proposed statements to be published in the *Canada Gazette* on August 3, 1991. Three organizations have filed objections to these statements: the Canadian Cable Television Association (CCTA); Canadian Satellite Communications Inc. (CANCOM); and Regional Cablesystems Inc. (Regional).

In its proposed statement, CRC requests that the Board gives effect to its tariff on an interim basis, starting January 1, 1992. On September 16, 1991, SOCAN filed with the Board an application for an interim order establishing the retransmission royalties for 1992 at the rates, terms and conditions certified for 1990 and 1991. On October 29, 1991, the Board held a hearing to determine whether to issue such an order, and if so, what it should contain.

Collectives and objectors agree that retransmitters should continue to pay retransmission royalties during the period between January 1, 1992, and the date at which the Board will certify the final tariffs for 1992. (“the interim period”) Not all, however, agree on the conditions under which this ought to happen.

The collectives ask that retransmitters continue to pay royalties according to the provisions of the tariffs currently in force. The draft order filed by CCC would also provide that “no interest ... accrue during the Interim Period or be owing in respect of any adjustments to royalty payments ... arising from [the final decision of the Board] with the exception of any royalty payment determined to be owing to the IOC.” The collectives maintain that this would ensure that no party is unduly prejudiced by any delay in the certification of the final tariffs. Presumably, the exception in favour of the IOC is there to account for the fact that this collective, not being named in the 1990-91 tariffs, will receive nothing during the interim period.

CCTA agrees with this approach, with one reservation: it submitted that no exception ought to be made with regard to the IOC. For their part, CANCOM and Regional argue that for reasons both of policy and law, the interim order ought not to be modified retrospectively when the final tariff is certified. In effect, they ask that the interim tariff settle once and for all the measure of their liability for the interim period.

The current retransmission tariffs expire on December 31, 1991. It will be impossible to certify final tariffs before the current ones expire. Indeed, the current timetable for these proceedings calls for the hearings to begin on January 27, 1992. In all probability, a final decision will not be issued until the summer.

The Board agrees with the parties that royalty payments ought to continue. Nothing in the *Act* provides that a retransmission tariff continues to apply until a new one is certified. If royalty

payments are to continue, the Board must issue an interim decision pursuant to section 66.51 of the *Act*.

The Board agrees to do so. This being said, it remains necessary to explain the precise nature of the order being issued.

The Board does not have the power to review its final decisions. It cannot extend the "life" of the tariffs it certified on October 2, 1990. These tariffs will expire on December 31, 1991.

On the other hand, the Board is of the opinion that it can issue an interim decision that adopts by reference the provisions of the current tariffs and makes them apply during the interim period. This may seem a distinction without a difference. However, given the repeated admonitions of courts to administrative agencies concerning their inability to revisit their final decisions, the Board finds it preferable to be very specific in this regard.

Retransmitters must be notified of the interim decision. They cannot be expected to continue to pay royalties unless they are informed that they have to do so. Notice of the order shall take two forms. First, the Board shall cause the interim order to be published in the *Canada Gazette*. The Board abstains from commenting on whether publication of interim decisions in the Gazette is required by the *Act*. Second, the collectives shall cause a notice, in the form attached to the order, to be sent to all retransmitters known to them. In the Board's opinion, this second measure provides effective notice to known retransmitters. The order does not require that each collective send a notice to each retransmitter; indeed, this would appear an obvious case for a single, combined effort.

Counsel for Regional and CANCOM argue that for reasons both of policy and law, the final determination of the Board ought not to modify the regime that the interim order will set up for the interim period. They ask that the Board dispose of this issue at this time. The Board considers that this is an issue better left addressed in the final decision. A policy decision at this time that the interim tariffs settle once and for all the measure of their clients' liability for the interim period would require making a final determination without hearing any evidence on the matter. CANCOM and Regional are free to document any deleterious effect that might result from the retrospective operation of the final tariffs. It may be that in the final analysis, fair and equitable tariffs require that the interim position be maintained for that period in the end. However, that is something to decide at the end of the process. On the other hand, if it is true that the Board cannot make adjustments for the interim period in its final order, nothing that could be said here would be of much consequence.

The Board is of the opinion that the matter of whether or not any payment corrections required by the final decision ought to include an interest factor is another issue that will be better dealt with in the final decision. This applies both to corrections to the payments by retransmitters to collectives and to corrections as between collectives to account for changes in their shares.

A handwritten signature in dark ink, appearing to read "G. L. G. G. G." with a stylized, cursive flourish at the end.

Philippe Rabot
Secretary General