

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2004-01-19

Citation FILE: Private Copying Tariff Enforcement

Regime Copying for Private Use
Copyright Act, subsection 66.7(1)

Members Mr. Justice John H. Gomery
Mr. Stephen J. Callary
Mrs. Sylvie Charron

Application by the canadian private copying collective (CPCC) for orders in aid of the enforcement of the 2001-2002 private copying tariff and of the interim tariff of levies to be collected by CPCC in 2003 on the sale of blank audio recording media in Canada

Reasons for decision

On May 7, 2003, the Canadian Private Copying Collective (CPCC) asked that the Board issue orders against certain importers of blank audio recording media whom it claims are not complying with the terms of the *Private Copying Tariff, 2001-2002* and the interim tariff for 2003 (together, the “private copying tariff”). The orders would require the importers to pay outstanding levies and interest, as well as amounts ascertained as owing in the future; to comply with the tariff’s reporting requirements; to allow auditors to have access to the importers’ books and premises, cooperate with auditors, answer all reasonable questions, and not remove from their premises documents that auditors might need to conduct an audit; and to generally comply in the future with their obligations as set out in the tariff.

At the outset, the Board raised the issue of whether it has the power to issue orders in aid of the enforcement of a certified tariff. The concerned importers were advised of CPCC’s request, received copy of the relevant documents and were allowed to file arguments. Since no evidence is required to rule on the jurisdictional issue raised by the application, the Board disregarded all evidence filed with, and factual allegations contained in, the representations it received.

In a nutshell, CPCC is of the view that the Board has the power to order someone to comply with their reporting, audit and payment obligations set out in a certified tariff and to hold that person in contempt in the event they refuse to do so. The Board disagrees, for the reasons set out below.

Relevant Legislative Provisions

CPCC's argument relies in essence on section 66.7 of the *Copyright Act* (the "Act") which reads as follows:

"66.7(1) The Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its decisions and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

(2) Any decision of the Board may, for the purposes of its enforcement, be made an order of the Federal Court or of any superior court and is enforceable in the same manner as an order thereof.

(3) To make a decision of the Board an order of a court, the usual practice and procedure of the court in such matters may be followed or a certified copy of the decision may be filed with the registrar of the court and thereupon the decision becomes an order of the court.

(4) Where a decision of the Board that has been made an order of a court is varied by a subsequent decision of the Board, the order of the court shall be deemed to have been varied accordingly and the subsequent decision may, in the same manner, be made an order of the court."

Also relevant, for reasons that will become clear later on, is section 8 of the *Competition Tribunal Act* (CTA) as it read in 1990, date at which the Competition Tribunal released the contempt order that was at issue in *Chrysler Canada v. Canada (Competition Tribunal)*.¹ The provision read as follows:

"8(1) The Tribunal has jurisdiction to hear and determine all applications made under Part VIII of the *Competition Act* and any matters related thereto.

(2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

(3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances."

I. ANALYSIS

CPCC's application raises two questions. Does the Board have the power to order someone to comply with the terms of a certified tariff and if so, can it sanction non compliance with the order

¹ *Chrysler Canada v. Canada (Competition Tribunal)* [1992] 2 S.C.R. 394. The relevant provision was subsequently modified to account for a widening of the Tribunal's jurisdiction. The changes are not relevant to the issues at hand.

through contempt proceedings?

A. ORDERING COMPLIANCE WITH THE TERMS OF A CERTIFIED TARIFF

CPCC's argument that the Board has the power to issue an order requiring someone to comply with the terms of a certified tariff rests on three main propositions.

First, subsection 66.7(1) of the *Act* grants to the Board the powers, rights and privileges enjoyed by a superior court of record in several respects, including "the enforcement of [the Board's] decisions". As certified tariffs are decisions, the Board has the power to enforce certified tariffs. Enforcing tariffs necessarily entails such things as ordering an importer to file reports, to make payments or to keep records that meet the terms of the tariff.

Second, subsection 8(2) of the *CTA* gives the Competition Tribunal broad enforcement powers over its own orders. Subsection 66.7(1) of the *Act* is worded almost identically; therefore, the Board has the same powers as the Competition Tribunal.

Third, it is unlikely that a certified tariff can be effectively enforced pursuant to the *Federal Court Rules, 1998*² without an order of the Board directed against a specific person or an order to pay a quantified amount. Without such an order, CPCC has no effective means to obtain or verify reporting information except by instituting separate legal actions. This would be inefficient and would in effect deprive CPCC of its right where the claim does not justify the cost of separate legal action or where CPCC cannot judge whether such action is warranted.

CPCC's first argument is attractive at first blush. Still, it runs against strongly held administrative law values and principles, such as restricting a tribunal's powers to those that are expressly granted to it by statute or impliedly necessary to the proper exercise of its core competence. If only for that reason, a reference to the enforcement of decisions is not of itself sufficient to conclude that Parliament intended the Board to deal with the day-to-day enforcement of tariffs. The provision grants powers "with respect to ... matters necessary or proper for the due exercise of [the Board's] jurisdiction". Put another way, it provides the tools the Board requires to carry out its core mandate. The reference comes after mentions of "the attendance, swearing and examination of witnesses" and "the production and inspection of documents"; this would tend to support reading the words as a reference to decisions of a procedural or interlocutory nature made in support of, and as a corollary to, the exercise of the Board's core function (here, the certification of a tariff).

The use of the expression "*other* matters necessary or proper for the due exercise of its jurisdiction" seems to reinforce that conclusion. The word "other" implies that the enumerated powers that precede are themselves granted to the Board only insofar as they are "necessary or proper for the due exercise of its jurisdiction".³ One does not require the power to enforce tariffs in order to

² See especially Rule 424, which sets out how the Court enforces tribunal orders, and Rule 433, which deals with the issuance of writs of execution.

³ By contrast, the jurisdiction of the Competition Tribunal extends to *any matter related* to applications made under Part VIII of the *Competition Act*.

certify tariffs.

Subsection 66.7(2) of the *Act* also serves to bolster this interpretation. By allowing one to seek the assistance of a superior court in enforcing decisions of the Board, the provision is stating implicitly that something more than the power granted in subsection (1) is needed for the regime to be fully operational, and that there are things a superior court can do that the Board cannot.

As for the similarities in wording of subsections 66.7(1) of the *Act* and 8(2) of the *CTA*, they must be analysed by looking at power granting provisions “in light of one another” and “having regard to the whole statutory scheme”.⁴ When so approached, the differences, not the similarities, between the Board and the Competition Tribunal become striking.

For example, the *CTA* and the *Act* set out the respective agencies’ core functions quite differently. Section 8 of the *CTA* lists all of the Tribunal’s functions and powers. Subsection (1) sets out the substantive powers in broad, general terms. Subsection (2) “confirms and consolidates the jurisdiction of the Tribunal”.⁵ Subsection (3) “not only confirm[s] the contempt power of the Tribunal, it also introduce[s] procedural safeguards specific to the exercise of the power”.⁶ The Court attached considerable importance to the “breadth of the provisions seen in light of one another”.⁷ By contrast, the *Act* sets out the Board’s mandate in half a dozen or so provisions that can be found throughout Parts VII and VIII; in the context of private copying, that role is limited to setting levies and their related terms and conditions.

The two bodies also fulfill quite different roles. The Tribunal supervises all non-criminal, (anti)competitive behaviour in Canada. It decides what is appropriate behaviour and what is not. It designs remedies that are meant to change inappropriate behaviour and enforces compliance with its orders. The Board sets rates and packages them in tariffs. It decides what is the cost of doing certain things and how and when that cost is to be assessed and paid.

Third, according to the Supreme Court of Canada, the Competition Tribunal is the only forum capable of properly ensuring the enforcement of the orders it makes:

“Given the complexity of orders under Part VIII, monitoring their application could not be made a completely separate process, before a court of general or criminal jurisdiction, without a corresponding loss of effectiveness”.⁸

By contrast, the Board’s tariffs are not that complex to understand or enforce. They are not readily circumvented. Courts have proven to be an effective forum to enforce them, as the numerous

⁴ *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, 743j, 744b.

⁵ *Supra* note 1 at 411i-j.

⁶ *Supra* note 4 at 744h.

⁷ *Ibid.*, at 743i-j.

⁸ *Supra* note 1 at 408a. Later on, the Court alludes to its “fear of seeing these orders circumvented through elaborate relational arrangements which, although on the surface innocuous, effectively create the same obstacles that the orders sought to remove”. *Id.* at 419d-e.

successful prosecutions by SOCAN demonstrate.

Fourth, the *Act* clearly leaves it to others to enforce tariffs. It makes it possible for CPCC to seek the assistance of a superior court in enforcing decisions of the Board. It also makes specific provisions for the enforcement of certified tariffs in general, and (in section 88) of private copying tariffs in particular. The *CTA* does not provide one or the other.

Fifth, similarities between these provisions are superficial, at best:

“The attention of this Court has been drawn to other federal statutes which contain provisions similar in wording to ... s. 8(2) *CTA*. None of these provisions, however, is similar to the three subsections of s. 8 *CTA* taken as a whole. Moreover, all of the statutes in which these provisions are found offer schemes different from that of the [*Competition Act*] and *CTA*, in as much as the issue of enforcement through contempt proceedings does not arise in any of them. Either they provide for a particular enforcement mechanism, through filing of the Tribunal’s order with the Federal Court, or the relief granted by the Tribunal is self-executory in nature. In other cases, the Tribunal only has powers of recommendation. Section 8 *CTA* is thus unique, and it must be interpreted in light of its wording and its context”.⁹

In the end, what matters is whether the contemplated power is necessary, given the context of the relevant legislation and the tribunal’s core functions. The Canadian Radio-television and Telecommunications Commission (CRTC) is able to revisit interim rates because ruling otherwise “would result in the frustration of the work of the Commission in its central role of ensuring that the rates charged to the public were just and reasonable”.¹⁰ The Competition Tribunal issues highly complex and fine tuned orders; it cannot fulfill its role without being able to deal with those who defy its orders. By contrast, the Copyright Board can certify tariffs and their related terms and conditions without getting involved in their enforcement.

CPCC says that no useful purpose is served in filing tariffs with a superior court when these are not directed against a specific importer and are therefore incapable of enforcement as an order of the court. This, even if true,¹¹ is irrelevant. Certified tariffs set out the rights and obligations of the societies that have applied for them and of those who are required to comply with them. The *Act* sets out how they can be enforced. Nothing more is needed. As for having to decide whether filing legal actions makes practical sense, that is nothing more than what confronts all rights-holders who suspect that a user’s obligations towards them are not being satisfied.

B. CONTEMPT

If the Board does have the power to issue the orders CPCC seeks, CPCC nevertheless is wrong in stating that the Board has the power to find those who would fail to comply with such orders in contempt of the Board. Failure to comply with such an order would constitute contempt *ex facie*. Grants of powers made by reference to the powers of a superior court of record are not sufficient

⁹ *Supra* note 1 at 408i-409c.

¹⁰ *Supra* note 4 at 746a, referring to *Bell Canada v. Canada (CRTC)*, [1989] 1 S.C.R. 1722.

¹¹ But see *Zhang v. Chau* [2003] Q.J. No. 8071 (C.A.).

to provide the power to find someone in contempt *ex facie* in all but exceptional circumstances.¹² Nothing in the wording of the *Act* or the mandate of the Board makes it logically compelling for the Board to have that power. To the contrary, by providing that a decision of the Board can be made an order of a superior court, whose powers to deal with *ex facie* contempt is undoubted, the *Act* seems to indicate that the power to sanction *ex facie* contempt rests elsewhere.

The fact that the wording of subsection 66.7(1) of the *Act* closely parallels that of subsection 8(2) of the *CTA* is of no importance. The ruling in *Chrysler Canada* does not rest on subsection 8(2) alone, far from it. In reaching its decision, the Court looked at the Tribunal's power granting provisions "in light of one another" and "having regard to the whole statutory scheme".¹³ It attached significant importance to the fact that the *CTA* expressly deals with contempt and expressly provides for safeguards:

"... s. 8(3) requires that the judicial member of the Tribunal concur in a finding of contempt... Inferior tribunals, whose members are seldom all lawyers or judges, may generally find persons in contempt *in facie* and punish them without the need for judicial endorsement... It would seem somewhat incongruous that the Tribunal be subject to such a unique requirement if it only had power over contempt *in facie*, like others. Section 8(3), because of this unique requirement, is indicative of the intention of Parliament to give the Tribunal contempt powers going beyond those which an inferior tribunal would ordinarily exercise".¹⁴

II. DISPOSITION

For these reasons, CPCC's application is dismissed.



Claude Majeau
Secretary General

¹² To the Board's knowledge, only the Competition Tribunal has been found to have the power to do so.

¹³ *Supra* note 4.

¹⁴ *Supra* note 1 at 412b-f.