Copyright Board Canada

Commission du droit d'auteur Canada

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Regime Collective Administration of Performing Rights and of Communication Rights *Copyright Act,* section 66.51

Members Mr. Justice William J. Vancise
Mr. Stephen J. Callary
Mrs. Francine Bertrand-Venne

Interim Statement of Royalties to be collected by SOCAN and NRCC in respect of commercial radio for the years 2003-2007

Reasons for decision

I. INTRODUCTION

[1] Until December 2002, most commercial radio stations paid 3.2 per cent of their gross income to the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and 1.44 per cent of their advertising revenues to the Neighbouring Rights Collective of Canada (NRCC). Stations broadcasting SOCAN's repertoire for less than 20 per cent of their broadcast time paid 1.4 and 0.64 per cent respectively. All talk stations paid NRCC $100 per month. Pursuant to subsection 68.2(3) of the *Copyright Act* (the "*Act*"), these rates continued to apply on an interim basis until the Board certified a tariff for the period starting January 1, 2003.[1]

[2] On October 14, 2005, the Board certified the *SOCAN-NRCC Commercial Radio Tariff, 2003-2007* (the "October 2005 Tariff"). For SOCAN, the rates were 3.2 per cent on a station's first $1.25 million of revenues in a year, and 4.4 per cent on the excess; the rate for low-use stations increased to 1.5 per cent. For NRCC, the rates became 1.44 per cent, 2.1 per cent and 0.75 per cent. To help broadcasters absorb these increases, the decision allowed stations to pay additional amounts owed for past periods free of interest, in equal payments payable on the first of each

[1] Hereinafter, these rates are referred to as "the2002 rates".

month from January 2005 to December 2007. Stations started paying royalties pursuant to the new tariff on December 1, 2005.

[3] The decision of October 14, 2005 justified the increase in the rates on three accounts. First, music had been historically undervalued. Second, radio played more music. Third, music allowed radio to derive efficiencies they should share with composers. The Canadian Association of Broadcasters (CAB) challenged the Board's decision by applying for judicial review. On October 19, 2006, the Federal Court of Appeal set aside the decision and remitted the matter to the Board to "redetermine the issues in respect of which the reasons have been found to be inadequate". The Court found that the reasons given to justify the amount of the first and third increases were insufficient. The Board's decision to increase the tariff on all three accounts was not impugned, nor was the decision to increase the tariff by 10.6 per cent to account for the fact that radio plays more music.

[4] As a result of the decision of the Federal Court of Appeal, again pursuant to subsection 68.2(3) of the *Act*, the 2002 rates will continue to apply until the Board complies with the decision of the Court of Appeal, reconsiders the decision of October 14, 2005 and issues a new tariff, unless the Board issues an interim tariff.

[5] On October 26, 2006, pursuant to section 66.51 of the *Act*, SOCAN and NRCC applied for an interim tariff that would maintain in place the provisions of the October 2005 Tariff until the Board issues a final decision. NRCC argues that such an interim tariff would be fair, adding that the Federal Court of Appeal questioned not the quantum of the October 2005 Tariff, but the adequacy of the reasons for the increase. SOCAN offers two other arguments in support of its motion. First, CAB conceded that the evidence rationally supported the Board's decision to increase the rate on all three accounts, and only challenged the adequacy of the reasons justifying the first and third increases. Second, spreading the repayment of additional amounts owed for the period ending December 2005 involved complex calculations; reverting to the 2002 rates would require further calculations to determine how much should be refunded to each station, for each month, to account for the discrepancy between the October 2005 Tariff and the 2002 rates. This makes no sense if, as SOCAN argues, it seems clear that the final tariff will be higher than the 2002 rates in any event, resulting in a third round of recalculations. Reinstating the October 2005 Tariff on an interim basis would reduce the required recalculations to one at most; no recalculation will be required if the final rates prove to be the same.

[6] CAB makes three submissions that would all result in the 2002 rates continuing to apply on an interim basis until the Board issues a final decision.

[7] First, there is no need to make an interim decision. The 2002 rates continue to apply by virtue of subsection 68.2(3) of the *Act*. Interim decisions provide temporary relief against the deleterious effects of the duration of the proceedings. Here, there are no such effects. The *Act*

sets a legal framework, thereby ensuring certainty. The 2002 rates applied until the October 2005 Tariff was certified; the collectives were content to abide by them. They have not explained how what worked well for almost three years could be deleterious now. Furthermore, since the October 2005 Tariff no longer exists in law, relying on it in setting an interim tariff would involve taking into account an irrelevant consideration.

[8] Second, the October 2005 Tariff is a legal nullity and cannot be used as a basis for setting an interim tariff. The Federal Court of Appeal has set aside the Board's decision for a lack of procedural fairness. The Board must redetermine the tariff *de novo*, without preconceived notions of what the appropriate rate might be. If the October 2005 Tariff cannot be the starting point for the new, final tariff, it cannot be the starting point for an interim tariff. CAB expects to argue that even though the Board *may* proceed with the first and third increases mentioned earlier, it *should* not do so. In CAB's words, the Board must "consider the matter anew and conclude that any increases on these bases would be not only permissible, but fair and equitable." The concessions that CAB made in the context of the application for judicial review do not apply to the question of what the Board should do in setting a new tariff.

[9] Third, if the Board wishes to set an interim tariff, it should simply restate what is already in place by virtue of subsection 68.2(3) of the *Act*. The collectives have the burden of persuading the Board that the interim rate should change the *status quo*. The Board itself has indicated in the past that it probably would require the person who requests an interim tariff to demonstrate its likelihood of success before issuing an interim order that modified the existing situation. The collectives have not done so.

II. ANALYSIS

[10] The nature and purpose of interim orders were explored in *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission).*[2] Speaking for the Court, Mr. Justice Gonthier stated:

> Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order.[3]

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[2] [1989] 1 S.C.R. 1722.
[3] *Ibid.*, at 1754.

[11] In *Retransmission of Distant Radio and Television Signals, Interim Decision of the Board, 1992-1994*,[4] this Board relied upon that statement in dealing with such an application:

> As stated by the Supreme Court of Canada, an interim order "is made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision", "does not make any decision on the merits of an issue to be settled in a final decision", and "provide[s] temporary relief against the deleterious effects of the duration of the proceedings".[5]

[12] Applying these principles, we grant the collectives' application in part, for the reasons that follow.

[13] First, while the *Act* provides a mechanism whereby a certified tariff that has expired continues to apply on an interim basis, that is not, in and of itself, determinative. The Board can make interim decisions in those situations as well. To systematically refuse to do so would require the Board to illegally fetter its discretion. The decision to rely or not to rely on the mechanism provided in the *Act* must be made in accordance with the context. Here, for reasons that will become clear below, the context requires that the Board take action.

[14] Second, circumstances are no longer what they were before the Board issued its October 2005 decision. Until then, the rate had remained the same for more than 20 years; as a result, it was reasonable to maintain the *status quo*. The *status quo* is no longer an option. The rate will increase by 10.6 per cent because radio uses more music. There will be no all-talk radio rate. NRCC will get half of what SOCAN gets, not 45 per cent. A single rate base will be used for both collectives. These substantial changes to the 2002 rates were put in effect a year ago and should be maintained.

[15] Third, the deleterious effects of staying with the 2002 rates are obvious. Since October 2005, money has changed hands. Reverting to the 2002 rates would impose a recalculation that we know would not be final because we know that there will be an increase in the tariff. Imposing two recalculations where there could be one (or none) creates deadweight loss. Granting the application minimizes unnecessary exchanges of money. CAB downplayed these difficulties, stating it was confident that the parties' accountants could easily make these determinations. We agree with SOCAN, for the reasons set out in paragraph 5 of this decision, that the exercise would be complex, costly and useless.

[16] Fourth, even though the October 2005 Tariff currently is a nullity in its entirety, the Board is not required to reconsider the matter *de novo*. To do so may violate the order of the Federal

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[4] Board's interim decision dated February 28,1994 on an application to vary the televisionretransmission tariff, 1992-1994.
[5] *Ibid.*, at 242.

Court of Appeal, which remitted the matter to the Board to re-determine "the issues in respect of which the reasons have been found to be inadequate." The order further provides that the Board *may* permit the parties to supplement the existing record with respect to "these issues of quantification". A discretion to allow or not to allow for the record to be supplemented is incompatible with the notion of a *de novo* review. CAB will be allowed to reargue only the amount of the increases that *will* be set to account for the historical undervaluation of music and for its more efficient use. The reasons for which CAB conceded before the Federal Court of Appeal that the three increases could be made may be irrelevant here. The consequences of these concessions, however, are clear. The only matter that remains to be reconsidered by a panel of the Board is how much more radio stations will pay.

[17] Fifth, the burden of proof as contended by CAB is misstated. The passage on which it relies to state its proposition is to the opposite effect, as becomes clear when it is quoted in its entirety:

> When seeking interim relief, it is not necessary for a party to demonstrate prima facie that the main application is likely to succeed; indeed, an interim order can be issued in the absence of any evidence or argument, so long as the main application is not plainly without merits. The Board, in its discretion, may ask the applicant to make such a demonstration or to supply it with evidence or argument; it probably would do so before issuing an interim order that modified the existing situation.[6]

[18] Here, common sense dictates that the Board exercise its discretion and grant the application. The 2003-2007 rates will not be the 2002 rates. SOCAN's rate base will change. NRCC's rates will increase to account for the wider use of its repertoire. The rates will increase on three accounts. The only thing that remains to be decided is by how much. The final rates may be those set in October 2005, or they may not. The October 2005 Tariff may be a nullity, but the rates it set are as likely to be the final rates as any rate above 3.54 per cent, which is the rate obtained if the rate of 3.2 per cent is changed to account for a 10.6 per cent increase in the use of music.

[19] CAB argues that it seeks to maintain the *status quo*. We do not agree. What it asks for is to revert to rates we know are too low, thereby depriving the collectives of moneys we know they are entitled to. If radio stations continue to pay according to the October 2005 Tariff, the collectives *may* have to refund (or credit) overpayments. If we use the 2002 rates, the stations *will* have to make large retroactive payments to the collectives.

[20] There is, finally, the matter of balance of convenience. In the short and longer run, having the broadcasters continue on an interim basis to pay what they were required to pay until the

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[6] *Ibid.* But see Board's interim decision dated November 22, 1999, on an application by SODRAC for an interim licence for MusiquePlus, at p. 2.

Federal Court of Appeal issued its decision is clearly less disruptive to all participants than relying on the 2002 rates. Unnecessary flows of money are minimized. Moreover, every month, radio stations accrue royalties that they must pay to the collectives. It is easy for them to set-off excess payments against future royalties; this could occur over a fairly short period of time. And if the overpayments are significant, the Board can easily order the collectives to remit them immediately. The converse may not be true. Collecting underpayments may not be as easy, which explains why the October 2005 decision allowed stations to pay additional amounts owed for past periods free of interest, in equal payments over two years.

[21] This interim decision does not in any way pre-judge the issues to be ruled upon in reconsideration. Were we to hold the interim tariff at 3.2 per cent, no one would think that we were somehow indicating that this should be the final tariff, or that the increases should be as low as possible. An interim tariff "does not make any decision on the merits of an issue to be settled in a final decision".[7] We are not attempting to guess what the final result will be. We are seeking to minimize disruptions, now and later, as best we can. Our decision is based not on what may be later, but on what is certain now. The information currently available favours the solution the collectives proposed, not the one that CAB advanced.

[22] CAB argued that retroactive payments of the type awarded in the October 2005 decision are inconsistent with the notion of an interim rate. CAB offers no other explanation for this otherwise surprising conclusion. An interim decision can provide for anything that a final decision can. It could provide not only for the maintenance of the catch up payments made to date, but order that these payments continue. Having said this, the Board is willing to concede that no harm is done by allowing the radio stations to stop making catch up payments that may no longer be necessary or might be reduced, especially given that half or so of the monies owed have already been collected.

[23] We are of the view that an interim tariff can affect past transactions just as a final tariff can. Subsection 16(1) of the interim tariff will so state. We are conscious that the question of whether the Board has the power to adopt a retrospective interim tariff is not settled. In any event, we want to ensure that amounts paid to date pursuant to the October 2005 Tariff remain with the collectives for the time being. Subsection 16(1) of the interim tariff is worded so as to achieve this.

A. DECISION

[24] The application by SOCAN and NRCC for an interim decision is granted in part. The *SOCAN-NRCC Commercial Radio Tariff, 2003-2007* is reinstated as an interim tariff effective as

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[7] [1989] 1 S.C.R. 1754.

of January 1, 2003 and until the Board issues a further interim decision in this matter or issues a final ruling pursuant to the October 19, 2006 order of the Federal Court of Appeal, subject to the following modifications.

[25] The title of the interim tariff shall read as follows:

> INTERIM STATEMENT OF ROYALTIES TO BE COLLECTED BY THE SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA (SOCAN) FOR THE COMMUNICATION TO THE PUBLIC BY TELECOMMUNICATION, IN CANADA, OF MUSICAL OR DRAMATICO-MUSICAL WORKS FOR THE YEARS 2003 TO 2007
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> INTERIM STATEMENT OF ROYALTIES TO BE COLLECTED BY THE NEIGHBOURING RIGHTS COLLECTIVE OF CANADA (NRCC) FOR THE COMMUNICATION TO THE PUBLIC BY TELECOMMUNICATION, IN CANADA, OF PUBLISHED SOUND RECORDINGS EMBODYING MUSICAL WORKS AND PERFORMERS' PERFORMANCES OF SUCH WORKS FOR THE YEARS 2003 TO 2007

[26] Section 1 of the interim tariff shall read as follows:

> *Short Title*
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> 1. This tariff may be cited as the *NRCC-SOCAN Interim Commercial Radio Tariff, 2003-2007*.

[27] The following section shall be added to the interim tariff:

> 16. (1) This tariff is effective as of January 1, 2003. If the decision to this effect is *ultra vires* the powers of the Board, and only in so far as it is, any amount that would have been payable pursuant to the *SOCAN-NRCC Commercial Radio Tariff, 2003-2007* before the day this tariff is adopted shall become due pursuant to this tariff on the day it is adopted.
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> (2) Subsection 15(2) of *SOCAN-NRCC Commercial Radio Tariff, 2003-2007* shall cease to have effect as of November 1, 2006.

[28] SOCAN and NRCC shall jointly cause anyone who is subject to the interim tariff to be mailed a copy of this decision no later than **Monday, November 27, 2006**.

Claude Majeau
Secretary General