

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20100527

Docket: A-582-08

Citation: 2010 FCA 139

**CORAM: LÉTOURNEAU J.A.
NADON J.A.
PELLETIER J.A.**

BETWEEN:

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA

Applicant

and

BELL CANADA, THE CANADIAN ASSOCIATION OF BROADCASTERS, THE CANADIAN BROADCASTING CORPORATION, THE CANADIAN RECORDING INDUSTRY ASSOCIATION, APPLE CANADA INC., THE NATIONAL CAMPUS AND COMMUNITY RADIO ASSOCIATION, THE ENTERTAINMENT SOFTWARE ASSOCIATION, THE ENTERTAINMENT SOFTWARE ASSOCIATION OF CANADA, ICEBERG MEDIA.COM, ROGERS COMMUNICATIONS INC., ROGERS WIRELESS PARTNERSHIP, SHAW CABLESYSTEMS G.P., TELUS COMMUNICATIONS INC., CMRRA/SODRAC INC., ESPRIT COMMUNICATIONS, CKUA RADIO NETWORK and THE RETAIL COUNCIL OF CANADA

Respondents

and

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Intervener

Heard at Montréal, Quebec, on May 5, 2010.

Judgment delivered at Ottawa, Ontario, on May 27, 2010.

REASONS FOR JUDGMENT BY:

LÉTOURNEAU J.A.

CONCURRED IN BY:

NADON J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues on this application for judicial review

[1] In addition to the sempiternal question of the applicable standard of review, this application for judicial review by the Society of Composers, Authors and Music Publishers of Canada (SOCAN) raises the following three issues:

- a) did the Copyright Board of Canada (Board) err in law and exceed its jurisdiction in refusing to certify a tariff for the use by the Canadian Broadcasting Corporation (CBC) of SOCAN's repertoire in the Internet simulcast of CBC's conventional radio signal and/or in refusing to certify a tariff for the "Other Sites" category?
- b) did the Board breach SOCAN's right to procedural fairness in relying upon evidence that was not part of the record, namely the agreement between SOCAN and CBC, and failing to allow the parties to make submissions and adduce evidence on the issue of whether the existing CBC agreement on Tariff 1.C encompassed Internet usage?
- c) did the Board make a perverse or capricious finding of fact in concluding that the existing payments made by CBC to SOCAN for conventional radio also include Internet simulcasting?

The relevant legislation

[2] At play here are sections 3, 66.7, 66.71, 67.1 and 68 of the *Copyright Act*, R.S.C. 1985, c. C-42 (Act). I reproduce them:

Copyright in works

3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any

Droit d'auteur sur l'oeuvre

3. (1) Le droit d'auteur sur l'oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'oeuvre, sous une forme

material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

(h) in the case of a computer program that can be reproduced in the ordinary course of

matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'oeuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :

a) de produire, reproduire, représenter ou publier une traduction de l'oeuvre;

b) s'il s'agit d'une oeuvre dramatique, de la transformer en un roman ou en une autre oeuvre non dramatique;

c) s'il s'agit d'un roman ou d'une autre oeuvre non dramatique, ou d'une oeuvre artistique, de transformer cette oeuvre en une oeuvre dramatique, par voie de représentation publique ou autrement;

d) s'il s'agit d'une oeuvre littéraire, dramatique ou musicale, d'en faire un enregistrement sonore, film cinématographique ou autre support, à l'aide desquels l'oeuvre peut être reproduite, représentée ou exécutée mécaniquement;

e) s'il s'agit d'une oeuvre littéraire, dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter publiquement l'oeuvre en tant qu'oeuvre cinématographique;

f) de communiquer au public, par télécommunication, une oeuvre littéraire, dramatique, musicale ou artistique;

g) de présenter au public lors d'une exposition, à des fins autres que la vente ou la location, une oeuvre artistique — autre qu'une carte géographique ou marine, un plan ou un graphique — créée après le 7 juin 1988;

h) de louer un programme d'ordinateur qui peut être reproduit dans le cadre normal de

its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied,

and to authorize any such acts.

Simultaneous fixing

(1.1) A work that is communicated in the manner described in paragraph (1)(f) is fixed even if it is fixed simultaneously with its communication.

General powers, etc.

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.

Enforcement of decisions

(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.

Procedure

(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

son utilisation, sauf la reproduction effectuée pendant son exécution avec un ordinateur ou autre machine ou appareil;

i) s'il s'agit d'une oeuvre musicale, d'en louer tout enregistrement sonore.

Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

Fixation

(1.1) Dans le cadre d'une communication effectuée au titre de l'alinéa (1)f), une oeuvre est fixée même si sa fixation se fait au moment de sa communication.

Attributions générales

66.7 (1) La Commission a, pour la comparution, la prestation de serments, l'assignation et l'interrogatoire des témoins, ainsi que pour la production d'éléments de preuve, l'exécution de ses décisions et toutes autres questions relevant de sa compétence, les attributions d'une cour supérieure d'archives.

Assimilation

(2) Les décisions de la Commission peuvent, en vue de leur exécution, être assimilées à des actes de la Cour fédérale ou de toute cour supérieure; le cas échéant, leur exécution s'effectue selon les mêmes modalités.

Procédure

(3) L'assimilation se fait selon la pratique et la procédure suivies par le tribunal saisi ou par la production au greffe du tribunal d'une copie certifiée conforme de la décision. La décision devient dès lors un acte du tribunal.

becomes an order of the court.

Effect of variation of decision

(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.

Décisions modificatives

(4) Les décisions qui modifient les décisions déjà assimilées à des actes d'un tribunal sont réputées modifier ceux-ci et peuvent, selon les mêmes modalités, faire l'objet d'une assimilation.

Distribution, publication of notices

66.71 Independently of any other provision of this Act relating to the distribution or publication of information or documents by the Board, the Board may at any time cause to be distributed or published, in any manner and on any terms and conditions that it sees fit, any notice that it sees fit to be distributed or published.

Publication d'avis

66.71 La Commission peut en tout temps ordonner l'envoi ou la publication de tout avis qu'elle estime nécessaire, indépendamment de toute autre disposition de la présente loi relative à l'envoi ou à la publication de renseignements ou de documents, ou y procéder elle-même, et ce de la manière et aux conditions qu'elle estime indiquées.

Filing of proposed tariffs

67.1 (1) Each collective society referred to in section 67 shall, on or before the March 31 immediately before the date when its last tariff approved pursuant to subsection 68(3) expires, file with the Board a proposed tariff, in both official languages, of all royalties to be collected by the collective society.

Dépôt d'un projet de tarif

67.1 (1) Les sociétés visées à l'article 67 sont tenues de déposer auprès de la Commission, au plus tard le 31 mars précédant la cessation d'effet d'un tarif homologué au titre du paragraphe 68(3), un projet de tarif, dans les deux langues officielles, des redevances à percevoir.

Where no previous tariff

(2) A collective society referred to in subsection (1) in respect of which no tariff has been approved pursuant to subsection 68(3) shall file with the Board its proposed tariff, in both official languages, of all royalties to be collected by it, on or before the March 31 immediately before its proposed effective date.

Sociétés non régies par un tarif homologué

(2) Lorsque les sociétés de gestion ne sont pas régies par un tarif homologué au titre du paragraphe 68(3), le dépôt du projet de tarif auprès de la Commission doit s'effectuer au plus tard le 31 mars précédant la date prévue pour sa prise d'effet.

Effective period of tariffs

(3) A proposed tariff must provide that the royalties are to be effective for periods of one or more calendar years.

Prohibition of enforcement

(4) Where a proposed tariff is not filed with respect to the work, performer's performance or sound recording in question, no action may be commenced, without the written consent of the Minister, for

- (a) the infringement of the rights, referred to in section 3, to perform a work in public or to communicate it to the public by telecommunication; or
- (b) the recovery of royalties referred to in section 19.

Publication of proposed tariffs

(5) As soon as practicable after the receipt of a proposed tariff filed pursuant to subsection (1), the Board shall publish it in the Canada Gazette and shall give notice that, within sixty days after the publication of the tariff, prospective users or their representatives may file written objections to the tariff with the Board.

Board to consider proposed tariffs and objections

68. (1) The Board shall, as soon as practicable, consider a proposed tariff and any objections thereto referred to in subsection 67.1(5) or raised by the Board, and

- (a) send to the collective society concerned a copy of the objections so as to permit it to reply; and
- (b) send to the persons who filed the objections a copy of any reply thereto.

Criteria and factors

Durée de validité

(3) Le projet de tarif prévoit des périodes d'effet d'une ou de plusieurs années civiles.

Interdiction des recours

(4) Le non-dépôt du projet empêche, sauf autorisation écrite du ministre, l'exercice de quelque recours que ce soit pour violation du droit d'exécution en public ou de communication au public par télécommunication visé à l'article 3 ou pour recouvrement des redevances visées à l'article 19.

Publication des projets de tarifs

(5) Dès que possible, la Commission publie dans la Gazette du Canada les projets de tarif et donne un avis indiquant que tout utilisateur éventuel intéressé, ou son représentant, peut y faire opposition en déposant auprès d'elle une déclaration en ce sens dans les soixante jours suivant la publication.

Examen du projet de tarif

68. (1) La Commission procède dans les meilleurs délais à l'examen des projets de tarif et, le cas échéant, des oppositions; elle peut également faire opposition aux projets. Elle communique à la société de gestion en cause copie des oppositions et aux opposants les réponses éventuelles de celle-ci.

Cas particuliers

(2) In examining a proposed tariff for the performance in public or the communication to the public by telecommunication of performer's performances of musical works, or of sound recordings embodying such performer's performances, the Board

(a) shall ensure that

- (i) the tariff applies in respect of performer's performances and sound recordings only in the situations referred to in subsections 20(1) and (2),
- (ii) the tariff does not, because of linguistic and content requirements of Canada's broadcasting policy set out in section 3 of the *Broadcasting Act*, place some users that are subject to that Act at a greater financial disadvantage than others, and
- (iii) the payment of royalties by users pursuant to section 19 will be made in a single payment; and

(b) may take into account any factor that it considers appropriate.

Certification

(3) The Board shall certify the tariffs as approved, with such alterations to the royalties and to the terms and conditions related thereto as the Board considers necessary, having regard to

- (a) any objections to the tariffs under subsection 67.1(5); and
- (b) the matters referred to in subsection (2).

Publication of approved tariffs

(4) The Board shall

- (a) publish the approved tariffs in the *Canada Gazette* as soon as practicable; and
- (b) send a copy of each approved tariff, together with the reasons for the Board's decision, to each collective society that

(2) Aux fins d'examen des projets de tarif déposés pour l'exécution en public ou la communication au public par télécommunication de prestations d'oeuvres musicales ou d'enregistrements sonores constitués de ces prestations, la Commission :

a) doit veiller à ce que :

- (i) les tarifs ne s'appliquent aux prestations et enregistrements sonores que dans les cas visés aux paragraphes 20(1) et (2),
- (ii) les tarifs n'aient pas pour effet, en raison d'exigences différentes concernant la langue et le contenu imposées par le cadre de la politique canadienne de radiodiffusion établi à l'article 3 de la *Loi sur la radiodiffusion*, de désavantager sur le plan financier certains utilisateurs assujettis à cette loi,
- (iii) le paiement des redevances visées à l'article 19 par les utilisateurs soit fait en un versement unique;

b) peut tenir compte de tout facteur qu'elle estime indiqué.

Homologation

(3) Elle homologue les projets de tarif après avoir apporté aux redevances et aux modalités afférentes les modifications qu'elle estime nécessaires compte tenu, le cas échéant, des oppositions visées au paragraphe 67.1(5) et du paragraphe (2).

Publication du tarif homologué

(4) Elle publie dès que possible dans la *Gazette du Canada* les tarifs homologués; elle en envoie copie, accompagnée des motifs de sa décision, à chaque société de gestion ayant déposé un projet de tarif et aux opposants.

filed a proposed tariff and to any person who filed an objection.

A summary of the facts

[3] SOCAN proposed a tariff (Tariff 22) for the communication of musical works over the Internet. The process before the Board evolved in two stages. The hearing was divided into two phases. Phase II of the hearing, which is of concern in this application for judicial review, was subsequently divided into two parts which led to two decisions by the Board. One was rendered in 2007 and is the subject of five other applications for judicial review. The second, rendered in 2008, is the subject of the present proceedings.

[4] This second decision addressed the issues of commercial radio (Item B of Tariff 22), non-commercial radio (Item C), commercial television, non-broadcast television, pay audio services, satellite radio services (Item D), Canadian Broadcasting Corporation (CBC), Ontario Educational Communications Authority (TVO), Société de télédiffusion du Québec (Télé-Québec) (Item E), audio websites (Item F), game sites (Item G) and a residual category referred to as “Other Sites”.

[5] SOCAN challenges only two parts of the Board’s voluminous decision. It disagrees with and seeks review of the Board’s conclusion regarding the portion of Item E relating to the tariff for the use of music in connection with Internet simulcasting by CBC. It also seeks the quashing of the Board’s decision with respect to Part VIII of the proposed tariff dealing with “Other Sites”. I will provide more details relating to these two issues when addressing them on the merits.

The standard of review

[6] While SOCAN and respondent CMRRA-SODRAC INC. (CSI) submit that the standard of review applicable to the Board's refusal to exercise its jurisdiction, as well as to the breach of procedural fairness, is that of correctness, most of the respondents contend that the review of these issues is governed by a standard of reasonableness. For its part, Apple Canada Inc. argues that reasonableness is the standard, but in any event the Board's decision is correct. Finally, the Canadian Recording Industry Association is of the view that the standard applicable is either correctness or reasonableness.

[7] All the parties have provided conflicting justifications for their submissions based on their understanding of the Supreme Court of Canada's jurisprudence (see *Dunsmuir v. New Brunswick*, [2008] 1 SCC 9; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12) and their characterization of the first two issues. With respect to the third issue relating to findings of fact, there is no disagreement that the reasonableness standard applies.

[8] I do not intend to address specifically and in detail the parties' justifications. For the reasons which follow, I am of the view that, whether it is one standard (correctness) or the other (reasonableness) that applies, the Board's decision meets both standards.

Analysis of the Board's decision and SOCAN's submissions

Whether the Board erred in law and exceeded its jurisdiction in refusing to certify a tariff for the use by the CBC of SOCAN's repertoire in the Internet simulcast of CBC conventional radio signal and in refusing to certify a tariff for the "Other Sites" category

[9] This ground of review in effect addresses two different issues. I will first deal with the alleged refusal to certify a tariff for the CBC's use of SOCAN's repertoire in the Internet simulcast of the CBC radio signal.

a) The alleged refusal to certify a tariff with respect to CBC's use of SOCAN's repertoire in the Internet simulcast of the CBC radio signal

[10] SOCAN proposed a rate of 8% for the Internet simulcast of the CBC radio signal. It based its rate on the same rate it proposed for conventional radio. For its part, CBC contended that it was simply duplicating on the Internet a conventional, over-the-air signal and, therefore, there should not be additional liability arising from the simulcasting of its signal on the Internet as it was just another way of listening to the radio.

[11] The Board squarely addressed the issue and complained of a lack of specific analysis of CBC by the applicant in order to justify the proposed CBC tariff. Then it considered CBC's contention that the right to Internet streaming should be included in the existing SOCAN Tariff 1.C. Finally, it concluded that for the time being "the current CBC payments to SOCAN already include

the right to use SOCAN music on the Internet simulcasts”. For reasons that it expressed, it deferred the final determination of the issue to the time of the review of SOCAN Tariff 1.C.

[12] It is useful to reproduce in full paragraphs 64 to 70 of the Board’s decision which show the Board’s exercise of jurisdiction and the reasons for its finding:

CBC

[64] CBC websites provide simulcasting of radiosignals, audio and audiovisual webcasting as well as other types of activities.

Audio Simulcasting

[65] SOCAN proposed a rate of 8 per cent for the simulcast of the CBC radio signal, based on applying the same rate it proposes for conventional radio. Professor Liebowitz provided no specific analysis of CBC in order to justify the proposed CBC tariff. SOCAN appears to base its position on the notion that public and private radio stations should be treated the same in the Internet environment.

[66] CBC contends there should be no additional liability arising from simulcasting its signal on the Internet. In its submission, simulcasting just duplicates a conventional, over-the-air signal. It is just another way of listening to the radio.

[67] CBC’s Internet audience is, at the moment, marginal. CBC argues that the right to Internet streaming should be included in its existing tariff (SOCAN

La SRC

[64] Les sites Web de la SRC pratiquent la diffusion simultanée de signaux de radio, la webdiffusion audio et audiovisuelle, ainsi que d’autres types d’activités.

La diffusion simultanée audio

[65] La SOCAN propose d’appliquer à la diffusion simultanée du signal de radio de la SRC le même taux qu’elle propose pour la radio conventionnelle, soit 8 pour cent. M. Liebowitz n’a pas justifié par une analyse spécifique le taux proposé pour la SRC. La SOCAN semble fonder sa position sur le principe qu’il convient de traiter de la même façon les stations de radio publiques et privées dans l’environnement Internet.

[66] La SRC soutient que la diffusion simultanée de son signal sur Internet ne devrait entraîner pour elle aucune charge supplémentaire. Elle fait valoir que la diffusion simultanée ne fait que reproduire un signal conventionnel (hertzien). Il s’agirait là simplement d’une autre façon d’écouter la radio.

[67] L’audience Internet de la SRC est pour l’instant marginale. La SRC soutient que le droit à la transmission Internet devrait être inclus dans le tarif existant

Tariff 1.C). In support of this position, it provided evidence of agreements with artists associations such as the American Federation of Musicians of the United States and Canada (AFM), the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) and the *Union des artistes* (UDA) which shows that rights holders have agreed to include these rights in the bundle of rights for which they already receive payments from CBC.

[68] We reject SOCAN's proposal in this respect. It is based on the tariff proposed for the simulcast of a commercial radio station's signal similar to a Tariff 1.A broadcast station, which relies on the sunk cost analysis we have already rejected.

[69] We find that some payment should be made to SOCAN for CBC's Internet simulcasting and those payments should, as much as possible, be derived from the income arising from these Internet simulcasting activities. However, CBC currently pays a fixed amount per year, established by agreement with SOCAN, for its conventional radio activity. The amount is not tied to CBC's income or expenses. Thus, any possible increase in audience that CBC might achieve from Internet simulcasts will not automatically generate additional payments to SOCAN, as it would for example with commercial radio. We have no data on advertising or other revenues or additional audience on which to base an increase in SOCAN royalties.

(Tarif 1.C de la SOCAN). Elle a produit à l'appui de cette position des éléments de preuve relatifs à des accords avec des associations d'artistes telles que l'*American Federation of Musicians of the United States and Canada* (AFM), l'*Alliance of Canadian Cinema, Television and Radio Artists* (ACTRA) et l'*Union des artistes* (UDA), qui montrent que les titulaires de droits ont consenti à inclure la transmission Internet dans l'ensemble de droits en vertu desquels la SRC les rémunère déjà.

[68] Nous rejetons la proposition de la SOCAN à cet égard. Elle est fondée sur le taux proposé pour la diffusion simultanée des signaux des stations de radio commerciales assimilables à celles du tarif 1.A, taux obtenu à partir de l'analyse basée sur les coûts irrécupérables que nous avons déjà rejetée.

[69] Nous concluons que la SRC devrait rémunérer dans une certaine mesure la SOCAN pour la diffusion simultanée de son signal sur Internet et que cette rémunération devrait autant que possible être assise sur les revenus de ces activités de diffusion simultanée. Cependant, la SRC paie actuellement un forfait annuel convenu avec la SOCAN au titre de ses activités radiophoniques conventionnelles. Ce montant n'est pas lié aux revenus ou aux dépenses de la SRC. Par conséquent, l'accroissement d'audience que pourraient valoir à la SRC ses activités de diffusion simultanée sur Internet n'entraînera pas automatiquement une augmentation des redevances versées à la SOCAN, comme ce serait le cas par exemple pour la radio commerciale. Nous ne disposons pas de données, touchant les revenus publicitaires ou autres ou l'accroissement de l'audience, sur lesquelles fonder une augmentation des redevances à verser à la SOCAN.

[70] Therefore, for the moment, we can only consider that the current CBC payments to SOCAN already include the right to use SOCAN music on the Internet simulcasts. When the time comes to revise SOCAN Tariff 1.C, the Board will be able to reestablish a link between CBC payments and its audience, including that derived from the Internet, because the methodology used in the past to establish CBC royalties was linked to advertising revenues of commercial radio.

[70] Par conséquent, force nous est pour le moment de considérer que les redevances actuellement versées par la SRC à la SOCAN rémunèrent déjà le droit d'utiliser la musique de cette dernière dans le cadre de la diffusion simultanée sur Internet. Quand viendra le temps de réviser le tarif 1.C de la SOCAN, la Commission sera en mesure d'établir de nouveau un lien entre les redevances versées par la SRC et son audience, y compris celle attribuable à Internet, étant donné que la méthode employée dans le passé pour établir les redevances à payer par la SRC était liée aux recettes publicitaires de la radio commerciale.

[Emphasis added]

[13] With respect, I cannot see how it can be said that the Board refused to certify a tariff and, in so doing, refused to exercise its jurisdiction or exceeded it. In the absence of specific analysis of CBC by SOCAN, of data on advertising, other revenues or additional audience on which to base an increase in SOCAN royalties and of evidence that any possible increase in CBC's audience from Internet simulcasts would generate additional payments to SOCAN under Tariff 1.C, the Board concluded that the current CBC payments made to SOCAN include the right to use SOCAN music on the Internet simulcasts. On these facts, I cannot say that the Board's determination is either wrong or unreasonable and warrants our intervention.

[14] Obviously, SOCAN does not like the decision rendered by the Board in the discharge of its highly specialized function and duties to which this Court owes deference: see *Neighbouring Rights*

Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada, 2003 FCA 302 at paragraphs 42 and 44; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2002 FCA 166, at paragraphs 72 and 76. However, it is a decision on the tariff applicable to the simulcasting by CBC, made by the Board in the very exercise of its jurisdiction. As this Court said in *Federation of Canadian Municipalities v. AT&T Canada Corp. (C.A.)*, 2002 FCA 500, at paragraph 27, “there is an undisputed principle of law that jurisdiction of an administrative board is not conditional on a litigant’s satisfaction or dissatisfaction with the decision the Board has rendered”.

[15] For these reasons, I cannot uphold SOCAN’s contention on this first issue. In light of this conclusion, I need not address the allegations that the Board based its decision on the agreement between CBC and SOCAN and that it breached SOCAN’s right to procedural fairness by failing to give it the opportunity to speak to this issue. This brings me to the allegation that the Board refused to certify a tariff with respect to “Other Sites”.

b) The alleged refusal to certify a tariff for “Other Sites”

[16] The tariff Item relating to “Other Sites” was part of Tariff 22. The Board did certify Tariff 22, but without including in it the Item containing the provisions proposed by SOCAN that would have subjected “Other Sites” to royalty rates for the use of music on their websites. The terms “Other Sites” refer to “disparate sites that use music in different ways but for which the main activity is not related to the use of music”: see the Board’s decision at paragraph 108. The Board

gives as examples restaurants, hotels, bars, amateur podcasts, video sharing sites and social networking sites. The parties in their memoranda of fact and law add that this category would include, among other things, online shopping sites, card and joke sites, general information sites, business and retail sites, webisodes, page identities, advertisements, promotional sites and cartoons: see SOCAN's memorandum at paragraphs 29 and 30 and Apple Canada Inc.'s memorandum at paragraph 15.

[17] Again, and I say this with respect, I do not think that it is accurate at law to say that the Board refused to certify a tariff and, therefore, refused to exercise or exceeded its jurisdiction.

[18] The Board is invested with the power to approve a proposed tariff and the duty to certify it once approved. In exercising this function, the Board possesses the power to make "such alterations to the royalties and to the terms and conditions thereto as the Board considers necessary": see subsection 68(3) of the Act. This is precisely what the Board did.

[19] In exercising its jurisdiction to approve the proposed Tariff 22, the Board found it necessary to exclude from the certification process the Item that related to "Other Sites". It provided abundant, elaborate and cogent reasons for this exclusion.

[20] First, in a nutshell, it ruled that it would be highly disruptive and unfair to blindly set a tariff which has retroactive application (from 1996 to 2006): see paragraph 113 of the decision.

[21] Second, in the absence of proper and reliable evidence, it would be irresponsible to certify a tariff that could potentially have such a broad scope of application, especially in view of the joint and several liability in the communication of music: *ibidem*, at paragraph 114.

[22] Third, in view of the fact that video sharing and social networking are a relatively new phenomenon which became popular towards the end of the period (1996 to 2006), the amounts involved for the period would most probably be quite modest: *ibidem*, at paragraph 115.

[23] Fourth, the Board concluded that it could not “in the absence of evidence discharge its obligation, as mandated by the Federal Court of Appeal in *CAB v. SOCAN and NRCC* to provide adequate reasons explaining how it arrived at the rate of the tariff”: *ibidem*, at paragraph 116.

[24] Finally, while acknowledging SOCAN’s entitlement to compensation for any use of its repertoire and the corresponding obligation of the users to pay royalties, the Board felt that, in this instance, for the period claimed, it could not, because of a lack of reliable evidence, establish a fair and reasonable tariff applicable to “Other Sites” (emphasis added). Paragraph 117 of the decision eloquently states the dilemma in which the Board found itself:

[117] The Board has repeatedly stated that SOCAN is entitled to compensation for any use of its repertoire and that users cannot be exempted from paying royalties. These statements are correct as a matter of principle. In this instance, however, no evidence whatsoever was produced that would seek to establish the value of the repertoire or even the degree or the nature of its uses. In addition there

[117] La Commission a déclaré à plusieurs reprises que la SOCAN a le droit d’être rémunérée pour toute utilisation de son répertoire et que les utilisateurs ne peuvent être dispensés de lui payer des redevances. Ces déclarations restent vraies en principe. Cependant, dans le cas qui nous occupe, il n’a été produit absolument aucun élément de preuve tendant à établir la valeur du

are no reliable benchmarks on which to base a tariff. Indeed, even SOCAN's intention with respect to the application of this part of the tariff is not clear. The Internet is such a fluid, yet omnipresent phenomenon that it would be foolhardy to attempt to set a tariff when we fear that the consequences might be overwhelming and, we repeat, socially unfair. In any event, SOCAN has filed for 2007 and beyond, proposed tariffs that target again "all other sites". When the Board hears such tariffs in the future, parties will be expected to provide the necessary evidence to allow the Board to properly assess the situation.

répertoire ou même le degré ou la nature de ses utilisations. En outre, nous ne disposons pas de points de repère fiables sur lesquels fonder la fixation d'un taux. En fait, même l'intention de la SOCAN concernant l'application de cet élément du tarif n'est pas claire. Internet est un phénomène à la fois si fluide et si omniprésent qu'il serait imprudent de fixer un taux dont nous pensons que les conséquences risqueraient de se révéler excessives et, comme nous le disions, socialement inéquitables. En tout état de cause, la SOCAN a déposé pour 2007 et au-delà, des projets de tarifs toujours applicables à « tous les autres sites ». Lorsque la Commission examinera de nouveau ces tarifs, elle attendra des parties qu'elles produisent les éléments de preuve nécessaires à une évaluation adéquate de la situation.

[Emphasis added]

[25] That the Board's obligation in considering a demand for the certification of a proposed tariff is to approve and certify a fair and reasonable tariff is not disputed. This is inherent in its obligation to balance the competing interests of copyright holders, service providers and the public: see *Neighbouring Rights Collective of Canada v. Society of Composers, Authors & Music Publishers of Canada, supra*, at paragraph 42.

[26] In my view, it would have been unreasonable for the Board to certify this impugned Item of the proposed Tariff 22 in the absence of the necessary probative evidence, on mere guesses, speculations and approximations, especially in view of the long retroactive period covered (1996 to

2006) and the fact that, as the Board found, it is only at the end of that period that social networking and video sharing sites became popular.

[27] In addition, to proceed to a determination of the kind sought by SOCAN, in the absence of that evidence, would be acting arbitrarily and unreasonably. However, to act arbitrarily and unreasonably when required by law to act fairly and reasonably is wrong at law. The resulting decision of the Board would have been both wrong and unreasonable.

[28] It is true: subsection 68(3) stipulates that the Board shall certify the tariffs as approved. However, I cannot see how the use of the word “shall” can and would oblige the Board to certify a tariff that it cannot approve because of a lack of or insufficient evidence to meet the legal requirements for approval.

[29] Even if I assume, as contended by SOCAN, that the “Other Sites” Item must be seen as a tariff of its own and, therefore, that the Board refused to certify that tariff, I would conclude for the reasons already stated that the Board was justified in refusing to certify it. Surely, it was not the intention of Parliament that the Board certify an unapproved and unapprovable tariff.

[30] Consequently, I see no merit in this second ground of judicial review raised by SOCAN.

[31] At the hearing, SOCAN conceded that most of the Board’s conclusions regarding the lack and insufficiency of evidence were justified. However, it argued that this was not the end of the

matter since, in its view, the Board was duty-bound to certify a tariff. Therefore, it should have resorted to its procedural powers under the Act and taken all necessary steps to obtain the information it deemed necessary for the purpose of certifying a tariff that is fair and equitable: see paragraphs 58 to 61 of the applicant's memorandum.

[32] Section 66.7 of the Act gives the Board the powers, rights and privileges of a superior court of record with respect to, broadly stated, the attendance of witnesses, the production of documents, the enforcement of its decisions and other matters necessary or proper for the due exercise of its jurisdiction.

[33] These powers are useful complementary tools at the disposition of the Board for use upon request or of its own motion in appropriate circumstances: see section 6 of the Board's Model Directive on Procedure. However, they are not a substitute for a party's obligation to file the necessary evidence in support of its proposed tariff, especially when a significant part of the crucial missing evidence is in the hands of the proposing party. While these powers can conveniently be used by the Board to complement a partially defective record, they do not give rise to a duty on the part of the Board to create one. In submitting a tariff for certification, a proposing party must put its best foot forward and not ask the Board to do it in its stead.

[34] I should add that it was open to SOCAN under the procedural rules applicable to proceedings before the Board to request the Board's assistance in gathering and complementing its evidence that, it had to know, was fundamentally deficient. Its omission to do so at the time under

these procedural rules cannot be later transposed into the Board's duty and failure to, *proprio motu*, make use of its discretionary powers under section 66.7 of the Act.

[35] I would dismiss SOCAN's argument based on section 66.7 of the Act.

[36] Relying on the dissenting opinion of Mrs. Charron, member of the Board, SOCAN and CSI in support of SOCAN submitted that the Board should have certified a tariff but fixed the rate at zero. As pointed out by counsel for Apple Canada Inc., a tariff entails onerous obligations such as auditing, accounting and reporting. In view of these obligations, the broad and ill-defined category of persons to whom these obligations would apply and the lack of evidence enabling the Board to approve the proposed tariff, I cannot say that it was wrong or unreasonable for the Board in these circumstances to refuse to certify a zero tariff. By asking the impossible, SOCAN obtained the best possible, i.e. a proposal to reconsider the issue when the proposed tariffs for 2007 and beyond come before the Board: see paragraph 117 of the decision.

Conclusion

[37] For these reasons, I would dismiss the application for judicial review with costs to the respondents.

“Gilles Létourneau”

J.A.

“I agree
M. Nadon J.A.”

“I agree
J.D. Denis Pelletier J.A.”

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