Copyright Board Canada

Commission du droit d'auteur Canada

CANADA

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Regime Retransmission of Distant Radio and Television Signals
Copyright Act, Section 66.52

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

Application to vary the television retransmission tariff, 1992-1994

Reasons for decision

On January 21, 1994, the Canadian Broadcasters Rights Agency (CBRA) asked that the Board vary for 1994 the *Television Retransmission Tariff, 1992-1994* [the retransmission tariff]. In support of this application, CBRA stated that as of January 1, 1994 amendments to the *Copyright Act* resulted in the broadcast day being recognized as a work of compilation entitled to compensation under the retransmission royalty scheme.

On February 8, 1994, CBRA, the Border Broadcasters' Collective (BBC) and the Canadian Retransmission Right Association (CRRA) applied for an interim order that would increase the retransmission royalty for 1994 by one dollar a system, apportion the increase equally amongst the applicants and provide expressly that in its final decision on the application to vary, the Board may review, revise or rescind the interim decision as of the latter's date. The applicants also asked that the Board stay the implementation of the interim order pending a final decision on the application to vary.

The Board asked for comments from parties to the Retransmission Tariff hearings. The Copyright Collective of Canada (CCC), FWS Joint Sports Claimants (FWS), Major League Baseball Collective of Canada (MLB) and SOCAN took no position on the application for an interim decision. The Canadian Retransmission Collective (CRC) did not respond. The Canadian Cable Television Association (CCTA), Regional Cablesystems and CANCOM raised several objections to both applications.

The relevant parts of sections 66.51 and 66.52 of the *Act* provide as follows:

> 66.51 The Board may, on application, make an interim decision.
>
> 66.52 A decision of the Board respecting royalties that are effective for more than one year or their related terms and conditions that is made under subsection ... 70.63(1) may, on application made at least one year after the royalties become effective, be varied by the Board if, in its opinion, there has been a material change in the circumstances pertaining to the decision since it was made.

The issues raised by the application for an interim decision can be stated as follows:

- is the application to vary plainly without merits?
- is it appropriate to issue an interim order?
- what is the appropriate content of the order?

I. IS THE APPLICATION TO VARY PLAINLY WITHOUT MERITS?

Were the application to vary to be plainly without merits, the matter could be disposed of without delay. Such is not the case here.

In the Board's view, an amendment to the *Act* constitutes a "change in the circumstances pertaining to the decision." "Circumstances" are not limited to the factual basis of a decision. Legislation as it stands at the time a decision is issued is part of its "adjuncts" (OED), of [TRANSLATION] "the state of things" (*Larousse*) or of [TRANSLATION] "the situation" (*Robert*) at the time the decision is made. Furthermore, the "cooling off period" provided in section 66.52 exists to ensure a measure of stability, and does not change the nature of the circumstances that may give rise to an order to vary: changes in facts can occur as quickly as any change in legislation.

The Board is also of the view that the relevant change to the *Act* may be material within the meaning of section 66.52. Nothing in the application to vary allows the Board to determine whether it is: its impact cannot be assessed without hearing evidence. However, the fact that CBRA's 1990 compilation claim was for 3.346 per cent, combined with the Board's statement in its 1990 retransmission decision at p. 53 (*p. 46 in this volume*) that "The compilation of programs requires considerable skill and effort" are sufficient not to rule out this change as insignificant at this stage of the proceedings.

II. IS THIS AN APPROPRIATE CASE FOR INTERIM RELIEF?

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." [*Bell Canada* v. *Canada (CRTC)*, [1989] 1 SCR 1722, 1754.]

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.

In the present case, the applicants are clearly confronted by "the deleterious effects of the duration of the proceedings." They may well be correct in stating that "any variation ... might have effect only from the date of the order and not from the date of the relevant material change or, alternatively, the application to vary." Absent an interim order, they may receive no compensation for the period before an order to vary is issued, even if their claim is granted. An order to vary cannot be issued swiftly. The legal and factual issues raised are complex: ample evidence will be required before determining whether the claim (if correct in law) should result in an increase in the tariff rate or only in a reallocation amongst the collectives. The extent of the required adjustments also remains to be determined.

III. WHAT IS THE APPROPRIATE CONTENT OF THE ORDER?

The order suggested by the applicants is meant to preserve their right to compensation for the period from the date of the interim order to the date of the order to vary. The Board is of the view that this is better accomplished by making the current tariff interim. This avoids any prejudice to other participants by keeping the status quo until an order to vary is issued. This will also allow for appropriate notices to be given, and for a process to be set out for the examination of the issues. Finally, this will allow parties to fully argue the date at which any changes made in a decision to vary may take effect.

The Board notes that the hearings into the retransmission tariff for 1995 and beyond will begin soon, and that it may be best to deal with the application to vary within those hearings.

As a result, it is the decision of the Board that effective March 1, 1994, the *Television Retransmission Tariff, 1992-1994*, as published in the *Canada Gazette* on January 16, 1993, be made interim. Participants are advised that in its final decision on the application to vary, the Board may review, revise or rescind the interim decision.

A notice concerning the manner in which the application to vary should be dealt with will soon follow.

Claude Majeau
Secretary General