Copyright Board Canada

Commission du droit d'auteur Canada

CANADA

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Regime Retransmission of Distant Television and Radio Signals
Copyright Act, section 73(1)

Members Mr. Justice William J. Vancise
Mr. Stephen J. Callary
Mrs. Sylvie Charron

Statements of Royalties to be collected for the retransmission of distant television and radio signals for the years 2004 to 2008

Reasons for decision

I. INTRODUCTION

[1] On March 31, 2003, the Border Broadcasters Inc. (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), the Society of Composers, Authors and Music Publishers of Canada (SOCAN), the Major League Baseball Collective of Canada Inc. (MLB) and FWS Joint Sports Claimants Inc. (FWS) jointly filed a proposed tariff for the retransmission of distant television signals. All but two of the collectives filed for a term of five years. MLB filed for one year and FWS filed for three. SOCAN, CBRA and CRRA also filed a proposed tariff for the retransmission of distant radio signals for 2004 to 2008.

[2] On March 30, 2004, MLB filed a proposed television tariff for 2005 to 2008. The following day, the Direct Response Television Collective (DRTVC), representing copyright owners in what is defined as "infomercials", filed a proposed tariff for 2005. On March 29, 2005, DRTVC filed a proposed tariff for 2006 to 2008.

[3] Bell ExpressVu, the Canadian Cable Television Association (CCTA), Star Choice Television Network, TELUS Communications Inc., Quebecor Média inc. and Vidéotron ltée filed objections to one or more of the tariffs. All collectives except SOCAN objected to DRTVC's

tariff proposal for 2005. CCTA wound up its activities in February 2006; for that reason, the Board allowed individual cable companies to join the proceedings as objectors.

II. CHRONOLOGY

[4] A number of factors contributed to making the examination of the proposed tariffs a process that extended over far too many years. Among them were changes to existing regulations that needed to be reflected in a new tariff and as such, complicated the process.

[5] In 2001 and 2002, the Canadian Radio-television and Telecommunications Commission (CRTC) issued orders allowing certain small cable and wireless systems to operate without a licence.[1] This regulatory amendment created an ambiguity in the interpretation of the *Definition of Small Retransmission Systems Regulations*,[2] which were articulated around the notion of *licensed* area. As a stopgap measure, the Board changed the wording of the tariffs to account for the new exemptions. These changes were first reflected in interim tariffs certified on December 21, 2001[3] and then in the retransmission tariffs for 2001-2003, which were certified on March 22, 2003.[4]

[6] On December 22, 2003, at the request of the collectives, the Board extended indefinitely, on an interim basis, the application of the 2001-2003 tariffs.[5] That decision changed the definitions of "distant signal" and "local signal" to account for proposed amendments to the *Local Signal and Distant Signal Regulations*.[6] These amendments were intended to address a potential ambiguity in the wording of the regulations and to allow direct-to-home satellite systems (DTH) to be treated on the same footing as cable retransmitters. The amendments came into force on March 8, 2004.[7]

[7] Meanwhile, on June 5, 2003, amendments to the *Broadcasting Distribution Regulations* came into force.[8] The amendments simplified the regulatory framework for cable broadcasting

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[1] Amendments to the *Exemption order for small cable undertakings*, Broadcasting Public Notice CRTC 2002-74, which amends the *Exemption order for small cableundertakings*, appended to the *Exemption order respecting cable systems having fewer than 2,000 subscribers*, Public Notice CRTC 2001-121; *Exemption order respecting radiocommunication distributionundertakings (RDUs)*, Broadcasting Public Notice CRTC 2002-45.
[2] SOR/89-255, amended by SOR/94-754.
[3] *Interim Tariffs for the Retransmission of Distant Radio and Television Signals during 2002*, Board decision of December21, 2001.
[4] *Television Retransmission Tariff 2001-2003*; *Radio Retransmission Tariff 2001-2003*, Board decision of March 21, 2003.
[5] *Interim Tariffs for the Retransmission of Distant Radio and Television signals in 2004*, Board decision of December 22, 2003.
[6] SOR-89/254.
[7] *Regulations Amending the Local Signal andDistant Signal Regulations*, SOR/2004-33. The title of the regulations was changed to *Definition of Local Signal and Distant Signal Regulations.*
[8] *Regulations Amending the Broadcasting Distribution Regulations*, SOR/2003-217.

distribution undertakings (BDUs). They were now regulated according to a regional licensing regime. At the time, the CRTC was concerned that the implementation of the regime might lead to an increase in retransmission royalties for smaller cable systems. For that reason, it decided not to issue regional licences to existing BDUs until changes were made to the existing tariffs and regulations to mitigate this risk.

[8] On April 23, 2004, in an attempt to manage the uncertainty resulting from potential conflicts between the CRTC regulations and the retransmission tariffs, the Board circulated a notice setting out its views on the impact of the retransmission tariffs on the implementation of the CRTC's regional licensing regime. The Board asked the collectives if they shared its view that the regional licensing regime should not have any impact on the copyright liability of BDUs and if they intended on governing themselves accordingly. The interested parties disagreed with the Board's view. As a result, on June 18, 2004, the Board advised the CRTC that its concerns could only be eased by way of a regulatory amendment harmonizing the *Definition of Small Retransmission Systems Regulations* with the *Broadcasting Distribution Regulations*.

[9] On May 17, 2005, amending regulations [9] harmonized the *Definition of Small Retransmission Systems Regulations* with the CRTC's 2001 and 2002 exemption orders and with its regional licensing regime.

[10] Protracted negotiations on a rate increase and on the allocation of royalties among collectives also contributed in drawing out the process. On June 18, 2004, the Board approved the parties' joint proposal for a timetable leading to a hearing starting on September 20, 2005. The process was postponed several times to allow for the ongoing negotiations to continue unimpeded.

[11] On May 20, 2005, the Board was informed that the key issues in dispute in the television tariff had been resolved. The parties agreed on a rate increase to be phased in over the life of the tariff. Only the allocation of royalties to FWS and DRTVC remained outstanding.

[12] The collectives undertook a viewing study in an attempt to resolve the allocation issues, while negotiations continued. On September 6, 2005, they informed the Board that the study would take several more months. The completion of the study was set back a number of times for a variety of reasons.

[13] On February 14, 2006, the Board received copy of a memorandum of agreement and a draft of the television tariff reflecting this agreement.

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[9] *Regulations Amending the Definition of Small Retransmission Systems Regulations*,SOR/2005-147. The title of the regulations was changed to *Definition of "Small Retransmission Systems" Regulations*.

[14] On July 20, 2007, while interested parties were still waiting on FWS to resolve its allocation issues with CRC and CRRA, DRTVC requested that the Board independently certify DRTVC's tariff since, as a newcomer, it was not able to collect royalties until certification. This request was withdrawn on September 21, 2007.

[15] Finally, on December 6, 2007, a further draft television tariff was submitted to the Board for certification. Since then, there have been ongoing discussions with the parties on the wording of the tariff.

[16] Settlement negotiations in the radio retransmission tariff were equally fruitful. On May 24, 2005, the parties confirmed that they had agreed on both the amount of the tariff and the allocation of royalties as between SOCAN and the broadcaster collectives (CBRA and CRRA). On July 7, 2005, the Board was advised that the allocation as between the broadcaster collectives was also settled. Three separate agreements were reached. The first dealt with the amount of the tariff, the second with the allocation of royalties as between SOCAN and the broadcaster collectives and the third with allocation between the two broadcaster collectives. On February 14, 2006, the Board received copy of a memorandum of agreement and a draft of the radio tariff reflecting this agreement.

[17] In early January 2006, CCC, acting on behalf of all collectives, advised all retransmitters that an agreement to increase the royalties had been reached and asked for retroactive payment of the increase if retransmitters wished to avoid paying interest on those additional royalties. Some retransmitters, who were not party to the agreement, notified the Board, who then warned the collectives that until a tariff was certified, any attempt at collecting additional royalties would be legally suspicious.

[18] While the process leading to the certification of this tariff was inordinately long, the substance of the changes made to the tariffs as compared to their 2001-2003 siblings can be outlined in relatively few words.

III. THE RATE

[19] The radio and television royalties payable by small retransmission systems remain the same. For all other systems, the television tariff increases over the life of the tariff to 15¢ per subscriber, per month and the radio tariff increases from 5 to 12¢ per subscriber, per year from the outset.

[20] Until now, the television tariff was as low as 20¢ per subscriber, per month, for smaller retransmitters and as high as 70¢ for the larger ones. The increase we certify is the same amount for all retransmitters. As a result, the increase in percentage is the highest (75 per cent) for smaller retransmitters and the lowest (21 per cent) for larger ones.

[21] These rate increases are important. However, they can be justified for several reasons. First, the objectors who agreed to the increase represent retransmitters of all sizes.[10] Second, the retransmission market has evolved considerably since 1990, when the Board opted for the current tariff structure. In particular, the number of distant signals available to the average subscriber has grown substantially. Third, the rates have remained the same since the inception of the regime in the case of the television tariff, and since January 1, 1992 in the case of the radio tariff. Meanwhile, the Consumer Price Index has increased by more than 45 per cent.

[22] We estimate that the total amount of royalties the television tariff will generate is $85 million for 2007. For the same year, the radio tariff will generate over $1 million. This reflects the increase in the tariffs along with the continued growth in the number of subscribers over the years.

IV. ADJUSTMENTS TO TARIFF WORDING

[23] In some respects, the tariffs have been re-worded substantially:

a. to account for the fact that DRTVC became entitled to a share of royalties starting in 2005 (Television section 15);
b. to account for the fact that subscribers in Francophone markets who receive optional English language signals are as likely to use distant signals as subscribers in other markets (Television section 10(3); Radio section 8(3));
c. to enable meaningful reporting from scrambled LPTVs (Low Power Television Stations or Very Low Power Television Stations), scrambled MDSs (multichannel multipoint distribution systems) and cable systems located within other cable systems (Television sections 18 and 21; Radio sections 13 and 16);
d. to ensure that the retention of records pursuant to the tariff accords with the *Personal Information Protection and Electronic Documents Act* (Television section 28; Radio section 23);
e. to reflect changes in regulations that have an impact on the application and ambit of the tariffs, as these changes come into force (Television and Radio sections 2(1) [definitions of "service area" and "small retransmission system"], 2(2) and 2(3));
f. to reflect the fact that, as a result of the amendments to the *Definition of Local Signal and Distant Signal Regulations*, it is no longer the case that all the signals a satellite retransmission system retransmits are distant to all its subscribers;[11]
g. to make the reporting of subscribers per postal code more meaningful (Television section 27);
h. to harmonize the television and radio tariffs.

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[10] Though admittedly, owners of a large number of systems of various sizes probably had interest in keeping the amount of the increase the same for all in order to minimizethe liability of their larger systems.

[11] As had been the case until then: *Statements of royalties to be paid for the retransmission of distant radio and television signals in 1990 and 1991*, Boarddecision of October 2, 1990 at page 69.

[24] The wording of the forms attached to the tariffs was adjusted accordingly.

[25] One aspect of the tariff wording which remains the same as before deserves mention. Apparently, some retransmitters have taken the position that the expression “postal code” as used in the television tariff actually means “forward sortation area”, which is the first three characters of a postal code and as such, defines a much larger geographical area. This position clearly is untenable. To define as plain a term as “postal code” merely to avoid the risk of fanciful interpretations would run against the usual canons of drafting and interpretation. Accordingly, we did not add a definition even though the collectives asked us to do so.

V. TRANSITIONAL PROVISIONS

[26] Most retransmitters have complied with the agreement at which the collectives and the objectors arrived. Some opted to continue to pay according to the interim tariffs. For those, transitional provisions are required to account for the increases in the rate and changes in the allocation of royalties.

[27] Payments made before January 1, 2009 that were allocated pursuant to the interim tariffs will require no correction.

[28] Retransmitters who have continued to pay according to the interim tariffs will be asked to pay additional amounts to make up for the increase in the rate. Those additional royalties will attract no interests if they are paid no later than on February 28, 2009.

[29] For the television tariff, additional royalties will be allocated according to a grid that is provided in the tariff. The grid shows how much, in pennies per subscriber, per month, each type of retransmitter is to pay to each collective society. The grid is designed to reflect final allocations over the life of the tariff. Some further adjustments might be required. The collectives have agreed to make those adjustments among themselves. In the event of disputes regarding the amount of these payments, the collectives will have until June 30, 2009 to file a motion requesting that the Board settle the disputes.

[30] The change in the share of royalties to which FWS is entitled is such that some retransmitters who continued to pay pursuant to the interim television tariff will have overpaid FWS. Crediting the amount would have meant dragging corrections over several months. FWS will refund any overpayment within 60 days of receiving a retransmitter’s royalty calculations.

[31] For the radio tariff, additional royalties will be allocated according to the shares set out in the tariff. The collectives have agreed to make further adjustments among themselves. The same dispute resolution mechanism will be available for radio as for television.

Claude Majeau
Secretary General