Copyright Board Canada

Commission du droit d'auteur Canada

Date of Decision	2009-09-22
Date of Reasons	2009-10-19
Citation	Files: Private Copying 1999-2007 (Application to Vary)
Regime	Copying for Private Use *Copyright Act*, subsection 83(8) and section 66.52
Members	Mr. Justice William J. Vancise Mr. Claude Majeau Mrs. Jacinthe Théberge

Tariff of levies to be collected by CPCC on the sale of blank audio recording media, in Canada, in respect of the reproduction for private use of musical works embodied in sound recordings, of performers' performances of such works or of sound recordings in which such works and performances are embodied

Reasons for decision

I. INTRODUCTION

[1] On May 30, 2008, Z.E.I. Media Plus Inc. (ZEI), a Canadian distributor of many types of recording media, filed an application asking the Board to issue an interim private copying tariff for 2008 and 2009, to reopen the proceedings dealing with the private copying tariff for 2008-2009 (which by then was unopposed and under advisement), to authorize ZEI to intervene in the reopened proceedings and to vary the private copying tariffs the Board had previously certified for the years 1999 to 2007.

[2] ZEI filed this application as a result of a sequence of events which, described from ZEI's point of view, can be outlined as follows:

> The private copying tariffs that the Board has certified over the years have always set a single rate for all recordable CDs, except for Audio CDs.

> ZEI has always been of the view that certain types of recordable CDs ("professional" CDs) are not ordinarily used by consumers to copy music and as such, cannot be subject of a private copying levy, irrespective of what the private copying tariff may provide.
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> For that reason, ZEI has never paid private copying royalties on professional CDs, despite attempts on the part of the Canadian Private Copying Collective (CPCC) to collect such royalties.
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> Eventually, CPCC initiated an action against ZEI before the Federal Court of Canada for money CPCC claims are owed to it pursuant to the private copying tariffs the Board has certified over the years.
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> On May 29, 2008, during the course of its examination of Ms. Laurie Gelbloom, General Counsel to CPCC, ZEI came to realize that the existence of certified tariffs for private copying may preclude ZEI from arguing before the Federal Court that professional CDs should not be subject to a private copying levy.
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> This led ZEI to make the above-mentioned application, with the view to asking the Board to clarify whether professional CDs should be subject to a levy.

[3] Shortly after receiving ZEI's application, the Board sent a notice to CPCC and ZEI, setting out a number of issues which the application appeared to raise:

1. Should the Board reopen the examination of CPCC's proposed tariffs for 2008-2009 so as to allow ZEI to argue that certain blank CDs are not "audio recording media"?
2. Should the application to vary the tariff be examined by the panel that is already examining CPCC's proposed tariffs for 2008-2009?
3. Can the private copying tariffs treat certain blank CDs differently than others? If so, on what basis can distinctions be made? Are so-called professional blank CDs a type of CDs that should be treated differently than others?
4. Does the Board have the power to vary now the certified private copying tariffs that applied to the years 1999 to 2007?
5. When a material change in circumstances occurs, how far back can the Board vary the tariffs so as to reflect that change? If the Board were told now of a change that occurred (say) two years ago, could the Board vary the tariff only as of now or could it vary it back to the date when the change actually occurred?
6. If the Board has the power to vary now the certified private copying tariffs that applied to the years 1999 to 2007, is it appropriate to do so in this instance? Specifically, did the examination of Ms. Gelbloom result in a material change in circumstances?
7. What would be the impact any changes the Board might make to certified tariffs as a result of the application to vary?
8. Should the application for interim relief be granted?
9. Could ZEI reasonably have been expected to make its application earlier on?
10. Is the Board the appropriate forum to deal with the issues raised by ZEI?

[4] On July 17, 2008, the Board reopened the examination of the 2008-2009 tariff, allowed ZEI to intervene in the proceedings and put in place a process that would provide it with the evidentiary record required to deal with ZEI's allegations. The Board also advised the parties that the matter would be terminated if the record led the panel to conclude, at any time, that professional CDs do not "deserve" to be singled out, that there had been no material change in circumstances or that ZEI's lack of diligence was such that the matter should not proceed as a matter of public policy.

[5] On December 5, 2008, at the request of CPCC, the Board certified a final tariff for 2008-2009 on the basis that CPCC undertook to either return to reporting companies, with interest, or not collect any levy on recording media which the Board might decide ought not to be levied as a result of ZEI's application to vary. The decision did not deal with ZEI's application to vary.

[6] On February 14, 2009, CPCC's proposed tariff for 2010 was published in the *Canada Gazette*.

[7] On February 26, 2009, ZEI filed its final application record. CPCC did so on March 30.

[8] On April 15, 2009, the delay afforded to object to CPCC's proposed tariff for 2010 expired. ZEI and the Canadian Association of Broadcasters (CAB) filed objections. CAB's was withdrawn on May 25, 2009. ZEI's in essence restates its position with respect to the 1997 to 2009 tariffs.

[9] These reasons deal only with ZEI's application to vary the previously certified private copying tariffs for the years 1999-2007. The application seeking to vary past certified tariffs does not apply to the 2008-2009 tariff for two reasons: first, the application was filed before the tariff was certified and section 66.52 of the *Copyright Act*[1] provides that only certified tariffs can be varied; second, the Board's decision of December 5, 2008 provides that the 2008-2009 tariff was certified on CPCC's undertaking that it would abide by the outcome of ZEI's application in collecting any levy on recording media. Consequently, the issue of whether ZEI ought to pay royalties on professional CDs it has or will dispose of in 2008 and 2009 will be addressed in the course of the upcoming 2010 tariff proceedings.

II. THE POSITION OF THE PARTIES

[10] ZEI contends the issues are: first, can the Board retroactively vary its decisions; and secondly, whether it should in the circumstances of this case.

[11] First, ZEI contends that the parameters within which the Board can exercise its discretion to vary its decisions are broad and discretionary. The *Act* imposes no pre-condition for the exercise of the discretion other than the existence of a material change. ZEI notes that the Board has

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[1] R.S.C., 1985, c. C-42 as amended (hereinafter the "*Act*").

recognized that its power to vary could be applied retroactively.[2] Further, ZEI cites a number of cases in support of its argument that the power to vary retroactively should not be viewed as an exception by reason that circumstances "will frequently arise" to require its application.[3]

[12] Secondly, ZEI submits that the Board's discretion to vary its decisions must be examined in the context of the Board's duty to determine a fair and equitable tariff. ZEI argues that it should not have been reasonably expected to question sooner than after Ms. Gelbloom's examination of May 29, 2008 whether the certification of private copying tariffs can preclude it from arguing before a court of law that the tariffs do not apply to professional CDs. ZEI claims that the jurisprudence accepts "misinterpreting" one's rights and obligations as a legitimate excuse for delaying in exercising one's legal right.[4] It points out that CPCC did not invite ZEI to come before the Board to argue its position on the applicability of the tariff to professional CDs in the context of a tariff proceeding.

[13] CPCC contends the Board does not have the authority to retroactively vary tariffs. It submits that even though a 1997 legislative amendment removed some limits on the Board's power to vary earlier decisions, [5] there is no evidence that Parliament intended to broaden the Board's power. CPCC argues that applying general principles of statutory construction to the amendment grants only a prospective power. The legislation will not have a retroactive effect when the provision substantially affects the vested rights of a party.[6]

[14] CPCC agrees that while the Board has previously retroactively varied a tariff, it recognized that retroactively varying the tariff had no practical effect and further, that it was equitable to do so.[7] CPCC argues that this is not the case here.

[15] In the alternative, CPCC raises a number of arguments of an equitable nature. A retroactive variance of the tariffs would destabilize the entire regime. It would be difficult or impossible to determine who overpaid levies and by how much. Any refunds would necessarily result in a net loss to CPCC, since it would not be possible for the Board to account for the removal of

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[2] Retransmission of Distant Radio and Television Signals, 1995-1997 (and Variance to the 1994 Tariff), (28 June 1996) Copyright Board Decision [*Retransmission Decision*].

[3] *Bakery and Confectionery Workers International Union of America Local No. 468 v. White Lunch Ltd.*, [1966] S.C.R. 282 at 295. See also *Re Eurocan Pulp & Paper Co. Ltd. and British Columbia Energy Commission*, [1978] B.C.J. No. 1228 (C.A.); *Nova, an Alberta Corporation v. Amoco Canada Petroleum Company Ltd.*, [1981] 2 S.C.R. 437.

[4] *United Food and Commercial Workers Union Local 280 P v. Pride of Alberta Meat Processors Co. (c.o.b. Gainers)*, 1998 ABCA 132 [*UFCW*].

[5] Until then, the Board could vary only decisions effective for more than a year, and only one year after the decision had become effective.

[6] *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at para. 22; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at 670; David Jones and A.S. de Villars, *Principles of Administrative Law*, 4th ed. Carswell, 2004 at 189.

[7] *Retransmission Decision*, *supra* note 2 at 14.

professional CDs from the regime, which should result in higher levies on the remaining CDs. Furthermore, CPCC argues that the doctrine of laches ought to preclude ZEI from availing itself of an essentially equitable remedy given the time it took for it to raise the issue.[8]

III. ANALYSIS

[16] Section 66.52 of the *Act* governs the Board's power to vary its decisions and reads as follows:

> A decision of the Board respecting royalties or their related terms and conditions that is made under subsection 68(3), sections 68.1 or 70.15 or subsections 70.2(2), 70.6(1), 73(1) or 83(8) may, on application, be varied by the Board if, in its opinion, there has been a material change in circumstances since the decision was made.

[17] This decision only deals with tariffs affecting transactions that occurred in the years 1999 to 2007, several months or years before ZEI applied for these tariffs to be varied. If decisions to vary past tariffs involve special considerations and if ZEI fails in respect of those considerations, there is no need to decide whether the Board has the power to so vary the tariffs in the first place or to address any other issue the Board or the parties may have raised. For this reason, we look first at the special considerations involved in dealing with past transactions.

[18] The central proposition from which we start is that a decision to vary the consequences of past transactions must account for factors which simply do not come into play when the decision targets future events. Decisions that vary the consequences of past events possess inherent characteristics that do not arise when deciding whether to vary rules that apply to future events. The Supreme Court of Canada developed that proposition in *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry; Hiemstra v. Hiemstra*.[9] In that decision, the Court set out four factors that should be considered before deciding to retroactively change child support: (1) a reasonable explanation for the delay in seeking additional support; (2) the conduct of the payor parent; (3) the circumstances of the child; and (4) the hardship imposed by a retroactive award. On their face, these factors seem to have little to do with the issue we have to decide. On the other hand, the explanations advanced by the Court in identifying those factors are relevant:

> Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted. Prospective and retroactive awards are thus very different in this regard. Prospective awards serve to define a new and predictable *status quo*; retroactive awards serve to supplant it.

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[8] *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6.
[9] [2006] 2 S.C.R. 231 [*DBS*].

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> Delay in seeking child support is not presumptively justifiable. At the same time, courts must be sensitive to the practical concerns associated with a child support application. They should not hesitate to find a reasonable excuse where the recipient parent harboured justifiable fears that the payor parent would react vindictively to the application to the detriment of the family. Equally, absent any such an anticipated reaction on the part of the payor parent, a reasonable excuse may exist where the recipient parent lacked the financial or emotional means to bring an application, or was given inadequate legal advice […]
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> Not awarding retroactive child support where there has been unreasonable delay by the recipient parent responds to two important concerns. The first is the payor parent's interest in certainty. Generally, where the delay is attributable to unreasonableness on the part of the recipient parent, and not blameworthy conduct on the part of the payor parent, this interest in certainty will be compelling. Notably, the difference between a reasonable and unreasonable delay often is determined by the conduct of the *payor* parent […]
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> […] each parent's behaviour should be considered in determining the appropriate balance between certainty and flexibility in a given case.
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> […]
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> […] retroactive awards disrupt payor parents' management of their financial affairs in ways that prospective awards do not. Courts should be attentive to this fact.[10]

[19] Judicial discretion in matters of child support is framed far more rigidly than in matters before the Board. Yet even in child support matters, courts approach applications to vary orders for the past differently. Such an application requires accounting for a number of factors inherent in any decision dealing with transactions that pre-date the application to vary. This led the Court in *DBS* to set out a number of factors which are relevant in any context. Changing awards after the fact impairs the balance between certainty and flexibility; past transactions should not be gratuitously disrupted.[11] Any delay in seeking the award must be reasonably excused.[12] The decision maker must seek to achieve a balance between certainty and fairness and, as a result, retroactive variances are inherently discretionary.[13] That discretion involves, among other things, assessing the actions (or inaction) of interested parties.[14]

[20] Expressed in this way, the principles that underlie *DBS* are easily transferable to this case. Dealing with an application to vary a past tariff involves an additional, separate analysis than if

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[10] *Ibid.* at paras. 96, 101-102, 105, 115.
[11] *Ibid*. at para. 96.
[12] *Ibid*. at para. 100-101.
[13] *Ibid*. at para. 104.
[14] *Ibid*. at para. 107.

the application to vary targets future events. That analysis involves criteria similar to those used in deciding whether to grant equitable relief. The Board can decline to act based on factors that go beyond those it may use to decide to certify a tariff in the first place, or to vary it for the future. Legal security and stability assume an importance that simply is not present when the application to vary targets the future. So does the conduct of the parties. The Board must have the discretion to decline the relief being sought if the circumstances at bar militate against a retroactive order.

[21] In light of the foregoing, we conclude that ZEI's application to vary the 1999 to 2007 tariffs fails to satisfy the *DBS* principles, for the following reasons.

[22] First, even if we were to accept that ZEI was diligent in pursuing its remedies before the Board once it understood what the law stood for, this does not justify its inaction up until that time. Ignorance of the law is no excuse. This is especially so when one has been involved for some time in a legal proceeding dealing with the very issues that ZEI is raising. ZEI was aware of the tariffs. There was a divergence of interpretation between CPCC and ZEI; ZEI simply chose to ignore it and will have to suffer the consequences. CPCC is under no duty to advise ZEI or anyone else of the right to object to proposed tariffs, or its interpretation of certified tariffs or of the impact of the rules governing collateral attacks of decisions of the Board before the Federal Court.

[23] ZEI relied on *UFCW* [15] in support of its contention that misconception of one's rights can excuse a failure or delay to press them. This case is of no help here by reason that some of the core conditions relied on by the Court of Appeal to grant retroactive relief do not exist here. Most importantly, *UFCW* involved clearly identifiable and definitively traceable funds, the payment of which had unjustly enriched the employer to the detriment of union members. Here, any decision to vary the tariff so as to exclude professional CDs will necessarily result in a net loss to CPCC and its members that would not have occurred had ZEI made its arguments in a timely fashion.

[24] Second, it would have been helpful if CPCC had provided the Board more information on marketing channels, packaging and other such issues. Such information may become important in disposing of future tariffs. However, there is nothing on the record that would lead us to conclude that CPCC did not act in good faith in its selection of information to be filed in evidence before the Board during past tariff proceedings.

[25] Third, and most importantly, equity favours stability in this instance. A retroactive variation as far back as 1999 would inevitably cause uncertainty and disruption, possibly on a large scale. Blank media importers that claim refunds may simply pocket them, even though the initial cost of the levy might have been passed on to their clients. CPCC's members would be deprived of income to which they are entitled, since if ZEI is right, this shifts liability for the overall amount of the

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[15] *Supra* note 4.

levy but does not reduce that amount. Moreover, even if we were to assume that ZEI would have persuaded the Board to exempt professional CDs had ZEI participated in the proceedings before the Board since the beginning, refusing to vary the 1999 to 2007 tariffs is akin to a family court leaving earlier support payments stand notwithstanding a significant change in circumstances, when that change is brought to the court's attention at a much later date.

[26] The application by ZEI to vary the 1999 to 2007 private copying tariffs is dismissed.

Lise St-Cyr
Senior Clerk of the Board