Copyright Board Canada

Commission du droit d'auteur Canada

Date	2012-12-20
Date	2013-04-26
Citation	File: Reproduction of Musical Works
Regime	Collective Administration in Relation to Rights Under Sections 3, 15, 18 and 21 *Copyright Act*, section 66.51
Members	The Honourable William J. Vancise Mr. Claude Majeau Mr. J. Nelson Landry
Proposed Tariffs Considered	SODRAC Tariff No. 5

Statement of Royalties to be collected by SODRAC for the reproduction, in Canada, of musical works embodied into cinematographic works for the purposes of distribution of copies of the cinematographic works for private use or of theatrical exhibition for the years 2009 to 2012

Reasons for decision

I. INTRODUCTION

[1] On November 2, 2012, the Board certified *SODRAC Tariff no. 5 (Reproduction of Musical Works in Cinematographic Works for Private Use or for Theatrical Exhibition), 2009-2012*.[1]

[2] On December 3, 2012, the Canadian Association of Film Distributors and Exporters (CAFDE) asked the Board to amend this tariff. CAFDE alleged that the Board, after stating that it wished to certify the tariff proposed by CAFDE, had certified something else. CAFDE wished to have this error rectified. Even though it is stated in a more complicated way, the application boils down to two requests: first, to suspend the 2009-2012 Tariff and to continue to apply, on an

[1] *SODRAC Tariff No. 5 (Reproduction of Musical Works in Cinematographic Works for Private Use or for Theatrical Exhibition), 2009-2012* (November 2, 2012), Copyright Board Decision. [*SODRAC 5 (2012)*]

interim basis, the *SODRAC Tariff (Reproduction of Musical Works in Video-copies), 2004-2008*; and second, on the merits, to certify a 2009-2012 tariff that reflects CAFDE's proposal.

[3] SODRAC objected to this request. It submitted that the November 2 decision does not establish at all that the Board intended to accept CAFDE's proposal. It added that, in any event, the Board did not have the implicit or express authority to amend the tariff.

[4] On December 20, 2012, the Board suspended the application of the 2009-2012 tariff and granted the application for an interim decision, with reasons to follow. The following are the reasons for the decision.

II. ANALYSIS

[5] There is consensus that, in some circumstances, the Board has the inherent authority to correct errors in otherwise final decisions. This supposes, however, that the Board made an error, and that the error is one that it can correct.

A. DID THE BOARD ERR IN ITS DECISION?

[6] CAFDE submits that it did. SODRAC replies that it does not know. We conclude that the Board did err.

[7] The November 2 decision leaves no doubt in this respect. The Board intended to approve what it perceived to be CAFDE's proposal:

> [176] […] In the end, we accept the distributors' proposition for two reasons. […]

[8] The decision also leaves no doubt about what the Board believed this proposal to be:

> [166] Alternatively, CAFDE proposed that the tariff be structured as in the CBC 2002 Agreement, with two important differences. The tariff would not differentiate foreground and background music and the rates would increase, not decrease, with the amount of music used: 0.65¢ per minute for the first 15 minutes, 1.25¢ for the next fifteen minutes and 2.0¢ for the rest. Royalties would be capped at 1.2 per cent of distribution revenues. […]

[9] The CBC 2002 Agreement provides for a cents-per-minute, per-copy rate. The Board stated that CAFDE was seeking a tariff that was structured like this agreement. The Board's description of CAFDE's proposal implies a cents-per-minute, per-copy rate. The certified tariff is a cents-per-minute, per-copy rate. There is therefore no doubt about what the Board understood CAFDE's proposal to be.

[10] Yet CAFDE's proposal, which can be found in Exhibit CAF-6, clearly does not provide for a cents-per-minute, per-copy rate, but for a three-tiered cents-per-copy rate, depending on the amount of music used:

6. A distributor shall pay to SODRAC the following royalties for each copy […]:

Repertoire use per copy (excluding promotional use)	Royalty in cents per copy
1 to 15 minutes	0.65
15 to 30 minutes	1.25
Over 30 minutes +	2.0

Notwithstanding the rates set out above, the maximum royalty payable in respect of any cinematographic work will be 1.2% of the revenues received by a distributor from the sales of the copies referred to above.

[11] CAFDE's final submissions are also in line with this proposal.

> […] the first thing I want to point out is CAFDE tariff in paragraph 91 is a per copy tariff. So, that's for each DVD. So, it's cents per copy. If you look at down to 93 over on the next page, the proposal that has been put forward by SODRAC, that's a per minute per copy tariff.[2]
>
> […]
>
> We tried to put forward a proposal that would have a range that would be simple, it would be easy for someone to see how much music there was there and there wouldn't be a dispute about whether it's two minutes, it's three minutes, it's this kind of thing, it would be much simpler.[3]

[12] Paragraph 91 of CAFDE's outline of final submissions[4] reproduces the above table.

[13] The Board clearly misinterpreted CAFDE's proposal. The difference between this proposal and the Board's interpretation of it may seem subtle, but it is not unimportant. CAFDE was seeking a rate of 2 cents per DVD copy containing over 30 minutes of SODRAC music; the Board's interpretation leads to royalties that are 15 times higher or even more.

[14] Moreover, contrary to what SODRAC seems to argue, there is no need to know (or to be able to deduce) the conclusion the Board would have arrived at if its assumption (what CAFDE is seeking) had been correct. An error is made whenever a conclusion is based on a false assumption. We will come back to this later.

B. DOES THE BOARD HAVE THE AUTHORITY TO CORRECT ITS MISTAKE?

[15] To correct its error, the Board must have the authority to do so. We conclude in this matter that it does have this authority, for two reasons. First, the error is palpable, and the Board has the

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[2] Transcripts (*SODRAC v. CBC* and *SODRAC v. Astral*), Volume 13 at pp. 2860:24-2861:5.
[3] *Ibid*. at pp. 2862:22-2863:3.
[4] DEF-69 at para. 91. Exhibit filed jointly by Astral and CBC/SRC.

authority to correct such an error. Second, the error led to the certification of a tariff *ultra petita*, thereby resulting in a breach of procedural fairness.

i. Palpable error

[16] The Board's error is not a simple clerical error. It is also not an error apparent from a mere reading of the decision; it is, however, an error on the face of the record, as we have just shown. It remains to be established whether the Board may correct such an error.

[17] As a general rule, the principle of finality requires that decisions made by bodies such as the Board may not be reopened, with certain exceptions.

[18] CAFDE relies on *Chandler v. Alberta Association of Architects*[5] to allege that the principle of finality should be applied more flexibly to administrative tribunals. This flexibility would require that the Board be allowed to reopen its decision in order to correct its error. By contrast, SODRAC submits that *Chandler* is not relevant. The Board does not have the authority to correct the error, even if we assume there is one. In support of its argument, SODRAC relies on *Munger v. Cité de Jonquière*.[6]

[19] In *Chandler*, the Practice Review Board of the Alberta Association of Architects had issued orders that were deemed to be *ultra vires* and, consequently, quashed. The Board then stated its intention to continue the original hearing in order to determine whether a new report should be prepared, pursuant to its powers. The Court of Queen's Bench prohibited the Board from proceeding further in the matter, on the grounds that the Board had completed and fulfilled its function and that it was therefore *functus officio*. The Court of Appeal found instead that the Board, having failed to dispose of the issue before it, had not exhausted its jurisdiction. The Supreme Court of Canada upheld the decision of the Court of Appeal.

[20] Justice Sopinka reviews the history of the principle of *functus officio* in judicial proceedings. This principle does not apply when there has been a slip in drawing up the decision or there has been an error in expressing the manifest intention of the tribunal. Justice Sopinka explains that the decisions that establish this principle were particularly concerned with decisions that could be appealed. Consequently, the application of this principle:

> […] must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the

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[5] [1989] 2 S.C.R. 848. [*Chandler*]
[6] [1962] B.R. 381 (Que.). [*Munger*]

reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.[7]

[21] In *Munger*, an arbitration council imposed a collective agreement on a city and its employees. The city moved that the decision be amended on the ground that the council had made a clerical error. The council allowed the motion. The Court of Queen's Bench quashed the decision, on the grounds that the council did not have the authority to amend its decision.

[22] The Court referred to two of its earlier decisions: *Fortin v. Talbot*[8] and *Jacques v. Paré*.[9] In the first case, a judge of the Superior Court had corrected a decision in which a colleague had failed to make an order relating to costs. Since the intention of the judge hearing the matter had been manifest on that point, the Court of King's Bench concluded that the second judge had been right to correct the decision by adding the note [TRANSLATION] "with costs" to the original decision: it was imperative that tribunals be allowed to correct [TRANSLATION] "such errors as are made inadvertently or distractedly or as a result of a lapse of memory or concentration, and that are furthermore palpable."[10]

[23] *Jacques* confirms the principle that emerges from *Fortin.* In *Jacques*, a judge of the Superior Court had mixed up the defendant and the plaintiff in his findings. On a motion by one of the parties, the judge corrected the mistake on the grounds that the judgment did not reflect his reasoning. In the context of a direct action instituted by the other party, a second judge then concluded that as a result of *res judicata*, the first judge did not have the authority to make such a correction. The Court of King's Bench, relying on *Fortin*, reversed the second judgment and confirmed that a tribunal has the authority to correct an error it committed inadvertently when it is clear that the decision does not reflect the opinion or thoughts of the decision maker.[11] Far from undermining *res judicata*, this was necessary in the interests of justice.[12]

[24] In *Munger*, the Court ruled that the arbitral award did not contain an error capable of being corrected according to the principles established in *Fortin* and *Jacques*. The error, assuming one had been made, arose from the fact that the arbitration council had not anticipated all the consequences that would arise from its decision. This type of error could not be corrected.

[25] Like CAFDE, we are satisfied that any analysis of the inherent power of administrative tribunals in general (and the Board in particular) to correct errors in their final decisions must necessarily flow from *Chandler*. Like SODRAC, we are satisfied that *Fortin, Jacques* and

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[7] *Chandler*, *supra* note 5 at 862.
[8] (1931), 51 B.R. 124 (Que). [*Fortin*]
[9] (1939), 66 B.R. 542 (Que). [*Jacques*]
[10] *Fortin, supra* note 8 at 126.
[11] *Jacques, supra* note 9 at 546.
[12] *Ibid*. at 545.

Munger provide an analytical framework for interpreting this power. This framework is based on a pragmatic view of the role of administrative tribunals, according to which the proper administration of administrative justice must take precedence over a literal application of the principle of finality. This framework is consistent with *Chandler*, which demands even more flexibility when the error is made by an authority whose decisions are not appealable.

[26] The decisions under review in *Fortin* and *Jacques* interpreted a provision of the *Code of Civil Procedure* in effect at the time, which stipulated that the "judge may, at any time, at the instance of one of the parties, correct any clerical error affecting a judgment." In addition, these cases concerned judicial decisions rather than decisions of administrative tribunals. This does not make them any less relevant. *Munger* involved an arbitrator's decision to which the provision referred to in *Fortin* and *Jacques* did not apply.[13] More importantly, if, as we believe, the error made by the Board falls within the framework established in *Munger*, *Fortin* and *Jacques*, the error is necessarily one the Board has the inherent power to correct, insofar as *Chandler* requires an even more flexible application of the principle of finality to the tariffs certified by the Board.

[27] The Board erred. It believed it was using one tariff structure while it was actually certifying another. The decision is not appealable. The error is of the type that *Munger*, *Fortin* and *Jacques* make it possible to correct. Its source was inadvertence or distraction. It was also palpable: without doubt, what the Board thought CAFDE sought was not what CAFDE proposed. It follows that the Board has the authority to reopen its decision and to correct its error. This pragmatic conclusion is made all the more necessary by the fact that on judicial review, the Federal Court of Appeal would have no choice but to allow the application. Waiting for that to happen will result in a sub-optimal use of the time and resources of that jurisdiction.

[28] So, how can the error be corrected? CAFDE submits that the Board unambiguously accepted CAFDE's proposal, even though it certified a completely different tariff structure. CAFDE concludes from this that the Board should amend the tariff so that it reflects the structure proposed by CAFDE. On the contrary, SODRAC submits that since the Board's final intention is not clear from reading the decision, the Board cannot reopen its decision.

[29] Neither party's arguments are tenable. This may be because the parties appear to be confusing manifest intention and palpable error. Even a strict application of the principle of finality allows decision makers to correct errors in expressing their manifest intention. But that is not the issue here. The Board made a palpable error within the meaning of *Munger*, based on the assumption that CAFDE was proposing one thing, while it was actually proposing another. In light of *Fortin*, *Jacques*, *Munger* and *Chandler*, this is enough to reopen the matter, even if the

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[13] "This article is not directly applicable in the present instance, but we may, in my opinion, apply the same principle": *Munger*, *supra* note 6 at 386. The Supreme Court upheld the decision as a whole, while adopting the above excerpt: *Cité de Jonquière v. Munger et al.*, [1964] S.C.R. 45 at 48.

Board's intention − the tariff structure it would have certified if it had properly understood CAFDE's position − was not manifest. The Board must reopen the file and issue a new decision.

ii. Ultra petita

[30] CAFDE submits that the certified tariff imposes higher royalties for certain uses than what SODRAC requested in its original proposed tariff. As a result, the Board exceeded its jurisdiction and must be able to reopen the decision. On the other hand, SODRAC argues that the Board is not obliged to accept the full position of either party and may vary the royalties and their related terms and conditions on the basis of what it deems to be necessary.

[31] The Board is not obliged to restrict itself to the parties' proposals; it may even decide *ultra petita*. This, however, is not the issue. What must be established is whether the certified tariff gives SODRAC more than what it asked for and, if so, whether the parties had an opportunity to be heard on the tariff structure the Board certified.

[32] It is easily established that the royalties payable under the certified tariff will ultimately exceed what would have been payable under SODRAC's proposal.

[33] The Board certified the following royalties: 0.65¢ per minute for the first 15 minutes, 1.25¢ for the next 15 minutes and 2.0¢ per minute thereafter.[14]

[34] SODRAC's proposed tariff, which was published in the *Canada Gazette*, proposed a royalty of 1.2 per cent of distribution revenues.[15]

[35] At the end of the hearing, SODRAC proposed the following royalties: for feature music, 1.92¢ for the first 15 minutes, 1.18¢ for the next 15 minutes and 0.71¢ thereafter; for background music, 0.78¢ for the first 15 minutes, 0.47¢ for the next 15 minutes and 0.28¢ thereafter.[16]

[36] The number of minutes at which point the royalty payable under the certified tariff exceeds what would have been payable under SODRAC's proposals can be calculated as follows:

Number of minutes / Nombre de minutes	**Royalty payable based on the certified tariff / Redevance payable en vertu du tarif homologue**	**Royalty payable under SODRAC's proposals / Redevance payable en vertu des propositions de la SODRAC**
28 minutes	($0.0065 × 15) + ($0.0125 × 13) = $0.26	Proposed tariff / tarif proposé 1.2% of/de $22[17] = $0.26

[14] *SODRAC 5 (2012)*, *supra* note 1 at para. 176.
[15] *Ibid.* at para. 163.
[16] *Ibid*.

18 minutes	($0.0065 × 15) + ($0.0125 × 3) = $0.135	Alternative proposal (background music) / Proposition alternative (musique de fond) ($0.0078 × 15) + ($0.0047 × 3) = $0.1311
44 minutes	($0.0065 × 15) + ($0.0125 × 15) + ($0.02 × 14) = $0.565	Alternative proposal (feature music) / Proposition alternative (musique de premier plan) ($0.0192 × 15) + ($0.0118 × 15) + ($0.0071 × 14) = $0.5644

[37] The tipping points are 28, 18 and 44 minutes, respectively, if the issue is addressed for each individual cinematographic work.

[38] Some might argue that an excess for certain individual works will not matter as long as, overall, the certified tariff does not generate more royalties than SODRAC's proposals. This argument could only be sustained if the distribution industry was relatively homogeneous. The evidence we have heard, however, suggests the opposite: for example, a Quebec film is much more likely to use SODRAC music than a film from Hollywood. Consequently, some distributors would be more prone to excess royalties than others.

[39] Moreover, if one relies on the evidence on the record, the movies for which SODRAC holds the cue sheets contain on average 28 minutes of music.[18] Consequently, in two of the three hypothetical scenarios analyzed above, the tipping point is lower than or equal to the average amount of music according to the cue sheets. This satisfies us that it is highly likely that the certified tariff will, overall, lead to the payment of royalties exceeding what SODRAC had asked for.

[40] That leads us to conclude that the decision was *ultra petita*, both for individual works and as a whole.

[41] The Federal Court of Appeal determined that the Board may certify a tariff that is higher than the one proposed by a collective, without regard to the *ultra petita* principle, as long as procedural fairness is not breached.[19] In this instance, the tariff structure the Board accepted is unprecedented. It creates many situations in which the amount of royalties will exceed what was proposed by SODRAC. As the parties did not have an opportunity to be heard on the selected tariff structure, procedural fairness was breached. This breach renders the certification of

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[17] Average wholesale price of a DVD: transcript (SODRAC 5, 2009-2012), Volume 2 at 261.
[18] With the exception of films including over 60 minutes of music, which are usually dealt with separately.
[19] *Canadian Private Copying Collective v. Canadian Storage Media Alliance* (F.C.A.), [2005] 2 F.C.R. 654.

SODRAC Tariff 5 null and void. There is no doubt that the Board may redetermine a matter when the decision that is meant to dispose of it is null because of such a breach.[20]

a. Other arguments

[42] In light of the above, there is no need to consider the parties' other arguments, including whether the error constitutes a material change in circumstances within the meaning of section 66.52 of the *Copyright Act*, whether the November 2 decision is null because it was not based of the evidence on the record, and whether the decision dealt sufficiently with all of the issues raised by the record.

b. Content of the interim decision

[43] Once it was decided to reopen the case, the nature of the interim decision to be issued became obvious, for the reasons argued by CAFDE.

[44] The purpose of an interim decision is to counteract the negative effects of delays between instituting a proceeding and making a final decision. Without an interim decision, the effects of the 2009-2012 tariff would have been felt as of January 1, 2013. The tariff would have imposed a structure, rates and reporting requirements that were unprecedented, which in turn would have required developing a major administrative infrastructure that would have become unnecessary if the final decision, once the case had been reopened, was substantially different. It was therefore preferable to maintain the status quo and to re-establish, on an interim basis, the 2004-2008 tariff, which had already been provisionally extended until the November 2 decision pursuant to section 70.18 of the *Act*.

c. Conclusion

[45] The application of the 2009-2012 tariff has been suspended. The application for an interim decision was granted. The file has been reopened and a new decision will be issued. Parties will be advised in due course of whether the Board intends to proceed on the basis of the existing record or whether the matter requires that parties file with the Board additional evidence or arguments.

[20] See, among others, *Chandler*, *supra* note 5 at para. 81.

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