

Copyright Board  
Canada



Commission du droit d'auteur  
Canada

**Date** 2024-05-03

**Citation** *Interim Television Retransmission Tariffs (2019-2023 and 2024-2028)*, 2024 CB 3

**Member** The Honourable Luc Martineau

**Proposed Tariffs** *Tariff for the Retransmission of Distant Television Signals (2024-2028)*  
*Tariff for the Retransmission of Distant Television Signals (2019-2023)*

**Application to Issue Interim Decision re.**  
***Interim Tariff for the Retransmission of Distant Television and Radio Signals, 2019-2023;***  
***and***  
***Interim Television Retransmission Tariff (2024-2028)***

**REASONS FOR DECISION**

**I. OVERVIEW**

[1] In August 2019, the Board approved a tariff for the retransmission of distant television signals up to the year 2018<sup>1</sup> (the “Original Decision”).

[2] There remain two outstanding proposed tariffs: one for 2019–2023 and one for 2024–2028. The Board has issued interim decisions for these two periods<sup>2</sup> (the “Interim Tariffs”). In two separate interim decisions, the royalty rates in the Interim Tariffs were set to be equal to those set by the Board for the year 2018 in its Original Decision—this being the last year for which there was an approved tariff.

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<sup>1</sup> The royalty rates were first determined in *Tariff for the Retransmission of Distant Television Signals 2014-2018 (Quantum)*, CB-CDA 2018-227 (18 December 2018). The actual tariff was not approved until 2 August 2019, once the collective societies came to an agreement on the allocation of royalties among them: *Tariff for the Retransmission of Distant Television Signals 2014-2018*, CB-CDA 2019-056 (August 2, 2019).

<sup>2</sup> *Interim Tariff for the Retransmission of Distant Television and Radio Signals 2019-2023*, CB-CDA 2019-009 (February 22, 2019) and *Interim Television Retransmission Tariff (2024-2028)* 2023 CB 14 (December 21, 2023).

[3] On January 13, 2024, following judicial review by the Federal Court of Appeal, the Board issued its revised decision for the years 2014–2018<sup>3</sup> (the “Redetermination”). As a result of this Redetermination, the approved royalty rates for the year 2018 are now lower than those set for that year in the Original Decision. As such, the royalty rates in the Interim Tariffs are higher than those currently approved for the year 2018.

[4] The BDUs<sup>4</sup> applied for both Interim Tariffs to be modified such that the royalty rates be the same as those fixed by the Board for the year 2018 in its Redetermination.

[5] The Collectives<sup>5</sup> oppose varying the interim tariff for the years 2019–2023, but do not oppose the request to vary the interim tariff for the years 2024–2028.

[6] For the reasons below, I

- do not grant the application to modify the interim royalty rates for 2019–2023; and
- grant the application to modify the interim royalty rates for 2024–2028, such that they match the royalty rates set by the Board in its Redetermination of January 13, 2024.

## **II. CONTEXT**

### **A. PROCEDURAL BACKGROUND**

[7] Given the somewhat complex procedural history, I summarize the main events related to this application in Table 1, below.

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<sup>3</sup> *Television Retransmission Tariff (2014-2018)* [Redetermination], 2024 CB 1 (January 12, 2024).

<sup>4</sup> Being the following broadcasting distribution undertakings: Bell Canada, Cogeco Communications, Quebecor Media, Rogers Communications, Canadian Communications Systems Alliance Inc., and TELUS Communications.

<sup>5</sup> Being the collective societies: Border Broadcasters, Inc., Canadian Broadcasters Rights Agency, Canadian Retransmission Collective, Canadian Retransmission Right Association, Copyright Collective of Canada, Direct Response Television Collective Inc., FWS Joint Sports Claimants Inc., Major League Baseball Collective of Canada, Inc., and Society of Composers, Authors and Music Publishers of Canada.

**Table 1: Main Procedural Events**

<b>DATE</b>	<b>EVENT</b>
December 18, 2018	Royalty rates determined for <i>Television Retransmission Tariff (2014-2018)</i> [tariff not yet approved, as remainder of the tariff not yet decided].
December 28, 2018	Collectives' application for interim decision for 2019–2023 granted. Request is unopposed by Objectors. Decision sets same rates as those in December 18, 2018 decision.
February 22, 2019	Collectives' application for interim decision for 2019–2023 granted. Request is made with consent of Objectors. Decision modifies revenue allocation among collectives as per collectives' agreement.
August 2, 2019	<i>Television Retransmission Tariff (2014-2018)</i> approved.
July 2, 2021	Federal Court of Appeal granted judicial review on several issues, and sent matter back to the Board for redetermination.
March 24, 2022	Leave to Appeal to the Supreme Court of Canada denied.
December 21, 2023	Collectives' and Objectors' application for interim tariff for 2024–2028 granted. Rates set as those in August 2, 2019 decision.
January 12, 2024	Board issued redetermination of <i>Television Retransmission Tariff (2014-2018)</i> .
February 9, 2024	Collectives sought judicial review of January 12, 2024 decision before the Federal Court of Appeal.
February 24, 2024	Objectors file application for an interim decision for 2019–2023 and for 2024–2028 that would set the rates as those in the January 12, 2024 decision. Collectives oppose the application for 2019–2023, but not that for 2024–2028.

## **B. LEGAL FRAMEWORK**

[8] Unlike the case for most other tariffs, the “continuation of rights” provision in section 73.2 of the *Copyright Act* does not apply to a tariff for the retransmission of distant television signals. However, section 66.51 of the *Act* permits the Board to make, on application, an interim decision.

[9] Despite the BDUs’ reference to section 66.52 of the *Copyright Act*, this is not a kind of decision enumerated by section 66.52<sup>6</sup>. Rather, the changes being sought by the BDUs are to an interim decision.

[10] As such, for the purposes of the statute, the BDUs’ request to “vary” is properly characterized as being a request for the Board to make (another) interim decision. This distinction is important since, while the *Copyright Act* contemplates that a material change is required in order for the Board to “vary” a decision enumerated in s. 66.52, no such requirement is present for interim decisions in section 66.51.

[11] Therefore, the only issue, for each of two periods, is whether the Board should issue a new interim decision—effectively varying the existing interim decision.

## **I. ISSUES**

A. Should the Board vary the interim tariff for 2019–2023?

B. Should the Board vary the interim tariff for 2024–2028?

## **II. ANALYSIS**

### **A. SHOULD THE BOARD VARY THE INTERIM TARIFF FOR 2019–2023?**

[12] The BDUs’ primary arguments are that the Board has a practice of updating interim tariffs and that there will be deleterious effects of keeping the current interim royalty rates. The Collectives’ primary argument against varying the interim tariff for these years is that it would be costly to implement, especially given that the 2014–2018 final tariff on which the royalty rates are set may be again revised after judicial review.

[13] I consider these in turn.

#### **i. Does the Board update interim tariffs as a matter-of-course?**

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<sup>6</sup> These are decisions made pursuant to subsection 70(1) [approval of tariffs], 71(2) [fixing of royalty rates in individual cases], 76.1(1) [considering requests by Commissioner of Competition] or 83(8) [levies on blank audio recording media].

[14] The BDUs submit that “[t]he standard is that the Interim Tariffs for the periods that have not yet been approved are automatically updated to reflect the most recently approved Tariff.”

[15] It is true that, when first set, interim tariffs generally attempt to maintain some measure of *status quo*. For example, in its December 28, 2018 interim decision, when the Board set the interim royalty rates for 2019–2023 to be the same as the rates those it had approved for 2018, it described its decision as setting the rates “at their most current level as recently determined by the Board.”<sup>7</sup>

[16] That being said, there is little support in the jurisprudence cited by the BDUs for the proposition that interim tariffs—after having been set and in the absence of agreement—are “automatically updated to reflect the most recently approved tariff.”

[17] It appears that the last time an interim tariff was varied—not on consent— was in a series of decision in 2011.<sup>8</sup> From the reasons for the initial interim tariff,<sup>9</sup> it appears that it was set without the benefit of an approved tariff to act as a status quo reference, and in an expeditious manner, in contemplation that a fuller discussion could lead to a modification of the interim tariff.<sup>10</sup>

[18] In fact, once set, they are very rarely updated—and mostly on consent of the parties.

[19] Moreover, as noted by the Collectives, the 2019–2023 period is entirely in the past. There is no jurisprudence referred to by either of the parties where the Board has varied a “spent” interim tariff: that is, an interim tariff whose entire effective period is in the past at the time the new interim decision was sought.

[20] I conclude that there is no established Board practice by which it updates previously set interim tariffs in a near-automatic way.

## **ii. Possible deleterious effects of not changing the interim tariff**

[21] The BDUs refer to the Supreme Court of Canada’s statement in *Bell v CRTC*<sup>11</sup> that “interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused

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<sup>7</sup> *Interim Tariff for the Retransmission of Distant Radio and Television Signals 2019-2023*, CB-CDA 2018-234 (December 28, 2018) at para 11.

<sup>8</sup> *Access Copyright - Interim Tariff for Post-Secondary Educational Institution 2011-2013* [Amended Interim Tariff] (April 7, 2011).

<sup>9</sup> *Access Copyright - Interim Tariff for Post-Secondary Educational Institution 2011-2013* (December 23, 2010).

<sup>10</sup> *Ibid* at para 4 (“Since this tariff is being issued even though its provisions would benefit from fuller discussion, participants wishing to propose immediate changes are asked to file an application to that effect no later than on Friday, January 21, 2011”).

<sup>11</sup> *Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722.

by the length of the proceedings.”<sup>12</sup> They urge the Board to find that not modifying the interim tariff would cause such deleterious effects.

[22] The Board last relied on the Supreme Court’s *Bell v CRTC* statement in a 2012 decision.<sup>13</sup> The “deleterious effect” that was clearly most important to the Board in that decision related to the effects of a legal vacuum—a concern not present here. In this case, the BDUs submit that the deleterious effects would be having to pay—on an interim basis—higher rates than those currently approved for 2018.

[23] In my view, having to pay an interim rate other than the most-recently approved, is not—in and of itself—a significant deleterious effect. The most important deleterious effect intended to be addressed by the two Interim Tariffs, the possibility of a legal vacuum, has already been addressed. No other significant deleterious effects remains.

### **iii. Efficiency**

[24] The Collectives state that, in respect of the period of 2019–2023, royalties have already been paid by users, and those royalties distributed among the Collectives.

[25] They submit that a change to the royalty rates in the interim tariffs for those years would require lump-sum payments that account for the difference between the royalties already paid, and the royalties now payable—in addition to interest on those difference. Moreover, as the Collectives note, there are also retransmitters other than those that made the Application. It would be necessary to contact all such retransmitters and collect from them or distribute to them.

[26] I agree. Given that the royalty rates set in the Redetermination are lower than those in the current interim tariffs, this difference would require collecting—the correctly calculated—moneys from nine collective societies and distributing to all the payors.

[27] This calculation and payment of lump-sum amounts is already a process that will have to occur once the Board approves a final tariff for the 2019–2023 period. Furthermore, the Collectives are seeking judicial review of the 2014–2018 Redetermination; this process could also occur if review is granted. Therefore, there is a potential for this process to occur up to three times.

[28] I conclude that considerations of efficiency weigh against modifying the interim royalty rates for 2019–2023.

### **iv. Conclusion**

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<sup>12</sup> *Ibid.*

<sup>13</sup> *SOCAN Tariffs 22.4 and 22.D (Audiovisual Webcasts) 2007-2011; Tariffs 22.7 and 22.G (Audiovisual User Generated Content) 2007-2011 (Application for Interim Tariff), (February 17, 2012).*

[29] Given

- the lack of an established practice of the Board to automatically update interim tariffs,
- no significant deleterious effect identified, and
- the costs and complexities associated with modifying the interim rates for 2019–2023,

I do not vary the interim tariff for 2019–2023.

**B. SHOULD THE BOARD VARY THE INTERIM TARIFF FOR 2024–2028?**

[30] The Collectives do not oppose the BDUs’ request to vary the *TV Retransmission Interim Tariff (2024-2028)*.

[31] Given that this period has only begun, the Collectives state that it is relatively simple to make adjustments to the royalty payments already received at the beginning of a tariff period.

[32] I am not aware of any reason not to change the royalty rates for this period.

[33] As the Board has stated in the past, interim tariffs are neither intended to represent the Board’s preliminary view on the proposed tariff, nor its estimate of the chance of success of one party or another.

[34] I therefore grant the application to modify the royalty rates for 2024–2028.

[35] The interim tariff established on December 21, 2023 (itself based on *Tariff for the Retransmission of Distant Television Signals, 2014-2018*, issued August 3<sup>rd</sup>, 2019) is modified by replacing the table in Section 8 with the following table:

<b>Number of Premises</b>	<b>Monthly rate for each premises receiving one or more distant signals (dollars)</b>
Up to 1,500	0.55
1,501 – 2,000	0.60
2,001–2,500	0.66
2,501–3,000	0.72
3,001–3,500	0.77
3,501–4,000	0.83
4,001–4,500	0.89
4,501–5,000	0.95
5,001–5,500	1.00
5,501–6,000	1.06
6,001 and over	1.12

