Federal Court of Appeal | Cour d'appel fédérale

OTTAWA, THURSDAY THE 11TH DAY OF DECEMBER, 1997.

Docket: A-759-96

CORAM: **STRAYER J.A.**
LINDEN J.A.
McDONALD J.A.

IN THE MATTER of the *Copyright Act,* R.S.C. 1985, c. C-42, as amended;

AND IN THE MATTER of the *Federal Court Act,* R.S.C. 1985, c. F-7, as amended

BETWEEN:

LES RÉSEAUX PREMIER CHOIX INC.

- and -

CANADIAN CABLE TELEVISION ASSOCIATION - ASSOCIATION CANADIENNE DE TÉLÉVISION PAR CÂBLE, SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA, ALLARCOM PAY TELEVISION LIMITED, CABLE NEWS NETWORK, INC., CANADIAN HOME SHOPPING NETWORK (CHSN) LTD., COUNTRY MUSIC TELEVISION, INC., CTV TELEVISION NETWORK LTD., FAIRCHILD TELEVISION LTD., FIRST CHOICE CANADIAN COMMUNICATIONS CORPORATION, GOVERNMENT OF ONTARIO, CONSORTIUM DE TÉLÉVISION QUÉBEC-CANADA INC., LE RÉSEAU DES SPORTS, MÉTÉOMÉDIA INC., CHUM LIMITED, MUSIQUEPLUS INC., CANADIAN BROADCASTING CORPORATION, SHOWCASE TELEVISION INC., TALENTVISION TV LTD., ADVENTURE UNLIMITED, THE FAMILY CHANNEL INC., OPRYLAND USA INC., THE SPORTS NETWORK, THE WEATHER CHANNEL, VISION TV: CANADA'S FAITH NETWORK/RESEAU RELIGIEUX CANADIEN, YOUR CHANNEL TELEVISION INC., WOMEN'S TELEVISION NETWORK (WTN), AND YTV CANADA, INC.

Respondents

JUDGMENT

The application is dismissed.

J.A.

Federal Court of Appeal  Cour d'appel fédérale

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REASONS FOR JUDGMENT

LINDEN J.A.

[1] This application for judicial review is from a decision of the Copyright Board (the "Board") dated April 19, 1996, in which it set the tariff rates for cable television operators. The decision applies to cable transmission in the years 1990 to 1995. The tariff rate determines the amount of royalties that are paid by the cable television operators to the composers, authors, musicians and other owners of copyrighted material. The Society of Composers, Authors and Music Publishers of Canada (SOCAN) represents the owners of those copyrights. In its decision the Board, *inter alia*, granted a 15% reduction (the "Quebec Adjustment", hereinafter the "Adjustment") in the tariff for Canadian specialty cable services delivered to Francophone markets. The Board refused to extend the adjustment to Canadian pay services and American specialty services. The Applicant, Premier Choix, is the owner of Quebec's only French-language pay service, Super Écran. The question in this application is whether the Board erred in not extending the adjustment to include Canadian pay and American specialty services.

Powers of the Board

[2] Under the *Copyright Act*[1] the Board is empowered to set tariff rates. The legislative scheme provides that groups representing copyright owners may submit a statement of proposed royalty rates. The Board then posts that statement in the Canada Gazette and allows submissions

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[1] R.S.C. 1985, c. C-42, as amended.

on the part of any objectors. The Board then considers the proposals and pursuant to subsection 67.2(1) certifies the statement with any changes it sees fit. That subsection reads:

> 67.2 (1) On the conclusion of the Board's consideration of a statement, any objections to it and any reply to the objections, the Board shall,
>
> (a) certify the statement as approved, with or without such alterations to the royalties and related terms and conditions specified therein as the Board may make;

[3] SOCAN filed what has come to be known as Tariff 17, which covers the time period between 1990 and 1995, inclusive. This statement of royalty rates was the subject of hearings before the Board between January 10, 1995 and February 1, 1995. The decision of the Board with respect to this tariff dated April 19, 1996 is the subject of this application for judicial review.

[4] The Board authored a thorough decision over sixty pages in length dealing with a wide variety of issues. It surveyed the history of cable television services in Canada and the evolution of broadcasting legislation, as well as the various proposals put forward by the competing groups. Many matters were decided in the course of the decision, but only one aspect of the decision is contested -- the so-called "Quebec adjustment" issue as it relates to American specialty and Canadian pay services.

[5] The tariff structure certified by the Board pursuant to subsection 67.2 (1) of the Act has two components. The first component was designed for cable services available on basic cable

and extended-basic cable packages[2]. The second component was designed for discretionary services. The discretionary services are Canadian pay and American specialty services, including Super Écran. The tariff structure for the first group of services was calculated by taking 1.7% of the total revenue for all those services in a particular year and then dividing that figure by the total number of cable subscribers in Canada for that year. The resulting figure is then applied to individual cable transmitters by multiplying the figure by the number of subscribers for the individual transmitter. The tariff rate for discretionary services is simply a percentage of affiliation payments, i.e., the payments made by the transmitters to the respective channels for the provision of Canadian pay and American specialty services. These payments are a "function of the number of subscribers"[3] to each service.

[6] The Board then made a series of adjustments to the tariff rate applicable to the portfolio services in order to account for special circumstances. With respect to the Quebec adjustment. The Board states:

> ...given the tariff structure used by the Board, the practical way of recognizing the need for a different price [for systems delivering services to Francophone markets] is to set a rate for those systems.[4]

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2 "Basic cable" is the minimum package that a person receives with a cable subscription. The Board applies this tariff also to "extended-basic", which refers to the extra package of services a subscriber receives when he or she pays for the second level of programming. Because over 90% of those who are offered extended-basic receive it, it forms a de facto basic cable package. These services are referred to as "portfolio services".

3 Reasons, at 31.

4 Reasons, at 24-25.

The Board determined that an appropriate adjustment in the circumstances was 15%. The Board went on to state:

> No adjustment is warranted for American specialty and Canadian pay services, which are discretionary. The tariff formula, a percentage of affiliation payments, ensures that the royalties are automatically lower if the market commands a lower price. Therefore, the market can be relied on to generate without correction the appropriate quantum of royalties.[5]

It is this, and only this aspect of the decision that is the subject of judicial review in this application.

Submissions of the Parties

[7] The appellant submits that the Board has erred in not extending the adjustment to the Canadian pay and American specialty services. Mr. David Kent, for Premier Choix, insisted that because the French pay services are subject to the same economic handicaps that are confronted by the portfolio services, the same rationale exists for granting the adjustment to his client. Furthermore, in not extending it, the Board has created a regime whereby English-language specialty services receive the discount but his client does not. According to the applicant, this is an anomalous result, because the point of the adjustment is to recognize the problems of economic viability for French language services.

[8] The respondent argues that the Board was correct in not extending the adjustment to cover all services. Mr. George Hynna, for SOCAN, points out that the evidence before the Board

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5 Reasons, at 25.

showed that it was the economic viability of French-language specialty services that was problematic, not pay services. Mr. Hynna submits that extending the adjustment would have been unreasonable, given the two-level tariff formula adopted by the Board. The reason for the adjustment was to reflect lower actual use in the Francophone markets. Because Canadian pay and American specialty services are discretionary, the percentage of affiliation payments will be a direct function of actual use.

[9] Both parties made submissions on the standard of review. The applicant argued that the Court should follow *Pezim v. British Columbia (Superintendent of Brokers)*[6] and *Canada (Director of Investigation and Research, Competition Act) v. Southam.*[7] Since there is no privative clause, it was suggested that the Court apply a standard somewhat below patent unreasonableness, that of ordinary unreasonableness. The respondent submits that the Court is bound by the decision of this Court in *Canadian Association of Broadcasters v. SOCAN*[8] where it was decided that the Board, when making this kind of decision, was on its home territory and should be reviewed on a standard of patent unreasonableness.

Analysis

(a) The Standard of Review

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[6][1994] 2 S.C.R. 557.

[7][1977] 1 S.C.R. 748.

[8](1994), 58 C.P.R. (3d) 190 (F.C.A.)

[10] In any application for judicial review, the question of what standard of review the Court should apply is the first task of the Court. We must always be aware that, where the legislature has developed a specialized body to deal with technical problems, the decisions of that body should be given considerable weight. The determination of the standard of review to be used begins with the dictum of Dickson J. in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*[9]:

> Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review.[10]

It should be noted that the *CUPE* case involved a specialized board, namely the Labour Relations Board, acting with the protection of a full privative clause.

[11] The standard of patent unreasonableness was further defined by Cory J. in *Canada (Attorney General) v. P.S.A.C.*[11] where he states:

> It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational...Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was

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[9][1979] 2 S.C.R. 227.

[10]*Ibid.*, at 237.

[11][1993] 1 S.C.R. 941.

> a loss of jurisdiction. This is clearly a very strict test.[12]

In *P.S.A.C.* the Court was also dealing with a specialized Board comprised of representatives of both management and labour and protected by a privative clause. In situations involving expert Boards in circumstances like these, therefore, the Court will not intervene, unless a decision is clearly irrational.

[12] The question of which standard of review should be applied to the decisions of this particular Board has already been considered by this Court in *Canadian Association of Broadcasters, supra.* Létourneau J.A., relying on earlier authority, declared that:

> ...the Board is in a better position than this court to strike a proper balance between the interests of copyright owners and users and this court will not interfere unless the result reached is patently unreasonable.[13]

It will be noticed that, even though a privative clause is not included in the *Copyright Act*, Létourneau J.A. decided not to apply the standard of correctness, but chose rather that of patent unreasonableness.

[13] Considering the recent Supreme Court of Canada decision in *Pezim*, *supra*, where Iacobucci J. discussed the spectrum of standards and the factors used to choose between them, it is clear that choosing the proper standard of review is not an all-or-nothing proposition. He explained:

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[12] *Ibid.*, at 963-64.

[13] *supra* note 13, at 197.

> Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal.[14]

Hence, patent unreasonableness was the appropriate standard for the expert Board deciding a matter within its jurisdiction and protected by a privative clause, but where there was no statutory right of appeal.

[14] More recently, the Supreme Court of Canada in *Southam*[15] indicated that, where a highly specialized tribunal was deciding an issue squarely within its jurisdiction, the Court should afford it a considerable degree of deference, despite the absence of a privative clause and the presence of a statutory right of appeal. Iacobucci J. recognized a third standard of review. He stated:

> I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it.[16]

While the decision in *Southam* involved a statutory appeal and the present case is one of judicial

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[14] *Pezim, supra,* at 590.

[15] *supra,* note 13.

[16] *Ibid.,* at 776.

review, the general approach outlined there and in *Pezim, supra,* must be considered in determining whether the standard of review to apply to this Board should be changed from that adopted by Létourneau J.A. in *Canadian Association of Broadcasters, supra.* Of particular relevance in this case should be the nature of the problem before the board and its expertise in dealing with that problem, as well as the other usual factors.

[15] This is an expert Board. It must consider complicated evidence in the area of economics, cable technology and statistics. The problem being considered is central to the Board's jurisdiction. The words of Iacobucci J. in *Southam* are again helpful. He states:

> Because an appellate court is likely to encounter difficulties in understanding the economic and commercial ramifications of the Tribunal's decisions and consequently to be less able to secure the fulfilment of the purpose of the *Competition Act* than is the Tribunal, the natural inference is that the purpose of the *Act* is better served by appellate deference to the Tribunal's decision.[17]

In other words, the Tribunal was better placed to make the decision in question than the Court. There is no doubt that the technical and economic issues in this case, which have ramifications for the broadcasting industry, would be better understood by the Board than by an Appellate Court. The *Act* creates the Board to regulate royalty payments for the collective administration of performing rights. In that way, it is more of an economic or commercial institution than it is a legal one. By the terms of the *Copyright Act,* legal disputes about the ownership or enforcement of a copyright are expressly granted to the Courts[18], which presumably are better

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[17] *Supra* note 21, at 773.

[18] Section 37 of the Act provides:

> 37. The Federal Court shall have concurrent jurisdiction with

placed to decide those questions. These technical economic matters, however, are handed to the Board. The purposes of the legislation, therefore, will be better served by a high degree of appellate deference being paid to this expert Board.

[16] While there is no privative clause in this legislation, the fact that the legislature did not provide a statutory right of appeal is a signal that considerable deference is warranted. This is especially relevant where a Board given wide discretionary powers is dealing with a very narrow technical issue, which is clearly within its "home territory". It should be recalled that, even in *Southam*, where a right of appeal was expressly granted, the standard of review was determined to be reasonableness, not correctness.

[17] In the light of the new teachings of the Supreme Court of Canada, like Létourneau J.A., therefore, I am of the view that the most appropriate standard of review in this case should continue to be patent unreasonableness. I am persuaded that the absence of a statutory right of appeal, the wide discretion given to the Board, and the highly technical nature of the Board's subject matter warrant the utmost deference, even though there is no privative clause. The third standard of review identified by Iacobucci J. in *Southam* may be more appropriate for those situations where a Board is both unprotected by a privative clause and is subject to a statutory right of appeal, which is not the case here, there being no statutory right of appeal.

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provincial courts to hear and determine all civil actions, suits or proceedings that may be instituted for contravention of any of the provisions of this Act or to enforce the civil remedies provided by this Act.

(b) Applying the Standard

[18] The question to ask then is whether it can be said that the decision reached by the Board to deny an extension of the Quebec adjustment to Canadian pay and American specialty services was patently unreasonable or clearly irrational. I would answer that question in the negative.

[19] The Board adopted a two-component tariff structure. Each component was designed to be applied to a different type of service. The Board found that a formula based on a rate per subscriber approach was suitable to the portfolio services. The way this royalty rate is calculated is with reference to data from all the portfolio services across the country. The Board determined that the application of the resulting royalty rate would be problematic for certain areas and certain transmitters. It therefore made adjustments where it was felt it to be appropriate.[19]

[20] With respect to the Quebec adjustment the Board found that there was on average less viewing of cable services in Quebec as compared to the rest of Canada. The Board recognized the reason for the relative reduction in cable viewing in this area was applicable to all Francophone markets. Therefore, an adjustment had to be made for cable systems delivering services to those markets. Otherwise, the royalties paid by those service providers would not

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19 For example, the Board set a different rate for cable transmitters offering three or fewer portfolio services on the basis that the rate was set with reference to cable transmitters who on average throughout the country offered 6.81 portfolio services (see Reasons, p. 25).

accurately reflect the usage of copyrighted material, which is, after all, the purpose of the exercise.

[21] The reason given by the Board for not applying the adjustment to the Canadian pay and American specialty services is that those services are subject to a different tariff formula. Because the rationale for implementing the adjustment was to correct inequities which result from the application of a particular tariff formula, where a different formula is used the adjustment does not necessarily apply.

[22] The Board decided that, because the structure of the tariff formula applicable to Canadian pay and American specialty services is a percentage of affiliation payments, there is therefore no reason to adjust the royalties. The Board reasoned that the market will adjust the royalties by its free operation. In other words, where there is less than average usage of Canadian pay and American specialty services this will be reflected in lower affiliation payments. Because the amount of royalties to be paid is based on those affiliation payments, the royalties will reflect this less than average usage. This would not be the case with respect to the tariff formula applied to the portfolio services.

[23] The arguments raised by the applicant are based on the notion that the Board established the Quebec adjustment in response to the difficulties faced by French-language cable services. In not extending the adjustment to the pay services, it is said that the Board ignored the evidence of these difficulties and relied on irrelevant considerations. The applicant urges us to recognize

that French-language pay services are in just as much need of an adjustment as French-language specialty services, because of the economic difficulties facing both groups. Counsel for the applicant also argues that the decision creates an anomaly in that English-language specialty services in Francophone markets will benefit from the adjustment while his client will not.

[24] I have not been persuaded by any of these arguments that the decision of the Board was patently unreasonable. I do not see why the Board's decision had to incorporate a subsidy for French-language cable services. To my mind, the Quebec adjustment was employed because of the statistical anomalies that were created by the tariff formula used by the Board to calculate the amount to be paid for the portfolio services. Where the tariff formula did not create those anomalies (as with the formula used for Canadian pay and American specialty services) there was no reason for any correction. In short, it cannot be said that it was patently unreasonable for the Board to decline to correct a problem that did not exist.

[25] For these reasons, the application is dismissed.

J.A.

I agree
D. H. Hugessen J.A.

I agree

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