Federal Court of Appeal | Cour d'appel fédérale

CANADA

**Date: 20100118**

**Docket: A-581-08**

**Citation: 2010 FCA 16**

**CORAM:** **NADON J.A.**
**EVANS J.A.**
**PELLETIER J.A.**

**BETWEEN:**

**NEIGHBOURING RIGHTS COLLECTIVE OF CANADA**

**Appellant**

**and**

**ASTRAL MEDIA RADIO INC., CTV LIMITED, CORUS ENTERTAINMENT INC., ROGERS MEDIA INC., and STANDARD RADIO INC.**

**Respondents**

Heard at Toronto, Ontario, on November 9, 2009.

Judgment delivered at Ottawa, Ontario, on January 18, 2010.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: NADON J.A.
PELLETIER J.A.

Federal Court of Appeal | Cour d'appel fédérale

CANADA

**Date: 20100118**

**Docket: A-581-08**

**Citation: 2010 FCA 16**

**CORAM:** **NADON J.A.**
**EVANS J.A.**
**PELLETIER J.A.**

**BETWEEN:**

**NEIGHBOURING RIGHTS COLLECTIVE OF CANADA**

**Appellant**

**and**

**ASTRAL MEDIA RADIO INC., CTV LIMITED, CORUS ENTERTAINMENT INC., ROGERS MEDIA INC., and STANDARD RADIO INC.**

**Respondents**

**REASONS FOR JUDGMENT**

**EVANS J.A.**

***A. INTRODUCITON***

[1] This is an appeal by the Neighbouring Rights Collective of Canada ("NRCC") from a decision of the Federal Court (2008 FC 1198), in which Justice Zinn granted a motion by Astral Media Radio Inc. *et al.* ("broadcasters") for summary judgment against NRCC and the Society of Composers, Authors and Music Publishers of Canada ("SOCAN").

[2] The Judge granted a declaration in the following terms:

> The *Regulations Defining "Advertising Revenues"*, SOR/98-447, permits a radio broadcaster to exclude the fair market value of the production services that it provides to advertisers from the revenues it generates from the broadcast of the ads to which those production services relate and upon which royalties are to be paid under the *NRCC 1998-2002 Radio Tariff* and the *SOCAN-NRCC Commercial Radio Tariff 2003-2007*.

SOCAN has not appealed.

[3] NRCC is a collective society which collects remuneration on behalf of performers and makers of sound recordings of musical works for the public performance and communication to the public of those recordings. The broadcasters operate radio stations which broadcast sound recordings of music, for which NRCC is entitled to collect a royalty in accordance with a tariff approved by the Copyright Board ("Board"). The tariff is based on a percentage of the advertising revenue earned by the broadcasters from the advertisements that they air.

[4] National or large advertisers normally either create and produce air-ready advertisements themselves or engage an accredited advertising agency to do so for them. However, some advertisers, especially local businesses, contract with the broadcaster to both produce and air an advertisement, for which the broadcaster typically charges a single fee that is not broken down into air-time and production components. This arrangement is known in the industry as a "turn-key contract".

[5] The question in dispute in this appeal is whether the statutory term, "advertising revenues", on which NRCC's royalties are based, includes the fair market value of the production services

provided to advertisers by broadcasters under turn-key contracts. Excluding the value of production services from the revenues that broadcasters receive for advertising would reduce the base on which NRCC's royalty is calculated. The Judge held that it should be excluded.

[6] I agree that, as a matter of statutory interpretation, "advertising revenues" does not include revenue earned by a broadcaster from producing an advertisement. However, in my respectful view, the Judge erred in assuming that, because a broadcaster incurs costs in producing an advertisement and performs a service of value to an advertiser, it therefore has production revenue which must be subtracted from the single fee charged to advertisers under a turn-key contract.

[7] From an accounting perspective, costs are set off against revenue: the existence of costs does not establish a source of revenue. Thus, the cost of producing an advertisement may simply be one of the expenses associated with generating advertising revenue, like the payment of either rent or utility bills. Whether a given broadcaster who has produced an advertisement has "production revenues" and if so, how much, is a factual issue to be determined at trial on the basis of evidence.

[8] Accordingly, I would allow the appeal and set aside the Motion Judge's order. In its place, I would grant the following declaration:

> The *Regulations Defining "Advertising Revenues"*, SOR/98-447 permits radio broadcasters to exclude from "advertising revenues" upon which they must pay royalties under *NRCC 1998-2002 Radio Tariff* and the *SOCAN-NRCC Commercial Radio Tariff 2003*-2007 any revenues that they derive from the production of advertisements. However, the mere fact that radio broadcasters incur costs in the production of advertisements under turn-key contracts or that their service is of value to advertisers does not prove that broadcasters have production revenues which must be excluded from "advertising revenues".

## *B. FACTUAL BACKGROUND*

[9] In addition to those already described, some other facts should be noted. First, NRCC has collected royalties for the broadcast of sound recordings of musical works that occurred after 1998. Before 2003, the Board certified separate tariffs for SOCAN and NRCC. The SOCAN radio tariff for the years 1998-2002 provided for a royalty payable by broadcasters as a percentage of the "gross income" of stations, while the NRCC radio tariff for those years was based on a percentage of "advertising revenues". For the years 2003-2007, the Board held a joint hearing and, in 2005, approved a joint NRCC-SOCAN radio tariff in which the royalty was based on a percentage of broadcasters' "advertising revenues".

[10] The Board was of the view that the definitions of "gross income" and "advertising revenues" represent the same revenue base: *SOCAN/NRCC Statement of Royalties (Commercial Radio) 2003-2007 (Tariff 1.A)* (Re) (2005), 44 C.P.R. (4th) 40 at 63 (Copyright Board).

[11] Second, in calculating the royalty payable under the 1998-2002 NRCC tariff, broadcasters did not deduct the fair market value of production services that they had rendered to advertisers who requested them to produce as well as to air their advertisements. However, when reviewing the 2003-2007 tariff, the broadcasters formed the view that the definition of "advertising revenues" in the Regulations did not include the value of their production services.

[12] Third, NRCC and SOCAN did not agree with the broadcasters' interpretation of the Regulations, and advised them that they would not accept a calculation of royalties based on a percentage of advertising revenues from which the value of production services had been excluded.

[13] Fourth, despite their view that they were paying more in royalties than was required by the definition of "advertising revenues", the broadcasters continued to pay royalties calculated as a percentage of advertising revenues, with no deductions for production services. This was because if their view that "advertising revenues "does not include the value of production services proved to be wrong, they were potentially liable under section 38.1(4) of the *Copyright Act* to pay a significant penalty for failing to pay the amount of a royalty required under a tariff.

[14] Fifth, in response to a request by the plaintiff, Standard Radio Inc., for an interpretation of the disputed provisions of the Regulations, the Copyright Board held in a decision dated November 30, 2006, that it had no jurisdiction to rule on this request: *Application by Standard Radio Inc. for a Ruling Re: "The Regulations Defining Advertising Revenues" and Royalties Payable under SOCAN/NRCC Commercial Radio Tariff, 2003-2007*. However, in concurring reasons, the Vice-Chair of the Board, Stephen J. Callary, stated (at para. 22) that, in his opinion, "the fair market value of production services can be deducted from revenues obtained under turn-key contracts".

[15] Sixth, when an advertiser uses an advertising agency or a media management company, the agency or company negotiates the air-time fee, and pays it to the broadcaster, often with a 15% discount by way of a commission or finder's fee. Depending on the terms of the agreement between

the agency and its advertiser-client, the agency may pass all or part of the undiscounted air-time fee onto the advertiser. There was evidence before the Motions Judge that broadcasters charge the same fee under turn-key contracts as they charge for air time when advertisers produce their own advertisements.

### *C. DECISION OF THE FEDERAL COURT*

[16] The Motions Judge found that the Court had jurisdiction to determine the plaintiffs' action, that the test for summary judgement under rule 213 of the *Federal Courts Rules*, SOR/98-106, had been satisfied, and that the Court should exercise its discretion to grant a declaration. These rulings are not being appealed.

[17] The Judge also ruled on the evidence that could properly be relied on to interpret the Regulations. In particular, he held that the Regulatory Impact Analysis Statement ("RIAS") issued by the Board when it promulgated the Regulations was relevant to, but not determinative of, their meaning. On the other hand, he attached no weight to the affiants' views of how the Regulations should be interpreted; the affidavits were, however, useful as evidence of the general business of commercial radio stations – the context within which the Regulations operate. The Judge's rulings on the admissibility of evidence are not in dispute in this appeal.

[18] The Judge held (at para. 64) that any revenue generated by an advertising agency for producing advertisements is properly characterised as production revenue, not advertising revenue. Accordingly, he reasoned, when a commercial radio station creates advertisements that it

subsequently broadcasts, any revenue resulting to the station from the production of advertisements should similarly be characterised as production, not advertising revenue. Further, he stated, the fact that in turn-key contracts radio stations normally do not break down the fee charged into advertising and production components is not relevant to identifying the true nature of the revenue. Accordingly, he concluded (at para. 69):

> I am of the view that the Regulations permit radio stations to exclude production costs and expenses from the revenues received for the transmission of the ads to which those [production] services relate.

[19] On the basis of subsection 2(2) of the Regulations, the Judge held that the fair market value of the production services of a radio station under a turn-key contract should not be included in the advertising revenue on which collectives' royalties are calculated. He said (at para. 74):

> The part of the revenue received that relates to these costs and expenses is not advertising revenue within the meaning of the Regulations – it is production revenue.

## *D. LEGISLATIVE FRAMEWORK*

[20] The performers and makers of sound recordings, the owners of "neighbouring rights", have no copyright in the recordings that they can protect from infringement by an action for breach of copyright. However, the *Copyright Act* confers on them a right to "equitable remuneration" as determined by the Copyright Board, which is payable to NRCC and SOCAN as a royalty by commercial radio broadcasters of sound recordings of music.

| | |
|---|---|
| 19 (1) Where a sound recording has been published, the performer and maker are entitled, subject to section 20, to be paid equitable remuneration for its performance in public or its communication to the public | 19 (1) Sous réserve de l'article 20, l'artiste-interprète et le producteur ont chacun droit à une rémunération équitable pour l'exécution en public ou la communication au public par télécommunication – à |

| | |
|---|---|
| by telecommunication, except for any retransmission. | l'exclusion de toute retransmission – de l'enregistrement sonore publié. |
| 19 (2) For the purpose of providing the remuneration mentioned in subsection (1), a person who performs a published sound recording in public or communicates it to the public by telecommunication is liable to pay royalties | 19 (2) En vue de cette rémunération, quiconque exécute en public ou communique au public par télécommunication l'enregistrement sonore publié doit verser des redevances : |
| *(a)* in the case of a sound recording of a musical work, to the collective society authorized under Part VII to collect them; or | *(a)* dans le cas de l'enregistrement sonore d'une œuvre musicale, à la société de gestion chargée, en vertu de la partie VII, de les percevoir; |
| *(b)* in the case of a sound recording of a literary work or dramatic work, to either the maker of the sound recording or the performer. | *(b)* dans le cas de l'enregistrement sonore d'une œuvre littéraire ou d'une œuvre dramatique, soit au producteur, soit à l'artiste-interprète. |

[21] The Board may approve tariffs proposed by NRCC and SOCAN to remunerate those with rights in sound recordings. Tariffs are based on a percentage of the advertising revenues of radio stations that broadcast the recordings.

| | |
|---|---|
| 67.1 (1) Each collective society referred to in section 67 shall, on or before the March 31 immediately before the date when its last tariff approved pursuant to subsection 68(3) expires, file with the Board a proposed tariff, in both official languages, of all royalties to be collected by the collective society. | 67.1 (1) Les sociétés visées à l'article 67 sont tenues de déposer auprès de la Commission, au plus tard le 31 mars précédant la cessation d'effet d'un tarif homologué au titre du paragraphe 68(3), un projet de tarif, dans les deux langues officielles, de redevances à percevoir. |
| (2) A collective society referred to in subsection (1) in respect of which no tariff has been approved pursuant to subsection 68(3) shall file with the Board its proposed tariff, in both official languages, of all | (2) Lorsque les sociétés de gestion ne sont pas régies par un tarif homologué au titre du paragraphe 68(3), le dépôt du projet de tarif auprès de la Commission doit s'effectuer au plus tard le 31 mars |

| | |
|---|---|
| royalties to be collected by it, on or before the March 31 immediately before its proposed effective date. | précédant la date prévue pour sa prise d'effet. |
| (3) A proposed tariff must provide that the royalties are to be effective for periods of one or more calendar years. | (3) Le projet de tarif prévoit des périodes d'effet d'une ou de plusieurs années civiles. |
| (4) Where a proposed tariff is not filed with respect to the work, performer's performance or sound recording in question, no action may be commenced, without the written consent of the Minister, for<br>*(a)* the infringement of the rights, referred to in section 3, to perform a work in public or to communicate it to the public by telecommunication; or<br>*(b)* the recovery of royalties referred to in section 19. | (4) Le non-dépôt du projet empêche, sauf autorisation écrite du ministre, l'exercice de quelque recours que ce soit pour violation du droit d'exécution en public ou de communication au public par télécommunication visé à l'article 3 ou pour recouvrement des redevances visées à l'article 19. |
| (5) As soon as practicable after the receipt of a proposed tariff filed pursuant to subsection (1), the Board shall publish it in the *Canada Gazette* and shall give notice that, within sixty days after the publication of the tariff, prospective users or their representatives may file written objections to the tariff with the Board. | (5) Dès que possible, la Commission publie dans la *Gazette du Canada* les projets de tarif et donne un avis indiquant que tout utilisateur éventuel intéressé, ou son représentant, peut y faire opposition en déposant auprès d'elle une déclaration en ce sens dans les soixante jours suivant la publication. |

[22] Subsection 68.1(1) of the *Copyright Act* provides that royalties to be collected by NRCC are based on the "advertising revenues" of "wireless transmission systems". Subsection 68.1(3) confers on the Board the power to issue regulations defining the "advertising revenues" of radio broadcasters for the purpose of subsection (1). In exercising this power, the Board issued the

*Regulations Defining "Advertising Revenues"*. The following provisions of the Regulations are relevant to this appeal.

| | |
|---|---|
| 2 (1) For the purposes of subsection 68.1(1) of the *Copyright Act*, "advertising revenues" means the total compensation in money, goods or services, net of taxes and of commissions paid to advertising agencies, received by a system to advertise goods, services, activities or events, for broadcasting public interest messages or for any sponsorship. | 2 (1) Pour l'application du paragraphe 68.1(1) de la *Loi sur le droit d'auteur*, « recettes publicitaires » s'entend du total, net de taxes et des commissions versées aux agences de publicité, des contreparties en argent, en biens ou en services, reçues par un système pour annoncer des biens, des services, des activités ou des événements, pour diffuser des messages d'intérêt public ou pour des commandites. |
| (2) For the purpose of calculating advertising revenues, goods and services shall be valued at fair market value. | (2) Aux fins du calcul des recettes publicitaires, les biens et services sont évalués à leur juste valeur marchande. |

[23] Although not a part of the Regulations, the Regulatory Impact Analysis Statement issued by the Board to accompany the Regulations may be taken into account by the Court in interpreting them. As relevant to this appeal, the RIAS states as follows.

| | |
|---|---|
| The Board intends that all forms of advertising revenues be included in the rate base. Given the ongoing evolution in this market, it seems preferable to adopt a general definition and see how the market develops in the long run. | La Commission entend que toute recette publicitaire, quelle qu'elle soit, fasse partie de l'assiette tarifaire. Comme il s'agit d'un marché en constante évolution, il semble préférable d'opter pour une définition de portée générale tout en surveillant la réaction à long terme dans ce marché. |
| The Board also intends to exclude from the rate base revenues that are clearly not advertising revenues. The Regulations achieve this through the reference, in section 1, to "compensations … received … to advertise goods, services, activities or events, for broadcasting public interest messages or for any sponsorship". This | La Commission désire par ailleurs exclure de l'assiette tarifaire les revenus qui, clairement, ne sont pas des recettes publicitaires. Le règlement y arrive en parlant, à l'article 1, de « contreparties … reçues … pour annoncer des biens, des services, des activités ou des événements, pour diffuser des messages d'intérêt public |

| | |
|---|---|
| excludes from the rate base *(a)* subscription revenues, *(b)* production revenues and, *(c)* revenues for leasing personnel or space for the purposes of production. | ou pour des commandites », ce qui exclut *a)* les recettes d'abonnement, *b)* les recettes de production, et *c)* les recettes provenant de la fourniture de locaux ou de personnel à des fins de production. |
| As to compensations in kind, paragraph 2*(a)*, which provide that goods and services are valued at their fair market value, is sufficient to deal fairly with all the other concerns raised in this respect. | Quant aux contreparties en nature, le paragraphe 2*a)*, en prévoyant que les biens et services sont évalués à leur juste valeur marchande, permet de traiter équitablement de toutes les autres préoccupations formulées à cet égard. |
| Section 1 and paragraph 2*(a)* [i.e. subsections 2(1) and 2(2) of the Regulations] of the Regulations, when read together, also allow a system to exclude from the rate base the fair market value of the production services provided under a "key in hands" contract pursuant to which the system provides both advertising and production services. (Emphasis added) | L'article 1 et l'alinéa 2*a)* [paragraphes 2(1) et 2(2) du règlement] du règlement, lus ensembles, permettent au système d'exclure de l'assiette tarifaire la juste valeur marchande des services de production fournis dans le cadre de contrats « clés en mains », en vertu desquels le système fournit des services de production autant que de publicité. (Je souligne) |

## *E. ISSUES AND ANALYSIS*

[24] It is common ground that, as a question of law, the interpretation of the Regulations by the Motions Judge is reviewable on a standard of correctness. Any questions of fact and mixed fact and law decided by the Judge are reviewable only for palpable and overriding error.

### Issue 1: Does subsection 2(1) of the Regulations defining "advertising revenues" exclude revenues earned by radio broadcasters from producing advertisements which they subsequently broadcast?

[25] It is common ground that the royalty payable by broadcasters of musical recordings to NRCC is based on a percentage of the broadcasters' "advertising revenues". The question is what

constitutes “advertising revenues” when a broadcaster both produces and airs an advertisement. This depends on the definition in the Regulations of “advertising revenues”. The starting point for this exercise is the text of subsection 2(1), which, for ease of reference, I set out again below.

| | |
|---|---|
| 2 (1) For the purposes of subsection 68.1(1) of the *Copyright Act*, “advertising revenues” means the total compensation in money, goods or services, net of taxes and of commissions paid to advertising agencies, received by a system to advertise goods, services, activities or events, for broadcasting public interest messages or for any sponsorship. | 2 (1) Pour l’application du paragraphe 68.1(1) de la *Loi sur le droit d’auteur*, « recettes publicitaires » s’entend du total, net de taxes et des commissions versées aux agences de publicité, des contreparties en argent, en biens ou en services, reçues par un système pour annoncer des biens, des services, des activités ou des événements, pour diffuser des messages d’intérêt public ou pour des commandites. |

[26] This appears a comprehensive definition of “advertising revenues”, because it embraces “the total compensation in money goods, or services” received by a broadcaster. However, those payments must be received “to advertise goods or services, activities or events”. Money, goods or services received by a broadcaster other than to advertise fall outside the statutory definition of advertising revenues.” That this was the intention of the Board is supported by the RIAS, which states:

| | |
|---|---|
| The Board also intends to exclude from the rate base revenues that are clearly not advertising revenues. The Regulations achieve this through the reference, in section 1, to “compensations … received … to advertise goods, services, activities or events, for broadcasting public interest messages or for any sponsorship”. This excludes from the rate base ...*(b)* production revenues … | La Commission désire par ailleurs exclure de l’assiette tarifaire les revenus qui, clairement, ne sont pas des recettes publicitaires. Le règlement y arrive en parlant, à l’article 1, de « contreparties … reçues … pour annoncer des biens, des services, des activités ou des événements, pour diffuser des messages d’intérêt public ou pour des commandites », ce qui exclut<br>[… ]<br>*b)* les recettes de production, … |

[27] Thus, a broadcaster's revenue that is attributable to the provision of production services is excluded from the rate base. Indeed, as the RIAS makes clear (at p. 2591), the Board specifically rejected the position advanced by industry organizations during the consultative process that

> … the rate base include revenues derived from the production of commercial announcements as well as revenues derived from renting or leasing facilities or personnel for such productions.

[28] Production revenues are thus clearly excluded from the rate if a broadcaster created and produced an advertisement for an advertiser but, for whatever reason, did not broadcast it. The same may also be the case when a broadcaster both produces and airs an advertisement. However, this is a more problematic situation because none of the revenue received by the broadcaster following the airing of the advertisement is necessarily attributable to the production of the advertisement. The characterization of revenue is a largely factual issue that must be determined at trial.

[29] Thus, for example, if it were proved that broadcasters charge advertisers or their agents the same fee for air time, regardless of whether they also produce the advertisement, this might indicate that they do not earn production revenue under a turn-key contract. Conversely, if the fair market value of the air time sold by a broadcaster under a turn-key contract is less than the amount billed, it may be inferred that the difference represents production revenue. The terms of the contract may also be relevant in this regard, although I note that the Appeal Book does not contain a copy of a turn-key contract. On the other hand, I would think that the form of a broadcaster's invoice (that is, one fee or two separate fees) is unlikely to be determinative of the source of revenue.

[30] As I have already indicated, the Judge's error was, with all respect, to assume that because a broadcaster incurs costs in producing an advertisement, and thereby saves the advertiser the expense of producing the advertisement itself or engaging an agency to produce it, the broadcaster receives revenue attributable to production, as opposed to advertising.

[31] Moreover, if a broadcaster that has provided its services under a turn-key contract cannot establish that it has production revenue, subsection 2(1) does not permit it to reduce its "advertising revenues" by subtracting costs incurred in producing an advertisement. This is because "advertising revenues" is defined as the total compensation received to advertise "net of taxes and of commissions paid to advertising agencies". Having specifically identified two types of cost that may be deducted from "advertising revenues", the Board cannot be taken to have impliedly permitted the deduction of others, including production costs.

[32] The only statutory objective that counsel for NRCC argued was relevant to the interpretation of subsection 2(1) of the Regulations was the provision in subsection 19(1) of the *Copyright Act* that the makers and performers of a sound recording of musical works are entitled to be paid "equitable remuneration" for their broadcast to the public. This is consistent with the overall objective of the *Copyright Act*, namely, to strike an appropriate balance between the public interest in encouraging dissemination of works and providing just rewards to their creators. This means, counsel said, that subsection 2(1) should not be interpreted in a way that unduly skews the scheme in favour of either broadcasters or neighbouring rights holders.

[33] In addition, he emphasised as a contextual consideration, the fact that the only right available to performers and makers of sound recordings of musical works with respect to the broadcasting of the recordings is the statutory right to “equitable remuneration”. He argued that the Regulations should therefore be interpreted in a generous manner.

[34] In my opinion, the statutory objective of ensuring that performers and makers of sound recordings receive equitable remuneration is too general to be of assistance in interpreting subsection 2(1) and, in any event, no evidence was led to establish whether the broadcasters’ view of its interpretation would result in remuneration that was not “equitable”.

[35] To summarize, the definition of “advertising revenues” in subsection 2(1) does not include production revenues. Whether a broadcaster who has both produced and aired an advertisement under a turn-key contract has production revenue is a question of fact, to be determined on all the evidence. It cannot simply be inferred from the fact that the broadcaster has incurred costs in producing the advertisement.

**Issue 2: Does subsection 2(2) of the Regulations permit a broadcaster to exclude from the rate base the fair market value of the production services rendered under a turn-key contract?**

[36] Again, for ease of reference, I reproduce the text of this short subsection.

| | |
|---|---|
| 2 (2) For the purpose of calculating advertising revenues, goods and services shall be valued at fair market value. | 2 (2) Aux fins du calcul des recettes publicitaires, les biens et services sont évalués à leur juste valeur marchande. |

[37] The broadcasters say, and the Motions Judge agreed, that this provision applies not only to goods and services received by broadcasters as compensation in kind for airing an advertisement, but also to goods and services that broadcasters supply to advertisers. Hence, they argue, for the purpose of calculating "advertising revenues" the fair market value of the production services provided under a turn-key contract may be deducted. This interpretation is supported by the RIAS, which states:

| | |
|---|---|
| Section 1 and paragraph 2*(a)* [i.e. subsections 2(1) and 2(2) of the Regulations] of the Regulations, when read together, also allow a system to exclude from the rate base the fair market value of the production services provided under a "key in hands" contract pursuant to which the system provides both advertising and production services. | L'article 1 et l'alinéa 2*a)* [paragraphes 2(1) et 2(2) du règlement] du règlement, lus ensembles, permettent au système d'exclure de l'assiette tarifaire la juste valeur marchande des services de production fournis dans le cadre de contrats « clés en mains », en vertu desquels le système fournit des services de production autant que de publicité. |

A "key in hands" contract is what I refer to in these reasons as a "turn-key contract".

[38] Despite this evidence of the Board's intention, the Regulations as drafted cannot be interpreted as implementing it. In my respectful view, subsection 2(2) applies only to goods and services received by a broadcaster as the whole or part of the total compensation paid to it to advertise. Subsection 2(2) thus prevents a broadcaster from placing an artificially low value on those items in order to minimise the amount of "advertising revenues" that it has received, and thus to reduce the base on which the royalty fixed by the Board is calculated. I say this for the following three reasons.

[39] First, subsection 2(1) expressly includes goods and services in the “total compensation” paid in kind to a broadcaster for airing an advertisement that constitutes “advertising revenues”. Subsection 2(2) deals with an obvious problem left open by subsection 2(1), namely, the valuation of those goods and services. Second, subsection 2(2) does not say that the fair market value of a broadcaster’s production services may be deducted from “advertising revenues” as defined in subsection 2(1). It merely prescribes how they are to be valued for the purpose of calculating advertising revenues.

[40] Third, as I have already noted, in defining “adverting revenues” subsection 2(1) permits only taxes and commissions paid to adverting agencies, not production costs, to be deducted from the total compensation received by a broadcaster for advertising. To interpret subsection 2(2) as permitting a broadcaster who has entered into a turn-key contract, but is unable to prove that it has production revenue, to subtract from its advertising revenues the fair market value of its production services would, in effect, enable a broadcaster to do indirectly what subsection does not allow to be done directly. Such an interpretation would, in my opinion, be inconsistent with the text and structure of section 2.

## *F. CONCLUSIONS*

[41] For these reasons, I would allow the appeal, set aside the order of the Motions Judge, and grant a declaration in the following terms.

> The *Regulations Defining "Advertising Revenues"*, SOR/98-447 permits radio broadcasters to exclude from "advertising revenues" upon which they must pay royalties under *NRCC 1998-2002 Radio Tariff* and the *SOCAN-NRCC Commercial Radio Tariff 2003*-2007 any revenues that they derive from the production of advertisements. However, the mere fact that radio broadcasters incur costs in the production of advertisements under turn-key contracts or that their service is of value to advertisers does not prove that broadcasters have production revenues which must be excluded from "advertising revenues".

I would award the appellants their costs in this Court, but award none in the Federal Court.

"John M. Evans"
J.A.

"I agree
M. Nadon J.A."

"I agree.
J.D. Denis Pelletier J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | A-581-08 |
| **(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE ZINN OF THE FEDERAL COURT DATED OCTOBER 24, 2008, FILE NO. T-1439-07)** | |
| **STYLE OF CAUSE:** | Neighbouring Rights Collective of Canada v. Astral Media Radio Inc., CTV Limited, Corus Entertainment Inc., Rogers Media Inc., and Standard Radio Inc. |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | November 9, 2009 |
| **REASONS FOR JUDGMENT BY:** | Evans J.A. |
| **CONCURRED IN BY:** | Nadon and Pelletier JJ.A. |
| **DATED:** | January 18, 2010 |

**APPEARANCES:**

| | |
|---|---|
| Glen A. Bloom | FOR THE APPELLANT |
| Mark Hayes | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Osler, Hoskin & Harcourt LLP<br>Ottawa, Ontario | FOR THE APPELLANT |
| Hayes Elaw LLP<br>Toronto, Ontario | FOR THE RESPONDENT |