Federal Court of Appeal | Cour d'appel fédérale

Date: 20100902

Docket: A-521-07

Citation: 2010 FCA 221

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

BETWEEN:

ENTERTAINMENT SOFTWARE ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION OF CANADA

Applicants

and

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA

Respondent

and

CMRRA/SODRAC INC.

Interveners

Heard at Montréal , Quebec, on May 3, 2010.

Judgment delivered at Ottawa, Ontario, on September 2, 2010.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

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

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] This is the last in the series of applications for judicial review generated by the Copyright Board's (the Board) decision with respect to music on the Internet. This application is brought by the publishers of entertainment software who take issue with a number of the Board's conclusions. The Board's decision as to the liability of internet game sites to a tariff is found in its decision dated

October 18, 2007 (the Tariff 22.A Decision) while the specifics of the tariff itself are found in the Board's decision dated October 24, 2008 (the Tariff 22 B to G Decision), specifically, that portion of the decision dealing with Tariff G – Game Sites. On this application, only the Tariff 22.A Decision is in issue.

[2] The applicants, the Entertainment Software Association and the Entertainment Software Association of Canada (collectively, ESA), are industry associations which represent most of the publishers of interactive entertainment software products in North America. The Society of Composers, Authors, and Music Publishers of Canada (SOCAN) is a collective society which administers in Canada performing rights and the right to communicate musical works to the public by telecommunication. The interveners CMRRA/SODRAC are collective societies which administer the right to reproduce protected musical works in Canada. For all intents and purposes, the interveners support the position taken by SOCAN. As a result, references to SOCAN should be taken as a reference to the respondents and the interveners.

[3] ESA argues that the Board erred in finding that the download of a video game which includes music is a communication of that music to the public by telecommunication as provided in paragraph 3(1)(f) of the *Copyright Act*, R.S.C. 1985, c. C-42 (the Act). ESA also argues that the Board erred in certifying Tariff 22.G when SOCAN submitted no evidence to show that the tariff was just and equitable, as required by the Act. Finally, ESA pleads that the Board erred in rejecting or failing to give effect to its evidence as to industry practice with respect to securing rights to the

musical content of electronic games. It says that the Board's failure to give effect to that evidence will result in double compensation for those who composed the music.

[4] In my view, ESA's arguments are not well founded. As a result, and for the reasons which follow, I would dismiss the application for judicial review.

THE FACTS

[5] The Board summarized ESA's evidence as follows:

> The use of music in online video games and on game publishers' sites is marginal. Video games consist of millions of line of software code which, when played by the end user, process the data entered by the user and generate an audiovisual output. That output is generally comprised of many components, including images of the playing environment, characters and objects as well as full motion video segments, narrative text and voice over, and sound effects. The music component of a video game typically consists of a minute portion of the overall audiovisual output and, in ESA's submission, an equally negligible piece of the overall software program that is a video game. Between 0 and 5 per cent of the development budget of games can be attributed to music. Generally a video game publisher will enter into an agreement with a third-party rights holder to provide the music for incorporation into the video game. ESA argues therefore that the rights holders are fully compensated in advance of the game's publication.
>
> Tariff 22.A Decision at paragraph 75.

[6] ESA put before the Board a number of sample agreements used by some of its members in support of its position that rights holders were already fully compensated.

.

THE DECISION UNDER REVIEW

[7] The Board dealt with ESA's arguments at paragraphs 122 to 126 of the Tariff 22.A Decision.

[8] The Board dismissed ESA's argument that game software is not music even though it may contain musical segments. It held that the transmission of games over the Internet involved the transmission of the music incorporated in the games just as the transmission of a television program containing music was a simultaneous transmission of the music contained in the television program.

[9] As for the argument that ESA members have acquired all the rights for which the tariff is intended the rights holders, the Board found that, given the difference between Canadian and American copyright law, ESA's members have not acquired the rights which they thought they acquired.

[10] ESA argued before the Board that SOCAN had not led sufficient evidence to allow the Board to establish a just and equitable tariff. The Board also dismissed this argument. It proceeded from the basis that SOCAN was entitled to a tariff. The absence of evidence may well be relevant to the amount of the tariff but not to the right to establish a tariff. Similarly, there is no *de minimis* rule according to which a tariff could only be certified if a certain threshold of musical content was reached.

[11] Finally, the Board rejected the argument that the issue of compensation for rights holders ought to be dealt with by means of contracts between SOCAN and music users such as ESA's members. It held that the nature of the SOCAN regime precluded this possibility, referring to one of its prior decisions in which it discussed the issues raised in that approach.

[12] In the end, the Board dismissed all of ESA's arguments against the establishment of a tariff.

STATEMENT OF ISSUES

[13] In this Court, as it did before the Board, ESA challenged the determination that downloads of music were communication of that music to the public by telecommunication as provided in paragraph 3(1)(*f*) of the Act. That issue was disposed of by this Court in a decision released concurrently with this one, *Bell Canada et al. v Society of Composers, Authors, and Music Publishers of Canada*, 2010 FCA 220 (*Bell Canada*) in which this Court carefully reviewed the Board's decision and the applicable jurisprudence and concluded that the download of a music file or a stream did, in fact, constitute a communication of that musical work to the public by telecommunication and dismissed those applications for judicial review. As this application was consolidated with those disposed of in Bell *Canada*, the conclusions in that case are also binding on ESA. As a result, I do not propose to deal with that issue again in these Reasons.

[14] The remaining issues raised by ESA can be stated as follows:

1- Did the Board err in finding that video game sites were subject to a tariff with respect to the communication of musical works to the public, given the minor role which music plays in video games?

2- Did the Board err in certifying a tariff when SOCAN failed to present adequate evidence to justify the reasonableness of the tariff it proposed?

3- Did the Board err in failing to consider the evidence of the contractual agreements between ESA members and music creators, in failing to properly weigh that evidence, and in failing to provide adequate reasons for failing to consider that evidence?

ANALYSIS

Standard of review

[15] The Board is a specialist tribunal which deals extensively with copyright matters. The Act is its home statute. It is therefore entitled to deference with respect to its interpretation of that Act: see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 54. The question in issue here is one of mixed fact and law. If the Board is entitled to deference on pure questions of laws, and it is entitled to deference with respect to findings of fact, it must necessarily be entitled to deference on questions of mixed fact and law involving the application of its home statute to the facts of a case.

1- Did the Board err in finding that video games sites were subject to a tariff with respect to the communication of musical works to the public, given the minor role which music plays in video games?

[16] In the Tariff 22.A Decision, the Board rejected the notion that there is a *de minimis* rule in relation to the certification of tariffs. So long as music is performed or communicated to the public by telecommunication, SOCAN is entitled to have a tariff certified in respect of that use. The amount of the tariff may well vary with the amount of use, but it is the fact of performance or communication which gives SOCAN the right to seek a tariff and justifies the Board in certifying a just and equitable tariff in respect of that use.

[17] Subsections 19(2) and 67.1(4) of the Act are reproduced below:

19. **(**1) Where a sound recording has been published, the performer and maker are entitled, subject to section 20, to be paid equitable remuneration	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

for its performance in public or its communication to the public by telecommunication, except for any retransmission.	ou la communication au public par télécommunication — à l'exclusion de toute retransmission — de l'enregistrement sonore publié.
(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 (a) in the case of a sound recording of a musical work, to the collective society authorized under Part VII to collect them; or (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.	(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) dans le cas de l'enregistrement sonore d'une oeuvre musicale, à la société de gestion chargée, en vertu de la partie VII, de les percevoir; b) dans le cas de l'enregistrement sonore d'une oeuvre littéraire ou d'une oeuvre dramatique, soit au producteur, soit à l'artiste-interprète.
67.1 (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 (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 (b) the recovery of royalties referred to in section 19.	67.1 (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.

[18] These dispositions make it clear that the mechanism for the collection of compensation for the performance and communication to the public by telecommunication of sound recordings is the enforcement of approved tariffs by collective societies. Without a tariff, there is, practically speaking, no right to compensation. Such a regime does not lend itself to the application of a *de minimis* rule. The Board's conclusion on this issue is reasonable.

2- Did the Board err in certifying a tariff when SOCAN failed to present adequate evidence to justify the reasonableness of the tariff it proposed?

[19] ESA argued that the Board erred in certifying a tariff when SOCAN did not present evidence to justify the "fair and equitable" character of the tariff. The Board has previously rejected arguments of this nature. In *Re Statement of Royalties to be collected for Performances or Communication by Telecommunication, in Canada, of Musical or Dramato-Musical Works in 1994, 1995, 1996, and 1997*, (1997) 71 C.P.R. (3d) 199, the Board wrote at p. 202:

> As the Board has stated several times, the ordinary rules relating to evidence and the burden of proof do not apply. SOCAN is entitled to a tariff. Users cannot expect the Board to abolish a tariff merely because, in their view, SOCAN has not "proven its case" on a balance of probabilities or, as stated by counsel to the Association, "on the basis of lack of evidence."

[20] I agree with these comments. The collective administration regime depends upon the certification of tariffs. This system, which seeks to balance the rights of creators and users, cannot be hobbled by an overly rigid approach to the assessment of the basis upon which a tariff is certified. In this case, the base rate of .08 per cent of revenues was initially suggested by ESA itself and was eventually accepted by the Board. The Board's decision on this issue is reasonable.

3- Did the Board err in failing to consider the evidence of the contractual agreements between ESA members and music creators, in failing to properly weigh that evidence, and in failing to provide adequate reasons for failing to consider that evidence.

[21] ESA's argument on this point amounted to arguing, on the basis of a sample of agreements used by some of its members, that all of its members used similar agreement to secure all applicable rights from all rights holders. The difficulty with this approach was made clear by a concession made by ESA's counsel before the Board:

> THE CHAIRPERSON: You indicate in your submission and in your evidence that you don't use SOCAN's repertoire.
> MS. BERTRAND: Rarely, but it might occur.
> THE CHAIRPERSON: But it might occur?
> MS. BERTRAND: Yes, and then the reality is that if it occurs, we are there.
>
> SOCAN's Memorandum of Fact and Law, at paragraph 40.

In this context, I take "there" to mean that SOCAN would be entitled to have a tariff certified.

[22] In addition, SOCAN conceded in its Memorandum of Fact and Law that:

> To the extent that the operator of a videogame website can establish that all of the music rights with respect to the music used on its site have been cleared for use in Canada, the operator of that website would not be required to pay the SOCAN royalty and/or to obtain a SOCAN licence.
>
> SOCAN's Memorandum of Fact and Law, at paragraph 37.

[23] In this context, it is clear that ESA was overreaching when it argued, based on a sample of some contracts in use, that no tariff should be certified. In practice, in those cases where the game site operator had the right to communicate the music to the public, no royalties would be payable pursuant to any tariff certified by the Board. Where the operator could not show that it had the rights it claimed, the royalties would be payable according to the tariff.

[24] It is clear that the Board had ESA's evidence in mind in coming to the decision it did though it did not give that evidence the effect which ESA sought for it, namely, the refusal to certify a tariff. The Board's decision on the merits is reasonable.

[25] That said, the Board's laconic reasons on this point were non-responsive to ESA's argument. In my view, they would not satisfy any of the purposes identified by this Court at

paragraph 16 of *Vancouver International Airport Authority v. Public Service Alliance of Canada,* 2010 FCA 158, [2010] F.C.J. No. 809 at paragraph 16.. Notwithstanding the manifest inadequacy of the Board's reasons on this issue, I am not inclined to return this matter to the Board for better reasons with respect to this point. First, these matters have been pending before the Board since 1996. The interest in finality is substantial. Second, the deficiency in the Board's reasons relates to a single discrete issue. Finally, while the adequacy of the reasons is an independent question from the merits of the decision, there is little advantage for the parties or the Board in sending a matter back for further and better reasons where the reasonableness of the decision is apparent on its face. As a result, I would not give effect to this ground of judicial review.

CONCLUSION

[26] I would dismiss ESA's application for judicial review with costs to SOCAN. The interveners shall bear their own costs.

"J.D. Denis Pelletier"
J.A.

"I agree.
Gilles Létourneau"

"I agree.
M. Nadon"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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