Court File No.: A- -24

FEDERAL COURT OF APPEAL

B E T W E E N:

COPYRIGHT COLLECTIVE OF CANADA, CANADIAN BROADCASTERS RIGHTS AGENCY, CANADIAN RETRANSMISSION COLLECTIVE, FWS JOINT SPORTS CLAIMANTS, INC., CANADIAN RETRANSMISSION RIGHT ASSOCIATION, SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA, BORDER BROADCASTERS INC., and DIRECT RESPONSE TELEVISION COLLECTIVE INC.

Applicants

- and -

BELL CANADA, ROGERS COMMUNICATIONS INC., COGECO COMMUNICATIONS INC., VIDEOTRON LTD., TELUS COMMUNICATIONS INC., SHAW COMMUNICATIONS INC., THE CANADIAN COMMUNICATION SYSTEMS ALLIANCE and MAJOR LEAGUE BASEBALL COLLECTIVE OF CANADA INC.

Respondents

Application under s. 18, 18.1, and 28 of the *Federal Courts Act*, RSC 1985, c F-7, Part 5 the *Federal Courts Rules*, SOR/98-106, *Copyright Act*, RSC 1985, c C-42.

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicants. The relief claimed by the applicants appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicants' solicitors or, if an applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: February 9, 2024

Issued by: _____
Registry Officer

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Pursuant to Rule 133 of the *Federal Courts Rules*

APPLICATION

This is an application for judicial review of a decision of the Copyright Board of Canada (the "**Board**") dated January 12, 2024 (the "**Redetermination Decision**"). The Redetermination Decision certified a revised tariff of royalties payable by retransmitters, including the Respondents ("**BDUs**"), to the Applicants (the "**Collectives**"), for the retransmission of distant television signals in Canada for the years 2014-2018 (the "**Tariff**"). The Board's redetermination of the Tariff came after this Court's July 2021 decision (the "**JR Decision**") which granted in part the Collectives' application for judicial review of the Board's original Tariff decision dated August 2, 2019 (the "**Original Decision**"), set aside specific aspects of the Original Decision, and directed the Board to amend the original Tariff in accordance with the Court's reasons.

THE APPLICANTS MAKE APPLICATION FOR AN ORDER:

1. Setting aside the Redetermination Decision, making the correct amendments to the Board's rate calculation, substituting the correct Tariff rate(s), and directing the Board to issue a new certified Tariff in accordance with this Court's decision;

2. Alternatively, setting aside the Redetermination Decision and remitting the matter back to the Board for a further redetermination in accordance with such directions as the Court may deem appropriate;

3. Awarding the Applicants their costs of this application; and

4. Granting such further and other relief as the Applicants may request and this Honourable Court may deem just.

THE GROUNDS FOR THE APPLICATION ARE:

I. Overview

5. In its JR Decision, this Court held that the Board had made two discrete and "quite straightforward" errors in the Original Decision. Each error involved the Board's implementation of a separate step in its rate calculation methodology, and each error independently had the effect of lowering the royalties payable by BDUs to the Collectives. The first error was the Board's omission of certain BDU payments for three Canadian services. The second error was the Board's misapplication of a 25% "profit margin" adjustment based on its "flawed understanding" and "misrepresent[ation]" of BDU expert Dr. Chipty's evidence that the correct adjustment was only 10%.

6. This Court set aside the Board's decision "only to the extent of its use of the wrong pricing data in its proxy price calculation and of the wrong profit margin," and remitted the matter to the Board to calculate the effect of correcting these discrete errors. This Court noted that these corrections should not "create excessive delays" or "involve a reconsideration of the overall approach implemented by the Board", and stated:

> [84] … I trust that the Board will be able to amend its Tariff in conformity with these reasons in an expeditious way. In the meantime, the parties will be able to govern themselves and make whatever business decisions they may have to make in light of the adjustments that will be required as a result of this decision.

7. A new panel of the Board conducted the redetermination. That new panel ignored every important aspect of this Court's JR Decision. Rather than amend the Tariff "expeditiously" and without "excessive delays", as directed by this Court, the Board took almost two and a half years to issue the Redetermination Decision. More importantly, rather than correcting the two "quite straightforward" errors in the manner identified by this Court, the Board embarked on a search for *new* errors and performed *new* proxy price and profit margin analyses. In the result, the Board investigated matters that had

never been raised by any party on judicial review and — remarkably — ***reduced*** the Tariff rate even further.

8. The Board exceeded its jurisdiction on redetermination, acted unreasonably and introduced a cascade of legal, factual, and evidentiary errors into the Redetermination Decision, including by:

(1) Failing to restrict itself to the matters remitted to it by this Court;

(2) Failing to perform the redetermination in accordance with this Court's Reasons for Judgment;

(3) Addressing what it acknowledged were "areas not raised by the Parties on judicial review", and therefore addressing matters as to which it was *functus*;

(4) Stating that it would accept no new evidence, but then relying on untested and unsupported assertions of fact from the BDUs' counsel;

(5) Overriding the original Board's treatment of the expert and fact evidence; and

(6) Reinstating the 25% profit margin adjustment despite this Court's finding that that was "the ***wrong*** profit margin" and that, according to the BDUs' own expert whose evidence was relied on by the original Board, "the only correct profit margin adjustment for Canadian and U.S. proxy services would have been set at 10 percent".

9. This Court's intervention is once again needed to correct the errors of the Board.

II. Background

A. The Parties and the Distant Television Signal Retransmission Tariff

10. The Collectives are not-for-profit collective societies authorized under the *Copyright Act* to represent the rights of their copyright holder members entitled to be paid royalties for the retransmission of their members' works on over-the-air distant television signals in Canada. The Collectives represent a variety of copyright holders, including, but not limited to, thousands of Canadian and foreign broadcasters and program producers.

11. The BDUs are Canadian broadcast distribution undertakings that retransmit distant over-the-air television signals in Canada as part of cable/satellite/IPTV television subscription services that they sell to their customers.

12. Pursuant to a compulsory licencing regime established by the *Copyright Act*, RSC 1985, c C-42, the Board is required to fix royalty rates for distant signal retransmissions and to certify tariffs setting those rates and other terms and conditions.

13. The respondent Major League Baseball Collective of Canada Inc. is a collective management organization which, like the Applicants, represents the rights of certain copyright holders entitled to be paid retransmission royalties. MLB has declined to participate as an applicant in this proceeding and so has been named as a respondent pursuant to Rule 303(1)(a) of the *Federal Courts Rules*.

B. The Original Decision

14. After a fifteen-day oral hearing in 2015, the Board, on December 18, 2018, released the Tariff royalty rates it intended to certify, but stated that its reasons and a certified Tariff would follow. On August 2, 2019, the Board released its reasons, and the next day published the certified Tariff.

15. In its Original Decision, the Board adopted a methodology that involved: (i) selecting a proxy set of US and Canadian specialty services to mimic the distant signals

for which royalties were payable; (ii) calculating an initial proxy price by adding up all payments by four large BDUs to the proxy services; and (iii) applying a series of discrete downward adjustments to account for differences between the proxy services and distant signals. In the result, it held that the fair rate for the BDUs' largest systems was $1.17 per subscriber per month in each Tariff year. Owing to a procedural issue, the certified rate was "capped" at $1.06 for 2014 and $1.14 for 2015.

C. Judicial Review of the Original Decision

16. The Collectives and BDUs both sought judicial review of the Original Decision. Neither application disputed the Board's basic methodology; instead, each asserted errors in how that methodology was implemented.

17. This Court dismissed the BDUs' application. However, this Court granted the Collectives' application as to the two following errors made by the Board, each of which improperly lowered the certified royalty rates:

(a) The Board mistakenly relied on an out-of-date version of the payments to the proxy services that omitted certain payments to the three Canadian proxy services. This effectively reduced the initial proxy price and therefore the ultimate royalty rate; and

(b) The Board used the wrong profit margin figure. In particular, the Board used an incorrect 25% adjustment for the Canadian proxy services, when the evidence was that for those services the profit margin was only 10%. The Board compounded that error by then applying the incorrect 25% margin to the US proxy services as well, by misunderstanding, and despite expert evidence from the BDUs' witness Dr. Chipty that the appropriate adjustment for those services was also 10%.

18. This Court's Judgment provided:

> The Board's decision is set aside ***only*** to the extent of its use of ***the wrong pricing data*** in its proxy price calculation and of ***the wrong profit margin***. The matter is therefore remitted to the Board for redetermination of the rates ***in accordance with these reasons***. [emphasis added]

III. The Redetermination Decision

19. Despite this Court's exhortation for the Board to "amend its Tariff in conformity with these reasons in an expeditious way", the Board instead launched a protracted and flawed redetermination process, leading to the Redetermination Decision in which the Board committed a series of legal, factual, and procedural errors.

20. The redetermination process was carried out by a new panel of the Board (the terms of the original panel members having long since expired).

21. The new panel of the Board ruled that the redetermination would be confined to the existing record from the original tariff proceeding, and that the parties could not introduce any new evidence.

22. The Board issued the Redetermination Decision on January 12, 2024, nearly two and a half years after this Court ordered that it "amend its Tariff in conformity with [this Court's] reasons in an expeditious way". Despite being directed by this Court to fix two specific errors that had improperly reduced the royalty tariff rate, the Board ***further*** reduced the rate for the largest systems from $1.17 to $1.12.

A. Pricing Data Issue

23. The Board addressed the error found by this Court and added in the payments to Canadian proxy services that it had erroneously omitted in the Original Decision. This adjustment alone raised the appropriate Tariff rate to $1.20.

24. However, the Board then went on to reconsider certain payments to US proxy services and removed what it believed were payments that were double counted in the Original Decision. It did so without evidence of any prior error, but rather based on factual assertions made by the BDUs' counsel because, according to the Board, his clients "are in a good position to understand the meaning of the data they provided". The BDUs had not asserted any such double counting error in their unsuccessful application for judicial review, and did not seek leave to appeal this Court's JR Decision to the Supreme Court with respect to any aspect of the pricing data issue. The Board candidly acknowledged that "we are correcting the calculation of the proxy price in the Original Decision in areas not raised by the Parties on judicial review", but stated that it could not "purposefully ignore apparent errors".

25. The US service payments that were removed (without any error having been raised previously on judicial review) exceeded the Canadian service payments that were added (as a result of judicial review), thus leading to a net reduction in the Tariff rate established in the Original Decision.

B. Profit Margin Issue

26. Consistent with this Court's JR Decision, the Board applied a 10% profit margin adjustment to the Canadian proxy services. However, despite this Court's finding that the 25% margin was "wrong", the Board reapplied it to the US proxy services. Because the proxy set is overwhelmingly made up of US services, the net effect of applying the "wrong" 25% profit margin to those services was to leave the overall profit margin adjustment essentially unchanged.

27. The Board arrived at this result through a series of findings:

(a) Although accepted as an expert and relied on by the original panel of the Board in the Original Decision, the new panel of the Board doubted Dr. Chipty's expertise;

(b) The new panel of the Board also rejected Dr. Chipty's assessment of the profit profiles of the US proxy services and substituted its own different view; and

(c) The new panel of the Board (*unlike the original Board)* relied on an assortment of "10K" financial reports of US media companies and third party "blog" articles commenting on the finances of US media companies, all of which Board staff apparently found online after the evidentiary phase of the 2015 rate hearing had closed.

IV. The Board's Errors

A. The Missing Data

28. The Board made multiple reviewable errors in reviewing and changing the payments reported to have been made to US proxy services:

(a) The Original Decision was set aside "only" as to the use of "the wrong pricing data". The only pricing data alleged, and found, to have been wrong were the omitted payments to Canadian proxy services. The Board lacked jurisdiction to conduct a redetermination beyond what was remitted to it by this Court;

(b) For the same reasons, the Board was *functus officio* as to the US service payments. The Board lacked jurisdiction to examine alleged errors from the Original Decision that had not been made the subject of an application for judicial review. Put differently, the Board had no authority, statutory or otherwise, and was not entitled, to conduct a judicial review of its own decision;

(c) The Board erred in allowing the BDUs to re-litigate an issue (the payments made to US proxy stations) that had been finally concluded in the Original Decision and as to which no judicial review had been sought. This was

contrary to the principle of issue estoppel and amounted to an abuse of process; and

(d) The Board's removal of certain US service payments was unreasonable in that it was made in the face of existing sworn evidence, without new evidence, and on the strength of unsworn and unsupported assertions from the BDUs' counsel which the Board treated as though they were evidence.

B. The Profit Margin Adjustment

29. Similarly, the Board made multiple errors in reasserting the 25% profit margin adjustment for US proxy services that was set aside by this Court in the JR Decision:

(a) The JR Decision clearly found that the 25% adjustment was the "wrong profit margin", and that the only available evidence justified a 10% adjustment instead. The Board was directed to redetermine the royalty rate in accordance with this Court's Reasons for Judgment. The Board failed to do so and thereby acted without jurisdiction;

(b) The Board lacked jurisdiction to ignore this Court's Reasons for Judgment and to instead conduct and provide an entirely new *de novo* analysis of the Profit Margin adjustment that was not part of the Original Decision and had not been made part of an application for judicial review;

(c) The Board acted unreasonably in effectively disqualifying the BDUs' witness Dr. Chipty as an expert witness, and in again disregarding, misunderstanding and/or misrepresenting her evidence, including by:

(i) misstating Dr. Chipty's qualifications, rejecting her expertise and reweighing her evidence, all without the new panel of the Board having been present at or part of the hearing at which she testified; and

(ii) confusing the (irrelevant) vertical integration of some US proxy services into US conglomerates with the (relevant) ***non***-integration of those services with ***Canadian BDUs***; and

(d) The Board acted unreasonably in relying on an assortment of staff-sourced documents to reach conclusions about profitability that were beyond any expertise it might have and without any opinion or other evidence to support the documents' significance or meaning. Not only did the original Board panel not rely on these documents for the purposes of its assessment of the profit margin adjustment, the new Board panel misunderstood and misrepresented the original Board panel's use of these documents.

V. Remedy: Substitution of a Rate vs Remitting for Further Redetermination

30. This rate proceeding has now been underway for almost 11 years. The period to which the Tariff applies *ended* over five years ago. The sequence of events is as follows:

(a) **March 2013**: the Collectives filed a proposed Tariff for 2014 to 2018. This Tariff is the subject of this application and remains unsettled.

(b) **January 1, 2014**: commencement of the 2014-2018 Tariff period.

(c) **2015-2016**: presentation of the parties' evidence and witnesses, including numerous expert witnesses, at an oral hearing that took place over 15 days in 2015 and 2016 – the record was closed in the latter part of 2016.

(d) **December 18, 2018**: the Board released the 2014-2018 Tariff royalty rates.

(e) **January 1, 2019**: commencement of the Collectives' 2019-2023 Tariff period. The Board has not yet begun a rate proceeding with respect to this period.

(f) **August 2, 2019**: the Board released its Original Decision.

(g) **July 22, 2021**: this Court released the JR Decision.

(h) **March 24, 2022**: the Supreme Court dismissed the BDUs' application for leave to appeal of the JR Decision.

(i) **January 1, 2024**: commencement of the Collectives' 2024-2028 Tariff period. The Board has not yet begun a rate proceeding with respect to this period.

(j) **January 12, 2024**: the Board released its Redetermination Decision.

31. In its JR Decision, this Court declined the Collectives' request that this Court substitute its own decision for that of the Board and make the adjustments that should properly have been made based on the evidence. This Court observed that "the two errors identified by this Court in assessing the adjustment to the proxy price, namely the use of an incomplete and superseded version of the payment data as well as the use of the wrong profit margin figure, are quite straightforward and do not involve a reconsideration of the overall approach implemented by the Board." This Court went on to acknowledge the pernicious effects of delay, and its expectation that the redetermination would be conducted expeditiously:

> [84] I understand that the retransmission royalty rates for the period 2014–2018 were only released in December 2018, and that the Tariff was only approved and published on August 3, 2019. We are now, in effect, reconsidering royalty rates that should have applied between three and seven years ago. **This long delay is obviously of concern, and is the source of uncertainty for all the players involved. I trust that the Board will be able to amend its Tariff in conformity with these reasons in an expeditious way.** In the meantime, the parties will be able to govern themselves and make whatever business decisions they may have to make in light of the adjustments that will be required as a result of this decision. [emphasis added]

32. However, the redetermination was not "expeditious", nor did the Board treat the errors and their effects as "quite straightforward". The parties were not able to "govern themselves and make … business decisions" as was contemplated. Having tried remitting the matter to the Board once, without success, this Court should now substitute its own decision as to these two straightforward issues.

VI. Other Grounds

33. Sections 18, 18.1, and 28 of the *Federal Courts Act*, RSC 1985, c F-7, the *Copyright Act*, RSC 1985, c C-42, and such other legislation, regulations and rules as the Applicants may advise and this Honourable Court may permit.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

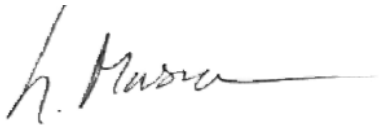
34. The Original Decision, the JR Decision, the Redetermination Decision, and the Certified Tariff.

35. Materials filed in the course of the Board's proceeding relating to the issues raised in this application, to be filed as part of the Applicants' record.

36. Rulings, notices, and decisions of the Board relating to the issues raised in this application, to be filed as part of the Applicants' record.

37. Such further and other materials as counsel may advise and this Honourable Court may permit.

Dated at Toronto this 9th day of February, 2024



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