Date: 20081024

Docket: T-1439-07

Citation: 2008 FC 1198

Ottawa, Ontario, October 24, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

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

Plaintiffs

and

**SOCIETY OF COMPOSERS, AUTHORS AND
MUSIC PUBLISHERS OF CANADA and
THE NEIGHBOURING RIGHTS COLLECTIVE OF CANADA**

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] The *Regulations Defining "Advertising Revenues"* don't quite live up to their name.

[2] The fundamental issue between the parties is whether a radio station that both produces and broadcasts an advertisement for a client under a turn-key contract is permitted to exclude the value of the production services it provided from the calculation of its advertising revenues.

[3] For the reasons that follow, I am of the view that the value of production services in such a situation is not included in "advertising revenues," and accordingly, I grant summary judgment to the Plaintiffs by way of a declaration to that effect.

Background

[4] The Plaintiffs are all commercial radio broadcasters operating and broadcasting at locations across Canada pursuant to licences issued by the Canadian Radio-television and Telecommunications Commission.

[5] The Defendant, Society of Composers, Authors and Music Publishers of Canada (SOCAN), is a collective society referred to in section 67 of the *Copyright Act*, R.S.C. 1985, c. C-42. SOCAN grants licences and collects royalties for the benefit of music composers and publishers. The Defendant, The Neighbouring Rights Collective of Canada (NRCC), is also a collective society referred to in section 67 of the *Copyright Act*. NRCC grants licences and collects royalties for the benefit of music performers and sound recording owners.

[6] The Plaintiffs broadcast music that is subject to the payment of royalties to SOCAN and NRCC. Pursuant to section 67.1 of the *Copyright Act*, both SOCAN and NRCC file proposed tariffs that set out the royalties to be paid by the Plaintiffs and others who broadcast musical works, performers' performances, and sound recordings to the public. The tariffs proposed by the Defendants are subject to review and approval by the Copyright Board of Canada. Once approved, they are published in the *Canada Gazette*.

[7] Pursuant to section 68.1 of the *Copyright Act*, NRCC's approved tariffs were calculated based on the "advertising revenues" of radio broadcasters. That section authorized the Board, by regulation, to define "advertising revenues". Prior to 2003, SOCAN's approved tariffs relating to commercial radio were based on the "gross revenues" of those broadcasters. In 2005, the Copyright Board certified a combined, single tariff for the royalties payable to SOCAN and NRCC with respect to the years 2003-2007 ("the 2005 decision"). The harmonized tariff was to be based on advertising revenues as defined in the *Regulations Defining "Advertising Revenues"*, SOR/98-447 ("the Regulations"). Although nothing in this case turns on it, the 2005 decision was quashed by the Federal Court of Appeal for insufficiency of reasons: See *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada et al*, 2006 FCA 337. Accordingly, the 2003-2007 commercial radio tariffs were re-certified by the Copyright Board by decision dated February 22, 2008, with no variation but with better reasons.

[8] The relevant portions of the Regulations are as follows:

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.

The Regulations were promulgated by the Copyright Board in 1998 and published in the *Canada Gazette* Part II, Vol.132, No.19.

[9] Prior to promulgating the Regulations, the Copyright Board by notice dated September 24, 1997, issued a draft definition of "advertising revenues" which it described as Proposed Regulations and Comments. The draft was circulated to interested parties for comment. The wording of the Proposed Regulations differed slightly from those which were ultimately promulgated in 1998. The relevant portions of the Proposed Regulations read as follows:

1. "Advertising revenues" means the total value, net of taxes and of commissions paid to advertising agencies, of compensations, whether in monies, goods or services, received by a wireless transmission system to advertise goods, services, activities or events, for broadcasting public interest messages or for any sponsorship.	1. «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 de transmission par ondes radioélectriques 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 purposes of these regulations,	2. Pour les fins du présent règlement:
(a) goods and services are valued at their fair market value;	(a) les contreparties en biens et services sont évaluées à leur juste valeur marchande;
…	…

[10] The Regulations, when promulgated and published, were accompanied by a Regulatory Impact Analysis Statement (RIAS). The RIAS which was published with the Regulations references the section numbering of the Proposed Regulations rather than the section numbering of the Regulations as they were published in the *Canada Gazette*. The RIAS states, among other things, that:

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 excludes from the rate base (*a*) subscription revenues, (*b*) production revenues and, (*c*) revenues for leasing personnel or space for the purposes of production.	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 *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	Quant aux contreparties en nature, le paragraphe 2*a*), en prévoyant que les biens et services sont évalués à leur

value, is sufficient to deal fairly with all the other concerns raised in this respect.	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)

The reference in the RIAS to a “key in hands” contract is a reference to what is more commonly known in English as a “turn-key” or “bundled” contract.

[11] Commercial radio broadcasters air advertisements. Their customers are either advertising agencies (“ad agencies”) who are seeking to purchase air time for their clients, or they are the businesses themselves that are the subject of the ads (the “advertisers”). This action deals with the revenue radio stations receive directly from advertisers.

[12] Advertisers may come to the broadcaster seeking air time with air-ready materials in hand, just as the ad agencies do. Alternatively, advertisers may come to the broadcaster seeking air time without air-ready materials in hand. In the latter instance, they are seeking the assistance of the broadcaster to produce the material for them. These are the turn-key contracts referenced above. The evidence is that

radio stations quote and bill a single fee to advertisers to produce and air a commercial. The expenses and costs incurred by the station in producing the advertisement are not broken down or billed separately to the advertiser, nor are they accounted for separately by the station. The compensation received by radio stations in connection with these expenses and costs is referred to as production revenue.

[13] Prior to the 2005 decision, the Plaintiffs had been calculating their royalty payments on the basis of the full amount received under advertising contracts, including the value of any related production services provided by the broadcaster itself. After the 2005 decision, the Plaintiffs concluded that the revenue base used to calculate royalties payable to NRCC and SOCAN should exclude the costs of any production services provided to advertisers. Based on this interpretation of the Regulations, the Plaintiffs consider that they have overpaid royalties to NRCC since 1998 and to SOCAN since 2003.

[14] Notwithstanding the Plaintiffs' view that they had miscalculated the required royalty payments and are overpaying the Defendants, the Plaintiffs have continued to pay royalties on the full amount of revenue received under advertising contracts, out of concern that a unilateral deduction of production revenues could expose them to an action under subsection 38.1(4) of the *Copyright Act*. That section provides a collective society with a rather extraordinary remedy where a party has not paid "applicable royalties". It provides that in lieu of other remedies, the collective may elect an award of statutory damages in a sum of not less than three and not more than ten times the amount of the applicable royalties, as the court considers just. While the Plaintiffs say that they are confident in their interpretation that production costs are to be deducted from the total revenues received for turn-key

advertising contracts, they are not confident enough to risk an award of damages of this magnitude if they are in error.

[15] Since February of 2006 the parties have been in negotiations over the calculation of advertising revenues. The Defendants have maintained that no deduction of a radio stations' production costs is to be made from the advertisement revenue it receives.

[16] In July of 2006, one of the Plaintiffs, Standard Radio Inc., hoping to resolve the dispute, applied to the Copyright Board for an interpretation of the *Regulations Defining "Advertising Revenues"*. On November 30, 2006, the Board dismissed the application on jurisdictional grounds.

[17] Vice-Chairman Stephen J. Callary wrote a concurring decision in which he agreed that the Board had no jurisdiction to issue the ruling sought, but nonetheless went on to provide his comments on the interpretation dispute, writing that "[i]n my opinion, the fair market value of production services can be deducted from revenues obtained from turnkey contracts (…)" Mr. Callary was the Chair of the Panel of the Board that rendered the 2005 decision.

[18] The present proceedings were initiated by the Plaintiffs in August of 2007. In this action the Plaintiffs seek only the following relief:

> a. A declaration that the *Regulations Defining "Advertising Revenues,"* SOR/98-447, permit radio broadcasters to deduct the fair market value of any production services that are provided to advertisers from the advertising revenues 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*; and

b. Such further and other relief and orders as may be necessary to implement any such declaration made by the Court.

[19] SOCAN brought a motion to strike the Statement of Claim on grounds that this Court was without jurisdiction to grant the requested relief. They were unsuccessful. In her Reasons for Order dated December 3, 2007, Prothonotary Milczynski held that "it is not plain and obvious that the Federal Court does not have jurisdiction pursuant to section 20 of the *Federal Courts Act* and section 37 of the *Copyright Act* to determine the issues raised in the Statement of Claim or grant the relief sought".

[20] The Defendants then filed their Statements of Defence. Both counterclaimed for (a) a declaration that the Regulations require the inclusion of all amounts received under turn-key contracts in the calculation of "advertising revenues", and (b) alternately, if the Court finds that the Plaintiffs are entitled to deduct the fair market value of production services from their respective advertising revenues, declarations relating to the accounting for the fair market value of airtime associated with turn-key contracts and a methodology for calculating the same. In their January 21, 2008 Statements of Reply and Defence, the Plaintiffs submit that there is no basis in law or fact for the declaratory relief sought in the counterclaims.

[21] The present motion for summary judgment is supported by the affidavit evidence of Gary Maavara, VP and General Counsel of Corus Entertainment Inc, one of the Plaintiffs. His testimony relates to historic royalty rates, turn-key contracts, and the timeline of the broadcasters' dispute with SOCAN and NRCC.

[22] For its part, SOCAN filed an affidavit from Mr. Rob Young, a media consultant with PHD Canada. Mr. Young's affidavit deals primarily with the ways in which radio stations earn advertisement revenue and the types of contracts into which they enter. He states that based on his knowledge, "radio stations do not charge a separate or additional fee to direct advertisers for the production of their commercials as part of turn-key contracts. The direct advertiser with an air-ready commercial is charged the same amount for an equivalent buy as a direct advertiser seeking a turn-key contract."

[23] NRCC filed an affidavit from Mr. Alan Mak, an accountant with the firm Rosen & Associates. Mr. Mak attests that from an accounting perspective, "revenue is not defined according to the types of costs that are incurred. Revenues (or sources/types of income) are identified and attributed for accounting purposes to the appropriate revenue description activity," and that "it is not clear that the Plaintiffs earn revenues from production services, as distinct from advertising revenue".

Issues

[24] The parties have raised a number of issues:

a. Does this Court have jurisdiction to determine the Plaintiffs' action?

b. Has the test for summary judgment under Rule 213 of the Federal Courts Rules been met or are there genuine issues requiring a trial?

c. Should the Court exercise its discretion not to grant declaratory relief?

d. What evidence is appropriate for the Court to consider in determining the proper interpretation of the Regulations?

e. What is the proper interpretation of the Regulations?

Analysis

Does this Court have jurisdiction to determine the Plaintiffs' action?

[25] The Defendants submit that this Court has no jurisdiction to grant the relief sought by the Plaintiffs. They argue that jurisdiction resides exclusively with the Federal Court of Appeal pursuant to section 28 of the *Federal Courts Act.* The argument advanced by the Defendants may be summarized in the following statements.

a. The declaration will have application beyond the interests of the Plaintiffs.

b. It is relief in which both the Copyright Board and the Attorney General of Canada have a legitimate interest.

c. If the claim for declaratory relief was brought in a provincial Superior Court, its practice may or may not provide for participation by the Copyright Board and the Attorney General of Canada.

d. Parliament has avoided this potential anomaly through the enactment of sections 18, 18.1 and 28 of the *Federal Courts Act* which provide for the grant of declaratory relief against federal boards, commissions and tribunals by way of application for judicial review.

e. On a judicial review application service on the Attorney General is required and both he and the Copyright Board may participate.

f. The Copyright Board is a federal board identified in subsection 28(1) of the *Federal Courts Act* and therefore exclusive jurisdiction to grant the relief sought lies exclusively with the Federal Court of Appeal.

[26] There are more than a few flaws in this submission. However, the submission fails for one fundamental reason: the Plaintiffs are not seeking relief against the Copyright Board or a review of its decision; they are seeking an interpretation of a regulation. This is not a proceeding in the nature of judicial review which would engage the Federal Court of Appeal's jurisdiction under section 28 of the *Federal Courts Act.* The Court is not being called upon to exercise any kind of supervisory jurisdiction, nor is the action a collateral attack on a decision of the Copyright Board, as was the case in *SOCAN v. Maple Leaf Sports and Entertainment*, 2005 FC 640, where it was found that the pleadings could only be pursued by way of judicial review. I agree entirely with the Plaintiffs' submission that "if the interpretation of a regulation is a ruling "against" the delegate who promulgated the regulation, then, according to the Defendants, section 18 of the *Federal Courts Act* would require that no federal regulation could ever be interpreted except by judicial review and both the delegate and the Attorney General would have to be a party to every proceeding in which such an interpretation was made".

[27] The Defendants also advanced an argument that what was being sought by the Plaintiffs fell under subsection 18.1(4)(c) of the *Federal Courts Act*, because it was really a claim that the Copyright Board had "erred in law in making a decision or an order, whether or not the error appears on the face of the record". As the Plaintiffs were quick to point out, they are not in any way suggesting that the Board made any error in law in reaching the decision respecting the tariff to be paid to the Defendants; if they had, they would have sought review of the original decision of the Board.

[28] Although the Federal Court of Appeal has exclusive jurisdiction in matters involving a judicial review of any order or decision of the Copyright Board, that is not the basis of the current proceeding. The current proceeding is an action for a declaration. Rule 64 of the *Federal Courts Rules* is quite explicit that if this Court otherwise has jurisdiction over the matter, it is no impediment to jurisdiction that the only relief sought is declaratory relief.

[29] In my view, it is clear that this Court does have jurisdiction over the subject matter of this action. This jurisdiction is found in section 37 of the *Copyright Act* which provides as follows:

37. The Federal Court has concurrent jurisdiction with provincial courts to hear and determine all proceedings, other than the prosecution of offences under section 42 and 43, for the enforcement of a provision of this Act or of the civil remedies provided by this Act.	**37.** La Cour fédérale, concurremment avec les tribunaux provinciaux, connaît de toute procédure liée à l'application de la présente loi, à l'exclusion des poursuites visées aux articles 42 et 43.

[30] The meaning of the phrase "all proceedings … for the enforcement of a provision of this Act" may be considered to be somewhat ambiguous, and thus might be read restrictively or liberally, as is apparent from the earlier submissions of the parties on the Defendants' motion to strike. However, the French language version of section 37 clearly grants this Court jurisdiction to hear and determine any proceedings relating to the application of the *Copyright Act*.

[31] The shared meaning rule of construction endorsed by the Supreme Court of Canada in *R. v. Daoust*, [2004] 1 S.C.R. 217, 2004 SCC 6, provides that where one language version of a legislative

provision is ambiguous and the other is clear, the clear version is to be preferred. Here, that would be the French language version.

[32] Considering that the *Regulations Defining "Advertising Revenues"* are authorized pursuant to subsection 68.1(3) of the *Copyright Act*, in my view, their interpretation relates directly to the application of the Act itself.

[33] Finally, I note that this view is buttressed by the decision of Justice Muldoon in *Sullivan Entertainment Inc. v. Anne of Green Gables Licensing Authority Inc. et al.*, [2000] F.C.J. No. 1683. In that case, it was held that Rule 64 of the *Federal Courts Rules* and section 55 of the *Trade-Marks Act*, R.S.C., 1985, c. T-13, vested the Federal Court with the necessary jurisdiction to grant declaratory relief under the *Trade-Marks Act*. The language of section 55 of the *Trade-Marks Act*, reproduced below, is analogous to that found in section 37 of the *Copyright Act*:

55. The Federal Court has jurisdiction to entertain any action or proceeding for the enforcement of any of the provisions of this Act or of any right or remedy conferred or defined thereby.	**55.** La Cour fédérale peut connaître de toute action ou procédure en vue de l'application de la présente loi ou d'un droit ou recours conféré ou défini par celle-ci.

[34] Accordingly, I find that this Court has jurisdiction over the subject matter of this action. I am further of the view that this Court may, in the present circumstances, grant the declaratory relief sought.

[35] While declaratory relief directed to legislative provisions usually deals with the *vires* of the provision in issue, courts may grant declaratory relief by way of interpretation of such a provision on application by an interested party. This aspect of declaratory relief is accurately and succinctly set out in Lazar Sarna, *The Law of Declaratory Judgments*, 3rd ed., at pages 136 to 137, as follows:

> The judicial power to review legislation is of course not limited to pure questions of validity. Upon the instance of an interested applicant, the court may interpret ambiguous phrasing, clarify definitions and resolve the conflict between contradictory provisions or statutes in order to determine the proper rights of the parties to the proceedings. In so doing, it is apparent that it is not sufficient for the applicant to simply place before the court a copy of the legislative instrument. In order to give the judge some perspective of the rights in issue, the applicant must submit in evidence, whether by affidavit or testimony, proof of status, activity and qualification as they relate to or are purported to be regulated by the instrument.

[36] The affidavits filed by the parties establish beyond doubt that there is a question as to the proper meaning of the definition of "advertising revenues" in the Regulations. Further, the evidence establishes that the Plaintiffs are directly and materially affected by the Regulations and thus have an interest in its proper interpretation. For these reasons, the Plaintiffs have standing to bring this action seeking a declaration and this Court has jurisdiction to grant the relief requested.

Has the test for summary judgment been met or are there genuine issues requiring a trial?

[37] As was observed by Justice Slatter of the Alberta Court of Appeal in *Tottrup v. Clearwater (Municipal District No. 99)*, [2006] A.J. No. 1532, "[t]rials are primarily to determine questions of fact…[they] are not generally held to find out the answers to questions of law". Summary judgment is a valuable tool for both the parties and the court in circumstances where there is no need to determine

the facts. Trials impose a burden on the parties in terms of costs, and on the parties and the court in terms of time. Whenever this is avoidable, it ought to be avoided.

[38] Rule 216(2)(b) of the *Federal Courts Rules* reflects the principle that where the matter before the Court is a matter of law alone, summary judgment may be granted:

216 (2) Where on a motion for summary judgment the Court is satisfied that the only genuine issue is … (b) a question of law, the Court may determine the question and grant summary judgment accordingly.	216 (2) Lorsque, par suite d'une requête en jugement sommaire, la Cour est convaincue que la seule véritable question litigieuse est : … (b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.

[39] The sole issue in the Plaintiffs' claim is the proper interpretation of the Regulations and that is a question of law. Accordingly, provided a trial to determine facts is not required, this is in my view an appropriate case for summary judgment.

[40] The Defendants submit that there are material facts in issue that require a trial. They framed their submission in the following manner:

> First, the court must decide whether the evidence shows that commercial radio stations do, in fact, incur "production costs" in order to produce "advertising revenues". Second, the court needs to determine the appropriate interpretation of the term "advertising revenues" in the Regulations and whether any deduction from those advertising revenues is permissible.
>
> Both questions necessitate a proper factual and contextual record and are genuine issues for trial.

> It is purely theoretical to determine the statutory interpretation of the term "advertising revenues", without knowing if it would apply to the actual practices in the industry. In this case, there is no proper contextual or evidentiary record to determine whether there are indeed production costs incurred by the stations or whether there are production revenues earned that are distinct from the sale of air-time. The determination of the question of law without consideration of those related issues is purely academic.

[41] The Defendants' submission that the Court requires a trial to determine whether there are "production costs" incurred in producing air-ready advertising overlooks the obvious. There are obviously costs associated with producing the tape or disc on which the advertisement is recorded, if only the cost of purchasing those media. Those costs are production costs. There may be other production costs relating to the use of studio time, fees paid persons performing voice roles, royalties for music used in the advertisement, and so forth. The Plaintiffs are not asking this Court to define what is to be included in "production costs". They are asking that this Court declare that those costs, whatever they may be, are not to be included in calculating "advertising revenues". That requires an interpretation of the Regulations, not a trial. That there are such costs entails that the question of interpretation posed by the Plaintiffs is not an academic or hypothetical question at all.

[42] The Defendants further submit that the determination of the meaning of the Regulations requires that the Court have evidence before it as to how air-time is actually sold, how production services are provided to clients, and how the station treats air-time revenues. It is submitted that this evidence is important to an understanding of the context within which the Regulations operate. The affidavits filed speak to these issues, among others. It is submitted that not all the affidavit evidence is consistent and accordingly, the Defendants assert that a trial is required in order that the Court may make findings of credibility. I do not agree.

[43] None of this affidavit evidence, even if it were to be amplified at a trial, is or would be of any assistance in the proper interpretation of the Regulations. In this respect, it is of note that the affiants were cross-examined by the party opposite. The Defendants brought a motion seeking an order compelling the Plaintiffs' affiant to answer questions that had been objected to at the cross-examination. Some of those questions related to the billing procedures for turn-key contracts. Prothonotary Milczynski dismissed the motion in its entirety. She ruled that the answers to the questions posed would make no difference to the issues to be decided on this motion. Her ruling was not appealed by the Defendants.

[44] While context is important to the interpretation of the legislative provisions at issue here, the day-to-day business operations of commercial radio stations are not part of the context which matters, or if they are, it is only in a very limited sense. Driedger's Modern Principle, as cited and approved by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 21, quoting Driedger on the Construction of Statutes (2nd ed. 1983), at p.87, provides that "[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." In this case, all of this context is available on the material before the Court. Further, to the extent that an understanding of the general business of a commercial radio station is relevant, vis-à-vis advertising, it too is available.

[45] Accordingly, in my view, there are no genuine issues requiring a trial that would stand in the way of granting of summary judgment.

Should the Court exercise its discretion not to grant declaratory relief?

[46] The Defendants submit that the Court should not exercise its discretion to issue the requested declaration because doing so would be to pronounce on a theoretical, abstract or academic question. They claim that there is no evidence that the Plaintiffs incur production expenses or receive production revenues, thus making the question posed hypothetical. This submission has already been considered and rejected.

[47] The Defendants further submit that the Court should not exercise its discretion because the declaration would have no practical effect and would not end the disputes between these parties. I agree that the issuance of the requested declaration does not resolve or bring to an end all of the matters at issue between these parties. Specifically, if the declaration issues it may well be that these parties will have a difference of opinion as to the valuation of production services. However, the proper interpretation of the Regulation is the first necessary step towards a resolution of the parties' disputes. If the interpretation proposed by the Defendants is accepted, subject to any appeal, that brings an end to all disputes regarding the calculation of the base for tariff purposes. If the Plaintiffs' interpretation is accepted, that at least ends the first hurdle that is required to be addressed, and allows the parties to move towards a resolution of the calculation of production expenses. Accordingly, I am of the view that the declaration sought will have a practical effect on the matters in dispute between these parties.

[48] The Defendants in their memorandum of argument further submit that any declaration issued by this Court will not relieve the Plaintiffs of the risk of the penalty provided for in subsection 38.14(4) of the *Copyright Act*, and thus, they submit, the declaration would be ineffectual. They write:

> The plaintiffs further suggest that the existence of declaratory relief will also settle the matter by somehow shielding them from the imposition of statutory damages….
>
> However, the reality of the situation is that if the plaintiffs unilaterally recalculate their license fees (and, presumably, either demand a refund or set off any alleged "overpayment" against future fees), the defendants will continue to have the right to sue for and collect statutory damages in the event that the license fees are not paid in accordance with the tariff. That situation will not change, even if this court grants the requested declaration.

[49] This submission, like the others, seems to be premised on an assumption that summary judgment is never appropriate unless it resolves all of the issues between the parties. That is clearly not the case. Where one or more issues are resolved, that in itself is valuable, even if other issues remain outstanding. Further, the submission ignores the fact that the only claim in the Plaintiffs' action is the declaration that is being sought. Accordingly, if granted on summary judgment, it will completely dispose of the Plaintiffs' claim in this litigation. The Defendants will be at liberty to continue their counterclaims, to the extent that they do not conflict with any Judgment rendered, and thus they are not prejudiced. One must ask why in those circumstances the Plaintiffs should have to wait for a full and complete resolution of all disputes (in this action and otherwise) and, equally as important, why the Court's time and resources should be so occupied in what has every indication to be a lengthy and hostile dispute.

[50] I am satisfied that the interests of justice require that, if otherwise appropriate, the Court issue the declaration sought, rather than delay and prolong the conflict between these parties. Every peace begins with a single step.

What evidence is appropriate for the Court to consider in determining the proper interpretation of the Regulations?

[51] The Defendants submit that the RIAS "is not part of the Regulations, is not binding, and may not establish additional elements beyond the wording of the Regulations itself". They cite R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 5th ed. (Markham, Butterworths, 2002), pages 621-626, in support of this proposition. Although I agree with the general proposition as stated by the Defendants, it is of note that the passages cited in *Sullivan and Driedger on the Construction of Statutes* is made with reference to directives issued by those responsible for administering the statutory scheme. A directive is not the same as a RIAS which is prepared and included with the first publication of the Regulations.

[52] France Houle in her article 'Regulatory History Material as an Extrinsic Aid to Interpretation: An Empirical Study on the use of RIAS by the Federal Court of Canada' in Canadian Journal of Administrative Law & Practice, vol. 19, 2006, describes the origin of the RIAS process. The RIAS process had its genesis in 1986 when the Federal Government approved a policy requiring those responsible for setting regulations to analyze the socio-economic impact of new or revised regulations. The approved process requires that a RIAS accompany the draft regulation, which is then open to comment by interested parties. The final version of the regulation is then published with the RIAS in the *Canada Gazette*.

[53] The Plaintiffs do not suggest that the RIAS accompanying the Regulations was determinative of the proper interpretation; rather they submit that it is appropriate for this Court to consider and consult regulatory impact statements just as a court will consider the debates in Parliament, the

proceedings of parliamentary committees, and other reports leading to the enactment of a given provision. The Plaintiffs pointed to a number of cases where the Supreme Court of Canada, the Federal Court of Appeal and this Court have considered a RIAS: *Friesen v. The Queen*, [1995] 3 S.C.R. 103, *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, *Bayer Inc. v. Canada (Attorney General)* (1999), 87 C.P.R. (3d) 293 (F.C.A.), *SmithKline Beecham Pharma Inc. v. Apotex Inc.* (1999), 3 C.P.R. (4th) 22 (F.C.T.D.), and *Merck & Co. v. Canada (Attorney General)*, [1999] F.C.J. No. 1825.

[54] In *SmithKline Beecham Pharma Inc. v. Apotex Inc.*, Justice McGillis succinctly described the purpose and use of a regulatory impact analysis statement.

> In order to determine the intention of Parliament in enacting subsection 6(7) of the Patented Medicines (Notice of Compliance) Regulations, assistance may be obtained by examining the circumstances leading to its enactment, as well as the Regulatory Impact Analysis Statement prepared as part of the regulatory process. A Regulatory Impact Analysis Statement, which accompanies but does not form part of the regulations, reveals the intentions of the government and contains "... information as to the purpose and effect of the proposed regulation". [See *Teal Cedar Products (1977) Ltd. v. Canada*, [1989] 2 F.C. 135 at 140 (F.C.T.D.)].

[55] Thus, while not binding on the Court, the RIAS may be considered as a tool in interpreting legislative provisions, as it reveals the intention of the drafter.

[56] The Plaintiffs also rely on Vice-Chairman Callary's concurring reasons in the Copyright Board's dismissal of Standard Broadcasting's application for an interpretation of the Regulations. They claim that they may be used as an interpretative tool. However, counsel for the Plaintiffs readily

acknowledged during oral submissions that he was not placing much reliance on these reasons as an aid to interpretation. I place no weight on them at all for the following reasons.

[57] Firstly, the statements are clearly obiter as the Board had ruled that it had no jurisdiction to issue the order sought. Secondly, the decision was made without full argument by opposing parties as to the proper interpretation of the Regulations. Thirdly, while the Vice-Chair was a member of the original panel of the Board that ruled on the 2003-2005 tariff, he was only one member of the three person panel. While his comments may reflect his view of the panels' intention, they are not necessarily reflective of the view of the panel as a whole. In that respect it is noted that Mrs. Charron was a panel member in both decisions as well; however, she did not join in the Vice-Chair's comments as to the intention of the first panel.

[58] I also give no weight to the affidavits filed in this motion to the extent that they purport to interpret the Regulations or to the extent that they are based on the affiant's own interpretation of the Regulations. There are many reasons why they ought to be given no weight; however, the principal reason is that the affiants have no particular expertise in statutory interpretation and they are, in effect, opining on exactly what this Court is required to determine.

What is the proper interpretation of the Regulations?

[59] In approaching the question of the proper interpretation of the Regulations, I am guided by the approach of the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd*., above. In *Rizzo*, the plain meaning of the legislation under consideration appeared to restrict the employer's obligation to pay termination and severance pay to employees whose employment was actually terminated by an act of

the employer but not to employees whose employment ended as a result of an employer's bankruptcy. Justice Iacobucci found that meaning was incompatible with the object of the legislation. He found it absurd that employees dismissed the day before a bankruptcy would be entitled to termination and severance pay but those who had lost their jobs the day after were not. He therefore rejected the plain meaning approach as incomplete. He turned to and relied on Driedger's approach to statutory interpretation, as cited above.

[60] Justice Iacobucci also noted the "well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences". This principle was described as follows:

> According to Côté, *supra*, [Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2nd ed. Cowansville, Que.: Yvon Blais, 1991] an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88. [Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994)]

[61] Accordingly, it is necessary to consider the object and intention of the Copyright Board which promulgated the Regulations as well as the context of the words in issue and to adopt an interpretation that does not produce absurd consequences.

[62] In examining the object and intent of the Regulations defining advertising revenue, it is important to keep in mind that they do not stand alone. The Regulations define the base on which the tariff paid to the Defendants is calculated. Accordingly, it is important that they be considered in that

context. The Copyright Board described the tariffs as providing “equitable remuneration” for the composers, publishers, and owners of sound recordings. Accordingly, the proper interpretation must not be one that would skew the tariff to favour either the radio broadcaster or the copyright holder.

[63] It is also to be noted that the Copyright Board, being a specialized tribunal with expertise in the business operations of commercial radio stations, should be presumed to know how those stations advertise for clients and how they charge for those services. The description in the RIAS drafted by the Copyright Board illustrates its knowledge in this area.

[64] It is not disputed that advertising is prepared for transmittal by the radio stations. In some cases the client goes to an ad agency which prepares or produces the digital copy that is to be transmitted by the radio station. The ad agency negotiates with the station and pays the station directly for that service. The ad agency bills its client. There is no dispute between the parties that the revenue the station receives for its broadcast of the ad (less taxes and commissions) is advertising revenue. As indicated in subsection 2(1) of the Regulations, the tariff will be paid on that net amount. Two facts are noteworthy. Firstly, there is no evidence before the Court that the Defendants receive any tariff from the ad agency on the fees it charges to the client for the preparation or production of the digital copy. Secondly, the revenue the ad agency receives for its preparation and production services would not commonly be described as advertising revenue. In my view ad agencies would not be said to generate advertising revenues for their work; rather they would be said to generate production revenue, as they produce, but do not broadcast advertisements.

[65] It is also not disputed that in some instances, no ad agency is involved. The radio station, in addition to transmitting the ad, also performs the role of the ad agency and produces the digital copy to be transmitted. The station could, but on the record does not, bill the client separately for these services. If the station were to separate the costs into the production costs and the transmission costs and bill them separately, then in my view, it would be absurd to conclude that the revenues received for producing the ad are advertising revenues. In my view that result is absurd because, if the station produced the ad but did not actually transmit it, in other words, if they did no more than the ad agency, there would be no money received by the station to "advertise goods, services, activities, or events" as described in the Regulations. It is absurd that the radio station would be treated differently than the ad agency for performing exactly the same services.

[66] The Defendants submit that all of the revenue received by the radio station is advertising revenue for two reasons. Firstly, they do not separately bill the client for the production costs, and secondly, they charge the client the same amount whether or not they produce the ad. I am not convinced that either reason supports the view urged upon the Court.

[67] In my view, whether or not the station chooses to split out the production costs when billing the client cannot alter the true characterization of the revenue received. If that were otherwise, it would lead to the absurd and inequitable result that a radio station that did bill these components separately would be paying less tariff to the Defendants than a station that does not separately bill for the production services. Each performs the same services and each receives the same total revenues for those services; yet, on the Defendant's interpretation, one will be required to pay more tariff than the other. That is an absurd result.

[68] For the same reason, if a station chooses to bill a client the same amount for transmitting an ad, whether or not the station produces the ad, seems to me to have nothing to do with the proper characterization of the revenues it receives. If it does not produce the ad, then all of the revenues received are properly allocated to the revenues earned from transmitting the ad – advertising revenue. Alternatively, if it has produced the ad but charges the same amount as it would if it did not, it remains the case that there are production costs incurred (of an amount that will be discussed below) and that the revenues received for transmitting the ad – advertising revenues – are properly lessened by that amount.

[69] In sum, if the Regulations are read as requiring the station to include in advertising revenues the entire fee charged to a client, without any deduction for the costs of production services, an absurdity results. Accordingly, I am of the view that the Regulations permit radio stations to exclude production costs and expenses incurred from the revenues received for the transmission of the ads to which those services relate.

[70] That this interpretation is correct is bolstered by the RIAS which is the best evidence of the intention of the Copyright Board when it drafted the Regulation.

[71] The Plaintiffs submit that the appropriate deduction permitted by the Regulations for production services performed by the station for turn-key ads is the fair market value of those services. They rely on subsection 2(2) of the Regulations which provides: “For the purposes of calculating advertising revenues, goods and services shall be valued at fair market value”.

[72] At first blush, subsection 2(2) appears to be directed to the proper valuation of goods and services received by a station in exchange for its advertising services, for the purpose of calculating the "total compensation" referred to subsection 2(1). The Plaintiffs submit, however, that subsection 2(2) also refers to the valuation of production revenue received for turn-key contracts.

[73] In my view, it is ambiguous as to whether or not subsection 2(2) was intended to have the limited or wider application. It could be argued that if the drafters of the Regulations intended the subsection only as a means of valuating goods and services received by a station in exchange for broadcasting ads - i.e., compensation in-kind - then the section would have been drafted accordingly. In these circumstances, it is appropriate to turn to extrinsic aids to assist in understanding the intention of the drafters. The RIAS is the best evidence of the intention of the regulators. It reads:

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.

It is not surprising that the Copyright Board, permitting a station to exclude revenue relating to its production costs, would stipulate those to be valued at fair market value. Otherwise, it would be open to a broadcaster to assign values that could result in it paying less tariff.

[74] Accordingly, where a radio station airs an advertisement produced under the terms of a turn-key contract, the fair market value of production costs and expenses incurred in producing the ad need not be included in the calculation of advertising revenues. That 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.

[75] For these reasons, the Court will issue a declaration as to the meaning of the Regulations, however, in a form slightly different from that sought by the Plaintiffs.

[76] The motion for summary judgment is allowed. The Plaintiffs are entitled to their costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Plaintiffs are granted summary judgment on their claim.

2. 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*.

3. The Plaintiffs are entitled to their costs.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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