Federal Court of Appeal | Cour d'appel fédérale

Date: 20170628

Docket: A-294-14

Citation: 2017 FCA 138

CORAM: **STRATAS J.A.**
WEBB J.A.
SCOTT J.A.

BETWEEN:

RE:SOUND

Applicant

and

CANADIAN ASSOCIATION OF BROADCASTERS, PANDORA MEDIA INC., CANADIAN BROADCASTING CORPORATION, ROGERS COMMUNICATIONS INC., SHAW COMMUNICATIONS INC., QUEBECOR MEDIA INC., ALLIANCE DES RADIOS COMMUNAUTAIRES DU CANADA, ASSOCIATION DES RADIODIFFUSEURS COMMUNAUTAIRES DU QUÉBEC, and NATIONAL CAMPUS AND COMMUNITY RADIO ASSOCIATION

Respondents

and

SOCIETY OF COMPOSERS, AUTHORS and MUSIC PUBLISHERS OF CANADA

Intervener

Heard at Toronto, Ontario, on February 24, 2016.

Judgment delivered at Ottawa, Ontario, on June 28, 2017.

REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	WEBB J.A. SCOTT J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The applicant applies for judicial review from the decision dated May 16, 2014 of the Copyright Board. In its decision, the Board certified a Re:Sound tariff setting royalties for the use of published sound recordings embodying musical works and performers' performances of such works in non-interactive and semi-interactive webcasting for the years 2009-2012.

[2] The applicant alleges a number of grounds upon which the Board's decision must be quashed.

[3] The standard of review is reasonableness. For the reasons set out below, the Board's decision is reasonable. In cases such as this, the Board is entitled to a broad margin of appreciation when it determines the right to equitable remuneration under section 19 of the *Copyright Act*, R.S.C., 1985, c. C-42 and the Board was well within that margin of appreciation. Therefore, I would dismiss the application with costs.

A. Background

[4] One of the Copyright Board's functions under the *Copyright Act* is to set fair and equitable rates in certifying the proposed tariffs filed by collective societies. The appellant is one such collective society.

[5] In 1997, performers and sound recording makers were given a new right—found in section 19 of the *Copyright Act*—to receive "equitable remuneration."

[6] Under section 19, sound recording makers and performers have a right to be paid for the public performance or the communication to the public by telecommunication of published sound recordings embodying performers' performances of musical works. Royalties for this right are allocated equally between the sound recording makers and the performers. The Copyright Board determines the amount in accordance with Part VII of the *Copyright Act*, discussed below.

[7] Sometimes the rights of performers and sound recording makers are called "neighbouring rights" because they are similar to, but not the same as, the copyright granted to authors in, for example, musical works. Instead of an exclusive copyright to perform in public and communicate to the public by telecommunication, performers and sound recording makers' rights are non-exclusive rights to receive equitable remuneration. See the Copyright Board's decision in *NRCC Tariff 1.A*, dated August 13, 1999, at p. 6.

[8] The appellant, Re:Sound Musical Licensing Company ("Re:Sound"), formerly Neighbouring Rights Collective of Canada ("NRCC"), is a collective society that administers the right to receive equitable remuneration.

[9] The Society of Composers, Authors and Music Publishers of Canada ("SOCAN") is the collective society that collects royalties for the use of the underlying musical works. It represents songwriters, composers and music publishers. SOCAN members' copyright in musical works is

distinct from Re:Sound members' right to receive equitable remuneration, but, as we shall see, the Board has consistently found that these rights have the same economic value.

[10] When a published sound recording of a performance of a musical work is publicly performed, royalties are payable both to SOCAN on behalf of the composer and publisher and to Re:Sound on behalf of the performer and sound recording maker.

[11] The second part of Part VII of the Act, entitled "Collective Administration of Performing Rights and of Communication Rights," establishes the regime under which the Board administers the proposed tariffs of both SOCAN and Re:Sound.

[12] Under the Act, any collective society that administers the right to perform musical works or sound recordings in public, or communicate them by telecommunication to the public—this is, at present, only SOCAN and Re:Sound—is governed by sections 67 to 69 of the Act.

[13] Under these sections, each is required to file with the Board proposed tariffs to receive royalties for the use of their repertoires. The Board considers the proposals in light of any objections. In the end, the Board certifies a tariff, with any changes it deems necessary.

[14] Subsection 68(2) of the *Copyright Act* is a key provision in this process. When examining a proposed Re:Sound or SOCAN tariff, the Board is subject to three mandatory requirements. The royalties paid must only cover eligible recordings, the Board must not place some users at a greater financial disadvantage than others by virtue of linguistic or content requirements and

royalty payments must be made in a single payment. Other than these requirements, the *Copyright Act* (in paragraph 68(2)(*b*) empowers the Board to take into account "any factor that it considers appropriate" in establishing the terms and conditions of a tariff.

[15] For reference, subsection 68(2) of the *Copyright Act* provides as follows:

68. (2) In examining a proposed tariff for the performance in public or the communication to the public by telecommunication of performer's performances of musical works, or of sound recordings embodying such performer's performances, the Board	**68.** (2) Aux fins d'examen des projets de tarif déposés pour l'exécution en public ou la communication au public par télécommunication de prestations d'oeuvres musicales ou d'enregistrements sonores constitués de ces prestations, la Commission :
(*a*) shall ensure that	*a*) doit veiller à ce que :
(i) the tariff applies in respect of performer's performances and sound recordings only in the situations referred to in the provisions of section 20 other than subsections 20(3) and (4),	(i) les tarifs ne s'appliquent aux prestations et enregistrements sonores que dans les cas visés à l'article 20, à l'exception des paragraphes 20(3) et (4),
(ii) the tariff does not, because of linguistic and content requirements of Canada's broadcasting policy set out in section 3 of the *Broadcasting Act*, place some users that are subject to that Act at a greater financial disadvantage than others, and	(ii) les tarifs n'aient pas pour effet, en raison d'exigences différentes concernant la langue et le contenu imposées par le cadre de la politique canadienne de radiodiffusion établi à l'article 3 de la *Loi sur la radiodiffusion*, de désavantager sur le plan financier certains utilisateurs assujettis à cette loi,
(iii) the payment of royalties by users pursuant to section 19 will be made in a single payment; and	(iii) le paiement des redevances visées à l'article 19 par les utilisateurs soit fait en un versement unique;
(*b*) may take into account any	*b*) peut tenir compte de tout facteur

factor that it considers appropriate.	qu'elle estime indiqué.

[16] Although there are no pre-set criteria that the Board must take into account when determining fair and equitable royalties, the Governor in Council has the power to make regulations establishing criteria. The power is found in section 66.91 of the *Copyright Act*.

[17] Section 66.91 of the *Copyright Act* provides as follows:

66.91. The Governor in Council may make regulations issuing policy directions to the Board and establishing general criteria to be applied by the Board or to which the Board must have regard	**66.91.** Le gouverneur en conseil peut, par règlement, donner des instructions sur des questions d'orientation à la Commission et établir les critères de nature générale à suivre par celle-ci, ou à prendre en compte par celle-ci, dans les domaines suivants :
(*a*) in establishing fair and equitable royalties to be paid pursuant to this Act; and	*a*) la fixation des redevances justes et équitables à verser aux termes de la présente loi;
(*b*) in rendering its decisions in any matter within its jurisdiction.	*b*) le prononcé des décisions de la Commission dans les cas qui relèvent de la compétence de celle-ci.

[18] The Governor in Council has not made any regulations under this section. Accordingly, under the legislation as it stands, the Copyright Board has a broad discretion when it sets equitable remuneration.

B. The standard of review

[19] In making its decision, the Board had to appreciate the scope of its powers under section 19 and the sections that relate to it, above. In other words, either expressly or implicitly it had to have a view or interpretation of these sections in mind. Then it had to apply that interpretation to the facts of the case before it.

[20] Thus, for the purposes of considering the standard of review that we are to apply, the decision of the Board has two components: the interpretation of section 19 of the *Copyright Act* and the statutory provisions that relate to it and the application of the statutory provisions to the facts of the case.

[21] In my view, the Board's decision on standard of review is reasonableness on both components.

[22] First, the issue of the Board's statutory interpretation. Normally an administrative decision-maker's interpretation of a statutory provision is reviewable on the standard of reasonableness: see, *e.g., Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 54 ("[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity"); *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 34 ("unless the situation is exceptional…the interpretation by the tribunal of 'its own statute or statutes closely connected to its function, with which it will have particular

familiarity' should be presumed to be a question of statutory interpretation subject to deference on judicial review"); *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293.

[23] However, this context is unusual. When it comes to interpreting many provisions in the *Copyright Act*, the Copyright Board shares jurisdiction with the courts. Accordingly, the Board's interpretation of provisions in the *Copyright Act* that courts also interpret is reviewable for correctness: *Canadian Broadcasting Corporation v. Sodrac 2003 Inc.*, 2014 FCA 84, [2015] 1 F.C.R. 509 at para. 27; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; [2012] 2 S.C.R. 283.

[24] But in this case, do courts interpret section 19 of the *Copyright Act* and related sections? Or is it a section that only the Board interprets?

[25] In *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, [2015] 2 F.C.R. 170, this Court held (at para. 46) that the standard of review is reasonableness if the "shared primary jurisdiction between the administrative tribunal and the courts" is not present.

[26] In *Fitness Industry Council*, this Court considered the Board's approval of a royalty under subsection 68(3) of the *Copyright Act*. Specifically, it considered whether a collective society was entitled to a tariff on the basis of all eligible works or only those works which the creators authorized the society to deal with. This Court held that it was "theoretical and somewhat remote" for a court to become involved in that issue: *Fitness Industry Council* at para.

49. Accordingly, the normal presumption of reasonableness review for interpretations of administrative decision-makers applied.

[27] To be certain of its view that reasonableness applied, the Court in *Fitness Industry Council* also examined the nature of the Board's decision. This confirmed its view that reasonableness was the correct standard of review (at paras. 50-51):

[28] Courts have long been familiar with the individual law of copyright through their jurisdiction over infringement actions. However, they have no similar knowledge of the statutory scheme for the collective administration of the right to equitable remuneration, a complex and technical matter that the *Copyright Act* entrusts almost exclusively to the Board: compare *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424, 247 D.L.R. (4th) 103 at para. 110.

[29] The superior expertise of the Board in the setting of royalty rates for the collective administration of the right to equitable remuneration further supports the conclusion that the Court should apply a standard of reasonableness to the Board's interpretation of the aspects of the statutory scheme in question in this application for judicial review.

[30] In my view, *Fitness Industry Council* and its reasoning bind this Court. This case deals with the interpretation of a similar regime and is not part of a shared jurisdiction with courts. Thus, this Court will engage in reasonableness review of the Board's interpretation of section 19 of the *Copyright Act*.

[31] As mentioned, the second component of the Board's decision was its application of the statutory provisions to the facts of the case.

[32] This is a factually suffused question of mixed law and fact. We are to review this using the reasonableness standard of review: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 53.

C. Analysis

[33] The Supreme Court has told us that reasonableness is a range of acceptable and defensible outcomes or a margin of appreciation: *Dunsmuir* at para. 47; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at para. 38.

[34] Repeatedly, the Supreme Court has suggested that reasonableness "takes its colour from the context" and "must be assessed in the context of the particular type of decision-making involved and all relevant factors": *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at para. 18; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 at para. 22; and many others.

[35] In other words, certain circumstances, considerations and factors in particular cases influence how we go about assessing the acceptability and defensibility of administrative decisions: *Catalyst* at para. 18; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395

at para. 54; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 at para. 44.

[36] Looking at this from the perspective of reviewing courts, if the circumstances, considerations and factors differ from case to case, how reviewing courts go about measuring acceptability and defensibility will differ from case to case; in other words, reasonableness will "take its colour from the context" of the case. Looking at this from the perspective of administrative decision-makers, as a practical matter some decision-makers in some contexts seem to be given more leeway or a broader "margin of appreciation" than other decision-makers in other contexts.

[37] For this reason, sometimes we see some administrative decision-makers afforded a very broad range or margin of appreciation and others less so: compare, for example, cases like *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3, with *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616.

[38] This Court has followed the Supreme Court's guidance and has commented upon a number of factors that might affect the "colour" of reasonableness review or, put another way, the intensity of review: see, *e.g.*, *Canada (Attorney General) v. Abraham*, 2012 FCA 266, 440 N.R. 201 at paras. 37-50, *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75, 444 N.R. 120 at paras. 13-14; *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006; *Canada (Attorney General) v.*

Boogaard, 2015 FCA 150, 474 N.R. 121. The Court of Appeal for Ontario has done this as well: *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71 at para. 22.

[39] For a number of reasons, the Board enjoys a broad margin of appreciation when setting "equitable remuneration" in a case like this.

[40] First, the statutory words in issue in this case are very broad indeed. The remuneration to be set is described in subsection 19(1) as "equitable." The word "equitable" imports much discretion based on the Board's fact-based sense of fairness in light of all of the circumstances.

[41] Sometimes statutory words direct an administrative decision-maker to follow a particular recipe or restrict the scope of discretion: see, *e.g.*, *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203 at para. 53. This can constrain the number of acceptable and defensible options available to the administrative decision-maker. Here, aside from the three requirements set out in paragraph 68(2)(*a*) which are not material here, there are no statutory words of direction or constraint.

[42] Indeed, paragraph 68(2)(*b*) instructs the Board that "[i]n examining a proposed tariff for the performance in public or the communication to the public by telecommunication of performer's performances of musical works, or of sound recordings embodying such performer's performances, the Board… may take into account any factor that it considers appropriate."

[43] Sometimes cases interpreting statutory words can constrain the outcomes that an administrative decision-maker can reasonably reach: *Canada (Attorney General) v. Abraham*, 2012 FCA 266, 440 N.R. 201; *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75, 444 N.R. 120. Here, no cases have given the words of paragraph 68(2)(*b*) an interpretation that would cut down their breadth.

[44] Indeed, the legislative history of subsection 68(2) shows that Parliament intended the discretion of the Board in setting equitable remuneration to be very broad.

[45] Bill C-32, *An Act to Amend the Copyright Act*, was introduced to Parliament in 1997. On the issue of setting tariffs concerning neighbouring rights, the Bill set out pre-set criteria that the Board would have been required to take into account when setting equitable remuneration.

[46] At first reading, paragraph 68(2)(*b*) stated:

> (2) …the Board
>
> (b) shall take into account
>
> > (i) that the tariff applies only in respect of the portion of the total programming of a user that corresponds to performer's performance and sound recordings, and
> >
> > (ii) that some users, while using music to generate revenue, assist the sale of sound recordings through the playing of that music[.]

[47] The House of Commons Standing Committee on Canadian Heritage studied this version of the Bill. On this portion of the Bill, it removed the criteria in subsection (2). Based on testimony before it, it rejected the idea of limiting the Board's discretion in setting rates: Canada,

Senate, *Evidence of the Standing Committee on Transport and Communications*, 35th Parl., 2nd Sess., No. 13 (April 14, 1997). Much of the testimony was aimed at identifying the myriad of considerations that could bear upon the Board's determination of equitable remuneration. The thrust of the testimony was that the Board should have flexibility to use its specialized knowledge to react appropriately to the many different circumstances that come before it.

[48] Another part of the "context" here that affects the "colour" of reasonableness is the nature of the Board's decision in setting equitable remuneration. It is one suffused by considerations of expertise about this regulated sector, regulatory experience, policy appreciation, subjective weighings and assessments and factual appreciation. It is a matter that is more suited to evaluation by the executive branch. It is less suited to the judicial branch because of the limited legal content in the decision.

[49] The case law shows that these considerations affect the reviewing court's application of the reasonableness standard. A decision-maker that has been given a broad policy mandate has a broad range of options it can legitimately choose from: *Farwaha*, above at para. 91. Where the decision is suffused with subjective judgment calls, policy considerations and regulatory experience or is a matter uniquely within the ken of the executive, the margin of appreciation will be broader: *Gitxaala Nation v. Canada*, 2016 FCA 187 at para. 149, citing *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, 382 D.L.R. (4th) 720, at para. 136. Courts are "poorly positioned" to opine on policy issues with "public interest components" and "economic aspects" and so "by legislative design the selection of a policy choice from among a range of options lies with the [administrative decision-maker] empowered and mandated to make that selection": *FortisAlberta*

Inc v. Alberta (Utilities Commission), 2015 ABCA 295, 389 D.L.R. (4th) 1 at paras. 171-172; to similar effect, see *Rotherham v. Metropolitan Borough Council v. Secretary of State for Business Innovation and Skills*, 2015 UKSC 6 at para. 78 (policy based decisions of this type are "particularly difficult for a court to evaluate and therefore to criticise, and therefore to condemn").

[50] A decision about the quantum of "equitable remuneration," such as the one in this case, is not a simple one, arrived at by processing information objectively and logically against fixed, legal criteria. Rather, it is a complex, multifaceted decision involving sensitive weighings of information, impressions and indications using criteria that may shift and be weighed differently from time to time depending upon changing and evolving circumstances. Accordingly, the Board's decision on such an issue is entitled to considerable leeway. See, *e.g.*, *Canada (Attorney General) v. Boogaard*, 2015 FCA 150; 474 N.R. 121 at para. 52.

[51] Previous decisions of this Court recognize the foregoing and acknowledge that the Board is entitled to considerable leeway in decisions concerning the quantum of "equitable remuneration." According to this Court, Parliament gave the Board "a very wide royalty certification discretion": *Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada*, 2004 FCA 302, [2004] 1 F.C.R. 303.

[52] In finding that the Board was entitled to significant leeway in setting the quantum of an equitable tariff, I do not suggest for a moment that it is anything close to immune from review. Its discretion is not absolute or untrammelled. Even the broadest grant of statutory power must

be exercised in good faith, in accordance with the purposes of the tariff regime and the *Copyright Act*:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

(*Roncarelli v. Duplessis*, [1959] S.C.R. 121 at page 140, 16 D.L.R. (2d) 689.)

[53] Before the Board, Re:Sound urged the Board to set the equitable remuneration at market rates. To this end, the applicant put before the Board several agreements that it submitted represented market rates for webcasting sound recordings. In doing so, it urged the Board to deviate from a particular approach it has followed in previous cases. In those cases, the Board has set Re:Sound's tariffs in relation to the pre-existing SOCAN tariffs for the same uses, and has applied a one-to-one ratio between the rates on the basis that there is no greater value in the sound recording than there is in the underlying musical work.

[54] In this case, the Board did not deviate from its previous cases. It chose to set the rates in this case in accordance with the one-to-one ratio without regard to the market conditions evidenced by the contracts the applicant put before it. In doing so, it offered a number of rationales, all of which are factual in nature and informed by the Board's expertise.

[55] For one thing, the agreements stood pretty much alone in the record. The Board heard no evidence as to why the agreements were signed and what factors may have led to their signing.

[56] The Board analyzed the agreements and found that they would be an inappropriate basis for the tariff. One of the concerns it had was that the Canadian webcasting market is in its infancy and the agreements were too new to yield any data showing how they were working in practice (at para. 144):

> The Canadian market for webcasting is nascent and underdeveloped. Relying on the agreements as proxies carries a greater risk than within a mature market, warranting a more cautious approach in assessing their suitability as proxies. Furthermore, since the agreements were very recent at the time of the hearings, no data were available regarding their workings, such as whether the per-play rate or the percentage-of-revenue rate was triggered or whether any options were exercised by the parties.

[57] Re:Sound urges us to find that the Board's use and evaluation of the agreements was unreasonable.

[58] Given the type and breadth of discretion available to the Board and the nature of reasonableness review, described above, I reject this submission. The Board's approach was an acceptable and defensible application of the facts and the law.

[59] This Court has said that in assessing whether an administrative decision is reasonable, a reviewing court can be assisted by the presence of certain "badges" or "indicia." For example, in

Delios v. Canada (Attorney General), 2015 FCA 117, 472 N.R. 171 at para. 27, this Court observed the following:

> The evidentiary record, legislation and case law bearing on the problem, judicial understandings of the rule of law and constitutional standards help to inform acceptability and defensibility. Here, certain indicators, sometimes called "badges of unreasonableness," may assist: *Farwaha*, above at paragraph 100. For example, a decision whose effects appear to conflict with the purpose of the provision under which the administrator is operating may well raise an apprehension of unreasonableness: *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427 at paragraphs 42 and 47. In that sort of case, the quality of the explanations given by the administrator in its reasons on that point may matter a great deal. Another badge of unreasonableness is the making of key factual findings with no rational basis or entirely at odds with the evidence. But care must be taken not to allow acceptability and defensibility in the administrative law sense to reduce itself to the application of rules founded upon badges. Acceptability and defensibility is a nuanced concept informed by the real-life problems and solutions recounted in the administrative law cases, not a jumble of rough-and-ready, hard-and-fast rules.

[60] In *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, [2012] 2 F.C.R. 312 at para. 87, this Court found that a rationally defensible application of a previously announced, unchallenged policy should be taken as a badge of reasonableness under *Dunsmuir*.

[61] In my view, the same may be said for an administrative decision that, absent new and different circumstances, applies its previous jurisprudence in the same way on similar facts. A number of decisions of this Court are consistent with this: see, *e.g.*, *HBC Imports (Zellers Inc.) v. Canada (Border Services Agency)*, 2013 FCA 167, 446 N.R. 352 at paras. 38-39; *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 373 DLR (4th) 167 at paras. 38 and 74; *Baragar v. Canada (Attorney General)*, 2016 FCA 75, 483 N.R. 52 at para. 20; *Jolivet v. Canada (Correctional Service)*, 2014 FCA 1, 456 N.R. 236 at para. 4.

[62] The Board has been consistent on this issue and this supports the reasonableness of its decision. In this case, it followed the same approach it has followed in its cases since 1999, a number of which have been upheld as reasonable by this Court. Under that approach it sets Re:Sound's tariffs in relation to the pre-existing SOCAN tariffs for the same uses, and applies a one-to-one ratio between the rates on the basis that there is no greater value in the sound recording than there is in the underlying musical work. Consistently, it has not been persuaded that it should have much if any regard to market rates. Often, as is the case here, it is not persuaded because of the quality of the evidence provided.

[63] First, I shall examine the Board's jurisprudence on the market rates issue.

[64] In 1999, in setting the inaugural NRCC Tariff 1.A, the Board identified a number of characteristics of the right to receive equitable remuneration that, in its view, were relevant to its task of rate setting: *NRCC Tariff 1.A*, dated August 13, 1999. It then identified guiding principles to be used when it fixed the royalties. These came from the *Copyright Act* itself. Drawing upon its earlier decisions, it ruled that the tariff should reflect Canadian circumstances, be simple to administer, transparent and comprehensible and be based on a set of statistics for a test period.

[65] In *NRCC Tariff 1.A*, NRCC proposed a higher rate than SOCAN's commercial radio rate. It pointed to several proxies, all of which were based on a "willing buyer and willing seller" market model. But in its discretion and based on the evidence, the Board disagreed. It found that the NRCC's rights are equal in value to SOCAN's rights (at p. 32). It used the SOCAN commercial radio tariff as a proxy and found that the sound recordings in NRCC's repertoire

were played on the radio half as often as the musical works in SOCAN's repertoire. Thus, NRCC's rate was set at half the rate payable to SOCAN for musical works.

[66] On previous occasions, based on the facts before it, the Board has rejected market evidence as bearing on the problem before it.

[67] For example, In *NRCC Tariff 1.8 (1998-2002)*, NRCC argued that the price for neighbouring rights should be reflective of market, *i.e.*, the price that a willing seller and a willing buyer would agree. It offered the Board proxy market transactions to consider. The Board rejected these, opting to use the pre-existing SOCAN tariff as the starting point for setting the tariff. It held that the market evidence offered by the NRCC was "a series of anecdotal, impressionistic statements that often pulled either way" (at p. 30).

[68] Three years later, in its *DPA 2002* Decision dated March 15, 2002, the Board again declined to adopt a market approach. The NRCC argued that "equitable remuneration necessarily reflects the price that a willing seller and a willing buyer would come to in a competitive market." The NRCC proposed different approaches regarding how the market might be assessed. The Board rejected them all. In rejecting the free-market standard, it said (at pp. 7-8):

> The price that would be arrived at by a willing buyer and a willing seller in a real or hypothetical free market is useful as a starting point only when it offers some basis for comparison with the industry under examination.
>
> …
>
> The absence of a usable free-market point is not in itself problematic. While free market transactions are both important and relevant, they are not the only factor to look at.

[69] Before us, Re:Sound submitted in the face of this jurisprudence and the broad statutory wording canvassed above that the Board is required to apply market rates in setting royalties. I reject this. The Board is not required in any way to do that. In para. 68(2)(*b*) of the *Copyright Act*, Parliament has defined the Board's task as setting "equitable remuneration" based on "any factor that it considers appropriate." The statutory wording under which the Board is operating can hardly be much broader.

[70] Before us, Re:Sound submitted that the Board did not consider its evidence as to the market. I disagree. At paras. 128-131 of its decision, the Board did not find the agreements put to it by Re:Sound to be fair proxies, some of the agreements were experimental and not reflective of those reached by a mature business, and the agreements were aligned with conditions in the United States, not the different conditions in Canada.

[71] Another way in which the Board has been consistent in its approach to rate setting—thus enhancing the reasonableness of its decision in this case—is its maintenance of a "one-to-one ratio" between SOCAN and NRCC/Re:Sound. It has applied this consistently in nine tariff proceedings. A brief summary of this jurisprudence follows.

[72] In *Tariff 1. C—CBC Radio in 1998, 1999, 2000, 2002*, dated September 29, 2000, the Board stated (at p. 6):

> [T]he SOCAN and NRCC tariffs deal with a similar use in a similar market. There is no reason to believe that sound recordings are more valuable in radio airplay than the underlying works. They involve the same uses, the same recordings, the same broadcasters. In the absence of evidence to the contrary, a

> pre-recorded performance is no more and no less valuable to a broadcaster than a pre-recorded work.

[73] In the *DPA 2002 Decision* dated March 15, 2002, the Board applied the one-to-one ratio. It stated (at p. 14) that "all things being equal, authors and composers should get the same as performers and makers."

[74] The Board also adopted this approach in *NRCC Tariff 1.8 (1998-2002)*. In this decision the Board considered what adjustments to the pre-existing SOCAN rate were necessary in order to set the appropriate rate for NRCC. In doing so, it established the one-to-one ratio between SOCAN and NRCC, a ratio that it has used ever since (at p. 32):

> The Board prefers deciding on the basis that there is no reason to believe that the use of sound recordings on radio stations has any greater value than the use of the underlying works. Several reasons point to this solution. First, nothing requires the Board to look to the market (especially a different market) for guidance; it is within its discretion to decide that this approach is reasonable. Second, these are similar uses of the same recordings by the same broadcasters. Third, it can be readily argued that a pre-recorded performance is worth no more to broadcasters than a pre-recorded work: in both cases, one is dealing with something that has already been fixed. Fourth, it matters not that one party was paid more than the other for making the fixation in the first place; we are dealing with two different markets and two different rights: the right to make the recording and the right to communicate it.

[75] In the *DPA (2003-2006)* decision dated February 25, 2005, the Board maintained the one-to-one ratio without explicit discussion of the matter.

[76] In its decision in *SOCAN/NRCC Tariff 1.A (2003-2007)*, dated October 14, 2005, the Board considered an attempt by NRCC to disconnect itself from the SOCAN tariff and displace the one-to-one ratio. Drawing on its consistent jurisprudence since 1999, the Board rejected this and offered a detailed rationale:

> NRCC's attempts to disconnect itself from the SOCAN tariff remain unconvincing. For the reasons set out in 1999, the Board remains of the opinion that the NRCC rate should be set as a function of the SOCAN rate.
>
> The Board has consistently set a one-to-one ratio between both rates since certifying the first NRCC tariff in 1999. NRCC did not challenge that approach until 2002, when the Board certified the pay audio services tariff. It then asked the Federal Court of Appeal to review the approach; the court rejected the application.
>
> NRCC again attempts to convince the Board to abandon the one-to-one ratio. It proposes to allocate roughly one third of the royalties to authors, one third to makers and one third to performers before any repertoire adjustment. This proposal relies on two main arguments. First this corresponds to what happens in the prerecorded CD market. Second, all things being equal, each of the three colleges of rights holders involved should be treated equally.
>
> The Board did not hear any new evidence or argument that might convince it to change the relative value of the repertoires. Once again, the Board concludes that the communication of a musical work should trigger the same remuneration as the communication of a sound recording, subject to repertoire adjustments. In this respect, the Board still agrees with its statement from the 1999 decision.

[77] In five later decisions, the Board maintained its position on the one-to-one ratio, referring to its earlier jurisprudence: *NRCC Tariff 3 (Background Music) 2003-2009*, dated October 20, 2006 at paras. 70, 84 and 89; *SOCAN/NRCC Tariff 1.A Commercial Radio (2003-2007) Redetermination*, dated February 22, 2008 at paras 5, 45 and 94; *Satellite Radio Services Tariff*

SOCAN (2005-2009), NRCC (2007-2010), CSI (2006-2009), dated April 8, 2009 at para.169; *Re:Sound Tariff 6.B – Use of Recorded Music to Accompany Physical Activities (2008-2012)*, dated July 6, 2012 at para. 25; *Re:Sound Tariff 8 – Simulcasting and Webcasting (2009-2012)*, dated May 16, 2014 at para. 164.

[78] It should also be noted that this Court has upheld the reasonableness of the Board's approach: *Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada*, 2004 FCA 302, [2004] 1 F.C.R. 303. Re:Sound has not submitted that this Court was manifestly wrong in doing so: *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149. Thus, this Court is bound to follow *Neighbouring Rights Collective*.

[79] I now turn to a number of subsidiary arguments that Re:Sound advanced in this Court. However, all of them fail to persuade me that the Board's decision is unreasonable.

[80] Re:Sound submits that Parliament used the term "equitable remuneration" in the *Copyright Act* to describe a different kind of remuneration from the royalties to which copyright owners like SOCAN's members are entitled.

[81] In my view, this submission is based on a misinterpretation of the *Copyright Act*. "Royalties" throughout the Act refers to the amounts that users pay and that Re:Sound and SOCAN receive under their tariffs. But "equitable remuneration" in section 19 refers to the type of right that has been granted to Re:Sound's members. It is a counterpart to the "sole right" that

is granted in section 3 of the Act. Put another way, the entitlement to equitable remuneration is different from the entitlement to exclude users that is contained in the exclusive rights given to SOCAN in section 3 of the *Copyright Act*.

[82] Re:Sound's members are not authors who create a musical work. They are performers and sound recording makers. Parliament has granted exclusive reproduction rights in the sound recordings, but where those sound recordings are to be performed in public or communicated to the public by telecommunication, the performer and makers are not entitled to exclude users from doing so. Under the *Copyright Act*, they are entitled only to equitable remuneration and, because of subsection 67.1(4) of the Act, must exercise this right by way of Board-certified tariffs.

[83] Re:Sound also submits that in granting Re:Sound's members their rights, Parliament was implementing international treaties. Re:Sound says that these treaties require the quantum of equitable remuneration to be determined on a market basis. The Board was obviously not convinced of this and for good reason. First, had that been Parliament's intention, it would have been much more clear on that. And it certainly would not have empowered the Board under paragraph 68(2)(*b*) to take into account "any factor that it considers appropriate" in establishing the terms and conditions of a tariff. Further, the international treaties to which Canada is a party do not differentiate between musical works and sound recordings in their use of the term "equitable remuneration." For example, under the Berne Convention, authors, performers and makers are all entitled at a minimum to "equitable remuneration": *Berne Convention for the Protection of Literary and Artistic Works*, September 28, 1979, arts. 11bis(2) and 13(1). Further,

the text of the Rome Convention does not mention use of a "market rate" as a standard that must be used to determine the quantum of equitable remuneration.

[84] Re:Sound also submits that the decision of the Board is unreasonable because it is not technologically neutral. It notes that the Supreme Court in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231 requires that the *Copyright Act* must be applied in a technologically neutral manner.

[85] Between the date of the Board's decision and the hearing of this judicial review the Supreme Court of Canada released *Canadian Broadcasting Corporation v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615. In *SODRAC* the Supreme Court affirmed the importance of the overarching principle of balance both when interpreting and applying the Act, including when the Board is valuing rights: paras. 74-75.

[86] In oral argument before this Court, Re:Sound argued that the principle of balance required the Board to consider costs incurred by producers and performers as a factor when setting the tariff. The Board's failure to consider input costs renders the decision inconsistent with *SODRAC* and unreasonable.

[87] In response, the respondents argued that the applicant's argument misconstrues *SODRAC*. While *SODRAC* mandates the Board to consider the principle of balance when determining which factors to consider in setting tariffs, it does not mandate that input costs be one of those factors. The Board retains discretion under para. 68(2)(*b*) to "have regard to factors it considers

relevant in striking a balance between the rights of users and rights-holders": *SODRAC* at para. 75.

[88] I agree with the respondents. The Board's decision not to consider input costs is reasonable in light of the Supreme Court's guidance in *SODRAC*. Nowhere in *SODRAC* are input costs discussed, never mind mandated. Further consideration of the principle of balance confirms this.

[89] Even before the Supreme Court's decision in *SODRAC*, it was well settled that the dual purposes of the *Copyright Act*—encouraging creativity and providing reasonable access to the fruits of creative endeavour—require careful balancing of user and creator rights: *Reference re Broadcasting Act, S.C. 1991 (Canada),* 2012 SCC 68, [2012] 3 S.C.R. 489 at para. 36. In *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34 [2002] 2 S.C.R. 336 at para. 30, Binnie J. described this as "a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)."

[90] The Board's analysis, focusing on the value of the sound recording rather than input costs, is fully consistent with this balance. Copyright protection exists because we find the works it protects valuable. There are many ways in which they may be valuable—encouraging learning, spreading knowledge, fostering creativity, exciting discussion, providing enjoyment, triggering reflection and promoting human flourishing: See David Lametti, "Laying Bare and Ethical

Thread: From IP to Property to Private Law?" in *Intellectual Property and the Common Law*, Shyamkrishna Balganesh, ed. (Cambridge: Cambridge University Press, 2013). It is because of all of these potential benefits that we both desire to encourage copyright protected works and also desire to provide wide access to them.

[91] The root of this value and genesis of these benefits are the ideas that the work embodies. This must be so as the very thing that copyright protects is the expression of ideas in works: *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 at para. 8. The mere production of a work is not enough to warrant copyright protection, no matter how costly. To gain copyright, a creator must express originality in a work through the exercise of skill and judgment: *CCH* at para. 16. Similarly, once a copyright has been assigned, copyright protection focuses on parts of a work that represent the skill & judgement of the creator: *Robinson v. Films Cinar Inc.*, 2013 SCC 73, [2013] 3 S.C.R. 1168 at para. 26.

[92] Because the value of a work is derived from the ideas embodied within it, it may be that a work's value may not have any relation to the economic costs of inputs. This is why in setting methodology for valuing the reproduction right, the Supreme Court in *SODRAC* highlighted the importance of considering the value to users, but did not analyze the cost to the right holder at any point: "When it is tasked with determining the value of a right, an important consideration for the Board is the value of that right to the user": para. 79. Similarly, the Board has taken this approach to valuing rights for over 15 years.

[93] In summary, if we protect works for their value and their value is not correlated to their input costs, the purposes of copyright—which are articulated in the principle of balance—do not require those costs to be considered. It was thus reasonably open to the Board to ignore these costs in its analysis.

[94] Finally, even though the Board's reasoning does not explicitly address the balance issue it must be noted that the Board did not have the benefit of the *SODRAC* decision at the time it made its decision. Further, the issue of balance was not an issue put to it by either of the parties. Still, the reasons of the Board demonstrate that they were alive to the argument that there was a risk that new sound recordings would not be created if returns were too low: at para. 87. In the Board's view, however, this risk was minimal as music streaming tariffs could not be considered in isolation. Total compensation from all channels must be considered and any rate imbalance between authors and producers/performers may be pursued by the labels on the free market for exclusive reproduction right: at para. 90. The Board's approach and underlying rationale are therefore reasonable in light of the principle of balance.

[95] In its reply factum the applicant raised the issue of technological neutrality, arguing that the Board's decision ignored critical differences between commercial radio and webcasting. The principle of technological neutrality "requires that different technologies using reproductions of copyright protected work that produce the same value to the users should be treated the same way. Conversely, different technologies using reproductions that produce different values should not be treated the same way": *SODRAC* at para. 72. Simply put, if users of webcasting derive

greater value from the same sound recording than commercial radio users, copyright holders should receive greater royalties from webcasters: *SODRAC* at paras. 70-71.

[96] Orally, the applicants argued that the Board found technological differences between commercial radio and webcasting, but failed to engage in any analysis of the resulting valuation differences. In support of their argument they cite a statement by the Board (at para. 70) that it was unnecessary to comment on "the difference in costs between conventional radio and webcasting; or the impact of recent technological advances on the value of the communication of sound records."

[97] Consistent with the argument of the applicant, throughout the decision the Board acknowledges differences between commercial radio and webcasting which may impact the value of sound recordings: difference cost structures (para. 158), differences in ability to target specific audiences (para. 171) and the value of interactivity through skipping tracks and personalizing webcasts (para. 179). However, the Board repeatedly concludes that there is not enough evidence for them to quantify what affect these differences have on the value of a sound recording: see, *e.g.*, paras. 156 and180.

[98] In the fee-setting context, the Supreme Court in *SODRAC* noted that technological neutrality will require the Board to consider particular factors: "[r]elevant factors will include, but are not limited to, the risks taken by the user, the extent of the investment the user made in the new technology, and the nature of the copyright protected work's use in the new technology.": *SODRAC* at para. 75. However, before getting to these factors, there must be

evidence upon which the Board may consider them. It is for the Board to determine how evidence should be presented and what onus should be placed on whom: *SODRAC* at para. 93.

[99] In this case it was reasonable for the Board not to perform the precise technological neutrality analysis mandated by the Supreme Court given the dearth of evidence on this before it. While experts did comment on the increased value of sound recordings in the webcasting setting, no expert provided any indication of how to quantify those differences. The applicant points to their agreements with webcasters as an indicator of this value. However, the agreements alone are not helpful. The technological neutrality analysis is relative, comparing the value of the sound recording under the new and old technology: *SODRAC* at para. 73. Therefore, the Board would need equivalent market agreements for commercial radio to make a useful valuation. With no expert evidence, it was reasonable for the Board to refuse to assign a value to these technological differences beyond requiring payment for partial plays, which they believed captured the value of interactivity: para. 177.

[100] To reiterate, overall the Board was entitled to a broad margin of appreciation in considering the complex and specialized issues in this case. The applicant has not persuaded me that the Board's decision was outside of that margin of appreciation.

D. Proposed disposition

[101] For the foregoing reasons, I would dismiss the application with costs.

"David Stratas"

J.A.

"I agree
Wyman W. Webb J.A."

"I agree
A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-294-14

AN APPLICATION FOR JUDICIAL REVIEW OF THE DECISION OF THE COPYRIGHT BOARD OF CANADA DATED MAY 16, 2014

STYLE OF CAUSE:	RE:SOUND v. CANADIAN ASSOCIATION OF BROADCASTERS, *et al.* and SOCIETY OF COMPOSERS, AUTHORS and MUSIC PUBLISHERS OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 24, 2016
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	WEBB J.A. SCOTT J.A.
DATED:	JUNE 28, 2017

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