

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20241009**

**Docket: A-322-23**

**Citation: 2024 FCA 166**

**CORAM: STRATAS J.A.  
LASKIN J.A.  
BIRINGER J.A.**

**BETWEEN:**

**SOCIETY OF COMPOSERS, AUTHORS  
AND MUSIC PUBLISHERS OF CANADA**

**Applicant**

**and**

**SIRIUS XM CANADA INC.**

**Respondent**

Heard at Toronto, Ontario, on October 9, 2024.

Judgment delivered from the Bench at Toronto, Ontario, on October 9, 2024.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**STRATAS J.A.**

**Federal Court of Appeal**



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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Toronto, Ontario, on October 9, 2024).**

**STRATAS J.A.**

[1] SOCAN applies for judicial review of the Copyright Board's rates-setting decision on October 27, 2023. The focus of SOCAN's application is the thinness and inadequacy of the

evidentiary record before the Copyright Board. SOCAN says that the Board's decision, based on this thin record, was unreasonable. SOCAN also raises procedural unfairness issues.

[2] We are all of the view that the application must be dismissed with costs.

[3] The Board's decision is acceptable and defensible and adequately supported on the evidentiary record before it. The Board also explained its decision in detailed and complete reasons. The Board's decision, involving subjective judgment calls, policy considerations and regulatory experience outside of the ken of the Court, is relatively unconstrained: *Re:Sound v. Canadian Association of Broadcasters*, 2017 FCA 138, 20 Admin LR (6th) 179 at para. 49; *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58, 422 D.L.R. (4th) 112 at para. 100; *CMRRA-SODRAC Inc. v. Apple Canada Inc.*, 2020 FCA 101. Thus, the Board's decision is reasonable.

[4] Contrary to the submissions of SOCAN, the Board did not act in a procedurally unfair way. As the respondent notes in its memorandum of fact and law (at paras. 57-61), SOCAN had many procedural opportunities and tools to advance and protect its interests. SOCAN, a sophisticated and experienced party before the Board and represented by counsel, must be taken to know about these procedural opportunities and tools. To the extent that SOCAN was concerned about the thinness and inadequacy of the developing record before the Board, it had every ability to use those procedural opportunities and tools to adduce, discover and challenge evidence. If SOCAN did not use them, it is the author of its own misfortune. The Board, a neutral adjudicator in a specialized proceeding involving sophisticated parties, does not have to

act on its own motion to help a party build its evidentiary case, such as by requiring a party to produce evidence. In administrative proceedings such as these, sophisticated parties alone are responsible for their own interests.

[5] This case resembles *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2010 FCA 139; see also *CMRRA-SODRAC Inc. v. Apple Canada Inc.*, 2020 FCA 101 at para. 21. In *SOCAN (2010)*, this Court rejected SOCAN’s argument that the Board “should have resorted to its procedural powers under the Act and taken all necessary steps to obtain the information it deemed necessary for the purpose of certifying a tariff that is fair and equitable” (at para. 31). This Court confirmed that the Board has those sorts of procedural powers (at para. 34) but that does not relieve a party from its “obligation to file the necessary evidence in support of its proposed tariff” and its obligation to “put its best foot forward” (at para. 33). It is not for the “Board to do it in [SOCAN’s] stead” (at para. 33).

[6] This is not a case where the Board, after the hearing but before it rendered its decision, decided it on an issue entirely unanticipated by the parties and outside of their reasonable contemplation, thereby depriving them of the opportunity to adduce and test evidence and make submissions on that issue. In cases where, as here, the issues are adequately defined or can be foreseen at the outset, parties must anticipate what might bear on their resolution and the final result and must conduct their cases accordingly.

[7] In oral argument, SOCAN points to a Board request for submissions on August 9, 2022 and suggests that it was misled into thinking that certain issues had been decided in its favour or

were no longer salient. This, it says, changed how it conducted its case. But until the Board finally decides the case, all issues remain live and parties must conduct themselves accordingly. And it was always open to SOCAN, if uncertain or confused at any point about what issues remained in play or whether issues of concern have been resolved to its satisfaction, to seek clarification from the Board and, if necessary, to make use of the procedural opportunities and tools available to it, even at the cost of necessary delay to the final resolution of the proceedings. Failure to object or follow up on an actual, potential or apprehended procedural flaw before the Board, such as uncertainty about the case to meet or what issues remain live, constitutes waiver of the concern and the concern cannot be raised later on judicial review: see, most recently, *Halton (Regional Municipality) v. Canada (Transportation Agency)*, 2024 FCA 122 at para. 38 and cases cited therein.

[8] SOCAN also objects to the Board's reliance on untested evidence submitted by the respondent. Administrative boards under statutory regimes such as this are entitled to admit and rely on such evidence. SOCAN did object to reliance on the evidence but the Board was entitled to dismiss the objection and rely on the evidence.

[9] SOCAN also attacks the Board's adoption of a new analytical framework (at paras. 69-70 of its reasons), apparently "by surprise". But the proper analytical framework was one of many live potential issues before the Board, and given the relatively unconstrained nature of the Board's decision, we cannot say its decision in this regard was unreasonable.

[10] Before the hearing, SOCAN brought a motion to introduce another Board decision into the record before us. The Board decision does not change the above analysis. Thus, the motion is moot and we will dismiss it.

[11] Therefore, we will dismiss the motion and the application with costs.

[12] The respondent seeks elevated costs equal to 50% of its expenses. It says the lack of arguable merit in the application warrants an adverse costs consequence. We disagree to this extent: this was not just a rerun of *SOCAN (2010)*. Important and arguably somewhat unclear issues of practice and procedure before administrative decision-makers were also involved. As well, this Court does not want to create a disincentive against judicial reviews of administrative decisions of public interest. Therefore, in our discretion, we will fix the respondent's costs in the all-inclusive amount of \$15,000.

“David Stratas”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-322-23

**STYLE OF CAUSE:** SOCIETY OF COMPOSERS,  
AUTHORS AND MUSIC  
PUBLISHERS OF CANADA  
v. SIRIUS XM CANADA INC.

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 9, 2024

**REASONS FOR JUDGMENT OF THE COURT  
BY:** STRATAS J.A.  
LASKIN J.A.  
BIRINGER J.A.

**DELIVERED FROM THE BENCH BY:** STRATAS J.A.

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