Federal Court of Appeal | Cour d'appel fédérale

Date: 20250508

Docket: A-57-24

Citation: 2025 FCA 92

CORAM: **LOCKE J.A.**
LEBLANC J.A.
BIRINGER J.A.

BETWEEN:

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

Applicants

and

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

Respondents

Heard at Ottawa, Ontario, on April 3, 2025.

Judgment delivered at Ottawa, Ontario, on May 8, 2025.

REASONS FOR JUDGMENT BY: LOCKE J.A.

CONCURRED IN BY: LEBLANC J.A.
BIRINGER J.A.

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REASONS FOR JUDGMENT

LOCKE J.A.

I. Overview

[1] The applicants are several copyright collectives (the Collectives). They seek judicial review of a redetermination decision made by the Copyright Board of Canada (the Board) dated January 12, 2024 (2024 CB 1, the Redetermination Decision) that set royalty rates for the *Tariff for the Retransmission of Distant Television Signals, 2014-2018* (the Tariff) pursuant to section 70 of the *Copyright Act*, R.S.C. 1985, c. C-42. The contemplated royalties are payable by the respondent Broadcast Distribution Undertakings (BDUs) to the Collectives.

[2] The Redetermination Decision followed a July 22, 2021 decision of this Court (2021 FCA 148, the JR Decision) granting in part an application for judicial review of an earlier decision of the Board setting such rates (CB-CDA 2019-056, the Original Decision). The JR Decision set aside certain aspects of the Original Decision and remitted the matter to the Board for redetermination of these issues. The dispute in this application concerns whether the Board exceeded its jurisdiction in the Redetermination Decision by going beyond what was contemplated in the JR Decision.

[3] As explained below, I conclude that the Board did indeed exceed its jurisdiction.

II. The JR Decision

[4] Following the Original Decision of the Board, the Collectives and the BDUs made separate applications to this Court for judicial review thereof. The resulting JR Decision

dismissed the BDUs' application but granted the Collectives' application in part, finding two reviewable errors in the Original Decision. Specifically, this Court concluded that the Board erred (i) in relying on incomplete and superseded information in its calculations of payments made by the BDUs for three Canadian services used as proxies (see paragraphs 62 to 64 of the JR Decision), and (ii) in applying a 25% profit margin adjustment in its calculations for Canadian and US proxy services (see paragraphs 66 to 72 of the JR Decision).

[5] With regard to the first error (which I will call the Payment Data Error), this Court concluded that certain payments for the three Canadian proxy services had been inadvertently omitted from the Board's calculations. The missing data had been entered into evidence via undertakings made at the hearing before the Board (the Undertakings Data) prior to the Original Decision. The BDUs did not dispute the error.

[6] With regard to the second error (which I will call the Profit Margin Error), this Court noted that the Board relied on the evidence of the BDUs' expert Dr. Chipty, and Dr. Chipty based her calculations on a 10% profit margin adjustment for the non-vertically integrated proxy services in question. This Court concluded as follows: "Under Dr. Chipty's approach, the only correct profit margin adjustment for Canadian and U.S. proxy services would have been set at 10%" (see paragraph 72 of the JR Decision).

[7] Regarding remedies, the Collectives urged this Court to substitute its own decision for that of the Board in the Original Decision. They argued that the errors were easy to fix, and there had been considerable delay since the 2014 to 2018 period covered in the Original Decision.

Despite the Collectives' urging, this Court decided to remit the matter to the Board for Redetermination. In doing so, this Court made the following observations:

> [82] …I appreciate that the two errors identified by this Court in assessing the adjustment to the proxy price, namely the use of an incomplete and superseded version of the payment data as well as the use of the wrong profit margin figure, are quite straightforward and do not involve a reconsideration of the overall approach implemented by the Board. At the same time, the amounts at stake are considerable, and as much as the Collectives filed with this Court (as an appendix to their factum) a calculation of the effect of correcting each error, we do not have the views of the BDUs on that issue.
>
> …
>
> [84] I understand that the retransmission royalty rates for the period 2014–2018 were only released in December 2018, and that the Tariff was only approved and published on August 3, 2019. We are now, in effect, reconsidering royalty rates that should have applied between three and seven years ago. This long delay is obviously of concern, and is the source of uncertainty for all the players involved. I trust that the Board will be able to amend its Tariff in conformity with these reasons in an expeditious way. In the meantime, the parties will be able to govern themselves and make whatever business decisions they may have to make in light of the adjustments that will be required as a result of this decision.

[8] The Judgment in the JR Decision reads as follows:

> The application for judicial review is granted in part. The Board's decision is set aside only to the extent of its use of the wrong pricing data in its proxy price calculation and of the wrong profit margin. The matter is therefore remitted to the Board for redetermination of the rates in accordance with these reasons. Each party shall bear its own costs.

III. The Redetermination Decision

[9] In its Redetermination Decision, the Board addressed both of the errors found in the JR Decision.

[10] With regard to the Payment Data Error, the Board applied the omitted payment data for the three Canadian proxy services as contemplated in the JR Decision, but it also made two additional modifications to its calculations that had not been in issue before this Court in the JR Decision. After providing the parties with preliminary calculations, and hearing submissions from the parties thereon, the Board removed what it concluded were double-counted payments in the Original Decision related to standard definition (SD) and high definition (HD) versions of a specialty service, and it added payments made by Telus related to the Fox News specialty service that the Board concluded had been incorrectly omitted in the Original Decision.

[11] With regard to the Profit Margin Error, the Board applied the 10% profit margin adjustment for non-vertically integrated Canadian proxy services as contemplated in the JR Decision. However, the Board concluded that 10% was inappropriate for US specialty services and applied instead a 25% profit margin adjustment.

A. *Redetermination Decision related to the Payment Data Error*

[12] The Board recognized that its calculations on Redetermination went beyond the issues that were considered in the JR Decision (see paragraph 20 of the Redetermination Decision). It concluded that it should consider those additional issues because (i) this Court had not endorsed the remainder of the Board's calculations of the proxy price in the Original Decision, (ii) the double-counting issue was identified through the redetermination process, and (iii) the Board has a mandate to fix fair and equitable royalty rates (see paragraph 21 of the Redetermination Decision). The Board expanded on its reasoning in this regard at paragraphs 49 to 56 of the

Redetermination Decision, commenting that it should not "purposefully ignore apparent errors" and that making the additional corrections was not in conflict with the JR Decision.

[13] In finding that payments concerning SD and HD services had been double counted, the Board relied on an argument from the BDUs that subscriber and payment amounts for each of these services were nearly identical (see paragraph 65 of the Redetermination Decision).

[14] With regard to the payments concerning Fox News, the Board noted that its preliminary calculations on redetermination did not rely on the Collectives' summary table of payments as had been the case in the Original Decision. Rather, it relied on Dr. Chipty's expert report together with the Undertakings Data. This explains why these Fox News payments were missing in the Original Decision. The parties did not take issue before the Board with the inclusion of these payments in the preliminary calculations (see paragraphs 67 and 68 of the Redetermination Decision).

B. *Redetermination Decision related to the Profit Margin Error*

[15] In applying a 25% profit margin adjustment for US proxy services, the Board conducted an evaluation of the evidence and rejected the 10% figure found in the JR Decision (see paragraphs 87 to 95 of the Redetermination Decision).

IV. Issues in Dispute and Standard of Review

[16] The Collectives argue that the Board exceeded its jurisdiction in the Redetermination Decision when it adjusted its calculations in ways not contemplated in the JR Decision. They argue that the Board was *functus officio* on the matter except to the extent that this Court remitted the matter for redetermination. With regard to the Profit Margin Error, the Collectives cite the principle of *stare decisis* to argue that the Board improperly overrode the treatment of evidence in the Original Decision, and improperly reinstated the 25% figure for profit margin adjustment in respect of US proxy services after this Court set aside that figure.

[17] The Collectives also argue that, even if the Board had the authority to make the contested adjustments to its calculations, its analysis on those issues was unreasonable.

[18] The BDUs disagree with the Collectives on all of the issues raised. The BDUs argue that the Board properly exercised its jurisdiction, and that its analysis was reasonable.

[19] On standard of review, the Collectives argue that the Board's conclusion as to the scope of its jurisdiction on redetermination should be reviewed on a standard of correctness. However, they acknowledge that, if the Board had the jurisdiction to make the contested adjustments to its calculations, its analysis of those issues should be reviewed on a standard of reasonableness. The BDUs argue that the applicable standard of review on all issues is reasonableness.

[20] In my view, it is not necessary to reach a conclusion on the standard of review applicable to the Board's determination of the scope of its jurisdiction on redetermination. As I explain below, I conclude that the Board's assessment of its jurisdiction in this regard was both incorrect and unreasonable.

V. Analysis

[21] While the parties disagree about whether the principles of *functus officio* or *stare decisis* apply in the present circumstances, it is not necessary to address these issues in detail. The parties agree that the scope of the Board's jurisdiction is constrained by the JR Decision, and that this Court should focus on the Judgment therein (reproduced at paragraph 8 above) to determine which aspects of the Original Decision the Board was entitled to revisit in its Redetermination Decision. The jurisprudence supports this approach, holding that only instructions explicitly stated in a judgment are binding on the subsequent decision-maker: *Canada (Citizenship and Immigration) v. Yansane*, 2017 FCA 48, [2017] F.C.J. No. 264 at para. 19; *Jagadeesh v. Canadian Imperial Bank of Commerce*, 2024 FCA 172 at para. 46. While not binding on their own, the reasons in the JR decision can be used to interpret the Judgment. Aside from the JR Decision, the Board's power to change the Original Decision was essentially limited to (i) slips in drawing up the formal judgment and errors in expressing the Board's manifest intention (see *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, 62 D.L.R. (4th) 577 at 860), and (ii) material changes in circumstances since the Original Decision (see section 66.52 of the *Copyright Act*, R.S.C. 1985, c. C-42). Neither of these sets of circumstances is present in this case.

[22] I note that the Board explicitly acknowledged the limits on its power on redetermination, stating as follows at paragraph 46 of the Redetermination Decision:

> The Board cannot unilaterally perform a review of its own decision, whether an error is obvious or not, or whether it is significant or not. The Board requires direction from a reviewing court.

[23] At paragraph 48 of the Redetermination Decision, the Board cited this Court's decision in *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2003 FCA 53, [2003] 3 F.C. 529 at para. 10, for the framework for determining whether a tribunal has acted within its authority on a redetermination:

> In order to determine whether the Tribunal, in its redetermination decision, failed to follow the directions of the Federal Court of Appeal, it is necessary to consider:
>
> l. the relevant legislative scheme;
>
> 2. the relevant findings of the Tribunal in its original decision;
>
> 3. what the Court found to be in error in the Tribunal's original decision;
>
> 4. what the Court concluded and directed the Tribunal to do; and
>
> 5. whether the Tribunal, in its redetermination decision, did what it was directed to do by the Court.

[24] In my view, a strict application of these criteria is not needed here. A simpler analysis suffices: (1) what did this Court direct on redetermination, and (2) did the Board follow those directions: *ABB Inc. v. Hyundai Heavy Industries Co., Ltd.*, 2015 FCA 157 at para. 29.

[25] The dispute between the parties does not appear to relate to the legal limitations on the Board in redetermination, but rather on how those legal limitations should have been applied in the circumstances of this case.

A. *Redetermination Decision related to the Payment Data Error*

[26] Regarding the Payment Data Error, the Judgment in the JR Decision set aside the Original Decision "only to the extent of its use of the wrong pricing data in its proxy price calculation" (emphasis added). The Collectives argue that the word "only" indicates that the JR Decision provided for a limited setting aside of the Original Decision and a limited scope for redetermination. They also argue that the term "the wrong pricing data" indicates that it referred specifically to the pricing data identified in paragraphs 62 to 64 of the JR Decision as erroneous – the inadvertently omitted payments for the three Canadian proxy services in issue. The Collectives argue that corrections to the pricing data were to be limited to taking account of those payments.

[27] As indicated at paragraph 12 above, the Board acknowledged in its Redetermination Decision that the adjustments to its calculations went beyond the issues considered in the JR Decision. The additional modifications it made are those identified in paragraph 10 above concerning the alleged double counting of SD and HD versions of services (the SD/HD double counting issue) and the omitted payments by Telus for Fox News (the Telus/Fox News issue). The Board concluded that it was justified in making these additional modifications for the reasons summarized at paragraph 21 of the Redetermination Decision and discussed in greater detail at paragraphs 49 to 56 thereof. Broadly speaking, the Board provided two justifications for its approach in this regard. The first was that the JR Decision had not endorsed the remainder of the Board's calculations in the Original Decision. The second was that, having found the additional errors in the course of redetermination, the Board was duty-bound to correct them. In my view, neither of these justifies the Board's approach.

[28] With regard to the first justification (the absence of endorsement of the remainder of the Original Decision), the parties agree that part of the Board's task on redetermination was to interpret what this Court directed with the text of the Judgment in the JR Decision. The Board clearly concluded that this text permitted redetermination of issues beyond those addressed in the JR Decision. In my view, this interpretation was both incorrect and unreasonable.

[29] I disagree with the Board's interpretation of the JR Decision. The JR Decision discussed the Payment Data Error at paragraphs 62 to 64, wherein the Court detailed the nature of the error as missing payment data for the three Canadian proxy services. Beyond this, I note that paragraph 82 of the JR Decision identifies the error as "the use of an incomplete and superseded version of the payment data", which appears to refer to the same missing payment data. There is no suggestion in the JR Decision of any other errors in the payment data.

[30] I see no relevance in the absence of an explicit endorsement by this Court of the remainder of the Board's calculations in the Original Decision. Such an endorsement was not necessary to prevent the Board from revisiting those calculations in redetermination. Moreover, the Judgment in the JR Decision clearly indicates that the Original Decision was set aside "only to the extent of" the two errors identified therein. On a fair reading of the JR Decision and the Judgment therein, it is implicit that this Court directed that the remainder of the Original Decision would be left undisturbed.

[31] The BDUs note that the JR Decision could have included an explicit direction to the Board of the kind contemplated in paragraph 18.1(3)(*b*) of the *Federal Courts Act*, R.S.C. 1985,

c. F-7, to the effect that the redetermination should be limited to the two errors identified therein. The BDUs argue that this Court's failure to do so indicates that it did not intend the JR Decision to be interpreted in such a limited way. While this Court could indeed have chosen to include such a direction, I see no reason to infer a broader meaning to the JR Decision from its absence.

[32] My conclusion concerning the Board's limited power on redetermination is no different if I apply the more deferential reasonableness standard to the Board's interpretation of the JR Decision. I see no rational basis for concluding that this Court contemplated that the Board's redetermination would go beyond the issues addressed in the JR Decision and revisit issues that had not been addressed before it. As indicated, the Court identified two errors in the Original Decision and set that decision aside only to the extent of those two errors. A conclusion that the JR Decision provided for redetermination to extend beyond those two errors is unreasonable, and smacks of goal-oriented reasoning.

[33] In fact, the JR Decision strongly suggests that the redetermination would be limited. In deciding to remit the matter to the Board rather than performing the necessary recalculations itself, this Court expressed concern about the long delay in calculating the Tariff to cover the 2014-2018 period, but stated the recalculations would be "quite straightforward" (see paragraph 82 of the JR Decision). This Court concluded as follows, at paragraph 84 of the JR Decision:

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

[34] Clearly, this Court expected that the results of the redetermination would be quick and predictable enough to permit the parties to make business decisions in anticipation thereof even before the process was completed. In the end, the redetermination was not conducted expeditiously. It took almost 2½ years.

[35] The second justification offered by the Board for going beyond the issues that were before the Court in the JR Decision was that the Board was duty-bound to correct the additional errors that it found. In my view, this is not a proper justification for revisiting the Original Decision. The additional errors the Board identified in the Redetermination Decision were based on the calculations made by the Board in the Original Decision. As noted at paragraph 22 above, the Board acknowledged that it had no power to review that decision, even to correct obvious and significant errors, without direction from this Court. So, once again we are led to consider what this Court directed in the JR Decision. As discussed above, I see no reasonable basis for concluding that the JR Decision provided direction to correct errors other than the two the Court identified.

B. *Redetermination Decision related to the Profit Margin Error*

[36] Much as with regard to the Payment Data Error, this Court's Judgment in respect of the Profit Margin Error was limited. It set aside the Original Decision "only to the extent of its use of … the wrong profit margin" (emphasis added). As discussed above, the words "only to the extent of" clearly indicate a limited scope for redetermination. Moreover, it is clear from paragraph 72 of the JR Decision that "the wrong profit margin" was the figure of 25% applied in the Original Decision, and "the only correct profit margin adjustment" was 10%.

[37] As indicated at paragraph 15 above, the Board in the Redetermination Decision re-evaluated the evidence that had been considered in both the Original Decision and the JR Decision and concluded that the 10% profit margin adjustment contemplated in the JR Decision should be applied only to Canadian proxy services, and that a 25% profit margin adjustment should be applied in respect of US proxy services.

[38] The Board did not repeat the justifications provided in the Redetermination Decision in the context of the Payment Data Error for failing to limit its redetermination to the error identified in the JR Decision. It noted the Collectives' argument that the only option available was the 10% profit margin adjustment and proceeded to explain how it disagreed as regards US proxy services. The Board preceded its analysis of this issue with the following statement at paragraph 78 of the Redetermination Decision:

> Given that the FCA sent the issue of profit adjustment back to the Board due to the Board's appreciation of the evidence, and given that the description of the evidence in the Original Decision was perhaps terse, we describe in greater detail that evidence here.

[39] This paragraph, and the Board's subsequent reasoning, suggests that it understood that the matter of profit margin adjustment was remitted to it for a re-evaluation of the evidence with a more detailed explanation. That is an unreasonable reading of the JR Decision and the Judgment therein. The Judgment was not ambiguous as to the aspects of the Original Decision that were set aside, and the Board did not explain how it reached its different interpretation of the Judgment. It appears that the Board interpreted the Judgment as it wanted it to be rather than as it actually read.

[40] I agree with the Collectives that there was only one reasonable way to interpret the Judgment as it related to the Profit Margin Error. Its wording, as well as the passages in paragraphs 82 and 84 of the JR Decision concerning the simplicity of the contemplated redetermination (see paragraphs 33 and 34 above), clearly indicate that no further evaluation of the evidence was permitted, and that the 10% profit margin adjustment should be applied to both Canadian and US proxy services.

[41] As discussed above in respect of the Payment Data Error, I see no reason to infer a broader scope for redetermination from the absence of an explicit direction in the Judgment of the kind contemplated in paragraph 18.1(3)(*b*) of the *Federal Courts Act*.

C. *Reasonableness of the Board's determinations concerning the additional issues*

[42] Because of my conclusions on the limited scope for redetermination, it is unnecessary for me to address the arguments in the alternative concerning the reasonableness of the Board's conclusions concerning the SD/HD double counting issue and the 25% profit margin adjustment applied to US proxy services.

VI. Remedy

[43] Having concluded that the Board exceeded its jurisdiction in the ways discussed above, it is necessary to decide the appropriate remedy.

[44] As noted above, this Court in the JR Decision decided to remit the matter to the Board. It did so despite concern for the long delay in setting the Tariff, noting that the contemplated recalculations were quite straightforward and could be done expeditiously. This Court also noted that the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 141 (*Vavilov*) taught that "it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision". In concluding that the general rule (remitting to the Board) should apply in this case, the Court noted that the amounts at stake were considerable, and that it did not have the BDUs' views on the recalculations as proposed by the Collectives. It also noted that Parliament had created the Board as the expert administrative tribunal responsible for approving the Tariff.

[45] The situation has now evolved in that the delay that was of concern to this Court in 2021 is even more of a concern now in 2025. In addition, the Collectives have provided Appendix A in their memorandum of fact and law, which provides the appropriate monthly per subscriber royalty rate for large systems (over 6,000 subscribers) depending on how this Court rules on the Payment Data Error and Profit Margin issues in the present application. The BDUs indicate that they do not quibble with the numbers in Appendix A. Moreover, the Collectives confirm that the figures in Appendix A do not take into account any payments related to the Telus/Fox News issue.

[46] The Collectives ask that this matter not be remitted to the Board again for redetermination. They cite the guidance in *Vavilov* at paragraph 142 to avoid "an endless merry-go-round of judicial reviews and subsequent reconsiderations." Instead, they seek a direction

from this Court for the Board to issue a new certified Tariff in accordance with the figures in their Appendix A, but subject to the caps for all years based on the proposed royalty rates as published in the *Canada Gazette* and identified in paragraph 154 of the Redetermination Decision. Those caps concern the rates originally proposed by the Collectives.

[47] The BDUs do not dispute that, if we grant the present application, we may direct the Board as to the appropriate royalty rates for the Tariff. As this Court stated at paragraph 83 of the JR Decision, it is ultimately for the Board to approve a proposed tariff and publish it in the *Canada Gazette*.

[48] Based on the figures in the Collectives' Appendix A (and specifically the figures applicable in the event that the Collectives are successful on both of the issues in dispute), and the caps identified in paragraph 154 of the Redetermination Decision, I conclude that the caps are determinative and the Board should be directed to set per month per subscriber royalty rates for large systems in the Tariff as indicated in the last column of the table below:

Year	**Appendix A Rate**	**Cap**	**Appropriate Tariff Rate**
2014	$1.46	$1.06	$1.06
2015	$1.46	$1.14	$1.14
2016	$1.46	$1.22	$1.22
2017	$1.46	$1.30	$1.30
2018	$1.46	$1.38	$1.38

[49] The rates for systems other than large systems should be determined based on the rates for large systems, as listed in the table above, and adjusted as indicated in paragraph 162 of the Redetermination Decision.

VII. Conclusion

[50] For the foregoing reasons, I would grant the present application with costs, set aside the Redetermination Decision, and direct the Board (in accordance with paragraph 18.1(3)(*b*) of the *Federal Courts Act*) to issue a new certified Tariff with rates as indicated in the previous two paragraphs.

"George R. Locke"
J.A.

"I agree.
René LeBlanc J.A."

"I agree.
Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-57-24
STYLE OF CAUSE:	COPYRIGHT COLLECTIVE OF CANADA, CANADIAN BROADCASTERS RIGHTS AGENCY, CANADIAN RETRANSMISSION COLLECTIVE, FWS JOINT SPORTS CLAIMANTS, INC., CANADIAN RETRANSMISSION RIGHTS ASSOCIATION, SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA, BORDER BROADCASTERS INC., and DIRECT RESPONSE TELEVISION COLLECTIVE INC. v. BELL CANADA, ROGERS COMMUNICATIONS INC., COGECO COMMUNICATIONS INC., VIDEOTRON LTD., TELUS COMMUNICATIONS INC., SHAW COMMUNICATIONS INC., THE CANADIAN COMMUNICATION SYSTEMS ALLIANCE and MAJOR LEAGUE BASEBALL COLLECTIVE OF CANADA INC.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 3, 2025
REASONS FOR JUDGMENT BY:	LOCKE J.A.
CONCURRED IN BY:	LEBLANC J.A. BIRINGER J.A.
DATED:	MAY 8, 2025

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