

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140224

Docket: A-353-12

Citation: 2014 FCA 48

**CORAM: EVANS J.A.
TRUDEL J.A.
WEBB J.A.**

BETWEEN:

RE:SOUND

Applicant

and

**FITNESS INDUSTRY COUNCIL OF CANADA
and GOODLIFE FITNESS CENTRES INC.**

Respondents

Heard at Toronto, Ontario, on November 19, 2013.

Judgment delivered at Toronto, Ontario, on February 24, 2014.

REASONS FOR JUDGMENT BY:

EVANS J.A.

CONCURRED IN BY

**TRUDEL J.A.
WEBB J.A.**

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REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] Section 19 of the *Copyright Act*, R.S.C. 1985, c. C-42 (Act) entitles performers and makers of sound recordings to an equitable remuneration from those who use these recordings in a public performance.

[2] Re:Sound is a not-for-profit collective society authorized under the Act to administer the performance rights of performers and record labels in sound recordings. In particular, Re:Sound collects and distributes equitable remuneration on behalf of performers and makers of sound recordings of musical works in accordance with royalty tariffs certified by the Copyright Board (Board).

[3] In a decision dated July 6, 2012, the Board approved *Re:Sound Tariff No. 6.B – Use of Recorded Music to Accompany Physical Activities, 2008-2012 (Tariff 6.B)*. *Tariff 6.B* prescribes the amount of equitable remuneration to be collected by Re:Sound from those using published sound recordings of musical works to accompany fitness classes, skating, dance instruction, and other physical activities.

[4] *Tariff 6.B* requires fitness centres to pay an annual flat fee to Re:Sound for each venue where recorded music in Re:Sound's repertoire is used in conjunction with fitness classes. The Board based the royalty on the average of the payments made by fitness centres under agreements with the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for the composers, lyricists, and music publishers of recorded music to accompany dance instruction and fitness activities, in lieu of the amounts set in *SOCAN Tariff 19 – Use of Recorded Music to Accompany Dance Instruction and Fitness Activities, 2011-2012 (SOCAN Tariff 19)*.

[5] Re:Sound has brought an application for judicial review to set aside *Tariff 6.B*. The application is opposed by the respondents, the Fitness Industry Council of Canada (FIC), the industry's trade association, and Goodlife Fitness Centres Inc. (Goodlife), a major player in the

fitness industry. They had participated in the proceedings before the Board as objectors to Re:Sound's proposed *Tariff 6.B*.

[6] Re:Sound alleges in its application for judicial review that the Board committed three errors in setting the royalty rates for the use of recorded music to accompany fitness classes: (i) it breached the duty of fairness by basing *Tariff 6.B* on a ground that was not considered during the hearing and on evidence that Re:Sound had no opportunity to address; (ii) it erred in law when it interpreted the Act as providing that royalties under section 19 should be based, not on the number of all recordings used in fitness classes that are eligible for equitable remuneration, but on the percentage of those for which the performers or makers had authorized Re:Sound to collect royalties on their behalf; and (iii) it set the royalty at an unreasonably low level.

[7] For the reasons that follow, I would allow the application for judicial review on the ground that the Board breached the duty of fairness. However, I am not persuaded that the Board committed a legal error when it reduced the section 19 royalties payable to Re:Sound to reflect the percentage of eligible recordings used in fitness classes that performers or makers had brought into Re:Sound's repertoire by authorizing it to act on their behalf. Since I have concluded that the Board must redetermine the royalty after hearing additional submissions, it is unnecessary to opine on the reasonableness or otherwise of the royalty set by the Board in *Tariff 6.B* for the use of recordings to accompany fitness classes.

[8] As already noted, *Tariff 6.B* also includes royalties payable to the makers and performers of sound recordings of musical works that are used to accompany skating, dance instruction, and other

physical activities. Re:Sound made relatively few submissions on these aspects of *Tariff 6.B* to either the Board or this Court. I shall deal with Re:Sound's challenge to these royalties after my analysis of its application to review the royalties approved for the use of recorded music in fitness classes.

Factual background

[9] The Board has a statutory jurisdiction to set tariffs of royalties payable to the owners of copyright in sound recordings (composers, lyricists, and music publishers). It also approves royalty tariffs payable as "equitable remuneration" to the holders of "neighbouring rights" in published sound recordings (performers and makers) for the performance in public or the communication to the public by telecommunication in Canada of their recordings.

[10] The right of performers and makers to an equitable remuneration is not an exclusive right: unlike traditional copyright owners, holders of neighbouring rights in musical works cannot bring an action to recover equitable remuneration against a person who, without authorization, performs their recordings in public. The only legal recourse they may have is against a collective society that has failed either to file a proposed tariff with the Board as required by subsections 67.1(1) and (2) of the Act, or to distribute to the beneficiaries the royalties that have been approved by the Board and collected from the users by the collective society.

[11] Nor can a collective society bring an action against a user to recover equitable remuneration when no tariff has been proposed, unless the Minister of Industry has given written consent:

subsection 67.1(4). However, if users default in making the royalty payments in an approved tariff, a collective society may recover them in a court of competent jurisdiction: subsection 68.2(1).

[12] The recognition of neighbouring rights in Canadian law is relatively recent. They were added to the Act in 1997 (S.C. 1997, c. 24) in order to implement obligations assumed by Canada on March 4, 1998 when it acceded to the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 26 October 1961, 496 U.N.T.S. 43 (Rome Convention). For the limited protection previously enjoyed by makers and performers of recorded music, see the first neighbouring rights decision of the Board in *Tariff No. 1.A – Commercial Radio, 1998-2002*, dated August 13, 1999, at 2-3 (*Tariff 1.A*).

[13] *Tariff 6.B* is the first neighbouring rights tariff that the Board has certified for the use of sound recordings to accompany fitness classes. However, it has certified two related tariffs.

[14] First, *SOCAN Tariff 19* is the most recent SOCAN tariff of royalties approved by the Board to be paid to the composers and lyricists of recorded music used to accompany dance, aerobics, body building, and other similar activities.

[15] Second, in 2006 the Board certified *NRCC Tariff No. 3 – Use and Supply of Background Music, 2003-2009* proposed by the Neighbouring Rights Collective of Canada (NRCC), Re:Sound's predecessor, for the holders of neighbouring rights in published sound recordings used as background music in an establishment.

[16] Re:Sound is an umbrella organization for its five member societies, which are comprised of performers or makers, in Quebec and elsewhere in Canada. It distributes the royalties collected from users either to the member society to which the performer or maker belongs or directly to the individuals entitled to them. Re:Sound is currently the only collective society authorized by the Board to collect section 19 royalties from the users of sound recordings.

[17] The proceedings from which this application arises commenced on March 30, 2007 when Re:Sound filed a proposed tariff for the use of recorded music to accompany, among other things, fitness classes. If approved as filed, Re:Sound's proposed *Tariff 6.B* would, the Board found, impose royalty payments of approximately \$86 million annually on the Canadian fitness industry which, according to Re:Sound, has an annual revenue of around \$2 billion. In objecting to Re:Sound's proposed tariff, the FIC and Goodlife submitted that the Board should impose royalties totalling approximately \$3 million.

[18] The Board certified *Tariff 6.A* on July 15, 2011 to deal with the tariff proposed by Re:Sound for sound recordings used in connection with dance. A year later, the Board certified *Tariff 6.B* for the use of recorded music to accompany other physical activities, including fitness classes. It is common ground between the parties to this application that under *Tariff 6.B* as approved by the Board, the annual amount that Re:Sound can collect from users is less than that proposed by the FIC and Goodlife.

[19] The Board's five-year long decision-making process comprised formal and informal procedural steps, including interrogatories and responses, written submissions, and the filing of

expert evidence. Only 11 days were spent on the oral hearing. I shall describe the aspect of the Board's procedure relevant to Re:Sound's allegation that it was denied procedural fairness in my analysis of that issue.

Decision of the Board

[20] The Board's reasons describe and analyze at length the expert evidence and submissions of the parties in support of their respective positions on the appropriate bases for determining the equitable remuneration payable to Re:Sound for the use of recorded music to accompany fitness classes: paras. 9-63, and 98-147.

[21] It suffices to say here that the Board found most of the expert evidence and submissions of Re:Sound and the respondents to be unsatisfactory. Consequently, it rejected the royalties that the parties proposed.

[22] One point is, however, worth noting. An expert witness for the respondents, Dr. David Reitman, suggested that since *SOCAN Tariff 19* concerned royalties payable to composers and lyricists of recorded music played in conjunction with physical activities similar to those targeted in *Tariff 6.B*, it was an appropriate benchmark for *Tariff 6.B*. It was argued that *SOCAN Tariff 19* had been in existence in various forms for 30 years and was "a reality in the marketplace": at para. 136. It was thus a reliable indicator of the market value of recorded music when used in conjunction with physical activities.

[23] The Board, however, agreed with Re:Sound that *SOCAN Tariff 19* was not an appropriate benchmark: at para. 147. It had never been the subject of even cursory examination, important terms of the Tariff were ambiguous, and its enforcement had proved problematic: at paras. 136, 140-144. As evidence of the difficulties with *SOCAN Tariff 19*, the Board noted (at para. 146) that, rather than attempting to enforce the rates certified in the Tariff, SOCAN collected nearly one third of its “*Tariff 19* royalties” under confidential licensing agreements that it had made with individual users subject to *SOCAN Tariff 19*, including some of Canada’s largest fitness centres and dance instruction providers. After the hearing on *Tariff 6.B* was closed, the Board requested SOCAN to deposit copies of these agreements with it, which it did.

[24] The Board recognized that its rejection of both the expert evidence adduced by the parties, and the other suggested bases for setting the royalties, left it in a difficult position. Nonetheless, it decided (at paras. 161-164) not to exercise the option of declining to approve a tariff after considering *SOCAN v. Bell Canada*, 2010 FCA 139 at paras. 25-30. Since the Board had not rejected the factual information filed by the parties it had some evidence of the value of recorded music to fitness classes. Consequently, it held, Re:Sound was entitled to a tariff.

[25] The Board acknowledged (at para. 167) that flat fee royalties are generally an unsatisfactory reflection of the value of music to users, because they do not take account of the number of participants in a targeted activity or the amount of music used. Nonetheless, the Board decided that this was the best solution to its dilemma in this case. A flat fee for all users is easy to administer because minimal compliance monitoring is needed. In addition, *Tariff 6.B* was only transitional, in the sense that the period that it covered ended in 2012, the year of its approval, and the Board would

likely be given better evidence on which to base a more permanent, multi-year tariff to start in 2013: see paras. 165-167.

[26] The Board calculated (at paras. 83-97, 168-169) the amount of the flat fee as follows. It computed the average “*Tariff 19* royalties” paid to SOCAN under the agreements with fitness centres that it had supplied to the Board. The Board determined that 53% of the musical recordings played at fitness centres were eligible recordings under section 20. It then adjusted this percentage down to 36.6% to reflect the fact that Re:Sound’s repertoire consisted of only a portion of the eligible recordings played at fitness classes. This calculation produced an annual flat fee of \$105.74 to be paid by each venue using sound recordings to accompany fitness classes that were in the repertoire of Re:Sound or one of its member collectives.

Statutory Framework

[27] The statutory provisions relevant to the disposition of this application are contained in the *Copyright Act*. Section 2 defines a collective society for the purpose of the Act.

2. “collective society” means a society, association or corporation that carries on the business of collective administration of copyright or of the remuneration right conferred by section 19 or 81 for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and

(a) operates a licensing scheme, applicable in relation to a repertoire of works, performer’s performances, sound recordings or communication

2. « société de gestion » Association, société ou personne morale autorisée — notamment par voie de cession, licence ou mandat — à se livrer à la gestion collective du droit d’auteur ou du droit à rémunération conféré par les articles 19 ou 81 pour l’exercice des activités suivantes :

a) l’administration d’un système d’octroi de licences portant sur un répertoire d’oeuvres, de prestations, d’enregistrements sonores ou de

signals of more than one author, performer, sound recording maker or broadcaster, pursuant to which the society, association or corporation sets out classes of uses that it agrees to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, or

(b) carries on the business of collecting and distributing royalties or levies payable pursuant to this Act.

signaux de communication de plusieurs auteurs, artistes-interprètes, producteurs d'enregistrements sonores ou radiodiffuseurs et en vertu duquel elle établit les catégories d'utilisation qu'elle autorise au titre de la présente loi ainsi que les redevances et modalités afférentes;

b) la perception et la répartition des redevances payables aux termes de la présente loi.

[28] Subsection 19(1) creates a right to an equitable remuneration for makers and performers of sound recordings when performed in public. In order to produce the funds required to provide an equitable remuneration, those who perform the recordings in public are liable to pay royalties to the collective society authorized to collect them. Subsection 20(1) sets out the eligibility criteria for equitable remuneration and the conditions under which the right applies: the maker of a sound recording must be a Canadian citizen or a permanent resident (or, in the case of a corporation, have its headquarters in Canada), or the fixations for the recording must have occurred in Canada.

[29] Other provisions in sections 19 and 20, not relevant to the present proceeding, apply the right to equitable remuneration and the eligibility criteria to parties to the Rome Convention. Recordings emanating from the United States will normally not be eligible for equitable remuneration because the United States is not party to the Rome Convention. They can therefore be performed in public in Canada without the user being liable to pay a royalty under section 19.

19. (1) If a sound recording has been published, the performer and maker are entitled, subject to subsection 20(1), to be paid equitable remuneration for its

19. (1) Sous réserve du paragraphe 20(1), l'artiste-interprète et le producteur ont chacun droit à une rémunération équitable pour

performance in public or its communication to the public by telecommunication, except for a communication in the circumstances referred to in paragraph 15(1.1)(d) or 18(1.1)(a) and any retransmission.

l'exécution en public ou la communication au public par télécommunication — à l'exclusion de la communication visée aux alinéas 15(1.1)d ou 18(1.1)a) et de toute retransmission — de l'enregistrement sonore publié.

...

[...]

(2) For the purpose of providing the remuneration mentioned in this section, a person who performs a published sound recording in public or communicates it to the public by telecommunication is liable to pay royalties

(2) En vue de cette rémunération, quiconque exécute en public ou communique au public par télécommunication l'enregistrement sonore publié doit verser des redevances :

(a) in the case of a sound recording of a musical work, to the collective society authorized under Part VII to collect them; or

a) dans le cas de l'enregistrement sonore d'une oeuvre musicale, à la société de gestion chargée, en vertu de la partie VII, de les percevoir;

(b) in the case of a sound recording of a literary work or dramatic work, to either the maker of the sound recording or the performer.

b) dans le cas de l'enregistrement sonore d'une oeuvre littéraire ou d'une oeuvre dramatique, soit au producteur, soit à l'artiste-interprète.

(3) The royalties, once paid pursuant to paragraph (2)(a) or (b), shall be divided so that

(3) Les redevances versées en application de l'alinéa (2)a) ou b), selon le cas, sont partagées par moitié entre le producteur et l'artiste-interprète.

(a) the performer or performers receive in aggregate fifty per cent; and

(b) the maker or makers receive in aggregate fifty per cent.

20. (1) The right to remuneration conferred by subsection 19(1) applies only if

20. (1) Le droit à rémunération conféré par le paragraphe 19(1) ne peut être exercé que si, selon le cas :

(a) the maker was, at the date of the first fixation, a Canadian citizen or permanent resident within the meaning

a) le producteur, à la date de la première fixation, soit est un citoyen canadien ou un résident permanent au

of subsection 2(1) of the *Immigration and Refugee Protection Act* or, if a corporation, had its headquarters in Canada; or

sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*, soit, s'il s'agit d'une personne morale, a son siège social au Canada;

(b) all the fixations done for the sound recording occurred in Canada.

b) toutes les fixations réalisées en vue de la confection de l'enregistrement sonore ont eu lieu au Canada.

...

[...]

[30] The first part of Part VII of the Act establishes the Copyright Board and confers its powers.

Only a few provisions are sufficiently relevant to this application to warrant inclusion here.

66. (3) The chairman must be a judge, either sitting or retired, of a superior, county or district court.

66. (3) Le gouverneur en conseil choisit le président parmi les juges, en fonction ou à la retraite, de cour supérieure, de cour de comté ou de cour de district.

...

[...]

66.52 A decision of the Board respecting royalties or their related terms and conditions that is made under subsection 68(3), sections 68.1 or 70.15 or subsections 70.2(2), 70.6(1), 73(1) or 83(8) may, on application, be varied by the Board if, in its opinion, there has been a material change in circumstances since the decision was made.

66.52 La Commission peut, sur demande, modifier toute décision concernant les redevances visées au paragraphe 68(3), aux articles 68.1 ou 70.15 ou aux paragraphes 70.2(2), 70.6(1), 73(1) ou 83(8), ainsi que les modalités y afférentes, en cas d'évolution importante, selon son appréciation, des circonstances depuis ces décisions.

...

[...]

66.6 (1) The Board may, with the approval of the Governor in Council, make regulations governing

66.6 (1) La Commission peut, avec l'approbation du gouverneur en conseil, prendre des règlements régissant :

(a) the practice and procedure in respect of the Board's hearings, including the number of members of the Board that constitutes a quorum;

a) la pratique et la procédure des audiences, ainsi que le quorum;

...

[...]

66.7 (1) The Board has, with respect to the attendance, swearing and examination of witnesses, the

66.7 (1) La Commission a, pour la comparution, la prestation de serments, l'assignation et l'interrogatoire des témoins, ainsi que pour la production

production and inspection of documents, the enforcement of its decisions and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

...

d'éléments de preuve, l'exécution de ses décisions et toutes autres questions relevant de sa compétence, les attributions d'une cour supérieure d'archives.

[...]

[31] The second part of Part VII is headed "Collective Administration of Performing Rights and of Communication Rights". The following provisions are relevant to the present application.

67. Each collective society that carries on

(a) the business of granting licences or collecting royalties for the performance in public of musical works, dramatico-musical works, performer's performances of such works, or sound recordings embodying such works, or

...

must answer within a reasonable time all reasonable requests from the public for information about its repertoire of works, performer's performances or sound recordings, that are in current use.

67.1 (1) Each collective society referred to in section 67 shall, on or before the March 31 immediately before the date when its last tariff approved pursuant to subsection 68(3) expires, file with the Board a proposed tariff, in both official languages, of all royalties to be collected by the collective society.

(2) A collective society referred to in subsection (1) in respect of which no tariff has been approved pursuant to subsection 68(3) shall file with the

67. Les sociétés de gestion chargées d'octroyer des licences ou de percevoir des redevances pour l'exécution en public ou la communication au public par télécommunication — à l'exclusion de la communication visée au paragraphe 31(2) — d'oeuvres musicales ou dramatico-musicales, de leurs prestations ou d'enregistrements sonores constitués de ces oeuvres ou prestations, selon le cas, sont tenues de répondre aux demandes de renseignements raisonnables du public concernant le répertoire de telles oeuvres ou prestations ou de tels enregistrements d'exécution courante dans un délai raisonnable.

67.1 (1) Les sociétés visées à l'article 67 sont tenues de déposer auprès de la Commission, au plus tard le 31 mars précédant la cessation d'effet d'un tarif homologué au titre du paragraphe 68(3), un projet de tarif, dans les deux langues officielles, des redevances à percevoir.

(2) Lorsque les sociétés de gestion ne sont pas régies par un tarif homologué au titre du paragraphe 68(3), le dépôt du projet de tarif auprès de la Commission doit s'effectuer au plus tard le 31 mars

Board its proposed tariff, in both official languages, of all royalties to be collected by it, on or before the March 31 immediately before its proposed effective date.

(3) A proposed tariff must provide that the royalties are to be effective for periods of one or more calendar years.

(4) If a proposed tariff is not filed with respect to the work, performer's performance or sound recording in question, no action may be commenced, without the written consent of the Minister, for

...

(c) the recovery of royalties referred to in section 19.

(5) As soon as practicable after the receipt of a proposed tariff filed pursuant to subsection (1), the Board shall publish it in the Canada Gazette and shall give notice that, within sixty days after the publication of the tariff, prospective users or their representatives may file written objections to the tariff with the Board.

68. (1) The Board shall, as soon as practicable, consider a proposed tariff and any objections thereto referred to in subsection 67.1(5) or raised by the Board, and

(a) send to the collective society concerned a copy of the objections so as to permit it to reply; and

(b) send to the persons who filed the objections a copy of any reply thereto.

(2) In examining a proposed tariff for

précédant la date prévue pour sa prise d'effet.

(3) Le projet de tarif prévoit des périodes d'effet d'une ou de plusieurs années civiles.

(4) Le non-dépôt du projet empêche, sauf autorisation écrite du ministre, l'exercice de quelque recours que ce soit... ou pour recouvrement des redevances visées à l'article 19.

(5) Dès que possible, la Commission publie dans la Gazette du Canada les projets de tarif et donne un avis indiquant que tout utilisateur éventuel intéressé, ou son représentant, peut y faire opposition en déposant auprès d'elle une déclaration en ce sens dans les soixante jours suivant la publication.

68. (1) La Commission procède dans les meilleurs délais à l'examen des projets de tarif et, le cas échéant, des oppositions; elle peut également faire opposition aux projets. Elle communique à la société de gestion en cause copie des oppositions et aux opposants les réponses éventuelles de celle-ci.

(2) Aux fins d'examen des projets de tarif déposés pour l'exécution en public

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

(a) shall ensure that

(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),

(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

(iii) the payment of royalties by users pursuant to section 19 will be made in a single payment; and

(b) may take into account any factor that it considers appropriate.

(3) The Board shall certify the tariffs as approved, with such alterations to the royalties and to the terms and conditions related thereto as the Board considers necessary, having regard to

(a) any objections to the tariffs under subsection 67.1(5); and

(b) the matters referred to in subsection (2).

(4) The Board shall

ou la communication au public par télécommunication de prestations d'œuvres musicales ou d'enregistrements sonores constitués de ces prestations, la Commission :

a) doit veiller à ce que :

(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) 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) le paiement des redevances visées à l'article 19 par les utilisateurs soit fait en un versement unique;

b) peut tenir compte de tout facteur qu'elle estime indiqué.

(3) Elle homologue les projets de tarif après avoir apporté aux redevances et aux modalités afférentes les modifications qu'elle estime nécessaires compte tenu, le cas échéant, des oppositions visées au paragraphe 67.1(5) et du paragraphe (2).

(4) Elle publie dès que possible dans la Gazette du Canada les tarifs homologués; elle en envoie copie, accompagnée des motifs de sa décision,

(a) publish the approved tariffs in the Canada Gazette as soon as practicable; and

(b) send a copy of each approved tariff, together with the reasons for the Board's decision, to each collective society that filed a proposed tariff and to any person who filed an objection.

68.2 (1) Without prejudice to any other remedies available to it, a collective society may, for the period specified in its approved tariff, collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction.

(2) No proceedings may be brought against a person who has paid or offered to pay the royalties specified in an approved tariff for

...

(c) the recovery of royalties referred to in section 19.

(3) Where a collective society files a proposed tariff in accordance with subsection 67.1(1),

(a) any person entitled to perform in public or communicate to the public by telecommunication those works, performer's performances or sound recordings pursuant to the previous tariff may do so, even though the royalties set out therein have ceased to be in effect, and

(b) the collective society may collect the royalties in accordance with the previous tariff, until the proposed tariff is approved.

à chaque société de gestion ayant déposé un projet de tarif et aux opposants.

68.2 (1) La société de gestion peut, pour la période mentionnée au tarif homologué, percevoir les redevances qui y figurent et, indépendamment de tout autre recours, le cas échéant, en poursuivre le recouvrement en justice.

(2) Il ne peut être intenté aucun recours ... pour recouvrement des redevances visées à l'article 19, contre quiconque a payé ou offert de payer les redevances figurant au tarif homologué.

(3) Toute personne visée par un tarif concernant les oeuvres, les prestations ou les enregistrements sonores visés à l'article 67 peut, malgré la cessation d'effet du tarif, les exécuter en public ou les communiquer au public par télécommunication dès lors qu'un projet de tarif a été déposé conformément au paragraphe 67.1(1), et ce jusqu'à l'homologation d'un nouveau tarif. Par ailleurs, la société de gestion intéressée peut percevoir les redevances prévues par le tarif antérieur jusqu'à cette homologation.

Issues and analysis

[32] The Court must determine two primary issues in order to dispose of this application for judicial review of *Tariff 6.B* in respect of the use of sound recordings to accompany fitness classes.

- (1) Did the Board deprive Re:Sound of a fair opportunity to participate in the decision-making process in breach of the duty of fairness when it set the royalty on a basis not addressed by the parties, and on material that Re:Sound had neither seen nor had an opportunity to comment on?
- (2) Did the Board err in law when it interpreted the Act as entitling Re:Sound to collect royalties under section 19 in respect only of those eligible sound recordings played at fitness centres the performers or makers of which had authorized it or one of its member collectives to act for them in the administration of their right to equitable remuneration?

[33] First, though, it is necessary to determine the standard of review applicable to each question.

ISSUE 1: What is the applicable standard of review?

(i) *Breach of the duty of procedural fairness*

[34] The black-letter rule is that courts review allegations of procedural unfairness by administrative decision-makers on a standard of correctness: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.

[35] Courts give no deference to decision-makers when the issue is whether the duty of fairness applies in given administrative and legal contexts. This is evident from the discussion in *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R. 190 at paras. 77 *et seq.* (*Dunsmuir*) of whether

David Dunsmuir was entitled to procedural fairness before his employment in the provincial public service was terminated.

[36] However, the standard of review applicable to an allegation of procedural unfairness concerning the content of the duty in a particular context, and whether it has been breached, is more nuanced. The content of the duty of fairness is variable because it applies to a wide range of administrative action, actors, statutory regimes, and public programs, with differing impacts on individuals. Flexibility is necessary to ensure that individuals can participate in a meaningful way in the administrative process and that public bodies are not subject to procedural obligations that would prejudice the public interest in effective and efficient public decision-making.

[37] In the absence of statutory provisions to the contrary, administrative decision-makers enjoy considerable discretion in determining their own procedure, including aspects that fall within the scope of procedural fairness: *Prasad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at 568-569 (*Prasad*). These procedural aspects include: whether the “hearing” will be oral or in writing, a request for an adjournment is granted, or representation by a lawyer is permitted; and the extent to which cross-examination will be allowed or information in the possession of the decision-maker must be disclosed. Context and circumstances will dictate the breadth of the decision-maker’s discretion on any of these procedural issues, and whether a breach of the duty of fairness occurred.

[38] *Dunsmuir* does not address the standard of review applicable to tribunals’ procedural choices when they are challenged for breach of the duty of fairness. However, the Court held (at para. 53)

that the exercise of administrative discretion is normally reviewable on a standard of reasonableness. This proposition would seem applicable to procedural and remedial discretion, as well as to discretion of a more substantive nature. It is therefore not for a reviewing court to second-guess an administrative agency's every procedural choice, whether embodied in its general rules of procedure or in an individual determination.

[39] That said, administrative discretion ends where procedural unfairness begins: *Prasad* at 569. A reviewing court must determine for itself on the correctness standard whether that line has been crossed. There is a degree of tension implicit in the ideas that the fairness of an agency's procedure is for the courts to determine on a standard of correctness, and that decision-makers have discretion over their procedure.

[40] Thus, writing for the majority in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 27, Justice L'Heureux-Dubé included the decision-maker's procedural choice and agency practice as factors that courts must take into account when determining the contents of the duty of fairness in any given context. She stated that considerable weight should be given to this choice when the legislature had conferred broad procedural discretion on the agency or its expertise extended to procedural issues.

[41] Justice Abella endorsed these observations when writing for the majority in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at paras. 230-231. She said (at para. 231):

Considerable deference is owed to procedural rulings made by a tribunal with the authority to control its own process. The determination of the scope and content of a

duty to act fairly is circumstance-specific, and may well depend on factors within the expertise and knowledge of the tribunal, including the nature of the statutory scheme and the expectations and practices of the Agency's constituencies.

[42] In short, whether an agency's procedural arrangements, general or specific, comply with the duty of fairness is for a reviewing court to decide on the correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other. In recognition of the agency's expertise, a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar.

(ii) *Interpreting the Copyright Act*

[43] Statutory decision-makers constituting a "discrete and special administrative regime" (*Dunsmuir* at para. 55), such as the Board in this case, are presumptively owed curial deference in the interpretation and application of their enabling statute: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 39. Administrative tribunals' interpretation of their enabling legislation is thus normally subject to judicial review on a standard of reasonableness: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paras. 21-22.

[44] The substantive legal question in dispute in the present application is whether the *Copyright Act* entitles a collective society to a tariff calculated on the basis of all the sound recordings eligible for equitable remuneration that are used to accompany particular activities, or only those in respect

of which makers or performers have authorized the society to act on their behalf. This is a question of statutory interpretation because it is not limited to the facts of this case.

[45] Re:Sound contends that the presumption that reasonableness is the standard for reviewing an administrative tribunal's interpretation of its enabling legislation is rebutted when the Board is interpreting the Act: *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283 (*Rogers*). Writing for the majority in that case, Justice Rothstein stated (at para. 14):

It would be inconsistent for the court to review a legal question on judicial review of a decision of the Board on a deferential standard and decide exactly the same legal question *de novo* if it arose in an infringement action in the court at first instance. It would be equally inconsistent if on appeal from a judicial review, the appeal court were to approach a legal question decided by the Board on a deferential standard, but adopt a correctness standard on an appeal from a decision of a court at first instance on the same legal question.

[46] In my view, *Rogers* is distinguishable because the question of statutory interpretation in dispute in the present case arises from the Board's approval of a proposed royalty under subsection 68(3) of the *Copyright Act*. Determining whether a collective society represents eligible recordings not in its repertoire when proposing a tariff under section 67.1 is not within a statutorily created "shared primary jurisdiction between the administrative tribunal and the courts": *Rogers* at para. 18.

[47] This conclusion does not rest on a finding that there are *no* circumstances under which a court could be required to determine at first instance whether a collective society represented all eligible recordings used to accompany particular activities, or only those that had been brought into its repertoire as a result of some form of authorization from the performer or maker.

[48] For example, while a collective society that has failed to file a tariff may not bring an action to recover equitable remuneration from a user, it can do so with the written consent of the Minister of Industry: subsection 67.1(4). A user of a recording of music sued in such an action might seek to reduce the amount claimed by the collective society, on the ground that the society may only collect royalties in respect of recordings for which their makers or performers have authorized it to act for them.

[49] In my view, this theoretical and somewhat remote possibility is not sufficient to bring the present case within the *Rogers* exception. The requirement of Ministerial consent before a society can bring an action to recover equitable remuneration instead of seeking the Board's approval of a tariff is a clear indication that Parliament intended the Board to have primary jurisdiction over the collective enforcement of neighbouring rights, including the interpretation of the statutory provisions governing this complex, rate-setting scheme. No such provision limited the copyright holder's right in *Rogers* to bring an infringement action that could have required a court to decide the same legal question as that decided by the Board.

[50] 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 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.

[51] 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.

ISSUE 2: Did the Board breach the duty of fairness by basing the royalties tariff on the average of the amounts paid under licence agreements obtained by the Board from SOCAN after the close of the hearing on *Tariff 6.B*?

(i) *The law*

[52] Agencies such as the Board that administer a complex regulatory program are not restricted to the evidence adduced by the parties. They are charged with exercising broad substantive and procedural discretion to enable them to achieve an outcome that best serves the public interest implicated in the particular program. Thus, when not satisfied with the accuracy or completeness of the parties' evidence these tribunals may seek additional information from other sources.

[53] Since nothing in the Act precludes the Board from seeking extraneous information and relying on it in its decision, it was open to the Board in the present case to obtain from SOCAN copies of the confidential licensing agreements with users: *Society of Composers, Authors and Music Publishers of Canada v. Canada (Copyright Board)* (1993), 16 Admin. L.R. (2d) 187 at para. 51.

[54] However, agencies must ensure that, if they obtain information from third parties, they do not thereby jeopardize parties' participatory rights: to know and to comment on material relevant to the

decision; to have notice of the grounds on which the decision may be based; and to have an opportunity to make representations accordingly. The ultimate question for a reviewing court in every case is whether, in all the circumstances (including respect for administrative procedural choices), the tribunal's decision-making procedure was essentially fair. This involves a contextual and fact-specific inquiry.

(ii) *The facts*

[55] The parties to the present application agree on most of the facts, but disagree on their legal significance in determining if the Board had afforded procedural fairness to Re:Sound.

[56] Re:Sound requested members of the FIC during interrogatories to identify the amounts that they had paid to SOCAN for the public performance of recordings of musical works to accompany fitness classes. One responded in the Fall of 2009 by providing to Re:Sound and the Board the evidence that it had applied in the calculation of *SOCAN Tariff 19* for fitness classes. Others responded to the same interrogatory in a similar manner; some revealed the amounts that they had paid under their confidential agreements with SOCAN.

[57] In February 2010, Re:Sound obtained, with the assistance of a Board order, a copy of a confidential agreement between a user targeted by *SOCAN Tariff 19* and SOCAN under which a user had made its payments. The agreement revealed, among other things, the flat fee paid by the user for the performance in public of sound recordings to accompany fitness classes.

[58] Thus, well before the Board commenced its hearing on the proposed *Tariff 6.B* in April 2010, Re:Sound knew the amounts paid by some fitness clubs to SOCAN, including those used by the Board to calculate the flat fee royalties in *Tariff 6.B*. It also had a copy of the confidential agreement under which one of them had made payments to SOCAN.

[59] On May 16, 2011, more than a year after the oral hearing had closed, the Board ordered SOCAN to answer questions about *SOCAN Tariff 19*, which the FIC and Goodlife had suggested at the hearing as a possible benchmark for *Tariff 6.B* royalties. The Board informed the parties of these requests and of SOCAN's responses, which the Board forwarded to the parties on June 13, 2011.

[60] On June 23, 2011, the Board put further questions to SOCAN and requested copies of SOCAN's agreements with users subject to *SOCAN Tariff 19*. SOCAN responded to the Board on July 26, 2011, and copied the parties. It stated, among other things, that it would courier copies of the agreements to the Board, which it did. Neither SOCAN nor the Board provided copies of these agreements to Re:Sound.

[61] SOCAN's response also included an Excel spreadsheet summarizing aspects of the agreements, including a list of eighteen organizations that had made agreements with it, and the amounts that each had paid in 2007. I infer from the names of most of these organizations that their principal activities were not fitness classes, but skating or dance instruction.

[62] Even though Re:Sound knew that the Board had copies of the agreements, it did not ask the Board to disclose them. Nor did Re:Sound at any time ask the Board for an opportunity to respond orally or in writing to either the spreadsheet or any of the other information obtained by the Board.

[63] In an email dated May 16, 2011 advising the parties of the information that the Board had asked SOCAN to provide, the Secretary General of the Board stated that, once the Board had received SOCAN's responses, it would issue further directions on what information the parties should provide. In an email of June 13, 2011 informing the parties of SOCAN's responses, the Board again told them that it would issue further directions in due course. See Applicant's Record, vol. 1 at 84 and 87.

[64] A further email, dated November 3, 2011, contained an order of the Board stating that in accordance with a Board order of June 23, 2011, it had received from SOCAN on July 26, 2011 copies of agreements with those subject to *SOCAN Tariff 19*, and the Excel file. The Board ordered that these documents were to remain confidential and advised the parties to "conduct themselves accordingly." Unlike the earlier emails to the parties, however, this one did not state that the Board would be issuing further directions to them: see Applicant's Record, vol. 1 at 112.

[65] In the course of its application for judicial review of the Board's decision on *Tariff 6.B* Re:Sound made a request to the Board under rule 317 of the *Federal Courts Rules*, SOR/98-106, for a copy of the material in the Board's possession relevant to its decision that Re:Sound did not already have. In a covering letter accompanying the transmission of the Board's record, the general

counsel to the Board admitted to the paragraphs of Re:Sound's Notice of Application alleging procedural unfairness: Applicant's Record, vol. 2 at 177.

[66] I attach little weight to this opinion on the legality of the Board's procedure in determining whether the Board breached the duty of fairness, especially as the Board is not a party to the application for judicial review. Further, it is not clear that the letter expresses the opinion of the Board, rather than that of its general counsel. I note in this regard that the Board did not propose reopening the hearing in order to cure any breach of the duty of fairness.

(iii) *Was there a breach of the duty of fairness?*

[67] Re:Sound says that the Board breached the duty of fairness in two respects.

[68] First, the Board failed to disclose to Re:Sound copies of SOCAN's confidential agreements under which fitness clubs had made payments for the use of recorded music at fitness classes, and to provide it with an opportunity to make submissions on them.

[69] Second, the Board ought to have informed the parties to the proceeding before it of the basis on which it was considering fixing the royalties, disclosed the relevant agreements, and invited submissions on the appropriateness of basing the *Tariff 6.B* royalties on the average of the "*Tariff 19* royalties" paid by users under agreements with SOCAN. The oral hearing before the Board had focused on the evidence adduced by the parties and there was no discussion of the possibility of using the amounts paid under the agreements with SOCAN for setting the royalties.

(a) non-disclosure

[70] The principal difficulty with Re:Sound's complaint about the non-disclosure of the SOCAN agreements obtained by the Board after the hearing is that the Board had informed the parties of its request to SOCAN. Re:Sound knew the Board had the agreements, but did not ask for copies. The Board had not indicated that it would refuse a request by Re:Sound for disclosure.

[71] Two months before the start of the hearing, Re:Sound had itself obtained on a confidential basis a copy of one agreement with SOCAN, showing among other things the amounts that the user had paid to SOCAN. Re:Sound included that agreement in the written evidence it submitted to the Board. It also knew the amounts that other users of sound recordings in connection with dance instruction and fitness activities had paid to SOCAN under their agreements.

[72] At the hearing of the application for judicial review, counsel could offer no explanation for Re:Sound's failure to ask the Board for copies of the SOCAN agreements, which he now contends were of vital importance to the Board's decision.

[73] In my opinion, Re:Sound cannot say that the SOCAN agreements were so unrelated to the matter at hand that it could not reasonably have been expected to ask to see them, especially since the appropriateness of using *SOCAN Tariff 19* as a benchmark had been the subject of discussion before the Board. No doubt, best practice would indicate that the Board should have taken the initiative and disclosed the agreements without waiting for a request from a party. However, best administrative practice is not the standard for determining the legality of an agency's procedural choices.

[74] In the absence of a request from experienced counsel acting for a sophisticated client, fairness did not, in the circumstances of this case, require the Board to disclose copies of the SOCAN agreements on its own motion. In my opinion, the Board did not unfairly deprive Re:Sound of its right to know and to respond to information in the Board's possession. Rather, Re:Sound failed to avail itself of a reasonable opportunity to ask the Board to produce information that it knew was in the Board's possession.

(b) lack of notice of the basis of the Board's decision

[75] Is it nonetheless open to Re:Sound to say that it was deprived of a fair hearing because it had no prior notice of the basis of the Board's decision, and thus had no opportunity to make submissions on the appropriateness of the Board's methodology? In my view it is.

[76] Administrative proceedings are dynamic in nature: the key questions often emerge as a matter progresses, especially one as long and complex as that dealing with *Tariff 6.B*. Just as a regulatory tribunal is not limited to the evidence produced by the parties, so its identification of the appropriate bases of its decision is not confined to those advanced by the parties at the start of the proceeding.

[77] Nonetheless, it is a breach of the duty of fairness for a tribunal to base its decision on a ground that could not reasonably have been anticipated by those affected and that they did not have an opportunity to address. As Sarah Blake puts it in *Administrative Law in Canada*, 5th ed. (Markham, Ontario: LexisNexis Canada, 2011) at 43:

A party should not be left in the position of discovering, upon receipt of the tribunal's decision, that it turned on a matter on which the party had not made representations because the party was unaware it was in issue.

In my opinion, that is exactly what happened in this case.

[78] The oral hearing on Re:Sound's proposed *Tariff 6.B* was principally focused on the expert evidence of the parties in support of the tariffs that they were proposing, although the appropriateness of using other tariffs, including *SOCAN Tariff 19*, as benchmarks was also considered. However, the Board did not base the calculation of royalties in *Tariff 6.B* on those in *SOCAN Tariff 19*, but on the discounted amounts paid to SOCAN under individual licensing agreements by users to which the Tariff applied. These agreements were not discussed during the hearing.

[79] The parties in the present proceeding did not have an opportunity to make submissions on whether the agreements were an appropriate basis for determining the value of recorded music in the context of fitness classes. It is true that Re:Sound had included in its written evidence to the Board a copy of one agreement with SOCAN and the amounts paid under agreements by the fitness clubs on which the Board based the flat fee royalty. Nonetheless, given the complexity and range of the possible benchmarks for *Tariff 6.B*, and the absence of any discussion at the hearing of using the amounts paid under the licence agreements by fitness clubs targeted by *SOCAN Tariff 19*, fairness required the Board to notify Re:Sound that it was contemplating basing the royalty on the amounts paid under those agreements.

[80] Moreover, both Re:Sound and the respondents had proposed royalties based on the number of the ultimate consumers of the music: club members (Re:Sound), or the average weekly number of participants in fitness classes (respondents). The parties did not canvass before the Board the advantages and disadvantages of basing royalties on a flat fee in the circumstances of the present case.

[81] Since the tariff set by the Board was based entirely on a methodology not raised as an issue at any point in the decision-making process, *Tariff 6.B* cannot stand. The matter must be remitted to the Board for redetermination of the royalties payable for the use of recordings of musical works in fitness classes after it has disclosed to the parties any information that it alone has on the ground on which it based its decision and has provided the parties with an opportunity to address it.

(iv) *Should relief be denied?*

[82] The respondents say that if, contrary to their submissions, a breach of the duty of fairness had occurred, the Court should not intervene because it has not prejudiced Re:Sound. They argue that even if Re:Sound had been given an opportunity to make submissions on the basis of the Board's decision and had managed to persuade the Board that its methodology was flawed, the Board's only option would have been to set no tariff at all for the years in question. This would obviously have been detrimental to Re:Sound and those it represents.

[83] How the Board would have responded to Re:Sound's submissions is, in my view, pure speculation. For example, the Board could have decided to increase the royalty if it had thought that it was inappropriate to use one or more of the agreements as a basis for calculating an average flat

fee. Only in the clearest cases will an administrative decision vitiated by such a serious breach of procedural fairness as occurred here be permitted to stand on the ground that it would have made no difference to the tribunal's decision: see, for example, *Canadian Cable Television Association v. American College Sports Collective of Canada, Inc.*, [1991] 3 F.C. 626 (F.C.A.). This is not one of them.

[84] The respondents also rely on *Tariff 6.B's* "transitional" nature and the likelihood that the Board will have better evidence on which to base a more permanent tariff. In my view, these are not sufficient for the Court to exercise its discretion in this case to deny relief. The Board's breach of the duty of fairness was fundamental. Moreover, if relief were to be denied, the performers and makers who had authorized Re:Sound to act on their behalf in the administration of their right to equitable remuneration in respect of particular recordings might suffer a significant financial loss for the years 2008-2012.

[85] The respondents also argue that, even if the Court were to find that a breach of the duty of fairness had occurred, it should exercise its discretion not to grant the relief requested, on the ground that Re:Sound had an adequate alternative administrative remedy: a request to the Board to hear submissions on the suitability of the agreements for setting a flat fee royalty. I do not agree.

[86] First, the Board's express jurisdiction to vary an order under section 66.52 of the Act is exercisable only if the Board is satisfied that there has been a material change in circumstances since it rendered its decision. In my view, learning the basis of a tribunal's decision when the

decision is published is not, for this purpose, a “change in circumstances since the decision was made”.

[87] Second, tribunals generally have implied jurisdiction to correct breaches of the duty of fairness by reopening a decision: *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330 at 340, and, more generally, *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848; and see *Canadian Recording Industry Association v. Canada (Attorney General)*, 2006 FCA 336 (Copyright Board’s reconsideration cured any prior breach of the duty of procedural fairness).

[88] However, even if section 66.52 is not exhaustive of the Board’s power to reopen a final decision, it was not incumbent on Re:Sound in this case to request a reconsideration before applying for judicial review. Re:Sound could not have raised before the Board its other two grounds of review, namely the Board’s error of law in reducing the repertoire to recordings for which the performers or makers had authorized it to act for them, and the unreasonably low royalties in *Tariff 6.B*.

ISSUE 3: Did the Board err in law when it reduced the royalties payable to Re:Sound to reflect the percentage of eligible sound recordings used to accompany fitness classes for which Re:Sound or one of its member collectives had been specifically authorized by makers or performers to collect royalties?

[89] As already noted, this is a question that turns on the interpretation of the *Copyright Act* and the Board’s interpretation of it is reviewable in this Court on a standard of reasonableness. No provision in the Act expressly deals with the issue in dispute. Rather, the Board based its decision

on inferences that it drew from provisions of the Act dealing with other matters and on the practical implications for the operation of the statutory scheme that would flow from Re:Sound's position.

[90] An administrative agency's interpretation of its enabling legislation is unreasonable if it is inconsistent with the provision in dispute or with the broader statutory scheme. In undertaking this exercise, a reviewing court must apply the general principles of statutory interpretation by examining the statutory text, context and objectives. A court may also supplement the reasons given by the agency for its decision with those that could be given to support the decision: *Dunsmuir* at para. 48. If the court is not satisfied that the interpretation is unreasonable in the above sense, it must defer; that the party challenging the decision has an equally plausible reading of the enabling legislation is not sufficient to warrant judicial intervention.

(i) *Reasons of the Board*

[91] The Board gave three reasons for concluding that Re:Sound was not entitled to collect equitable remuneration on behalf of the performers and makers of all eligible recordings used to accompany fitness classes, but could collect only for those in respect of which the maker or performer had authorized it or a member collective to act on their behalf. The Board's discussion is found at paras. 70-82 of its reasons.

[92] First, in most other regimes under the Act a collective society can only collect royalties in respect of the recordings in its repertoire. Exceptionally, the Act provides that under the extended licensing schemes governing retransmission (paragraph 31(2)(d) and section 76) and private copying (subsection 83(11)), copyright owners who have not joined a collective society can claim

their share from a collective society designated by the Board, unless they have elected to opt out of the scheme. The sections of the Act on the collective administration of the right to equitable remuneration contain no analogous provisions allowing a collective society to collect section 19 royalties on behalf of performers or makers who did not authorize it to act for them in respect of particular recordings.

[93] Second, Re:Sound’s interpretation is inconsistent with subsection 67.1(4) of the Act, which I reproduce again for the reader’s convenience.

67.1

...

(4) If a proposed tariff is not filed with respect to the work, performer’s performance or sound recording in question, no action may be commenced, without the written consent of the Minister, for

(c) the recovery of royalties referred to in section 19.

67.1

[...]

(4) Le non-dépôt du projet empêche, sauf autorisation écrite du ministre, l’exercice de quelque recours que ce soit... ou pour recouvrement des redevances visées à l’article 19.

[94] The Board reasoned that this provision envisages that a tariff could be certified for a specified use, but not in respect of all eligible sound recordings. If, as Re:Sound contends, it automatically collects for all eligible recordings used in connection with a particular activity, the words “with respect to the ... sound recording in question” would be redundant.

[95] Third, subparagraph 68(2)(a)(i) provides that a tariff applies only in respect of performers and makers of recordings eligible for equitable remuneration under section 20. The purpose of this

provision is to ensure that royalties are not collected on behalf of non-eligible recordings, not, as Re:Sound argues, that royalties must be paid in respect of all eligible recordings.

[96] In my view, the first of the Board's reasons supports its interpretation. The relevance of subsection 67.1(4) in this context is, however, less clear. The French version of the statutory text does not contain words equivalent to "with respect to the work, performer's performance or sound recording in question", which, according to the Board, support the view that Re:Sound does not necessarily collect royalties on behalf of all eligible recordings used for the purpose identified in the tariff.

[97] The French version of subsection 67.1(4) suggests a situation where a collective society has proposed no tariff at all: « Le non-dépôt du projet empêche, sauf autorisation écrite du ministre, l'exercice de quelque recours que ce soit ... pour recouvrement des redevances visées à l'article 19. »

[98] On this basis, the function of subsection 67.1(4) is to provide an incentive for collective societies to file a proposed tariff in accordance with the three preceding subsections. That is, a collective society that fails in its duty to file a tariff cannot, without the written consent of the Minister, look to other legal proceedings to recover equitable remuneration from users of sound recordings of musical works. If this is correct, subsection 67.1(4) is of little assistance in determining for whom a collective society may collect.

[99] In light of the differences in the English and French versions of the statutory text, and bearing in mind that reasonableness is the standard of review applicable to the Board's interpretation of these provisions of the Act, I am not persuaded that the Board committed an error of law in relying on subsection 67.1(4) to support its decision, especially since other provisions of the Act provide a reasonable basis for the Board's decision.

[100] I do not find subparagraph 68(2)(a)(i) to be helpful in supporting the Board's decision. I agree with the Board that this paragraph does not require a collective society to collect royalties for all eligible recordings performed in public in connection with specified activities. It merely stipulates that tariffs may apply only to performers and makers of sound recordings eligible under section 20: that is, the maker of the recording was a citizen or permanent resident of Canada or a Rome Convention country at the time of the first fixation, or all the fixations done for the recording occurred in Canada or a Rome Convention country.

[101] In short, of the three reasons given by the Board, the first supports its decision, the second may, and third is not relevant to the issue in dispute.

(ii) *Reasons that could be given*

[102] In my opinion, four additional considerations support the reasonableness of the Board's decision that Re:Sound can collect section 19 royalties in respect only of sound recordings of musical works for which they have received authorization from the maker or performer.

[103] First, as relevant to the present application, section 2 defines “collective society” as a society in the business of the collective administration of the section 19 right to equitable remuneration “for the benefit of those who, by ... appointment of it as their agent or otherwise authorize it to act on their behalf in relation to that collective administration, ...”. Thus, for the purpose of the Act, a collective society collects royalties on behalf of those who in any manner have authorized it to act for them in connection with the collective administration of their rights under the Act. This includes proposing a tariff to the Board.

[104] Second, an indication of the reasonableness of an administrative interpretation is that it is consistent with earlier decisions by the agency: see *Communications, Energy and Paperworkers’ Union of Canada, Local 30 v. Irving Pulp and Paper Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458 at paras. 5 and 8. The first neighbouring rights tariff approved by the Board was *Tariff 1.A*. In its reasons for decision, the Board set out its understanding of the essential architecture of the then new statutory scheme for the collective administration of the right to equitable remuneration. It is open to this Court to consider the Board’s reasons in *Tariff 1.A* in assessing the reasonableness of the decision under review in the present proceeding.

[105] In *Tariff 1.A.*, two collective societies, the NRCC and SOGEDAM, representing different groups of neighbouring rights holders, proposed different royalty tariffs for the broadcasting of recordings eligible for equitable remuneration. The Board had to decide not only what the broadcasters should pay, but also to resolve disputes over the respective rights of the two collective societies. The tariff ultimately certified by the Board applied to all the section 19 rights holders represented by each society.

[106] Because of the requirement in subparagraph 68(2)(a)(iii) of the Act that users shall pay section 19 royalties in a single payment, the Board held that one collective society should collect the entirety of the royalties from the users targeted by the Tariff. It selected the NRCC as the sole collecting agent and left SOGEDAM with the responsibility of collecting its members' share from the NRCC.

[107] For present purposes, the most immediately relevant issue decided in *Tariff 1.A* was that the sound recordings before the Board were the eligible recordings in the collective societies' respective repertoires, and that each collective society proposing a tariff must prove that it administers the repertoire that it claims. In that case, these included makers and performers who, in one way or another, had authorized the NRCC or one of its sub-collectives to act on their behalf. However, the Board held, if either the maker or performer had authorized a collective society to collect in respect of a particular recording, it could collect the royalties for both of them. The Board rejected the NRCC's argument that it could collect on behalf of all eligible recordings used by broadcasters, regardless of any authorization by the rights holders. The Board's detailed discussion of these issues is found at 11-19 of its reasons for the decision to approve *Tariff 1.A*.

[108] The NRCC, Re:Sound's predecessor, did not apply for judicial review of the decision in *Tariff 1.A*, which has stood for nearly fifteen years. Counsel for Re:Sound argues that it is distinguishable from the present case in that the scope of a collective society's repertoire arose in *Tariff 1.A* in the context of a dispute between two collective societies.

[109] In my view, this factual distinction is immaterial. The Board's reasons in *Tariff 1.A* do not indicate that the principle that a collective society's repertoire is limited to recordings for which makers or performers have authorized it to act on their behalf applies only if more than one collective society proposes a tariff of section 19 royalties.

[110] Third, section 67 of the Act imposes a duty on a collective society, when requested by a member of the public, to provide information about its repertoire of performers' performances and sound recordings that are in current use. It is difficult to see how this obligation could be discharged if, as Re:Sound argues, its repertoire includes all performances and recordings eligible for equitable remuneration. While a collective society would be aware of eligible recordings and performances for which it had been authorized to act, this would not necessarily be true of the others.

[111] Fourth, it would be anomalous if a collective society were able to collect royalties for all eligible recordings used in a particular context, but distributed them only to the performers and makers of recordings in its repertoire, and to those whom it was able to discover. Re:Sound stated that it holds in a trust account the money that it had collected but could not distribute pending its identification of those who had not signed up with it. What happens to the funds owing to those that Re:Sound never identifies is unclear. In my view, Parliament should not lightly be taken to have intended to create a regime that produces such cumbersome and impractical results.

(iii) *Re:Sound's arguments*

[112] In addition to attacking the reasons advanced in support of the Board's decision, Re:Sound says that the decision is unreasonable because it is inconsistent with two fundamental principles on

which the right to equitable remuneration is based: that users should pay performers and makers for their use of sound recordings, and that users should only be required to make a single payment of equitable remuneration.

[113] Re:Sound's argument that a user will get a "free ride" if *Tariff 6.B* excludes performers and makers who have not authorized it to act as their agent in respect of particular recordings assumes that Re:Sound has a monopoly in proposing tariffs of section 19 royalties.

[114] I agree with the respondents that the Act contains no provision to this effect. I see nothing to prevent performers or makers from forming their own or joining an existing collective society to represent them in the administration of their rights to equitable remuneration. Re:Sound may currently be the only collective society representing holders of section 19 rights, but it does not follow from this that others may not come into existence and thereby inject a healthy measure of competition. Indeed, two collective societies proposed tariffs in *Tariff 1.A* on behalf of different groups of makers and performers, although the Board authorized only one of them, the NRCC, to collect for both.

[115] True, on the Board's interpretation of the Act performers and makers will not receive equitable remuneration until they sign up with a collective society. However, this seems a relatively easy step to take, especially since it is only necessary for either the maker *or* performer to bring a recording into a collective society's repertoire to enable it to collect royalties for both. In our legal system rights holders must normally take some action to vindicate their rights. When Parliament intends to make exceptions to the "opt in" principle generally applicable to the collective

administration of rights under the Act, as it has done for retransmission and private copying, it has expressly so provided.

[116] Nor is the potential existence of more than one society representing different makers and performers inconsistent with the principle that a user may not be required to make more than a single payment in order to discharge its obligation to pay an equitable remuneration in accordance with subparagraph 68(2)(a)(iii).

[117] Again, *Tariff 1.A* is instructive. After considering the tariffs proposed by two collective societies, the Board designated the NRCC to collect the amounts set by the Board on behalf of both collective societies, and left it to SOGEDAM to claim its members' share from the NRCC: see 35-39 of the Board's reasons.

[118] Finally, *Re:Sound* says that the Board erred in law by reading into section 20 an additional eligibility requirement, namely that makers or performers can only receive equitable remuneration for a recording for which they have appointed a collective society to act for them. Again, I do not agree.

[119] Requiring a performer or maker to sign up a recording with a collective society before being able to receive equitable remuneration is not of the same character as the eligibility conditions in section 20, namely, the maker's place of residence at the date of first fixation, or where the fixations occurred. These cannot be changed after the recording has been made and determine whether equitable remuneration is ever payable in respect of a particular recording. In contrast, makers or

performers of recordings may at any time authorize a collective society to act on their behalf in respect of a recording. Moreover, as already noted, signing up with a collective society is hardly an onerous requirement.

[120] In short, none of the arguments advanced by Re:Sound in favour of its interpretation of the Act persuades me that the Board's decision was unreasonable.

ISSUE 4: Did the Board commit reviewable errors in setting equitable remuneration royalties for the use of eligible recordings of music to accompany physical activities other than fitness classes?

[121] As I have already noted, *Tariff 6.B* applies to the use of music to accompany, not only fitness classes, but also skating, dance instruction, and other physical activities. Re:Sound directed relatively few submissions to the application of *Tariff 6.B* to activities other than fitness classes, no doubt because the grounds of review relied on to challenge *Tariff 6.B* with respect to fitness classes also applied, to differing extents, to these other activities. The respondents were similarly taciturn on these aspects of *Tariff 6.B*. I can be equally brief.

[122] Noting that “little or no attention” was given during the proceedings to the use of recorded music to accompany physical activities other than fitness classes, the Board had to use “the best information available to [it]”: para. 173.

[123] It set the royalties for dance instruction in the same way as it did for fitness classes: at paras. 174-175. Since the agreements between SOCAN and individual users provide for the payment of an amount that was essentially the minimum royalty under *SOCAN Tariff 19*, the Board used this

figure as a base and reduced it to reflect Re:Sound's repertoire. The resulting amount, \$23.42, was payable by each venue to Re:Sound as a flat annual fee for the use of recorded music to accompany dance instruction and other physical activities targeted in *Tariff 6.B* for which no specific fee had been set.

[124] The Board set the royalty for skating by reference to *SOCAN Tariff 7*, which deals only with this activity: at para. 176. It took the minimum rate paid under this latter tariff and adjusted it down to reflect the percentage of eligible recordings in Re:Sound's repertoire. This produced a royalty of 0.44% of gross receipts from admissions, exclusive of sales and amusement taxes, payable annually by each skating venue, subject to a minimum of \$38.18.

[125] Re:Sound challenged the Board's decision on the royalties payable with respect to skating, dance instruction, and other physical activities on the ground that the Board had erred in law by limiting the recordings in respect of which Re:Sound could collect royalties to those for which performers or makers had authorized it to act on their behalf. For the reasons given above, I do not agree.

[126] Since this was the only ground on which Re:Sound challenged the royalty set in *Tariff 6.B* for skating, this aspect of the Board's decision stands.

[127] However, because the Board set the royalties for dance instruction, and all other physical activities for which no specific rate was set, in the same way as it did for fitness classes, I would set aside this aspect of *Tariff 6.B* on the ground of a breach of the duty of procedural fairness. In these

circumstances, it is not necessary to consider Re:Sound's allegation that the royalty for these activities was also unreasonably low.

Conclusions

[128] For all of the above reasons, I would allow Re:Sound's application for judicial review and set aside the decision of the Board approving *Tariff 6.B* for breach of the duty of fairness, in so far as it applies to royalties for the performance in public of recorded music to accompany fitness classes, dance instruction, and other physical activities for which no specific rate has been set. I would also remit the matter to the Board for redetermination after the parties have had an opportunity in accordance with the duty of fairness to address the appropriateness of the ground on which the Board based its decision.

[129] Since Re:Sound was unsuccessful on the equally important issue of statutory interpretation concerning the percentage of eligible recordings on which the Board had to base royalties, I would award no costs.

“John M. Evans”

J.A.

“I agree,
Johanne Trudel J.A.”

“I agree,
Wyman W. Webb J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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WEBB J.A.

DATED: February 24, 2014

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