

**Speech given by
the Honourable Justice William J. Vancise
Chairman of the
Copyright Board of Canada**

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INTELLECTUAL PROPERTY RIGHTS – ARE THEY OUT OF CONTROL?

Introduction

Are intellectual property rights “out of control”? What you hear might depend on who is answering. Collective societies such as SOCAN or NRCC may not think this is the case. The CAB or any of its members may resoundingly answer: we pay too much for too many things! The answer from a local business owner may be even more perplexing – he may be willing to pay SOCAN for playing music but not NRCC to play the sound recording.

This paper will not provide an answer to the question posed. Rather, it deals with the mandate of the Board, a review of some recent Board decisions and the standard of judicial review of the Board’s decisions.

The Copyright Board

In the early 1930s, the Parker Commission recommended that a tribunal be established to review public performance tariffs before they took effect and on a continuous basis.¹ In response, the Copyright Board’s predecessor, the Copyright Appeal Board, was established in 1936 and certified its first tariff in 1937. The Board has issued one or more decisions dealing with copyright tariffs every year since.²

The Copyright Board, as it exists today, was created in 1989. It is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, tariffs of royalties to be paid for the use of copyrighted works, when they are administered collectively.³ The 1989 amendments effectively broadened the jurisdiction of the Board to encompass all areas of collective administration of copyright as well as the licensing of published works whose owners cannot be located.⁴

¹ Michel Hétu, “The Copyright Board: Functions and Practices” presented December 4, 1991 at *Copyright: From Beginning to End* in Toronto, Ontario at p. 1 and Report of His Honour Justice Parker, A Commissioner appointed by the Inquiries Act and the Copyright Amendment Act of 1931, pursuant to the Order of Council No. 738, March 22, 1935, J.O. Patenaude, I.S.O., Ottawa.

² Mario Bouchard, “Americans and the Copyright Board of Canada: Why Bother?” (unpublished) at p. 1.

³ See Part VII of the *Copyright Act* [hereafter the *Act*] for specific provisions related to the Board’s mandate.

⁴ Section 77.

The Board consists of not more than five members.⁵ The chairman must be a judge of a superior, county or district court either in function or retired.⁶ The Vice Chairman is the CEO and his duties, as well as the duties of the Chairman, are specified in the *Act*.⁷ Like most statutory tribunals, the Board controls its own procedures.⁸

In carrying out its functions, the Board regularly addresses administrative law issues and interprets not only its own *Act* but certain aspects of the regimes it administers.⁹ Initially, the Board's position was that it could not deal with any issue of law; however, in 1993, the Federal Court of Appeal decided that the Board could deal with issues of law as a necessary incident to the exercise of its core function.¹⁰ The situation has now evolved to the point that on certain issues of law, the Court has granted the Board the highest level of deference.¹¹ A number of the Board's recent decisions will be examined in greater detail later in this paper.

The Board oversees dealings between collective societies and users of copyright. In fixing the tariffs, the Board is mindful of the comments of the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*¹² and *Théberge v. Galerie d'art du Petit Champlain inc.*,¹³ that the stated purpose of copyright law is to balance the public interest in promoting the encouragement and dissemination of works of arts and intellect and obtaining a just reward for the creator. In fact, the Board's approach is somewhat unique in comparison to like organizations in other territories that focus on preventing collective societies from abusing their monopolistic powers against users. In *Canadian*

⁵ Subsection 66(1).

⁶ Subsection 66(3).

⁷ Section 66.1.

⁸ The template for the directive on procedure is available at: <http://www.cb-cda.gc.ca/aboutus/directive-e.html>.

⁹ For a thorough description of the powers of the Board and how it interfaces with collective societies, see M. Bouchard, "Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia," in D. Gervais (ed.), *Collective Management of Copyright and Related Rights* (Kluwer, 2006) and D. Gervais, « Essai sur le fractionnement du droit d'auteur », (2003) 15 *Cahiers de propriété intellectuelle* 501.

¹⁰ *Canadian Cable Television Assoc. v. Canada (Copyright Board)*, [1993] 2 F.C. 138 (C.A.) at paras. 12-16 [hereafter *CCTA*]. See also *FWS Joint Sports Claimants v. Canada (Copyright Board)* [1992] 1 F.C. 487 (C.A.).

¹¹ *Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada* 2003 FCA 302 [hereafter *NRCC v. SOCAN*].

¹² 2004 SCC 13 [hereafter *CCH*].

¹³ 2002 SCC 34.

Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada,¹⁴ the Federal Court of Appeal found that:

it is no more the Board's mandate to protect consumers to the detriment of copyright owners than it is to protect monopolies to the detriment of consumers.

[...] the Board properly understood its function when it stated that it had to regulate the balance of market power between copyright owners and users.

Again, in *NRCC v. SOCAN*, the Federal Court of Appeal acknowledged that the Board must balance the competing interests of copyright holders, service providers and the public.

The Copyright Board exercises a variety of functions and is responsible for certifying tariffs for: the public performance or telecommunication of musical works and sound recordings; the retransmission of distant television and radio signals; the reproduction and public performance by educational institutions, of radio or television news, news commentary and other programs; the private copying of published sound recordings of musical works; and, at the request of a collective society, the doing of virtually any other act protected under Canadian copyright law.

Much international attention has been given to the Board's power to issue licences for the use of works or other copyright subject-matters when the owner of the copyright cannot be located.¹⁵ Over the last eighteen years, the Board has issued over two hundred such licences (some involving literally thousands of works), rejected some applications, and traced more than a few "unlocatable" copyright owners. In doing so, the Board has developed standard licensing terms and conditions and a *modus operandi* with certain collective societies about their role in processing licence applications.¹⁶

The Board typically performs its functions on a case-by-case basis. In doing so, it has developed a high level of expertise and specialized technical knowledge in the areas of collective administration and administrative, contract and copyright law.¹⁷

¹⁴ (1994) 58 C.P.R. (3d) 190 (F.C.A.) at 196. [hereafter *CAB v. SOCAN*].

¹⁵ Section 77(1).

¹⁶ Mario Bouchard, "Americans and the Copyright Board of Canada: Why Bother?" (unpublished) at p. 5.

¹⁷ *NRCC v. SOCAN* at para 42.

Evans J.A., writing for the Court in *NRCC v. SOCAN*, reviewed the function and expertise of the Board and concluded that even though the question before the Board was one of law and likely to have precedential value (whether or not the Board has the power to merge tariffs), the decision was not one that the courts might have to decide in the context of an action for copyright infringement and concerned the Board's power to grant a remedy of a kind different from litigation conducted in the courts. Thus, he concluded at paragraph 56 that, taking into account both the expertise of the Board and the Court and the nature of the problem before it, the Board was best placed to determine if its powers include the certification of a single tariff when the parties have neither submitted nor consented to one.

Substantive Issues

The Board, in the furtherance of its mandate, has embarked on analyses to determine and resolve many of the legal issues which have come before it. In so doing, it continuously strives to balance the interests of the parties and to provide workable solutions.

SOCAN Tariff 22.A

Given that we are dealing with the year in review, it seems fitting to look at the Board's SOCAN Tariff 22.A decision.¹⁸ The tariff targets the communication to the public by telecommunication of musical works by means of Internet transmissions or similar transmission facilities. This decision was the first part (the second part will be released shortly) of the second phase of a process that began in 1996. Phase I of Tariff 22.A was released in October 1999 and dealt with various legal issues.¹⁹ That decision was reviewed by the Federal Court of Appeal²⁰ and subsequently appealed to the Supreme Court of Canada.²¹

The Board's 2007 decision in Tariff 22.A squarely dealt with two issues: (1) whether the

¹⁸ Decision dated October 18, 2007 certifying SOCAN Tariff 22.A (Internet - Online Music Services) for the Years 1996 to 2006, 61 C.P.R. (4th) 2007 353 [hereafter "Tariff 22.A"].

¹⁹ Decision dated October 27, 1999 certifying Tariff 22 (Transmission of musical works to subscribers by a telecommunication service not covered under Tariff 16 or 17) [Phase I – Legal Issues], 1 C.P.R. (4th) 427.

²⁰ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2002 FCA 166 [hereafter *SOCAN v. CAIP (FCA)*].

²¹ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 [hereafter *SOCAN v. CAIP (SCC)*].

transmission of a download is a communication to the public by telecommunication within the meaning of paragraph 3(1)(f) of the *Act*; and (2) whether previews involve fair dealing for the purposes of research as defined in Section 29 of the *Act* and as described by the Supreme Court of Canada in *CCH*. This paper will not spend a lot of time on this, for different reasons.

The first issue seems to have been resolved by the Federal Court of Appeal in its most recent decision involving *SOCAN Tariff 24 (Ringtones)*.²² In *CWTA v. SOCAN*, the Court found that the transmission of a musical ringtone to a cell phone is a communication to the public by telecommunication. The applicants had conceded that point before the Board but resiled before the Federal Court of Appeal. In a unanimous decision, the Federal Court of Appeal stated:

[19] In my view, the applicants are proposing a meaning of the word “communication” that is too narrow. The word “communication” connotes the passing of information from one person to another. A musical ringtone is information in the form of a digital audio file that is capable of being communicated. The normal mode of communicating a digital audio file is to transmit it. The wireless transmission of a musical ringtone to a cellphone is a communication, whether the owner of the cellphone accesses it immediately in order to hear the music, or at some later time. The fact that the technology used for the transmission does not mean that there is no communication. In my view, in the context of a wireless transmission, it is the receipt of the transmission that completes the communication.

[20] This conclusion accords with the *SOCAN* case (cited above). In that case Justice Binnie, writing for the majority, said that the transmission of information over the internet is a communication once the information is received (see paragraph 45). It is not clear whether that point was in issue in that case, or the subject of argument. It may be *obiter dicta*. Even so, it is undoubtedly a true statement. In relation to the meaning of the word “communication”, I see no relevant distinction between the transmissions in issue in the *SOCAN* case and the transmissions in issue in this case. I conclude that the transmissions are communications.

In so doing, the Court found that a number of earlier decisions²³ did not assist the applicants as they “cast no doubt on the conclusion that the transmissions in issue are

²² *Canadian Wireless Telecommunication Association; Bell Mobility Inc. and Telus v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6 [hereafter *CWTA v. SOCAN*].

²³ *Composers, Authors and Publishers Association of Canada Ltd. v. CTV Television Network Ltd.* [1968] S.C.R. 676; *CTV Television Network Ltd. v. Canada (Copyright Board)*, [1993] 2 F.C. 115; and *CCTA*.

communications.”²⁴

The Court also found that the communication by telecommunication of a ringtone from a wireless carrier’s website to a customer’s cell phone constitutes a communication “to the public”. Justice Sharlow stated:

[43] In my view, the conclusion of the Copyright Board that the transmissions in issue in this case are within the scope of paragraph 3(1)(f) of the *Copyright Act* is consistent with the language of that provision and its context. It also accords with common sense. If a wireless carrier were to transmit a particular ringtone simultaneously to all customers who have requested it, that transmission would be a communication to the public. It would be illogical to reach a different result simply because the transmissions are done one by one, and thus at different times.

The second issue still is a live one. In *CCH*, the Supreme Court found that practically anything legal counsel did in the process of preparing to advise a client constituted “research” within the meaning of section 29 of the *Act*. It also held that research made for commercial purposes can constitute a fair dealing. Nothing in that decision would permit one to easily distinguish research conducted by a lawyer for the purposes of briefing a client from research conducted by a government relation specialist for the purpose of briefing a client on how to best influence public policy decisions. Significantly, *CCH* stands for the proposition that fair dealing is a user right as opposed to an exception under the *Act* and must receive a liberal interpretation.

Fair dealing was an issue in *SOCAN 22.A*. The Board concluded that listening to previews so as to decide whether to purchase a download of a musical work over the Internet was fair dealing for the purposes of research. That ruling is the subject of an application for judicial review.

That issue will be considered again by the Board in the context of reprographic reproductions of works protected by copyright in primary and high schools in Access Copyright’s tariff proceeding which was heard by the Board in 2007 and is currently under deliberation. This is an issue which will have serious implications and not one of course which I am prepared to discuss at this time.

²⁴ *CWTA v. SOCAN* at para 30. For a complete analysis of the issue of whether or not the transmission of a download is a communication to the public by telecommunication within the meaning of paragraph 3(1)(a) of the *Act*, see the Board’s decision of October 18, 2007, paras. 86-100.

Procedural Issues

*Standard of Review*²⁵

A review of the Federal Court of Appeal's decisions on the standard of judicial review for decisions of the Copyright Board is as torturous as any attempt to rationalize the decisions of the Supreme Court of Canada on the subject. Mr. Justice Berger of the Alberta Court of Appeal, in another context but one which could apply here, described it this way:

The standard of review labyrinth continues to perplex reviewing judges. The maze of complexities is difficult to navigate. Along the tortuous path are the twin obstacles of reasonableness and patent unreasonableness which challenge the judicial mind to, among other questionable nuances, distinguish between "probing" and "somewhat probing" analyses. Nor is the hurdle of differentiating between questions of fact, law, and mixed law and fact easily overcome. Judges are invited to discern an "extricable question of law" that emanates from that which would otherwise be characterized as a question of mixed fact and law. The journey is exhausting.²⁶

I challenge anyone who doubts that statement to rationalize *Lévis (City) v. Fraternité des Policiers de Lévis Inc.*²⁷ and *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*,²⁸ two decisions of the Supreme Court of Canada respectively released on March 22 and March 23, 2007.

I will start my analysis of the decisions of the Federal Court of Appeal on the standard of review applicable to decisions of the Board with *AVS Technologies Inc. v. Canadian Mechanical Reproduction Rights Agency*.²⁹ The Court was asked to review the Board's interpretation of a definition contained in section 79 of the *Act*. The interpretation of that definition would in turn determine whether blank CDs were leviable pursuant to the private copying regime. Linden J.A., speaking for the Court, stated:

[5] In our view, this issue is mainly a question of law, that is, the interpretation of legislation that the Board administers. Such a determination falls squarely within the

²⁵ It must be noted that this paper was prepared before the Supreme Court ruled in *Dunsmuir v. New Brunswick*, 2008 SCC 9 on March 7, 2008.

²⁶ *Chauvet v. Alberta (Workers' Compensation Board, Appeals Commission)*, 2007 ABCA 155 at para. 17.

²⁷ 2007 SCC 14.

²⁸ 2007 SCC 15 [hereafter *CCD v. VIA Rail*].

²⁹ [2000] F.C.J. No. 960 [hereafter *AVS*].

jurisdiction of the Board. It is in its home territory. The issue is a polycentric one dealing with the interests of artists, manufacturers, importers, consumers who record sound, consumers who do not record sound and others. The purpose of Part VIII of the *Act* is mainly an economic one - that is, to fairly compensate artists and the other creative people for their work by establishing fair and equitable levies. These are matters within the expertise of the Board which has been given the authority to decide inter alia the manner of determining the levies, who pays, how much they pay and the terms and conditions of the payment. (See subsection 83(8).) The Board, therefore, should know the industry it is regulating better than the Court. Hence, applying the "functional and pragmatic" test of *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982, and having looked at the factors outlined, the proper standard of review on this issue, even though there is no privative clause, is patent unreasonableness, as considerable curial deference is due to this Board on this question. (See for cases applying this standard to this Board in other technical matters, *SOCAN v. C.A.B.*, [1999] F.C.J. No. 389 (F.C.A.); *C.A.B. v. SOCAN*, [1994] 58 C.P.R. (3d) 190 (F.C.A.); *Réseau Premier Choix Inc. v. Canadian Cable Television Association*, [1997] F.C.J. No. 1723 (F.C.A.).

Thus, we start with a standard of patent unreasonableness when interpreting legislation the Board administers.

In *SOCAN v. CAIP (FCA)*, the Federal Court of Appeal revisited the standard of review in the context of Phase I of SOCAN's Internet Tariff. The application raised three issues. First, can Internet service providers claim to only provide the means necessary for others to communicate and as such, take shelter under paragraph 2.4(1)(b) of the *Act*. Second, does a communication occur where the server that transmits the information is located, and only there? Third, can Internet intermediaries be required to pay a royalty because they authorize the communication of music transmitted on the Internet?

Mr. Justice Evans examined *AVS*. He noted that the patently unreasonable test was rarely used in the absence of a strong privative clause and that the Court may have overlooked a less deferential standard. Most importantly, he found that the Court had not considered the fact that questions of law decided by the Board may also have to be decided by a court in the exercise of its original jurisdiction over copyright infringement proceedings.

Mr. Justice Evans then considered the cases relied upon in *AVS* and found them wanting. He then emphasized that before conducting the pragmatic and functional analysis, the court must consider who, of the tribunal or the court, Parliament intended to determine the issue in question.

After reviewing the usual factors, Mr. Justice Evans concluded that neither the nature of the rights affected by the Board's decision nor the seriousness of its impact indicated that the court should review the Board's legal determination on a standard of correctness. He continued stating that if an administrative agency's enabling statute contains neither a right of appeal nor a strong privative clause, reasonableness appears increasingly to be the "default" standard when reviewing the interpretation and application of the constitutive legislation by a specialist independent administrative agency. The Copyright Board fits that description.

The question was thus reduced to whether there are reasons to apply a standard other than unreasonableness to the Board's determination of the question under review. Mr. Justice Evans then went on to consider the appropriate standard in circumstances where the Copyright Board interprets a provision of the *Act* that may arise in court proceedings other than judicial review applications. In those circumstances, the Board's expertise cannot be said to be greater than the courts and the standard of review in those circumstances is correctness. He finally concluded that issues involving the interpretation of the facts as found by the Board are better left to the Board and are subject to a more deferential standard of review. In the absence of a privative clause or a right of appeal, simple unreasonableness rather than patent unreasonableness is the appropriate standard of review of the Board's decision. One would have thought that that was the end of the matter. But things are not always as one would expect them to be.

In *NRCC v. SOCAN*, the Federal Court of Appeal again considered the appropriate standard of review to determine whether the Board had committed an error in certifying a single tariff. Mr. Justice Evans found that, having regard to the relative expertise of the Board and the court and the nature of the problem before it, the Board was better placed than the court to determine if it had the power to certify a single tariff when the parties have neither submitted nor consented to one. He found that this was not a question of law that is relevant to copyright infringement proceedings but rather a question of a specialized nature.

Justice Evans further pointed out that the courts seem generally reluctant to select patent unreasonableness as the standard of review applicable to the determination of questions of law by administrative tribunals that are not protected by a strong privative clause. He, however, made an exception and concluded that the patent unreasonableness test was the standard of review in this case. He did so because paragraph 69(2)(b) and

subsection 68(3) of the *Act* confer the widest possible regulatory discretion on the Board so that it can balance the public interest and the competing economic interests of the copyright holders, service providers and consumers. He also found that the interpretation of a remedial or procedural power should be afforded particular latitude because the exercise of the power is integral to a complex regulatory scheme.

A lot turns on which provisions of the *Act* are the subject of the review. Are they in a space that is shared by the courts and the Board? Are they questions which are at the heart of the exercise of the Board's powers and therefore not likely to surface in any action for infringement of copyright? Are they matters of a procedural nature which would assist in balancing the interests of the users, copyright holders and service providers?

As one can readily see from the foregoing, the question of standard of review is anything but clear. The Supreme Court seems to continue to devote incredible amounts of energy and paper to muddying the waters. This is demonstrated by *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*.³⁰ There, Mr. Justice Major, on behalf of the Court, held that when determining the standard of review, the intention of the Legislature governs.³¹ Where little or no deference is directed by the Legislature, the tribunal's decision must be correct, but where considerable deference is directed or indicated, the test of patent unreasonableness applies. He did point out, however, that courts are reluctant to use the test of patent unreasonableness and therefore moved to the test of reasonableness in dealing with the decision of an arbitrator under a regime in which a weak privative clause existed. One would have thought that for a decision by a specialized tribunal, empowered by a policy-laden statute where the nature of the question falls clearly within the tribunal's expertise and where the decision is protected by full privative clause, the standard of patent unreasonableness would apply. That is, however, not always the case.

Courts have directed that in every case the applicable standard of review will be determined by an application of the functional and pragmatic analysis as set out in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*.³² In my opinion, this causes courts to expend countless hours of energy to decide what ought to be patently obvious from the outset.

³⁰ 2004 SCC 23 [hereafter *Voice Construction*].

³¹ *Voice Construction* at para. 18.

³² [1998] 1 S.C.R. 982 at para. 27.

In my opinion, we spend far too much time dealing with whether or not there is a privative clause, a full privative clause, a partial privative clause and so on. Appellate courts should get on with determining issues and reaching a just decision. If a decision seems reasonable, it is reasonable because as a whole the reasons provided support the conclusion reached. If a decision is not reasonable, surely the position ought to be that the court will fix it. This is even more applicable in circumstances where the difference between judicial and appellate review has become so blurred as to be almost indistinguishable. All of this began with *Pezim v. British Columbia (Superintendent of Brokers)*,³³ where suddenly we were confronted with full rights of appeal from decisions of statutory tribunals, unrestricted to questions of law, being converted into judicial review applications. But that is a subject for a whole other debate.

In conclusion, let me point out that decisions of the Copyright Board are not protected by a privative clause nor is there a right of appeal. The absence of both of these elements did not however stop Mr. Justice Evans from applying the patent unreasonableness standard to an interpretation of the law in *NRCC v. SOCAN*. That is a clear indication that the Board ought to be free in the interpretation of its constituent statute to interpret it and to be free from judicial interference unless its decision is patently unreasonable. On this point Justice Evans and I see eye to eye.

Adequacy of Reasons

The Board was recently confronted with a decision of the Federal Court of Appeal in *CAB v. SOCAN (2006)*.³⁴ The Court unanimously found that the Board's reasons respecting the quantification of a royalty increase warranted intervention by the Court because the Board had failed to adequately explain the quantification of the increase. The Court remitted the matter to the Board to "re-determine the issues in respect of which the reasons have been found to be inadequate." Those reasons related to the historical undervaluing of music and the greater efficiencies achieved by commercial radio stations through the use of its music. Mr. Justice Evans reiterated the standard of review when he stated,

[16] The Board is entitled to the greatest deference in the exercise of its discretion to set a rate and, accordingly, the discretionary decisions lying at the heart of its expertise are reviewable only for patent unreasonableness. However, it must explain the basis of its decisions in a manner that enables the Court on judicial review to determine on the basis of

³³ [1994] 2 S.C.R. 557.

³⁴ 2006 FCA 337 [hereafter *CAB v. SOCAN (2006)*].

the reasons, read in context, whether the decision was rationally supportable. When an administrative tribunal's decision is reviewable on a standard of reasonableness, its reasons are the central focus of a judicial review: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at paras. 48-9, 54-5.

He relied on paragraphs 17 to 22 of *VIA Rail Canada Inc. v. National Transportation Agency*³⁵ to determine that:

[11] "Adequacy" is to be assessed in light of the functions performed by reasons: enhancing the quality of decisions, assuring the parties that their submissions have been considered, enabling the decision to be subject to a meaningful judicial review, and providing future guidance to regulates.... Equally important, the adequacy of the reasons must be assessed in context, including the agency's record, the issues to which the reasons relate, and the scope of the agency's expertise.

Justice Evans did recognize that the Board's difficulty in justifying the quantification of the undervaluation by merely referring to the evidence as a whole stemmed in part from the failure of the CAB to put in evidence showing the relative rates of return by radio stations which made significant use of music and those which did not. He further recognized that the parties have a responsibility to produce relevant evidence in support of their position. This was a case where they did not. Notwithstanding, he found that the inadequacies of the Board's reasons warranted intervention.

The decision of the Federal Court of Appeal's in *CAB v. SOCAN (2006)* was issued before the Supreme Court of Canada ruled in *CCD v. VIA Rail*. In that decision, the Court made the following statement:

[103] But whatever label is used to describe the requisite standard of reasonableness, a reviewing court should defer where "the reasons, taken as a whole, are tenable as support for the decision" (*Ryan*, at para. 56) or "where ... the decision of that tribunal [could] be sustained on a reasonable interpretation of the facts or of the law" (*National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at pp. 1369-70, per Gonthier J.) The "immediacy or obviousness" to a reviewing court of a defective strand in the analysis is not, in the face of the inevitable subjectivity involved, a reliable guide to whether a given decision is untenable or evidences an unreasonable interpretation of the facts or law.

[104]...[I]t is the way a tribunal understands the question its enabling legislation asks it to answer and the factors it is to consider, rather than the specific answer a tribunal arrives at,

³⁵ [2001] 2 F.C. 25 (C.A.).

that should be the focus of a reviewing court's inquiry:

[O]ne must begin with the question whether the tribunal's interpretation of the provisions in its constitutive legislation that define the way it is to set about answering particular questions is patently unreasonable. If the tribunal has not interpreted its constitutive statute in a patently unreasonable fashion, the courts must not then proceed to a wide ranging review of whether the tribunal's conclusions are unreasonable.

To engage in a wide-ranging review of a tribunal's specific conclusions when its interpretation of its constitutive statute cannot be said to be irrational, or unreasonable, would be an unwarranted trespass into the realm of reweighing and re-assessing evidence. Where an expert and specialized tribunal has charted an appropriate analytical course for itself, with reasons that serve as a rational guide, reviewing courts should not lightly interfere with its interpretation and application of its enabling legislation.

These comments would suggest that *CAB v. SOCAN (2006)* may no longer be good law. I would argue that the Supreme Court has held that the Board's reasons need not be written to assist a reviewing court and more importantly, that they only need to be taken as a whole, tenable support for the decision it reached. This would appear to be a much less rigorous standard than the one used by the Federal Court of Appeal.

One can argue, following *Voice Construction*, that the reasonableness of a decision should be assessed not by attacking each facet of the decision one-by-one, but by looking at the decision as a whole. As long as the decision falls within a zone of reasonableness, the courts should not interfere. Asking a decision-maker acting within its area of expertise to justify its choice of a figure that clearly falls within a zone of reasonableness would appear to contradict the rulings in *Voice Construction* and *VIA Rail*.

Conclusion

In conclusion, let me just say that we are all dealing with uncertainty. In attempting to deal with this, the Board will continue to apply the law in a consistent, logical fashion while balancing the competing interests of copyright holders, copyright users and the public. This is not always easy, as demonstrated by the uninformed remarks of some editorial writers at the National Post in describing the January 10, 2008 decision of the Federal Court of Appeal in *Apple Canada Inc. v. Canadian Private Copying Collective*³⁶ and in the comments of the Canadian Association of Broadcasters following the Board's

³⁶ 2008 FCA 9.

decision on the commercial radio tariff, which was reviewed in *CAB v. SOCAN (2006)*.

I shall conclude with one last comment. The practice of challenging by judicial review issues that had been conceded before the Board is one that ought to be discontinued. As the Board pointed out in Tariff 22.A:

Challenging by judicial review an issue that was conceded before the Board might trigger the application of certain principles governing collateral attacks of administrative decisions that the Court will no doubt examine. Others may wish to keep in mind the practical consequences of such a course of action. If a legal proposition that is conceded before the Board can be examined on judicial review, the Board will have no choice but to test every legal principle underpinning every decision it makes including principles that no one challenged. The Board would then insist on the parties providing, no doubt at substantial expense, the evidentiary base required to address every single issue: see for example, *SOCAN 24*, at paragraph 38, where the Board decided the issue of whether a ringtone constitutes a substantial part of a work as contemplated by subsection 3(1) of the *Act* to avoid just such a challenge.³⁷

The practice will only serve to prolong otherwise lengthy hearings.

³⁷ Tariff 22.A at footnote 20 at p.398.