Copyright Board Canada

Commission du droit d'auteur Canada

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

[Text is in language of delivery]

16th Annual Conference
on Intellectual Property Law & Policy
Fordham Intellectual Property Law Institute

New York, N.Y.
March 28, 2008

Reasons – Because I Said So – Not Good Enough - But What Is?*

Two recent decisions of the Federal Court of Appeal, the first remitting a matter to the Copyright Board to explain why it had fixed a tariff at a particular rate, the second which was characterized by one journalist as "seven brusque paragraphs"[1], caused me to examine the issue of the adequacy of reasons. The position of the Court in these two cases seems on its face contradictory. It smacks of two weights – two measures. If an administrative tribunal is required to explain how it arrived at a particular rate – something within its discretion in its home territory and expertise – does a reviewing tribunal have any less of an obligation? Is it enough to say we decided this in a previous case when the issue is whether the question was ever raised in the first place[2]?

I will begin this paper by exploring the sources of the duty to provide reasons in a Canadian context. I will then provide an overview of the principles governing the scope of this obligation. Thereafter, I will discuss how these principles translate in the context of the Copyright Board's decisions. Finally, I will share with you my concern about the level of deference currently being afforded to decisions of administrative tribunals under the Canadian law.

I. The sources of the duty to provide reasons

Although some administrative tribunals were and continue to be obligated by law to provide reasons, traditionally, those that failed to do so did not necessarily breach the common law principles of natural justice or procedural fairness. While desirable, reasons were not necessary[3]. In *Baker v. Canada (Minister of Citizenship and Immigration*)[4], however, the Supreme Court of Canada changed all that and held that administrative tribunals were required to provide reasons based on the principles of natural justice and procedural fairness. The requirement to give reasons was contingent on the following non-exhaustive factors:

1. The closeness of the administrative process to the judicial process[5];
2. The nature of the statutory scheme and the "terms of the statute pursuant to which the body operates"[6];
3. The importance of the decision to the lives of those affected[7];
4. The legitimate expectations of the person challenging the decision[8]; and
5. The choices of procedure made by the agency itself, particularly when the discretion or the expertise of the agency is at play. [9]

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* I would like to thank Mr. Mario Bouchard and Ms. Mélissa Lacroix for their assistance in researching and preparing this paper.

[1] *Apple Canada Inc. v. Canadian Private Copying Collective*, 2008 FCA 9.

[2] *Ibid.*

[3] *Northwestern Utilities Ltd. v. Edmonton*, [1979] 1 S.C.R. 684 at 706 ["Northwestern Utilities"].

[4] [1999] 2 S.C.R. 817 at paras. 23-27 ["Baker"].

[5] *Knight v. Indian Head School Division No.19*, [1990] 1 S.C.R. 653.

[6] *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170.

[7] *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105 at 1113.

[8] *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 76 F.T.R. 15.

[9] *IWA v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282.

In *Baker*, L'Heureux-Dubé J. examined the obligation to provide reasons for a decision dealing with an application to reverse a deportation order on humanitarian and compassionate grounds. Ms. Baker, a native of Jamaica had entered Canada on a visitor's visa in 1981. She stayed and did not apply for permanent resident status. She gave birth to four children while in Canada, two of whom were still dependants. She suffered from significant medical problems and was likely to be a drain on the Canadian medical system. She was ordered deported by the Ministry of Citizenship and Immigration and thereafter, applied for an exemption on humanitarian and compassionate grounds. The Ministry refused her application on the basis that there was insufficient grounds to warrant processing her application for permanent resident status. Ms. Baker appealed the Ministry's decision on a number of grounds, including a denial of procedural fairness for failure to give reasons for the decision refusing her application.

L'Heureux-Dubé J. found the application of the doctrine of procedural fairness can be triggered when an administrative decision affects the rights, privileges or interests of an individual. This included the review of immigration decisions on humanitarian and compassionate grounds. She emphasized that the underlying purpose of the participatory right is to ensure that administrative decisions are made using a fair and open procedure appropriate to the decision and the statutory and social context of the statute.[10] Thus, the content or extent of the duty of procedural fairness is flexible and variable and must be decided in each individual case.[11]

Madam Justice L'Heureux-Dubé found that a duty of fairness was owed to Ms. Baker and then considered the obligation to give reasons. She acknowledged that the Federal Court of Appeal had previously refused to recognize a common law right to reasons in a similar immigration context[12] and took note of favorable developments concerning the requirement to give reasons occurring in English case law.[13]

Madam Justice L'Heureux-Dubé dismissed the objection that an obligation to give reasons would impose an inappropriate burden on administrative tribunals and delay the administration of justice. She noted as well that reasons allow the parties to see that the relevant issues have been considered and are essential for appeal or judicial review. She held in unambiguous terms that "in certain circumstances" the duty of procedural fairness will require that the provision of a written explanation, particularly where the decision has important significance for the individual or when there is a right of appeal.[14] The circumstances giving rise to a common law right to reasons have

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[10] *Supra*, note 4 at para. 22.

[11] See *Knight v. Indian Head School Division No. 19.*, [1990] 1 S.C.R. 653.

[12] *Shah v. Minister of Employment and Immigration* (1994), 170 N.R. 238 (F.C.A.).

[13] *R. v. Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All E.R. 310 (C.A.) wherein reasons were required of a board deciding the appeal of the dismissal of a prison official. ; *R. v. Secretary of State for the Home Department, ex parte Doody*, [1994] 1 A.C. 531, wherein a duty to give reasons was imposed on the Home Secretary when exercising the statutory discretion to decide on the period of imprisonment that a prisoner who had been imposed a life sentence should serve before being entitled to a review; *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45 (N.I.R.C.), at 49; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120 (N.I.R.C.) which stood for the proposition that reasons are required at common law when there is a statutory right of appeal.

[14] *Supra*, note 4 at para. 43.

been expanded since *Baker*.[15]

As cynicism and institutional distrust seems to have firmly taken root in this era of "inquiries", reasons will undoubtedly become a frequent component of the duty of fairness to which individuals will be deemed entitled. Reasons are a salutary obligation which "reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals …".[16] It is now clear that "because I said so" will not discharge an administrative tribunal's duty to provide reasons. So then what will?

II. What are adequate reasons?

In the seminal case *Northwest Utilities*[17], Estey J., dealing with a statutory obligation to give reasons, held that it was it is not sufficient "to assert, or more accurately, to recite, the facts that evidence and arguments led by the parties had been considered…that much is expected."[18] He stated that reasons were desirable to avoid arbitrary and capricious decisions.

It has since proved difficult to formulate a specific test of adequacy due to "…the number of purposes served by a requirement of reasons and the range of decision-makers subject to the duty of providing reasons".[19] Whether a decision-maker will be said to have adequately set these out or not will ultimately be determined in light of all the circumstances of each case.[20] Accordingly, when determining the adequacy of reasons, a reviewing court should not examine them in isolation, but in the context that the administrative body made the decision.[21] For instance, the Court should look at the representations made at the hearing, the nature of the issues under appeal, the record of the proceedings and any applicable statutes or regulations.[22]

A review of the case law suggests that generally speaking, a decision-maker must set out in its reasons:

1. its findings of fact;
2. the evidence upon which it has drawn the findings of fact;
3. the major points in issue; and

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[15] *Prud'homme v. Prudhomme*, [2002] 4 S.C.R. 663 at para. 23; *Congrégation des témoins de*, [2004] 2 S.C.R. 650 at para.13.
[16] *Supra*, note 3 at 706.
[17] *Ibid*.
[18] *Ibid.* at 706-07.
[19] Brown, Donald J. M. and John M. Evans. *Judicial Review of Administrative Action in Canada*, loose-leaf ed. (Toronto: Canvasback Publishing, 2007) at 12-78.
[20] *Ibid*. at para. 12 :5320; *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (C.A) at paras. 17-22["VIA Rail"] .
[21] *Lor-al Springs Ltd. v. Ponoka County Subdivision and Development Appeal Board* (2000), [2001] 271 A.R. 149 at paras. 14-15 ["Lor-al Springs"]; *Keephills Aggregate Co. Ltd. v. Parkland (County of) Subdivision and Appeal Board* (2003), [2004] 348 A.R. 41 at para.24 ["Keephills Aggregate"]; *Couillard v. Edmonton (City)* (1979), 10 Alta. L.R. (2d) 295 at 303 (C.A.)["Couillard"]; *Rogers v. Strathcona (County) Development Appeal Board*, [1979] A.J. No. 370 (C.A.), online QL (AJ) at para. 10 ["Rogers v. Strathcona"].
[22] *Couillard , ibid.* at 303; *Rogers v. Strathcona, ibid.* at para. 10.

4. its reasoning process, which should reflect consideration of the main relevant factors.[23]

It is also well accepted that administrative tribunals are not held to "some abstract standard of perfection".[24] Indeed, it has been acknowledged that "the reasons of administrative bodies should not be scrutinized with the same scrupulous attention to detail as the reasons of a court".[25] It follows that in discharging its duty to provide reasons, a tribunal is not required to refer to all of the evidence and the arguments advanced by the parties or specify which standard of proof was applied.[26] While it will sometimes be acceptable for a decision-maker not to elaborate in detail on its rationale for arriving at a given conclusion, in other circumstances, more details of the chain of reasoning and the evidence considered will be necessary.

A reviewing court must be satisfied that the decision-maker's analysis of the evidence "must be such as to enable the parties and, on judicial review, the Court to understand how the Board reached its decision. Furthermore, the Court must be in a position to assess whether the Board understood the state of the law and whether it applied it to the facts of the case".[27] In other words, "the reasons must be 'sufficiently clear, precise and intelligible' to enable the individual [and the Court] to know why the tribunal decided as it did".[28]

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[23] *Suresh v. Canada (Minister of Citizenship and Immigration*), [2000] 2 F.C. 592 at 637, 687-88 (C.A.), cited in *VIA Rail, supra* note 20 at para. 22; *Gray v. Ontario (Disability Support Program, Director)* (2002), 59 O.R. (3d) 364 (C.A.) ["Gray"]; *Megens v. Ontario Racing Commission* (2003), 225 D.L.R. (4th) 757 at para. 14 ["Megens"]; *Harley v. Employment and Assistance Appeal Tribunal*, 2006 BCSC 1420 (CanLII) at paras. 39, 45 ["Harley"]; *Slawik v. Manitoba (Workers' Compensation Board)* (2006), 205 Man. R. (2d) 124 at para. 23 ["Slawik"]. A couple cases have also succinctly set out the test for adequate reasons as follows: Do they show why or how or on what evidence?, see: *Lor-al Springs Ltd., supra* note 20 at paras. 14-15; *Keephills Aggregate, supra note 20* at para.24.

[24] *Ahmed v. Canada (Minister of Citizenship and Immigration),* (2002), 225 F.T.R. 215 at para. 13, cited in *Hernando Paez v. Canada (Citizenship and Immigration)*, 2008 FC 204 at para. 25; *Baker, supra* note 4 at para.40.

[25] *Megens, supra* note 23 at para. 13.

[26] *Tsai v. Human Rights Commission (Canada)* (1988), 91 N.R. 374 (F.C.A.); *Lever v. Canadian Human Rights Commission* (1988), 10 C.H.R.R. D-6488 (F.C.A.); *Slawik, supra* note 23 at paras. 28-29; *Jaworski v. Canada (Attorney General)* (1998), 149 F.T.R. 184 (T.D.) ["Jaworski"]; *Zang v. Canada (Citizenship and Immigration)*, 2006 FC 1381 (T.D.); *Cepeda-Gutierrez v. Canada (Minister of Citizenship & Immigration)* (1998), 157 F.T.R. 35 at paras. 16-17 (T.D.); *Ozdemir v. Canada (Minister of Citizenship & Immigration)* (2001), 215 F.T.R. 32 at paras. 9-10 (C.A.); Brown & Evans, *supra* note 19 at 12-81; Robert W. Macaulay & James L.H. Sprague, *Practice and Procedure Before Administrative Tribunal*, vol. 3 (Toronto: Thomson Carswell, 2004) at 22-78.7.

[27] Brown & Evans, *ibid.* at 12-76 to 77; Macaulay & Sprague, *ibid*. at 22-78.4; *Northwestern Utilities, supra* note 3; *Whiteley v. Canada (Minister of Social Development)* (2006), 2006 FCA 72 at para. 2 ["Whiteley"]; *Kemping v. British Columbia College of Teachers* (2004), 31 C.C.E.L. (3d) 234 (BCSC), aff'd (2005), 255 D.L.R. (4th) 169 (BCCA), leave to appeal to SCC ref'd [2005] S.C.C.A. No. 381; *Boyle v. New Brunswick (Workplace Health, Safety & Compensation Commission)* (1996), 39 Admin. L.R. (2d) 150 at 156, cited in *Megens, supra* note 20at para.17; *Harley, supra* note 20 at paras. 27-28. Some cases suggest that where a great deal of deference is to be afforded to a tribunal's decision, it is even more critical that clear and intelligible reasons are provided; see for example, *Sinnathamby v. Canada (Minister of Citizenship and Immigration)* (2005), 29 Admin. L.R. (4th) 65 (FC).

[28] Brown & Evans, *supra* note 19 at 12-77 and fn 349.

It follows that succinct reasons will be quite acceptable where a party appears before a tribunal in an attempt to take "an improved kick at the can".[29] The reasons will be deemed to be adequate[30] as long as the record clearly conveys that the tribunal came to grips with the evidence, explained why it did not accept the evidence, and that its factual conclusions are supported by the record. Similarly, if as a result of "an intimate involvement in the process leading to the decision, a person understands, or has the means to understand the reason for the decision, the duty to give reasons will vary accordingly".[31] The importance of the evidence to the decision and whether the reasons adequately demonstrate that the person's claim was properly considered will ultimately determine whether or not reasons are adequate.[32]

Where an administrative tribunal, rather than analyzing the law and the evidence in any meaningful way, simply relates the evidence and then immediately states its conclusion, the reasons will be deemed insufficient.[33] Similarly, reasons have also been found inadequate where a tribunal merely quoted the language of the statute in arriving at its decision or recited the types of evidence considered together with a conclusion.[34] For example, where the decision rests on an interpretation of a term or concept that is relative by nature, comparative indicators may be required to properly set out the reasoning process.[35]

The courts have also quashed decisions when the reasons did not mention documentary evidence "specific to and corroborative of an applicant's allegations".[36] It goes without saying that a more onerous burden is imposed when credibility is in issue.[37] When a decision-maker contradicts or rejects the report of an investigator or the testimony of a witness, a clear explanation for accepting or not accepting the evidence will normally be required.[38] The underlying purpose is to avoid the perception of arbitrariness.[39]

In absence of a specific test, the comments of Nadon J.A. in *Giannaros v. Canada (Minister of*

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[29] *FWS Joint Sports Claimants Inc.v. Border Broadcasters inc.* (2001), 16 C.P.R. (4th) 61 (FCA) at paras. 18-19 ["FWS Joint Sports"].
[30] *Ibid.*at paras. 18-19.
[31] *Gardner v. Canada (Attorney General)* (2005), 339 N.R. 91 (FCA), leave to appeal to the S.C.C. ref'd [2005] S.C.C.A. No. 480.
[32] Macaulay & Sprague, *supra* note 26 at 22-78.15.
[33] *Whiteley, supra* note 27 at para.4; *Northwestern Utilities, supra* note 3*;Harley, supra note 23 at* para. 54; *O'Donnell v. New Brunswick (Workplace Health, Safety & Compensation Commission)* (1997), 183 N.B.R. (2d) 397, (C.A.); *MacKenzie v. LeBlanc*, 2007 BCSC 768 (B.C.S.C.).
[34] *Kidd v. Greater Toronto Airports Authority* (2004), 252 F.T.R. 277 (T.D.)["Kidd"], where the court referred in contrast to *Maclean v. Marine Atlantic Inc.*, [2003] F.C.J. No. 1854 (F.C.)(QL); *Daneshwar v. Canada (National Dental Examining Board)*, (2002) 43 Admin.L.R. (3d) 256 (Ont. Div.Ct.); *Whiteley, ibid.*.
[35] *VIA Rail , supra note 20* at paras. 38-46.
[36] *Jones v. Canada (Attorney General (2005)*, 273, F.T.R. 309; *N.S.T.U. v. Nova Scotia Community College* (2006), 265 D.L.R. (4th) 288 (NSCA).
[37] *Harley, supra note 23* at paras. 41-42, citing *Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services*, (1985), 51 O.R. (2d) 302 (Ont. H.C.) at 310-11; Brown & Evans, *supra* note 19 at 12-84.
[38] *Harley, ibid.* at paras. 41-42; *Kidd, supra* note34 at paras. 21-23; *Megens, supra* note 23 at para. 29; see also, Brown & Evans, *supra* note 19 at 12-84.
[39] *Harley, ibid.* at para. 42.

Social Development)[40], which refers to his previous decision in *Doucette v. Minister of Human Resources and Development*[41], clearly express the flexibility with which the adequacy of an administrative tribunal's decision should be assessed:

> [11] It is obvious that the Board could have explained its reasoning more fully, but one can nonetheless discern the Board's reasoning from the language it has used. Consequently, as I am satisfied that the Board's reasons allow us to exercise our review function, I have no difficulty concluding that they are adequate.
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> [12] To conclude on this point, I would add that our Court, like other courts of appeal, must be mindful of Binnie J.'s remarks in *Sheppard*, *supra*, that we should not intervene because we are of the opinion that the courts below failed to express themselves in a way acceptable to us. The reasons under review should be fairly considered and in performing that exercise, we should, as Binnie J. suggests, examine the record on which the decision under review is based. We must guard ourselves from being too eager to conclude that reasons do not pass muster.
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> [10] Whether one agrees or not with the Board's reasons, they are, in my view, sufficiently developed for us to fully understand why it reached the conclusion that it did.

III. The Appropriate Standard of Review

In Canada, the standard of review applicable to judicial review of an administrative tribunal's decision has recently been clarified by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*[42]. There the majority, under the joint authorship of Bastarache and LeBel JJ, determined that the function of judicial review is "to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.[43] They found the process of judicial review involves two steps. The first is to determine whether the jurisprudence has already determined in a satisfactory manner the degree of deference to accord to a particular category of question. Second, where the first inquiry does not provide the answer, the courts must proceed to an analysis of the relevant factors to identify the appropriate standard of review. The analysis must be contextual and the courts are to consider the following relevant factors: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue; and, (4) the expertise of the tribunal. It will not be necessary to consider all these factors in every case.[44]

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[40] 2005 FCA 187 (CanLII)["Giannaros"].
[41] 2004 FCA 292 at paras. 11-12.
[42] 2008 SCC 9 ["Dunsmuir"].
[43] *Ibid.* at para. 28.
[44] *Ibid*. at paras 63- 64.

In *Dunsmuir*, the Supreme Court of Canada defined reasonableness as:

> [47] … a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
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> […]
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> [49] Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

The Supreme Court defined correctness as follows:

> [50][…] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.[45]

The adequacy of reasons is not however determined on the basis of the standard of correctness or reasonableness. It is rather determined by the principles of procedural fairness. As the majority in *Dunsmuir* noted, "procedural fairness is the cornerstone of modern Canadian administrative law. Public decision makers are to act fairly in coming to decisions that affect the rights, privileges or

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[45] *Baker, supra* note 4; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 at para. 74; *Gray, supra* note 23 at para. 26, where the court qualifies the question as an error of law rather than jurisdiction, which ultimately amounts to the same standard of review; *Harley, supra* note 23 at para. 60; *Megens, supra* note 23 at para.12.

interests of an individual"[46]

Confusion as to the applicable standard of review may arise when dealing with the question of inadequate reasons. This confusion stems from the fact that when assessing a decision on the basis of "reasonableness", a reviewing court must also look at the reasons of a tribunal. However, in such circumstances, it is not assessing their adequacy; it is rather determining whether or not the reasons "fall within a range of possible outcomes".[47] Hence, it is not the manner in which the decision-maker went about making his decision that is under review, it is rather the outcome of the deliberations.[48] The object of the analysis will thus affect the degree of deference at play.

Normally, when an applicant attacks a tribunal's outcome or the decision itself, the court will allow the application for judicial review only if it finds that the decision is devoid of "justification, transparency and intelligibility within the decision-making process" and if it falls beyond "a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[49]

In my opinion, this analytical framework is flawed, particularly where decisions of specialized tribunals empowered by a policy-laden statute are concerned. Reviewing courts generally afford a relatively high level of deference to the decisions of such tribunals in recognition of their expertise and the mandate that has been conferred on them by the Legislature.

It follows that by opening the possibility of bypassing the deference owed to such tribunals' reasons in the context of a fairness analysis, reviewing courts provide parties a method of attacking an otherwise reasonable decision which should be accorded deference. Courts should intervene only when the reasons taken as a whole are not tenable and cannot support the decision. One is reminded of the admonition of Dickson J. (as he then was) not to lightly brand as jurisdictional that which is not jurisdictional so as to permit intervention and the substitution of a court's opinion for that of the administrative decision maker. Court should take care not to brand as insufficient reasons that are otherwise reasonable. (See comments of Nadon J.A. in *Giannaros v. Canada (Minister of Social Development*), *supra*).

Dunsmuir involved the firing of a public office holder. Mr. Dunsmuir alleged he had not received adequate reasons for his dismissal but in the end nothing turned on that issue. It is not necessary for our purposes to review the analysis. Suffice it to say that there is an obligation under the principle of procedural fairness and indeed, in the case of the Copyright Board, a statutory obligation to provide reasons. To undermine the deference owed to specialized and expert tribunals on the basis that the reasons, in the absence of relevant cogent evidence, did not adequately explain the finding, seems to me to fly in the face of the deference owed to the decisions of these tribunals and the fundamental reason why the system of administrative decision making was created.

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[46] *Dunsmuir*, *supra* note 42 at para. *79.*

[47] *Ibid. at para. 47; see also Histed v. Law Society of Manitoba* (2006), 274 D.L.R. (4th) 326; *Walsh v. The Law Society of Manitoba* (2006), 212 Man. R. (2) 5 at paras.4-5; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247.

[48] Binnie J. in *C.U.P.E. v. Ontario (Minister of Labour)*commented on this point*:* [2003] 1 S.C.R. 539 at paras.102-03.

[49] *Dunsmuir*, supra note 42 at para. 47.

Let me now turn to how these principles have translated in the context of the Copyright Board's decision. In doing so, I will examine three fairly recent decisions of the Federal Court of Appeal in light of other decisions dealing more generally with the questions of damages resulting from copyright infringement.

IV. Adequate reasons in the context of the Copyright Board decisions

When setting tariffs, the Copyright Board of Canada is required by law to provide reasons. Paragraph 68(4)*(b)* of the *Copyright Act*[50] provides that "The Board shall … 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."

According to the principles discussed earlier, "because I said so" or "trust us, we know better" will not suffice to fulfill the Board's duty to provide reasons. It follows that it must provide reasons that are "…sufficiently clear, precise and intelligible to enable the individual [and the Court] to know why the tribunal decided as it did".

If there are "tenable reasons", the prevailing view is that "[e] ssentially, it is agreed that a royalty rate set by the Board in the exercise of its broad statutory discretion is subject to review only on the ground of patent unreasonableness [now reasonableness]".[51]

Before turning specifically to decisions of the Federal Court of Appeal reviewing the Copyright Board's decision, it will be helpful to keep in mind that the Supreme Court of Canada, in *Dunsmuir*, just re-labeled the pragmatic and functional approach that the courts had used since 1988 as the "standard of review analysis.[52] Whether this change is significant remains to be seen. As Binnie J. noted in separate reasons in *Dunsmuir,*

> *"that which we call a rose*
> *By any other name would smell as sweet"*[53]

There is a reasonable argument that while the term has been banished, the approach, like cheap perfume, lingers on. Therefore, while the underpinnings of that approach are found in the earlier decisions, the language used by the reviewing court may differ but the concept is constant or as constant anything in this area is.

In *Réseaux Premier Choix*[54], the question before the Federal Court of Appeal was whether the Copyright Board erred by refusing to extend a 15 per cent discount granted to Canadian specialty

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[50] R.S.C. 1985, c. C-42.
[51] *Réseaux Premier Choix Inc. v. Canadian Cable Television Assn.,* 1997 CanLII 6313 (C.A.F.) at paras. 15-17["Réseaux Premier Choix"]; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Broadcasters* (1999), 1 C.P.R. (4th) 80 (F.C.A.)["SOCAN v. CAB-1999"].
[52] *U.E.S., Local 298 v. Bibeault*, [1988] 2S.C.R. 1048.
[53] Romeo and Juliet, Act II, Scene i.
[54] *Supra* note 51.

cable services to Canadian pay and American specialty services. Looking first at the appropriate standard of review, the court noted that the Board was an administrative tribunal charged with resolving complex technical issues and accordingly, its decision should be given considerable weight.[55] After considering the relevant factors, the Court applied the patently unreasonable standard of review [now reasonableness] and dismissed the application after summarily reviewing the Board's reasons for granting the discount to some services but not of all. In this case, the Court reviewed the Board's reasons to determine if the Board's interpretation of its own jurisdiction, or its scope rather, was irrational or patently unreasonable. Hence, it was the outcome itself that the applicants were challenging and not the process by which the decision came to fruition.

The reasons of the Board were also scrutinized in *SOCAN v. CAB-1999.*[56] There, the Court had to decide, among other things, whether the Board had acted unreasonably in reducing by 15 per cent the commercial television stations' performing rights tariff. In deciding the issue, the Federal Court of Appeal once again applied the "patently unreasonable" standard of review, as the issue "is squarely within the Board's statutory mandate and expertise to consider which factors are relevant to tariff-setting."[57]

Once again, the Board's decision was entitled to a high degree of deference because it was the outcome of the decision that was being challenged and not the adequacy of the reasons. The reasons served to assess the logic of the reasoning in light of the evidence and the law as opposed to their sufficiency. In this case, the Court of Appeal once again followed the approach that "[t]he Board properly understood its function when it stated that it had to regulate the balance of market power between owners and users."[58]

In 2001, the Federal Court of Appeal once again examined the reasons of the Board in the matter *FWS Joint Sports Claimants Inc. v. Border Broadcasters Inc.*[59] FWS, a collective that administers the retransmission rights of four professional sports leagues, was dissatisfied with the share of the royalties the Board had allocated to it. Even though the collective was dissatisfied with the outcome itself, it also claimed that the Board had committed an error in not examining some evidence.

In their reasons, the Federal Court of Appeal did not address the standard of review applicable to questions relating to inadequacy of reasons. The Court noted that the Board (1) addressed the evidence, "albeit somewhat briefly", and (2) provided a number of justifications as to why it rejects the evidence submitted. The Court, given the circumstances, was satisfied that the applicant was able to understand why the Board had reached the decision it had:

> [18] In evaluating the adequacy of the Board's reasons, and in determining whether it can be inferred from them that the Board's findings were made in a perverse or

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[55] *Ibid.* au para.10.
[56] *SOCAN v. CAB-1999*, *supra* note 51.
[57] *Ibid*. at para. 6.
[58] *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada* (1994), 58 C.P.R. (3d) 190, 196g (FCA)["CAB v. SOCAN-1994"].
[59] *Supra* note 29.

> arbitrary manner, or without regard to the material before it, we have noted that this is the third time that FWS has made similar arguments to the Board, albeit with somewhat different evidence, and attempted to persuade it to adopt other measures for determining the value of sports programmes to cable companies. It is appropriate to read the relatively brief treatment of FWS' evidence in light of the fact that FWS was taking what one of its witnesses aptly called, "an improved kick at the can." Finally, although legally inadequate reasons cannot be cured by reference to the transcript, we would note that it is apparent from the discussions between Board members and the witnesses that the Board came to grips with their evidence.
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> [19] In all the circumstances, we are satisfied that, while not necessarily addressing every item of evidence in great depth or, in some instances, at all, the Board's reasons adequately explain why it did not accept FWS' approach or its evidence, and that its factual conclusions are supported by the record.

The reasons of the Federal Court of Appeal supports the legal proposition that administrative boards are not bound to perfection and may omit some evidence or arguments, as long as the applicants and the courts are able to properly understand the reasoning underlying its decision. The succinct discussion of the evidence did not preclude such understanding. The Court in essence did what the Supreme Court said it should do in *Council of Canadians with Disabilities v. Via Rail*[60], that is, determine whether the reasons taken as a whole are tenable as support for the decision.[61]

Now let me turn to the decision in *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada*.[62] In the decision under the review, the Board had decided to increase the performing rights royalties of the larger commercial radio stations from 3.2 to 4.4 per cent based on three reasons. First, the value of music to radio was more than the Board had previously thought. Second, radio used more music than in the past. Third, radio used music to create efficiencies that should be shared with composers. The Board used hard data to assess the second increase, but not the first or the third, as no such data was available on the record. As a result, the Board determined two ranges or reasonable outcomes and then selected a number within those ranges.

The Federal Court of Appeal found that the royalty rate set by the Board in the exercise of its broad statutory discretion was subject to review only on the ground that the decision was patently unreasonable. Inexplicably it then found that the royalty increase warranted intervention by reason that the Board had failed to adequately explain how it arrived at the value of music in deciding the increased royalty. The matter was remitted to the Board to "redetermine the issues in respect of which the reasons have been found to be inadequate".

Interestingly, the Federal Court of Appeal characterized the question of "inadequacy of the

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[60] [2007] 1 S.C.R. 650 ["Council of Canadians with Disabilities"].
[61] *Ibid*. at para.103.
[62] (2006), 54 C.P.R. (4th) 15 (FCA)["CAB v. SOCAN-2006"].

reasons" under the umbrella of denial of procedural fairness only *after* having noted that the decision of the Board was entitled to the highest degree of deference. Significantly, the CAB, which had filed for judicial review, had failed to provide to the Board any relevant or cogent evidence on the value of music and yet, complained that in could not understand how the Board arrived at the value it placed on music.

With respect to the issue of inadequate reasons for the findings respecting the reduction of the tariffs, the Court relied on its own decision in *VIA Rail*[63] to find that it was not sufficient for the Board to justify its quantification by merely referring to evidence taken as a whole. The Court held that:

> "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.[64]

The applicants, by packaging the question as one of procedural fairness, succeeded in having the Court become preoccupied with finding the "chain of reasoning" that could justify the two findings in question. The Court should have appreciated, as it had in past decisions, that questions of tariff-setting fell "squarely on [the Board's] home territory" and should only be interfered with in the presence of untenable reasons and it had implicitly if not expressly, found that the reasons were not untenable.

Unsurprisingly, given the paucity of evidence offered by the CAB, the Court was unable to identify a chain of reasoning to justify the percentage change in the tariffs and as a result found the reasons inadequate. The Court should have recognized that this was once again:

> "a case where there are no useful proxies available to the Board. At most, there were a variety of marginally relevant indicators, all of which nevertheless serve to establish a "comfort zone" within which the Board, given all the circumstances, is able to exercise its discretion in setting the tariff. […] this is a case where tariff making involves looking at the characteristics of the industry and trying to figure out what makes sense at the time. In doing so, the Board will keep in mind its raison d'être […] to balance the competing interests of copyright owners and users."[65]

I would argue that the rationale of the Federal Court of Appeal to find the reasons inadequate were more stringent than the rational for determining the adequacy of reasons as described by the Supreme Court of Canada in *Council of Canadians with Disabilities* where the majority stated:

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[63] *Supra* note 20 at paras. 17-22.
[64] *CAB v. SOCAN-2006*, *supra* note 62 at, para. 11.
[65] *SOCAN/NRCC - Pay Audio Services for the Years 1997 to 2002*, March 15, 2002, (Copyright Board) at 13 citing in support *CAB v. SOCAN-1994*, *supra* note 58.

> 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 any reasonable interpretation of the facts or of the law" (National Corn Growers Assn. v. Canada (Import Tribunal), 1990 CanLII 49 (S.C.C.), [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.
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> 104 As Wilson J. recognized in National Corn Growers, at pp. 1347-48, it 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, that should be the focus of a reviewing court's inquiry:
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> > [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.
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> 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 ha[ve] 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.

One can argue following *Voice Construction Ltd .v. Construction and General Workers' Union, Local 92*[66] that the reasonableness of a decision is to 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 rendered 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 both *Voice Construction* and *Council of Canadians with Disabilities.*

I would argue that the comments of the majority in *Council of Canadians with Disabilities* clearly indicate that the reasons are not written for the reviewing court but for the parties. It must examine the reasons having regard for the total context in which the reasons were rendered. The Court may have preferred different reasons but there was nothing to support a contention that the reasons were

[66][2004]1 S.C.R. 609.

unreasonable.[67] As the majority in *Council of Canadians with Disabilities* noted - to engage in a wide ranging review of the tribunal's specific conclusions when the interpretation of its constituent statute cannot be said to be unreasonable is an unwarranted trespass into reweighing and re-assessing the evidence. In my opinion, taken with its comments mandating deference when the "reasons taken as a whole are tenable support for the decision" is ample justification for not succumbing to what would be called in some milieux a "sucker punch".

Interestingly, in another context, courts are well aware that putting a dollar value on copyright or its infringement can prove difficult. In *U&R Tax Services Ltd. V. H&R Block Canada Inc.* [68], Richard J. (as he then was) stated:

> The Copyright Act does not permit the person who has infringed the copyright of the owner to escape a condemnation for damages merely because they are impossible or difficult to prove. Damages can be granted for breach of the Copyright Act without the necessity to prove them and if damages are difficult to assess or can not be evaluated "…the tribunal must do the best it can, although it may be that the amount awarded will really be a matter of guesswork." (Fox, supra, at 464).[69] [My emphasis]

In the same vein, McLachlin J., (as she then was) stated in *Slumber-Magic Adjustable Bed Co.Ltd. v. Sleep-King Adjustable Bed Co. Ltd. And TODD*:

> This provision gives the court a much wider discretion in proving damages than exists in other branches of the law, recognizing, no doubt, the difficulty of proving precisely what loss of revenue has resulted from the defendant's illegal use of the plaintiff's business property. As stated by Spence J. in *Standard Indust. Ltd. V. Rosen*, [citation omitted]:
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> "…the inability to show exact damages does not bar the plaintiff's recovery. It is perhaps the essence of such an action that the plaintiff would be unable to prove the actual incidence of deception…"
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> […]
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> I have considered whether there should be a reference to the registrar on damages in view of the uncertainties in the evidence on the matter. In my view, such a reference would not be of great assistance, given that the fundamental premise on which damages are determined – the amount of sales lost to the plaintiff and the amount of profit derived by the defendant from the publication of infringing work – cannot be precisely calculated. The determination of damages must, to a large extent, be a rough and ready one.[70]

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[67] See the comments of Nadon J. in *Giannaros supra* note 40.

[68] (1995), 97 F.T.R. 259 at 272.

[69] *U&R Tax Services Ltd. v. H&R Block Canada Inc.* (1995), 97 F.T.R. 259 at 272, per Richard, J.(as he then was).

[70] *Slumber-Magic Adjustable Bed Co.Ltd. v. Sleep-King Adjustable Bed Co. Ltd. And TODD* [1985] 1 W.W.R. 113 at 120 (B.C.S.C.J.).

Setting royalty rates is, if anything, even more a matter of guess-work. Insisting on too much specificity will sometimes result in increased expenses for parties, possibly with little or no benefit. It could also lead decision-makers to construct, out of an abundance of caution, impenetrable mathematical edifices that few, if any, will comprehend.

Hence, in finding that the Board failed to provide adequate reasons, the Court in *CAB v. SOCAN-2006* overlooked, even if it acknowledged it in passing, that the Board did the best that it could with the information that it was provided. The Board is not an inquisitorial tribunal. It generally does not seek out evidence on which the parties seek to rely. It took a lot of chutzpah for the CAB, after it failed to provide the evidence, to complain to a reviewing Court that it could not understand the Board's reasoning, which was based on the evidence it had. I am reminded of a child convicted of murdering his parents who sought clemency at sentencing on the basis that he was now an orphan!

The analysis of the Federal Court of Appeal seems to confuse the two different purposes for which a reviewing court examines the reasons of a specialized tribunal. One is to assess the adequacy of reasons; the other is to assess whether or not the Board, in the exercise of its authority, rendered a decision that was reasonable. The case law subjects these different analyses to different standard of review. The Court referred to *Law Society of New Brunswick v. Ryan*[71] on the issue of the adequacy of the reasons. At paragraph 16 of its decision it states:

> 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 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.

Yet *Ryan* involved a challenge on the result, not the fairness of the process. The Federal Court of Appeal, while applying the appropriate standard of review throughout all the decisions considered, fell into the trap against which Nadon J.A. warned reviewing courts!

What is most fascinating about *CAB v. SOCAN-2006* is that it may well have been decided *per incuriam*. During argument, the collectives argued that this was an issue of reasonableness, not adequacy of reasons. In support of this proposition, they relied on *CAB v. SOCAN-1999*. During argument, the 2006 panel, which comprised one member of the 1999 panel, asked the parties if the issue of adequacy of reasons was on the table in 1999. The parties could not answer and the 2006 Court acted as if it was not. Yet, an examination of the pleadings reveals that the issue of what are sufficient "reasons respecting the quantifications of royalty *decreases"* was raised in 1999, and

[71] [2003] 1 S.C.R. 247 ["Ryan"].

that at that time, the CAB argued against an examination of the sufficiency of the reasons. SOCAN then challenged each of the five reasons the Board had offered to justify lowering the rate SOCAN collects from commercial television stations. It also took issue with the fact that the Board had not offered any explanation whatsoever for setting the decrease at 15 per cent. In its memorandum of argument, it stated:

> 38. The Board does not explain how each of the factors affects the royalties. Instead, it arbitrarily calculates a reduction by putting a notional cap on the royalties ... and then setting the rate by reference to what the capped royalty amounts represents of the industry revenues when applied to 1996. There is no rational reason for doing so: the process cannot in no way account for any of the concerns that the Board has identified.

CAB responded to this argument in the following fashion:

> 54. The Board is not required to link each factor in its Decision to a specific and calculable variation in the proposed royalty. The 15% reduction in the Standard royalty rate represented the Board's balancing of the broadcasters' entitlement to reduced rates and the impact of a reduction on SOCAN and its members The previous 2.1% rate had never itself been "justified" by evidence as to the intrinsic value of television performing rights. The Board's mechanism for reducing the Standard royalty rate for 1997 was the same mechanism employed to reduce the royalty rate in 1985 and 1986.

The Board also addressed the issue in its memorandum as intervenor:

> 23. The extent of a rate reduction to be granted is within the Board's "home territory" and should not be challengeable unless patently unreasonable.

Equipped with these arguments, the Court "consider[ed] the bases upon which the Board decided that a 15% reduction in the tariff was appropriate" [¶ 5] and applying a standard of patent unreasonableness, ruled that "it ha[d] not been adequately demonstrated that the Board's decision to lower the tariff rate was "patently unreasonable" or "clearly irrational"" and went no further. Implicitly, then, the 1999 Court had to consider that the reasons were adequate: had they not been, they would never have reached the point of assessing the reasonableness of the conclusions. Yet, it is after referring to this very decision that the Court, in 2006, stated that "the adequacy of the Board's reasons is a question of procedural fairness and, as such, is for the Court to decide for itself"[72] and then went on to require that the Board at least "explain the reasoning supporting its quantification of the global royalty rate increase"[73], something the same Court did find in 1999.

V. Conclusion

All that I have said may come as a surprise to those of you who are versed in American

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[72] *Supra* note 62 at para. 12.

[73] *Ibid*. at para 19.

administrative law. My understanding is that in the United States, a presumption of validity attaches to each exercise of a regulatory board's expertise, and that seeking review of a decision involves "the heavy burden of making a convincing showing that it is invalid and unreasonable it its consequences" and that if the "total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry ... is at an end" [*Federal Power Commission v. Hope Natural Gas Co.* 320 U.S. 591, at 602 (1944)]. As long as a tribunal acts within its zone of reasonableness, courts are without authority to intervene. In a way, I suppose that this is what I am asking for.

In my opinion, what constitutes adequate reasons is not difficult to determine. If in the given circumstances of a case, the decision can be sustained on any reasonable interpretation of the facts or the law it must be accorded deference. The reviewing court must examine the decision as a whole and as the majority noted in *Council of Canadians with Disabilities*, that to "engage in wide ranging review of a tribunal's specific conclusions when its interpretation of its constituent statute cannot be said to be irrational, or unreasonable, would be an unwarranted trespass into the realm of reweighing and re-assessing evidence"[74]. The point that I am making today is that the uncertainty in the current state of the law causes misunderstanding as to the different roles assigned to courts and administrative tribunals within the Canadian constitutional system. I suggest that once a decision falls within a zone of reasonableness, the decision is entitled to deference and the reviewing court should not interfere.

The courts should not be quick to brand that which is adequate as inadequate so as to substitute its opinion for that of the tribunal. As lengthier reasons are unlikely a desirable answer to the ambiguity and uncertainty surrounding these issues, the Board will continue to apply the law in a consistent, logical fashion while balancing the competing interests of copyright holders, service providers and the public. This is not always easy as demonstrated by the uninformed remarks of some unnamed editorial writer at the National Post following the Board's decision in *Private Copying Collective v. Retail Council of Canada*[75]and the intemperate comments of the CAB following the decision of the Board in 2005 in *SOCAN v.CAB Tariff 1A.*

On a final note, reviewing courts should follow the same requirement to provide clear, cogent and transparent reasons so that the parties and indeed the tribunal being reviewed can determine on what basis the reviewing court arrived at its decision. This is particularly true when the decision under review has dealt with serious and difficult legal issues such as res judicata and estoppel and has interpreted the constituent statute to answer a question that was central to the issue of whether the Board had jurisdiction. Surely to say "because we said so" is not good enough. It is not good enough for administrative tribunals, it is not good enough for the reviewing tribunals. It brings to mind geese and ganders!

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[74] *Supra* note 60 at para. 104.
[75] *Private Copying 2008-2009*, July 19, 2007(Copyright Board).