

Jurisprudential Developments Affecting the Board

Canadian Bar Association
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Sylvain Audet, General Counsel



Topics

- Recent applications of *Vavilov* in Board context
 - *ESA v. SOCAN*, 2020 FCA 100
 - *CMRRA-SODRAC Inc. v. Apple*, 2020 FCA 101
- *York v. Access*: What guidance will SCC provide on:
 - mandatory application of tariffs?
 - consideration of “aggregate” dealings in fair dealing analysis?
- *SOCAN v. ESA*: What guidance will SCC provide on:
 - understanding s. 2.4(1.1)?
 - Application of *ESA v SOCAN* (2012)?



What effects has *Vavilov* had?

- *ESA v. SOCAN*, 2020 FCA 100

Judicial Review of *SOCAN, CSI, SODRAC - Tariff for Online Music Services, 2010-2013 - Scope of section 2.4(1.1) of the Copyright Act – Making Available*, CB-CDA 2017-085

- *CMRRA-SODRAC Inc. v. Apple*, 2020 FCA 101

Judicial Review of *CSI, SOCAN, SODRAC - Tariff for Online Music Services, 2010-2013*, CB-CDA 2017-086

According to the FCA:

- *Vavilov* identifies only five situations for correctness → *SOCAN v. CAIP* (2004), *Rogers v. SOCAN* (2012), and *CBC v. SODRAC* (2015) are cast into doubt
- But, for cases such as these, *Vavilov* “hardly changed anything at all”



What effects has *Vavilov* had?

According to the FCA:

- Public interest; Complex, multifaceted weightings; Assessments based on expertise or specialization → Relatively unconstrained;
- Interpretation of legislation → more constrained. Have to explain reasoning and justify conclusions on issues of legislative interpretation;
- Meaningfully grappled with key issues or central arguments raised by the parties; was actually alert and sensitive to the matter before it;
- One panel of a board may disagree with another panel of the same board as long as there is sufficient transparency and justification in the reasoning



What guidance may the SCC provide?

York University v. Canadian Copyright Licensing Agency

**If SCC decides tariffs
“mandatory”, what is
required to trigger
application?**

- Do an act covered by tariff?
- Do an act that would constitute an infringement but for the application of tariff?
- Does the act have to no longer be a potential infringement after application of tariff?

**If SCC decides tariffs not
“mandatory”**

- What does “acceptance”(as per FCA) look like?
- What is period of acceptance and relationship to tariff length, payment periods?
- Can it be withdrawn?
- Relationship to ongoing tariff obligations?



What guidance may the SCC provide?

York University v. Canadian Copyright Licensing Agency

If SCC decides fair dealing can/should/must consider aggregate dealings:

- Does this apply to the Board?
- Which dealings should form part of this aggregate?
 - Same copyright owner? Similar works? Same user? Same group of users? Do users have to be aware of other dealings?
- How far back/forward in time does this effect extend to?
 - Can effects be retrospective?
 - How long does effect last?



What guidance may the SCC provide?

SOCAN v. ESA

- Meaning of s. 2.4(1.1)?
- How does it (or does it?) apply to sound recordings?
- Discretion of Board in such interpretation?
- Role of international law?
- Application of *ESA v. SOCAN* (2012)?
 - clarify (non) permitted layering?
 - what is a single act?



THANK YOU / MERCI

**Copyright Board of Canada
56 Sparks suite 800
Ottawa (Ontario)
K1A 0C9
www.cb-cda.gc.ca**

