Speech given by
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I read with interest the introduction of my friend Peter Grant to his latest publication. What is of the most interest to me, of course, is how the decisions of the Copyright Board have fared on judicial review having regard to the questions asked, that is, what impact the courts have had on communications and copyright regulation in Canada and the subsequent questions which were posed. That is, in their role as supervisors of decisions of tribunals, have the courts reined in any excesses or have they impaired or impeded the effectiveness of the agencies or tribunals. Having been both a reviewer and a reviewee, I conclude that there are or were very few excesses to rein in and that the courts have not impeded the effectiveness of the Board during the time frame under review.

The success rate of judicial review is interesting but in the end not conclusive. There are a number of ways to look at the Copyright Board's track record on judicial review. The first is that given the number of applications for judicial review and the very few successes that have been achieved, the Board's decisions are sound. Secondly, it is obvious the Board's decisions fulfill the mandate it is accorded under the *Copyright Act*.

The success rate or box score is more interesting from a litigator's point of view than from the Board's point of view. For us, the regulator, what a decision means, even one that does not agree with the decision made by the Board, is certainty. The Board, at least knows the limits of our decision-making power.

To answer the first question regarding the success in reining in excesses, I would answer a qualified yes. The most obvious examples of reining in an excess, at least from the Board's perspective, are the Federal Court of Appeal's (FCA) decisions on private copying (*CPCC v. Canadian Storage Media Alliance et al.; Apple Canada Inc. v. CPCC*), dealing with the memory embedded in an MP3 player and the players themselves.

In the first decision the Court found that the embedded memory was not a "recording medium". Moreover, the FCA, in *obiter* and what I have already characterized as a throw away line, to the dismay of my colleagues at the FCA, found that the player itself was outside the private copy regime. The decision from the Court's perspective reined in an attempt by the Board to extend the definition of audio recording medium beyond what Parliament had intended.

Did the first decision impede the effectiveness of the Board? No. Did it provide certainty where doubt existed? No, because the status of MP3 players was still in doubt. Did they impede the orderly development of the private copy regime? Yes. That decision had far

reaching effects on the marketplace. It created market uncertainty, made the daily innocent activities of ordinary consumers illegal and helped to ensure that the regime would become irrelevant with technological changes. An additional result is that in excess of $50 million in royalties have not flowed to authors, composers and performers.

Some two years later, CPCC asked the Board to certify a tariff on the MP3 player by reason that it conformed to the definition. The Board agreed and was prepared to fix a tariff for an MP3 player or iPod. The objectors again applied for judicial review and in eight “turgid paragraphs”, the FCA again quashed the decision of the Board.

First, from the Board’s perspective, the fact that these two decisions of the Board had been quashed, or roughly 12% of the decisions challenged by way of judicial review, is not really important. That is not to say we like being overturned but what is more important is the certainty it brings to the rate-setting regime. We know, for example, that any attempt by CPCC under the current law to certify a tariff for an iPod or an MP3 player or an imbedded chip therein will not fly.

Secondly, as the Chairman of the Board, I am not overly concerned about the possibility of a decision being overturned on judicial review. I never write a decision having the FCA squarely in my sights either in front of me or over my shoulder. My staff and the lawyers in particular, are more concerned about whether the reasons are likely to attract judicial review. I understand that. That’s their role. From my point of view as an appellate judge, I have never written a judgment worrying about whether it will be appealed to the Supreme Court of Canada. (I might say in passing that my record there is pretty good over the last 26 years.) My role is to ensure that we have a fair and impartial hearing, that all the parties are given an opportunity to be heard and that the Board balances the rights of all the parties.

I understand the system and I understand there can be different interpretations and points of view. So, speaking only for the Copyright Board, I think the Court reined in what it saw as an excess of jurisdiction on the issue of private copying. One could conclude that the FCA felt the Board was pushing the envelope and straining to find, given the logic of the situation, that the embedded memory or the iPod in and of itself fell within the definition of the audio recording medium so as to attract the levy.

In my opinion, I do not think, given the standard of review in play over the last 20 years, that the courts have impeded the effectiveness of the Copyright Board. If

anything, they have increased the effectiveness of the Board given the deference paid to decisions of the Board.

Before turning to the standard of judicial review, I would like to comment briefly on the court's decision in *CAB v. SOCAN* regarding the method the Board used to establish the tariff the broadcasters must pay for the use of music on commercial radio stations. The problem with the decision, and I do understand the difference between a denial of natural justice based upon inadequate or no reasons and the standard of review, is that it left the Board and the parties who regularly appear before the Board perplexed. By finding that the Board had not given adequate reasons in territory that the FCA had previously identified as being within the exclusive province of the Board caused confusion and left in doubt what evidence was required where the party claiming judicial review failed to provide adequate information to allow the Board to give more precise reasons. It raised the issue of how far the parties and the Board had to go in dealing with issues that could affect the outcome and in explaining how it had arrived at the tariff.

In my opinion, by so finding, although we have seen no follow up, this opens the door to circumvent the deference owed to the Board's decisions. Fortunately, the FCA only set aside the decision and remitted it to the Board for a redetermination of the tariff, which we did. To the surprise of no one, except the CAB, we confirmed the tariff previously set largely on the expert evidence presented by the CAB. The CAB, having remedied the failure to put in enough evidence to assist the Board in its deliberations, permitted us to confirm the finding that we had made based upon the limited evidence they had given us in the past. Is the FCA an impediment? Not really. But that decision does raise some perplexing issues.

Now, turning to judicial review, let me give you a little background.

The FCA considered the standard of review applicable to decisions of the Board in 2000 in *AVS Technologies Inc. v. Canadian Mechanical Reproduction Rights Agency [2000] F.C.J. No. 960*. There, the Court was asked to review the Board's interpretation of a definition contained in section 79 of the *Act* which would determine whether blank CDs were leviable pursuant to the private copying regime. Linden J.A., speaking for the Court, essentially found that the interpretation of the legislation fell within the jurisdiction of the Board and was within its home territory and expertise. As a result, the standard of review was patent unreasonableness when interpreting legislation within the Board's jurisdiction and home territory.

In *SOCAN v. CAIP (FCA)*, the FCA 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* and noted that the Court may have overlooked a less deferential standard. More importantly, he found that the Court had not considered 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.

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

After reviewing the usual factors, Evans J.A. 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 found that if an administrative agency's enabling statute contains neither a right of appeal nor a strong privative clause, reasonableness was the "default" standard when reviewing the interpretation and application of the constitutive legislation by a specialized independent administrative agency such as the Copyright Board.

The final issue was whether there are reasons to apply a standard other than unreasonableness to the Board's determination of the questions under review. Evans J.A. concluded that where the Copyright Board interprets a provision of the Act that may arise in court proceedings other than judicial review applications, 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. Thus, simple unreasonableness is the appropriate standard of review of the Board's decisions.

The real question is what standard of review the FCA will apply after the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9.

The pre-*Dunsmuir* position appears to be the one the court is following. That is, the default position is one of reasonableness when reviewing the interpretation and application by a specialized independent agency of its constituent statute. It is only when, in our case, the Board enters into territory where Courts and the Board can interpret the same provisions of the *Copyright Act* and therefore not within the Board's exclusive domain that the appropriate standard of review is correctness.

The FCA's judicial review of other statutory tribunals' decisions suggests it will apply the same standard of review to the Copyright Board's decisions as it did before *Dunsmuir*.

The first step in the *Dunsmuir* standard of review analysis is to look to pre-existing case law to determine if it has already established the standard of review for that particular type of question. It is only if the case law has not already determined the standard of review that the Court should embark on a standard of review analysis.

There are a number of other cases where the FCA relied on pre-*Dunsmuir* jurisprudence to establish the standard of review without doing a new standard of review analysis.

In some cases, the FCA found the need to embark on a new standard of review analysis instead of relying on previous jurisprudence – for example, when the case could be distinguished in some material way from the case in which the standard of review was established. For example, in *Cousins v. Canada (Attorney General)*, 2008 FCA 226, the Court held the Applications judge was wrong to rely on previous jurisprudence to establish the standard of review where the previous jurisprudence involved a totally different tribunal than the one currently under review.

The standard of review applicable to the Copyright Board's decisions has been well established in the pre-*Dunsmuir* jurisprudence of the FCA and the SCC. Judging from the FCA's post-*Dunsmuir* jurisprudence in other areas, it likely will continue to use the same standards of review as it did before, unless a question comes up that is totally different from the ones already dealt with pre-*Dunsmuir*. That being the case, we, at the Board, will continue to function as we always have and endeavour to make decisions that balance the positions of the rights holders and the users.