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BY EMAIL PDF

Mr. Gilles McDougall

Secretary General

Copyright Board

56 Sparks St.

Ottawa, Canada

Dear Mr. McDougall:

Re: WORKING COMMITTEE ON THE OPERATIONS, PROCEDURES AND PROCESSES OF THE COPYRIGHT BOARD

You have asked for comments on the Copyright Board's recently published report of the WORKING COMMITTEE ON THE OPERATIONS, PROCEDURES AND PROCESSES OF THE COPYRIGHT BOARD (the "Report"). I should disclose that I am representing clients as **interveners in a pending Supreme Court of Canada case on the issue of what they call the "mandatory tariff" theory.** The outcome of this case could affect some of the issues discussed below. However, what follows are my own personal comments and do not necessarily reflect the view of my firm or any of my clients. Many of the following comments have previously been in one form or another on my blog [here](#) and in previous postings.

The main issue, of course is that of the "the time it takes for the Copyright Board to issue decisions". I am not going to comment on the Report in detail on a point by point basis because, frankly, its recommendations are very limited and, even if implemented, will do little or nothing

to reduce the time and cost of Board cases. I commend the two members of the working group for their positions, which are effectively dissenting views, as outlined in the “additional note” on page 25 in this respect. In particular, one of the members noted that, as a result of certain recommendations, “the process may be lengthened and may become more expensive”. The other members of the working group do not seem to wish to venture far beyond the status quo, which has apparently served them and/or their clients well since they make few if any recommendations that would actually shorten proceedings or reduce costs. A working group that included more fresh approaches and a broader representation of stakeholders would have been preferable.

As I have [previously written](#) on my blog:

- *The Board’s hearing process regularly takes years longer than what we see in the Courts and other comparable tribunals, even in some far more complex cases that may involve patent, competition or communications law. It often takes four years or more for a proposed tariff just to get to the hearing stage at the Board and another two years or more for the Board to render a decision. One of the results of these long time lines can be tariffs with a sometimes very long retroactive reach that can come as a shock to many users who are without effective representation at the Board and may have been unaware of the looming liability.*
- *While the great cost of Board hearings was once considered a safe investment with a virtually guaranteed lucrative return by most collectives and even by bank lenders, this is probably no longer the case. The very high cost of Board proceedings has always been a problem for users, especially those who cannot pass the costs on to their customers. However, these high costs and delays and the uncertainty of the cost/beneficial outcome are now a problem for collectives too.*
- *The Board’s decisions are, it seems, increasingly and sometimes dramatically being reversed by the Federal Court of Appeal and the Supreme Court of Canada (“SCC”). The SCC decided five cases from the Board in 2012. While the Board was upheld in three of those cases, it was dramatically reversed in two of them. As noted above, the SCC has just taken on another important case involving technological neutrality and possibly other issues.*
- *While there are calls for greater resources for the Board, it is not clear that this would solve any problems. As I have earlier written, with about 16 full time equivalent employees (FTEs), plus up to five full or part time Board members themselves, this Board is already by far the largest organization of its kind anywhere in the world. It will have a net cost of operations for 2014 in excess of \$3.5 million. It is an interesting fact that the Copyright Board already has almost 10% of the budget of the Supreme Court of Canada. The Copyright Board’s net cost of operations for 2014 will be more than \$3.5 million. That of the Supreme Court for 2013 was less than \$41 million. The Copyright Board typically renders only about two or three (more or less) substantive decisions a year that typically require several years to reach the hearing stage. The hearings are rarely longer than a week or two. There is typically a 1.5 to 2 year (or even more) delay after the hearing before a decision is rendered, and the*

decisions are often then reversed after judicial review. By contrast, the Supreme Court of Canada in 2013 received 529 applications for leave to appeal, heard 75 appeals and rendered judgment in 78 cases. The average time between a hearing and the rendering of a judgment was 6.2 months. More statistics on the SCC can be found here.

Despite the culture of complexity that has arisen over the years regarding Board cases, it must be said that Board cases are not particularly complex in comparison to routine cases in the Federal Courts or the Competition Tribunal, to pick just two examples. There appears to be no justifiable reason why the Board has arguably departed from conventional practices, procedures and benchmarks in the federal administrative law context, where cases are often at least as complicated factually and legally and even more financially significant than Copyright Board cases

For example, [the Competition Tribunal recently dealt with the massive and complex Visa and MasterCard credit card case in well under three years from beginning to end.](#)

Another obvious example can be found in the Federal Court, which regularly deals with Patented Medicines Notice of Compliance (“PMNOC”) cases. The PMNOC regulations require that these cases be dealt with in “application” form and disposed of, including the rendering of a judgment, within 24 months. These cases are often far more complicated factually than typical Board cases, and routinely involve the affidavits of several scientific experts. Needless to say, they often involve very large amounts of money. The hearings are typically four days or less. They are dealt with by a single judge, who typically has only one clerk. The PMNOC regulations, while they remain controversial and imperfect, ensure that this system works within a fixed time frame.

There seems to be no explanation for the fact that Board cases often take four years or so to get to a hearing and then two years or more for a decision to be rendered. Indeed, the Canadian Judicial Council has recently [stated](#) that “judges should render decisions within six months of hearing a case, except in very complex matters or where there are special circumstances.”

Moreover, not only has the Board been reversed many times in recent years by the Federal Court of Appeal and the Supreme Court of Canada. It has recently had to admit on its own motion to some serious errors in its decisions, despite the length of time they took to render.

Given all of the foregoing, it is unfortunate that the Report does not adequately address issues such as the following, which might, if given a fresh and vigorous approach, lead to significant reduction in the time and cost of Board hearings:

1. Why does the Board not exercise proactive case management, like the Federal Court, that would force the parties to move their case forward expeditiously?
2. Why does that Board consider itself not be bound by the normal well-established rules of evidence, for example regarding hearsay or reliance on bare assertions by counsel to form the basis of a multi-million dollar interim tariff?

3. Why does the Board not “qualify” its “expert” witnesses? We see some “perennial” experts witnesses at the Board who would likely not be permitted to provide expert evidence of the type they provide to the Board because, despite their knowledge, they arguably lack the independence required by the Courts.
4. Why does the Board not follow the normal procedure in virtually all other fora, which is to make the applicant explain at the outset of a case – not at its conclusion - the basic facts and legal doctrines on which it relies?
5. Why does the Board not impose some clear rules on interrogatories, such as limiting the need for responses to a sensible representative sample of an association’s members rather than all members of an association? Even if some objector associations do not understand or are unaware of this possibility, why doesn’t the Board take more explicit and proactive steps in the public interest to ensure that they become aware and that this in fact done?
6. Why doesn’t the Board have a consistent policy re its practice in relation to the imposition of “interim” tariffs?
7. Why is the Board so quick to categorize important evidence as “confidential”, despite jurisprudence about open courts? Since the public ends up paying for tariffs, the public is presumptively entitled to know what evidence goes into their making.
8. Why does the Board apparently have no interest in the implementation of regulations that might address some of the foregoing issues? The Board itself can suggest regulations pursuant to s. 66.6 of the *Copyright Act* and the Government may implement regulations pursuant to s. 66.91. Regulations have ensured that the Competition Tribunal runs expeditiously and efficiently. Likewise, the Patented Medicines Notice of Compliance regulations ensure that PMNOC cases, which are often far more complicated than Board cases and can involve enormous sums of money, are dealt with in 24 months or less.
9. Why does the Board suggest that the length of time the Board takes to render its decisions has anything to do with “lack of resources”? The Board is already by an order of magnitude the largest tribunal of its kind anywhere in the world. It has almost 10% of the budget of the Supreme Court of Canada, but renders less than a handful of significant substantive decisions every year. Few of these in turn are “inaugural”. While I do not have precise figures, it would seem that the cost of rendering one significant substantive decision by the Board must already be among the highest such costs of any Court or Tribunal in Canada and would be in the neighbourhood of about \$1,000,000 each. That is the cost to taxpayers, and does not include the costs to parties of counsel fees and disbursements, which are now apparently regularly exceeding \$1,000,000 per case, and may no longer justify the costs of participation for either the collective or any objectors in some cases.

To conclude, there is little reason to believe that this Report will lead to a reduction of the time or cost of Board proceedings. The recommendations are too little, too late and in many cases even qualified by suggestions for “soft” means, measures or compliance. In my respectful view, the Government needs to look at implementing rules or regulations, such as those in place for the

[Competition Tribunal](#) or the [Patented Medicines Notice of Compliance Regulations](#). The authority to implement such regulations is already in place. There is no need for new legislation.

Yours sincerely,

"HK"

Howard Knopf