Copyright Board Canada

Commission du droit d'auteur Canada

Speech given by
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Judicial Review – A Curse or a Blessing

I am back for a fifth time, however this time in an unusual way. I read about my participation as the luncheon speaker in the program prior to having been asked! It was as if I had been reappointed!

What I want to talk about today is the impact, if any, the reviewing courts, in this case the Federal Court of Appeal (FCA), have on decisions of the Copyright Board and whether the Court's decisions affect the effectiveness of the Board.

As one who has been, and still is, both a reviewer as a member of the Saskatchewan Court of Appeal, and a reviewee, as Chairman of the Board, I have a perspective that is somewhat unique.

In my opinion, a reviewing court plays a useful role in ensuring that excesses, of which I might add there are very few, are reigned in or controlled. As I will indicate later, judicial review does not impact the effectiveness of the Board. It does however add a certain intellectual rigueur to the rate setting process.

The mandate of the Board is to set fair and equitable tariffs. That requires it to have regard to the interests of the rights holders as well as the users of copyright.

Peter S. Grant of McCarthy Tétrault recently completed *An Annotated Guide to Judicial Decisions relating to the Regulation of Communications and Copyright in Canada*[1] in which he posed a number of questions concerning the role of the courts in reviewing decisions of the Board and of the CRTC and how these tribunals had fared. He noted 20 of the 24 Board decisions reviewed by the courts since its inception in 1989 have been upheld. I might add that the Board's decisions have been upheld in two more recent instances, bringing the total to 26 reviewed and the success rate to 22 of 26 or 84%. More recently, the FCA in *Access Copyright* rendered a decision which could be termed a tie but because the Court referred a small matter back to the Board, I view it as a win.

The success or failure rate of judicial review is interesting but in the end not conclusive. There are a number of ways to look at the 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 and it is acting within its statutory jurisdiction. Secondly, it is obvious the Board's decisions fulfill the mandate accorded it under the *Copyright Act*.

The success rate or box score is more interesting to a litigator than to the Board. For the Board, any decision, even one that sets aside the decision it made, provides certainty. The Board at least knows the limits of its decision-making power.

To answer whether the FCA has had success in reining in excesses, I would answer a qualified yes. The most obvious examples, at least from the Court's perspective, are the FCA's judgments 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 MP3 players themselves.

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[1] ISBN 978-0-9865242-1-9

In the first judgment the Court found that the embedded memory was not a "recording medium" as defined in the *Copyright Act*. Moreover, the FCA, in *obiter* and in what I have already characterized as a "throw away line", to the dismay of my colleagues at the FCA, found that the MP3 player itself was outside the private copy regime. That decision from the FCA's perspective reined in or thwarted an attempt by the Board to extend the definition of "audio recording medium" beyond what Parliament had intended.

Did the first judgment 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 it impede the orderly development of the private copy regime? Yes. That judgment 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 as new technology changes the way consumers copy music. An additional and predictable result is that in excess of $50 million in royalties have not flowed to authors, composers and performers.

Some two years later, CPCC again asked the Board to certify a tariff on the MP3 player itself by reason that it conformed to the definition of "recording medium" set out in the Act. The Board in a long decision dealt with the issues of *res judicata* and issue estoppel in addition to interpreting the *Copyright Act*, its home territory. It agreed that the MP3 player was a "recording medium" and stated it 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.

What is the result of those two judgments?

First, from the Board's perspective, the fact that these two decisions were quashed is not really important. That is not to say we like being overturned but what is more important is the certainty the judgment 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 embedded 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 in mind what the FCA might or might not do. 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 as Chairman of the Board 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 parties in fixing a fair and equitable tariff.

Finally, I understand the system and I understand there can be different interpretations and points of view. 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 a way to include MP3 players in the private copying regime.

Now, I would like to turn to the issue of the effect of decisions of the FCA on the effectiveness of the Board.

In my opinion, I do not think, given the standard of review in existence over the last 20 years, that the courts have impeded that effectiveness. If anything, they have increased it given the deference the Courts pay to decisions of the Board.

Before turning to the standard of judicial review, I would like to comment briefly on the FCA'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 for making a finding within its home territory, territory the FCA had previously identified as being within the exclusive province and jurisdiction of the Board, the FCA caused confusion and left in doubt the question of what evidence was required to rebut such a finding where the party claiming judicial review was the party that failed to provide adequate information to allow the Board to give more precise and detailed 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. It also raised the issue of the obligation of the Board to fix a deficient record.

In my opinion, by so finding, although we have seen no follow up, indeed Justice Létourneau did not refer to *CAB v. SOCAN* in the recent decision regarding the obligation to certify a tariff where there was no evidence in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada et al*, 2010 FCA 139, of which I will have more to say later, 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 Canadian Association of Broadcasters, 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 first hearing. Is the FCA an impediment? Not really. But that decision does raise some perplexing issues.

The second decision is *SOCAN v. Bell Canada*, which dealt with the obligation of the Board to certify a tariff in circumstances where there was no evidence in support of the proposed tariff.

Briefly, SOCAN proposed a tariff for the communication of musical works over the Internet and in particular a proposed tariff for "Other Sites". The Board certified most items in the proposed tariff except for "Other Sites" which would have included diverse sites that use music in different ways but for which music is not the main activity and the activity is not related to the use of music.

The FCA found the Board had not refused to certify the tariff. Indeed it stated the Board provided "abundant and cogent reasons" for excluding the item for "Other Sites" from the tariff. It set out

four of them in paragraphs 20 to 24.

Finally, the FCA stated:

> [24] [Finally,] while acknowledging SOCAN's entitlement to compensation for any use of its repertoire and the corresponding obligation of the users to pay royalties, the Board felt that, in this instance, for the period claimed, it could not, because of a lack of reliable evidence, establish a fair and reasonable tariff applicable to "Other Sites" (emphasis added). Paragraph 117 of the decision eloquently states the dilemma in which the Board found itself:
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> > [117] The Board has repeatedly stated that SOCAN is entitled to compensation for any use of its repertoire and that users cannot be exempted from paying royalties. These statements are correct as a matter of principle. In this instance, however, no evidence whatsoever was produced that would seek to establish the value of the repertoire or even the degree or the nature of its uses. In addition there are no reliable benchmarks on which to base a tariff. Indeed, even SOCAN's intention with respect to the application of this part of the tariff is not clear. The Internet is such a fluid, yet omnipresent phenomenon that it would be foolhardy to attempt to set a tariff when we fear that the consequences might be overwhelming and, we repeat, socially unfair. In any event, SOCAN has filed for 2007 and beyond, proposed tariffs that target again "all other sites". When the Board hears such tariffs in the future, parties will be expected to provide the necessary evidence to allow the Board to properly assess the situation. [emphasis added]

The FCA concluded:

> [26] In my view, it would have been unreasonable for the Board to certify this impugned Item of the proposed Tariff 22 in the absence of the necessary probative evidence, on mere guesses, speculations and approximations, especially in view of the long retroactive period covered (1996 to 2006) and the fact that, as the Board found, it is only at the end of that period that social networking and video sharing sites became popular.
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> [27] In addition, to proceed to a determination of the kind sought by SOCAN, in the absence of that evidence, would be acting arbitrarily and unreasonably. However, to act arbitrarily and unreasonably when required by law to act fairly and reasonably is wrong at law. The resulting decision of the Board would have been both wrong and unreasonable. [my emphasis]

The FCA also considered SOCAN's argument that the statute is mandatory and the Board is duty bound to certify a tariff. The FCA did not accept that argument. The Court also referred to the Board's powers under section 66.7 of the Act and stated they are complimentary tools and are not a substitute for a party's obligation to file the necessary evidence in support of a proposed tariff.

Significantly, the FCA found there was no duty on the Board to use its power to create a record where none exists.

Now, turning to the standard of 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 if the Act which would determine whether blank CDs were leviable pursuant to the private copying regime. Mr. Justice Linden, 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, he used patent unreasonableness as the standard of review.

In *SOCAN v. CAIP*, the FCA revisited the standard of review in the context of Phase I of SOCAN's Internet Tariff.

Mr. Justice Evans examined *AVS* and noted that in that case, the Court may have overlooked the less deferential standard of unreasonableness. More importantly, he found that the Court had not considered whether questions of law decided by the Board that may also have to be decided by a court in the exercise of its original jurisdiction over copyright infringement proceedings would require a standard of correctness rather than reasonableness.

He considered the cases relied upon in *AVS*, 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 that agency.

The final issue was whether there were reasons to apply a standard other than unreasonableness to the Board's determination of the question under review. Evans J.A. concluded that where the 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 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 analysis.

In some cases, the FCA found the need to embark on a new analysis instead of relying on previous jurisprudence – for example, when the case at hand could be distinguished in some material way. 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 Board's decisions has been well established in the pre-*Dunsmuir* jurisprudence. Judging from the FCA's post-*Dunsmuir* jurisprudence in other areas, it is likely that it will continue to use the same standards of review, 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.