Cour d'appel fédérale | Federal Court of Appeal

Date: 20141020

Dockets: A-265-13
A-525-12

Citation: 2014 FCA 235

CORAM: **NOËL C.J.**
TRUDEL J.A.
BOIVIN J.A.

BETWEEN:

CANADIAN ASSOCIATION OF FILM DISTRIBUTORS AND EXPORTERS

Applicant

and

SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND PUBLISHERS IN CANADA (SODRAC) INC. and SODRAC 2003 Inc.

Respondents

Heard at Ottawa, Ontario, September 4, 2014.

Judgment delivered at Ottawa (Ontario), October 20, 2014.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: TRUDEL J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] At issue are two applications for judicial review in which the Canadian Association of Film Distributors and Exporters (CAFDE or the applicant) is challenging two decisions of the Copyright Board (the Board) regarding royalties to be collected by SODRAC 2003 Inc. and the

Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC or the respondents) for the reproduction, in Canada, of musical works embedded into cinematographic works for the purpose of distributing copies of these cinematographic works for private use or for theatrical exhibition for the years 2009 to 2012.

[2] In accordance with the order issued by Webb J.A. on October 23, 2013, consolidating the two applications for judicial review, the following reasons will be filed in docket A-265-13, and a copy thereof will be filed in docket A-525-12 to stand as the reasons in that case.

[3] The provisions of the *Copyright Act*, R.S.C. 1985, c. C-42, relevant to the present dispute are reproduced in the annex.

RELEVANT FACTS

[4] CAFDE is a professional association for the distributors and exporters of films and television programs. SODRAC is a reproduction rights collective society that represents the owners of copyright in musical works in Quebec and the rest of Canada.

[5] From 2004 to 2008, CAFDE and SODRAC were bound by the SODRAC Tariff for the Reproduction of Musical Works in Video-copies (SODRAC Tariff, 2004–2008), which provided for a royalty rate of 1.2 per cent of revenues derived from the distribution of video-copies containing at least one work from the SODRAC repertoire.

[6] On March 28, 2008, pursuant to subsection 70.13(1) of the *Copyright Act*, the respondents filed proposed Tariff No. 5 for the reproduction, in Canada, of musical works embedded into cinematographic works for the purpose of distributing copies of these cinematographic works for private use or for theatrical exhibition for the years 2009 to 2012; both the applicant and other Canadian moving picture industry stakeholders filed objections to the proposal.

[7] Following a decision rendered on November 2, 2012 (the Original Decision), the Board certified the Statement of Royalties to be Collected by SODRAC for the reproduction, in Canada, of musical works embedded into cinematographic works for the purpose of distributing copies of these cinematographic works for private use or for theatrical exhibition (SODRAC Tariff No. 5).

[8] On December 3, 2012, the applicant filed an application for judicial review of the Original Decision issued by the Board (A-525-12), on the ground that the Board had erred in certifying a [TRANSLATION] "per-copy, per-minute" tariff instead of the [TRANSLATION] "per-minute" tariff proposed by CAFDE despite declaring itself willing to adopt it.

[9] On the same day, the applicant applied for a redetermination by the Board, essentially asking it to set aside the tariff structure certified in its Original Decision and to replace it with the structure proposed by the applicant, which it allegedly had intended to adopt. In so doing, the applicant sought an interim decision fixing the royalty rates between then and the time when the

Board was able to redetermine the decision, in accordance with section 66.51 of the *Copyright Act*.

[10] On December 20, 2012, the Board granted the application for an interim decision and suspended the application of SODRAC Tariff No. 5 for 2009–2012, which it provisionally replaced by SODRAC Tariff, 2004–2008, with reasons to follow.

[11] On February 5, 2013, the Court, per Mainville J.A., ordered a temporary stay of proceedings in docket A-525-12 dealing with the judicial review of the Original Decision pending the Board's Redetermination Decision.

[12] In the reasons issued in support of its interim decision to suspend, dated April 26, 2013, the Board noted that it had erred in its interpretation of the tariff proposed by the applicant and asserted that it had the authority to reopen the decision based on this error (the Decision to Reopen).

[13] The Decision to Reopen was not subject to an application for judicial review.

[14] On May 22, 2013, the Board issued an order informing the parties that it was going to certify the new SODRAC Tariff No. 5 without the filing of additional evidence or arguments.

[15] At the end of a decision rendered on July 5, 2013 (the Redetermination Decision), the Board certified a new, amended SODRAC Tariff No. 5.

[16] On August 6, 2013, the applicant filed an application for judicial review of the Redetermination Decision (A-265-13).

[17] On October 23, 2013, this Court ordered that the two applications for judicial review be consolidated.

[18] On November 26, 2013, Blais C.J. ordered that the effects of the Original Decision and of the Redetermination Decision be suspended pending the outcome of the applications for judicial review of these decisions. At the same time, the Court decreed that SODRAC Tariff, 2004–2008 would remain in effect pending a decision in these matters.

ORIGINAL DECISION

[19] In its Original Decision dated November 2, 2012, the Board certified SODRAC Tariff No. 5 and issued two licences for the reproduction of musical works from the SODRAC repertoire by the Canada Broadcasting Corporation (CBC) and Astral specialty television channels, respectively, for which it also fixed royalty rates (Original Decision at paras. 1 to 6 and appended tables 1 and 2). It should be noted, however, that the application for judicial review from the Original Decision concerns only Tariff No. 5, specifically the tariff for DVD copies of music for retail sale or rental, and not copies of music made to distribute movies or show them in a theatre.

[20] The Board first chose to abandon the royalty rate of 1.2 per cent of distribution revenues, which had been given effect to in SODRAC Tariff No. 5 certified in 2005 (Original Decision at

para. 174). According to the Board, it was preferable to adopt the rate structure used for CBC sales of programs to consumers (*ibidem*). The Board noted that both SODRAC and CAFDE had agreed to be bound by such a structure (*ibidem*). In fact, before the hearing, SODRAC proposed a royalty rate of 1.2 per cent of distribution revenues combined with minimum royalty thresholds, but then came round to the structure in effect for CBC sales of programs to consumers (Original Decision at para. 163). CAFDE also agreed to the CBC structure, but requested some adjustments. The Board summarized CAFDE's position in the following manner (Original Decision at para. 166):

> Alternatively, CAFDE proposed that the tariff be structured as in the CBC 2002 Agreement, with two important differences. The tariff would not differentiate foreground and background music and the rates would increase, not decrease, with the amount of music used: 0.65¢ per minute for the first 15 minutes, 1.25¢ for the next fifteen minutes and 2.0¢ for the rest. Royalties would be capped at 1.2 per cent of distribution revenues. Finally, the tariff should make the distinction between copies made in Canada and elsewhere; only the former can be subject to the tariff.

[21] The Board declared itself willing to adopt CAFDE's position and to address its concerns (Original Decision at para. 176):

> Little was said on either side in support of one approach over the other. In the end, we accept the distributors' [CAFDE's] proposition for two reasons. First, we are willing to accept for the time being that asking distributors to distinguish between background and foreground music would create enforcement issues. We need to learn more about the apparently satisfactory *modus operandi* CBC and SODRAC have reached in this respect before we can impose such distinctions. Second, we have no way to appreciate the impact on the overall royalties of an increasing rate scale as opposed to a decreasing one. Again, data collected from CBC and distributors will no doubt help us to determine this in subsequent proceedings.
>
> [Emphasis added]

[22] In the same paragraph and in the Tariff it certified subsequent to the decision, the Board fixed the following royalty rate:

> 0.65¢ per minute, per copy for the first 15 minutes, 1.25¢ for the next fifteen minutes and 2.0¢ for the rest.
>
> [Emphasis added]

[23] The Board refused to cap royalties at 1.2 per cent of distribution revenues as advocated by CAFDE, noting that "[it had] no evidence that would lead [it] to believe either that [a] cap is appropriate or that the cap should be 1.2 per cent" (Original Decision at para.177).

DECISION TO REOPEN

[24] In its Decision to Reopen, the Board recognized that it had misunderstood CAFDE's proposition and concluded that it had the authority to correct its resulting error.

[25] It was clear to the Board that its Original Decision was made on the basis of a misinterpretation of the tariff proposed by CAFDE. Even though it stated that it accepted the applicant's proposal at paragraph 176 of its reasons, at paragraph 166 of its decision, the Board incorrectly described this proposal as establishing a cents-per-minute, per-copy rate, while CAFDE had actually proposed a cents-per-copy rate (Decision to Reopen at paras. 7 to 13):

> [7] The November 2 decision [the Original Decision] leaves no doubt in this respect. The Board intended to approve what it perceived to be CAFDE's proposal:
>
> > [176] … In the end, we accept the distributors' proposition for two reasons. …
>
> [8] The decision also leaves no doubt about what the Board believed this proposal to be:

> [166] Alternatively, CAFDE proposed that the tariff be structured as in the CBC 2002 Agreement, with two important differences. The tariff would not differentiate foreground and background music and the rates would increase, not decrease, with the amount of music used: 0.65¢ per minute for the first 15 minutes, 1.25¢ for the next fifteen minutes and 2.0¢ for the rest. Royalties would be capped at 1.2 per cent of distribution revenues. …
>
> [9] The CBC 2002 Agreement provides for a cents-per-minute, per-copy rate. The Board stated that CAFDE was seeking a tariff that was structured like this agreement. The Board's description of CAFDE's proposal implies a cents-per-minute, per-copy rate. The certified tariff is a cents-per-minute, per-copy rate. There is therefore no doubt about what the Board understood CAFDE's proposal to be.
>
> …
>
> [13] The Board clearly misinterpreted CAFDE's proposal. The difference between this proposal and the Board's interpretation of it may seem subtle, but it is not unimportant. CAFDE was seeking a rate of 2 cents per DVD copy containing over 30 minutes of SODRAC music; the Board's interpretation leads to royalties that are 15 times higher or even more.

[26] After recognizing that it had erred in its Original Decision, the Board concluded that it had the authority to correct its decision, on the grounds that the error was palpable and had led to the certification of a tariff *ultra petita*, without the parties having an opportunity to be heard on the erroneously accepted tariff structure (Decision to Reopen at para. 15).

[27] First, the Board was of the view that a palpable error committed inadvertently or distractedly is precisely the type of error that can be corrected, as seen in *Munger v. Cité de Jonquière*, [1962] Que. Q.B. 381 (*Munger*); *Fortin v. Talbot* (1931), 51 Que. Q.B.124 (*Fortin*); and *Jacques v. Paré* (1939), 66 Que. Q.B. 542 (*Paré*) (Decision to Reopen at paras. 27 and 29). In this case, the error that was committed was not a simple clerical error, but was at the core of the decision: the Board "believed it was using one tariff structure while it was actually certifying

another" (*ibidem*). Such a palpable error was enough to reopen the Original Decision, even if it was impossible to determine the Board's manifest intention (Decision to Reopen at para. 28). Reopening the Original Decision was all the more appropriate as it would save judicial resources, given that the error would, in any event, have to be corrected by the Federal Court of Appeal on application for judicial review (Decision to Reopen at para. 27).

[28] The Board also distinguished between manifest intention and palpable error, concepts which the parties confused in its opinion. According to the Board, it was not a matter of the Board correcting an error in expressing its manifest intention, but rather of correcting the palpable error it had made (Decision to Reopen at para. 29).

[29] Second, the Board found that it was necessary to reopen the Original Decision because it was issued in violation of the rules of procedural fairness. The Board noted that it could certify a tariff that is higher than the one proposed by the parties, as long as the parties were allowed to present their arguments on the accepted tariff structure (Decision to Reopen at para. 31). However, in its Original Decision, the Board erroneously certified a tariff structure that established royalties that were higher than what SODRAC had requested without the parties having an opportunity to be heard on this structure (Decision to Reopen at para. 41). By reason of this breach of procedural fairness, the Original Decision and its associated tariff were therefore null, with the result that the Board could reopen and reconsider them (*ibidem*).

[30] Finally, the Board confirmed the interim suspension of the application of the 2009–2012 tariff and the continued effect of the 2004–2008 tariff pending redetermination (Decision to

Reopen at para. 43). The Board undertook to advise the parties whether it would proceed on the basis of the record or whether it would invite them to file additional evidence or arguments (Decision to Reopen at para. 45).

REDETERMINATION DECISION

[31] In the Redetermination Decision dated July 5, 2013, the Board started by stating that there was sufficient evidence on the record for it to certify a new tariff without the parties having to file additional evidence or arguments (Redetermination Decision at para. 3). The Board then endorsed the passages from the Original Decision describing the parties, their positions, the proposed tariffs and the evidence filed, with the exception of paragraph 166 of this decision, in which the applicant's proposal was incorrectly described as introducing a per-minute, per-copy rate (Redetermination Decision at para. 4).

[32] The Board first abandoned CAFDE's proposal in favour of the rate structure used for CBC sales of programs to consumers, for the same reasons as set out in paragraph 174 of the Original Decision, reproduced below (Redetermination Decision at para. 12):

> [174] In 2005 the Board noted that there was no indication as to whether the rate it certified represented the true value of the relevant right. The record of these proceedings adds nothing in this regard. We abandon the percentage rate of 1.2 per cent in favour of the rate structure used for CBC sales of programs to consumers, for three reasons. First, that structure appears to have served CBC and SODRAC well. Second, the parties agree to use this structure. Third, this approach allows royalties to vary with the extent to which distributors need access to the SODRAC repertoire.
>
> [Emphasis added]

[33] After comparing the CBC schedule with the one actually proposed by CAFDE (Redetermination Decision at paras. 13 to 15), the Board concluded that the CAFDE schedule was "unreasonably low and the proposal [was] slipshod", in that it resulted in unreasonably low royalties for SODRAC (Redetermination Decision at para. 16). In turn, it found the CBC schedule to be "*prima facie* fair", as it was certified under the SODRAC/CBC arbitration (Redetermination Decision at para. 17). The Board was nonetheless willing to accommodate CAFDE by offering distributors the choice of being bound by either the CBC schedule or the scheduled proposed by CAFDE, adjusted to the rates of the CBC schedule (Redetermination Decision at paras. 18 and 19, and 22 to 30). To prevent more royalties being paid than initially requested by SODRAC and to avoid a debate on the procedural fairness of the decision, the Board put a cap of 1.2 per cent of distribution revenues on the total amount of royalties that distributors opting for the CBC schedule would have to pay from 2009 to 2012 (Redetermination Decision at para. 30).

APPLICANT'S POSITION

[34] In its applications for judicial review, CAFDE is asking this Court to set aside the Redetermination Decision and to substitute – or to order the Board to substitute – the original SODRAC Tariff No. 5, modified by removing the words "par minute/per minute", for the amended SODRAC Tariff No. 5 (applicant's memorandum at para. 2). In the alternative, CAFDE requests that the matter be referred back to the Board so that it can recommence the process of certifying a new royalty rate (applicant's memorandum at para. 2).

[35] The applicant first identified two standards of review applicable to decisions of the Board: the standard of correctness for the issues of procedural fairness and the interpretation of the *functus officio* principle, and the standard of reasonableness for how the Board applied this principle to its Original Decision (applicant's memorandum at paras. 25 to 32).

[36] On the merits of the case, the applicant advances five arguments.

[37] First, it alleges that the Board erred in how it interpreted and applied the *functus officio* rule to reopen its Original Decision without giving effect to its manifest intention to adopt the tariff structure proposed by the applicant (applicant's memorandum at paras. 33 to 49).

[38] Only the manifest intention exception allowed the Board to deviate from the general rule that a tribunal may not reconsider or vary a decision that it has already issued (applicant's memorandum at para. 41). In fact, none of the other exceptions to the *functus officio* principle, as recognized in *Alberta Teachers Association v. Northern Lights School Division No 69*, 2012 CanLII 12065 (AB GAA), apply to the present situation: the enabling statute of the Board does not allow it to alter, vary or reconsider its decision; the error in question is not merely a clerical one; this is not a case where the Board did not fulfill its mandate by, for example, failing to dispose of a certain aspect or a situation where, in the absence of an opportunity to appeal the Board's decision, the decision would have to be reopened in the interests of justice (applicant's memorandum at paras. 38 and 41). The applicant adds that even a factual error, as serious as it might be, would not allow a tribunal to reopen its own decision (applicant's memorandum at para. 39).

[39] According to the applicant, the Board clearly expressed its intention at paragraph 176 of its Original Decision, when it stated, "[i]n the end, we accept the distributors' proposition" (applicant's memorandum at para. 44). This excerpt is not only clear, but also sufficient to identify the Board's manifest intention. Consequently, only the Original Decision must be examined to identify the Board's intention, given that the Board could not reveal or clarify its intention in hindsight, through a subsequent decision (applicant's memorandum at para. 43).

[40] After it reopened its Original Decision on the basis of the manifest intention exception, the Board had no other option but to amend the royalty tariff so that it matched the applicant's tariff structure, which it had been willing to adopt (applicant's memorandum at para. 48).

[41] Second, the applicant is challenging the two reasons why the Board reopened its Original Decision, arguing that "palpable error" is not a legitimate exception to the *functus officio* principle and that the Board decided *ultra petita* by unilaterally setting aside its Original Decision even though neither of the parties had suggested this solution (applicant's memorandum at paras. 50 to 57).

[42] The applicant submits that the Board confused the concepts of manifest intention and palpable error: while the first concept is indeed an exception to *functus officio*, the second is the standard of review on appeal, which does not apply in this case (applicant's memorandum at para. 52). The applicant points out that none of the decisions referred to by the Board supports the idea that it had the authority to reopen its Original Decision in the event of a palpable error

(*ibidem*). If that were the case, tribunals would necessarily have the authority to revisit their decisions to correct any kind of error at any time (*ibidem*).

[43] The second reason for reopening the Original Decision is just as groundless, since the Board did not have the authority to set aside its Original Decision and, in doing so, went well beyond what the parties were seeking (applicant's memorandum at para. 56). All the applicant had asked for was that the Board apply the manifest intention exception to implement the applicant's proposed tariff structure (*ibidem*).

[44] Third, regarding the remedy to be awarded, the applicant is asking the Court to remedy the Board's error by setting aside the Redetermination Decision and the associated tariff and to substitute SODRAC Tariff No. 5 for it by removing the words "per minute" (applicant's memorandum at para. 59). This solution is necessary because the present matter essentially raises a question of law, namely, the interpretation of the *functus officio* rule and given that it would be both unnecessary and contrary to the parties' interests to refer the matter back to the Board.

[45] Fourth, the applicant argues that even if the Board had been authorized to reopen the proceedings, it could not render its Redetermination Decision without offering the parties an opportunity to be heard (applicant's memorandum at paras. 61 to 64). Paradoxically, after setting aside its Original Decision on the ground that it was tainted by a breach of procedural fairness, the Board repeated the same mistake by issuing its Redetermination Decision without seeking the parties' opinions (applicant's memorandum at para. 62). This breach of procedural fairness is exacerbated by the fact that in rendering its Redetermination Decision, the Board set aside its

Original Decision on the basis of factors that were never mentioned in this last decision (applicant's memorandum at para. 63).

[46] Fifth, the applicant submits that the Board erred in rendering the Redetermination Decision in the absence of persuasive evidence or representations from the parties (applicant's memorandum at paras. 65 to 74). Indeed, none of the evidence justifies the final tariff schedule adopted in the Redetermination Decision.

RESPONDENTS' POSITION

[47] The respondents ask that the two applications for judicial review be dismissed.

[48] Focussing first on the applicable standards of review, the respondents submit that the standard of correctness applies to the Board's alleged breaches of the *functus officio* rule and procedural fairness principles (respondents' memorandum at paras. 16 and 17). The Board's certification of a new tariff in the Redetermination Decision is, however, reviewable against the standard of reasonableness (respondents' memorandum at para. 18).

[49] The respondents' main argument is that the applicant is precluded from challenging the Board's authority to reopen its Original Decision and to consider it afresh if only to reflect the Board's manifest intention of accepting the tariff structure proposed by CAFDE. In its arguments regarding the *functus officio* principle, the applicant challenges the conclusions of the Board contained in the Decision to Reopen rather than in the Redetermination Decision. But the Decision to Reopen was not judicially reviewed, and the applicant cannot attempt to have it

reviewed indirectly through an application for judicial review of the Redetermination Decision (respondents' memorandum at paras. 23 to 26).

[50] The respondents emphasize that previous decisions of this Court clearly do not permit a party to seek review of issues decided in a previous decision that was not challenged and therefore is *res judicata* (see *Remstar Corporation v. Syndicat des employés-es de TQS Inc. (FNC-CSN)*, 2011 FCA 183 (*Remstar*); *Halifax Employers Association Inc v. Council of ILA Locals for the Port of Halifax*, 2006 FCA 82 (*Halifax Employers Association*); and *Lamoureux v. Canadian Air Line Pilots Associations*, [1993] F.C.J. No. 1128 (F.C.A.) (*Lamoureux*)) (respondents' memorandum at paras. 27 to 29).

[51] The respondents add that the three conditions for issue estoppel to operate have been fulfilled in this case, namely, the Decision to Reopen already decided the issue of whether the Board had the authority to reopen the Original Decision and to reconsider it; the Decision to Reopen was a final judicial decision and the Decision to Reopen and the present applications for judicial review involve the same parties (respondents' memorandum at paras. 30 to 35).

[52] In light of the above, the applicant should have filed an application for judicial review in a timely manner if it wished to make arguments based on *functus officio*, knowing that it would not be able to raise these later in a review of the Redetermination Decision (respondents' memorandum at paras. 36 to 39).

[53] In the alternative, in the event that the Court rejects the preclusion argument, the respondents submit that the application for judicial review concerning the Redetermination Decision must nonetheless be dismissed, on two grounds.

[54] First, the applicant is wrong to submit that the Board's authority was, as a result of the manifest intention exception, limited to re-establishing the tariff structure as it had originally indicated. The applicant's arguments rely on an incorrect premise, namely, that the Board's manifest intention was to accept the applicant's proposed tariff structure. Yet, [TRANSLATION] "[t]he 'Decision to Reopen' is clear: the Board did not accept the tariff structure actually proposed by the [a]pplicant, but accepted the structure that it wrongly believed the [a]pplicant to have proposed. … Its manifest intention was to accept a proposal that it later noted to be based on an error" (respondents' memorandum at paras. 43 and 44). It follows that the Board did not decide *ultra petita* by setting aside its Original Decision instead of simply correcting the tariff structure as suggested by the applicant (respondents' memorandum at para. 46).

[55] Second, the respondents argue that even if the Board was *functus officio* or had decided *ultra petita*, the Court should exercise its discretion to deny the remedies requested by the applicant in the two applications for judicial review, namely: re-establishing the tariff structure that corresponds to the Board's manifest intention; or in the alternative, refer the matter back to the Board so that it can rectify its error (respondents' memorandum at paras. 49 and 51). In fact, the first remedy sought should be rejected out of hand given that the Board did not manifestly intend to accept the applicant's proposal (respondents' memorandum at para. 50). As for the second remedy, the respondents argue that it would be unnecessary to grant it since the error has

already been recognized and corrected in the Decision to Reopen and in the Redetermination Decision (respondents' memorandum at paras. 50, 57 and 63). The interests of the parties and the principle of the sound administration of justice weigh against this Court's intervention (respondents' memorandum at paras. 52 to 56).

[56] Regarding the alleged breach of procedural fairness, it is the respondents' view that the applicant has failed to establish how the Board violated the *audi alteram partem* rule. First, the applicant did not seize the opportunity to ask the Board to be heard on time. In fact, the applicant cannot criticize the Board for rendering its Redetermination Decision and certifying a new tariff without giving it an opportunity to be heard when it never expressed the desire to present additional evidence or submissions, be that on the outcome of the Decision to Reopen or following the Board's order dated May 22, 2013 (respondents' memorandum at paras. 74, 75 and 78). The applicant also failed to establish an actual violation of its right to be heard given that it did not demonstrate before this Court which additional evidence or submissions it was deprived from presenting to the Board (respondents' memorandum at paras. 76 to 78).

[57] In light of the above, the Redetermination Decision in which the Board certified the new tariff is reasonable within the meaning of *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), in that the Board relies on the evidence – such as the royalties received by SODRAC for the distribution of DVDs in previous years – and its reasoning is transparent and intelligible (respondents' memorandum at paras. 91 to 103, and 105). In addition, the fixing of a new tariff structure by the Board is central to its area of expertise and the Board is therefore owed deference (respondents' memorandum at paras. 85 to 90, and 104).

ANALYSIS AND DECISION

Applicable standard of review

[58] The parties essentially agree on the applicable standards of review: the interpretation of the *functus officio* principle and questions of procedural fairness are questions of law that are reviewable on the correctness standard; on the other hand, the Board's certification of a particular tariff, whether in its Original Decision or in its Redetermination Decision, must be examined against a standard of reasonableness (*Canadian Broadcasting Corporation v. Sodrac 2003 Inc.*, 2014 FCA 84 at para. 27; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers*, 2012 SCC 35 at paras. 10 to 15; *Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 at para. 42).

Issues

[59] The issues that arise from the arguments raised by the parties during the hearing and in their respective memoranda can be grouped as follows:

> (1) Is the applicant precluded from challenging the Board's conclusions regarding its authority to reopen and reconsider its Original Decision given that the Decision to Reopen was not made the subject of a judicial review application?
>
> (2) Did the Board make a reviewable error in authorizing itself to reopen and redetermine its Original Decision on the ground that it had made a palpable error?
>
> (3) Did the Board make a reviewable error in refusing to remove the words "per minute" from the table of royalties as requested by the applicant?
>
> (4) Did the Board make a reviewable error in certifying a new tariff without giving the parties an opportunity to be heard?
>
> (5) Did the Board make a reviewable error in certifying a new tariff that was not supported by the evidence?

(6) Is the Original Decision reasonable?

I propose examining each of these questions in the order in which they appear.

First question

[60] The respondents have placed great emphasis on the fact that the applicant would be precluded from challenging the conclusions drawn by the Board in its Decision to Reopen because it did not seek for judicial review of this decision.

[61] It is true that the applicant is attacking not only the result of the Redetermination Decision, but also and especially the basis for the Decision to Reopen, to which it devotes much of its memorandum (applicant's memorandum at paras. 33 to 57). In fact, the applicant identifies the crux of the matter as being "what exceptions, if any, to the *functus officio* principle apply, and the extent to which the proper application of any applicable exceptions would have allowed the Board to reopen the Original Decision" (applicant's memorandum at para. 37).

[62] The applicant's argument covers both the Decision to Reopen and the Redetermination Decision: according to the applicant, only the manifest intention exception allowed the Board to reopen the matter, and, consequently, in reconsidering the case, the Board was limited to giving effect to this intention. This overlap is clear from reading the applicant's memorandum, where both decisions are addressed at once (applicant's memorandum at para. 48):

> While the Board could have Reopened the Original Decision pursuant to the manifest intent exception, the Board had no jurisdiction to make further changes to the DVD royalty rate or the tariff structure; it could only change the Original

> Decision to the extent necessary to reflect what the Board stated explicitly that it intended to do, which is accept the CAFDE DVD royalty proposal (without the proposed 1.2% revenue cap). To do otherwise would be the "board overturning itself".
>
> [Emphasis in original]

[63] I note here that it is not the Decision to Reopen as such that poses a problem. The applicant was of the opinion that the Board was entitled to reopen as long as this led to the adoption of its tariff structure since, according to the applicant, this was the only possible legitimate outcome. It counted on obtaining this result either before the Board or by way of a subsequent judicial review. Similarly, the Decision to Reopen was of little concern to the respondents as long as the exercise resulted in the certification of a tariff other than the one proposed by the applicant and that was acceptable to them. From the perspective of the parties, what mattered was not the Decision to Reopen but the correction that the Board would bring to the certified tariff following this decision.

[64] Normally the correction is pronounced at the same time as the Decision to Reopen. In fact, an error recognized in a redetermination decision and the required correction generally go hand in hand (see, for example, the redetermination decisions rendered under Rule 397 of the *Federal Courts Rules*, SOR/98-106 including *Le Corre v. Canada (Attorney General)*, 2005 FCA 238; *Besse v. Canada*, [2000] 1 C.T.C. 174 (C.A.); *Mondel Transport Inc. v. Afram Lines Ltd.*, [1990] 3 F.C. 701; and *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, [1984] 1 F.C. 713 (C.A.). The Board, however, chose to split the process into two stages by announcing the correction a few months after rendering its Decision to Reopen.

[65] It is true that the reasons issued on April 26, 2013, in order to justify the Decision to Reopen, intimate that the Board was not going to certify the tariff proposed by the applicant. But, as counsel for the applicant explained at the hearing, reasons cannot be judicially reviewed, and the applicant's position was and remains that the Board was entitled to reopen the matter.

[66] I emphasize the fact that the Redetermination Decision became necessary by reason of the Board's setting aside of its Original Decision in the Decision to Reopen. In this respect, the present situation must be distinguished from the decisions in *Halifax Employers Association*, *Remstar* and *Lamoureux*, referred to by the respondents. These decisions reiterate the principle according to which an unchallenged decision cannot be attacked indirectly in an application for judicial review of a subsequent redetermination. In the present matter, the applicant has filed an application for judicial review against both the Original Decision and the Redetermination Decision.

[67] Lastly, given the conduct of the proceedings before the Board, I cannot see how this Court could review the Redetermination Decision without considering the Decision to Reopen. In fact, the Decision to Reopen must be seen as part of a *continuum* that started with the Original Decision and concluded with the Redetermination Decision. The respondents' preclusion argument must therefore be rejected.

Second question

[68] The Board has the authority to reopen a prior decision pursuant to section 66.52 of the *Copyright Act* or based on the well-established case law that entitles administrative tribunals to

correct slips or other types of errors committed inadvertently. In this case, the Board authorized itself to reopen the proceedings in order to correct what it itself identified as a palpable error.

[69] In my opinion, the Board erred in assuming the authority to reopen the matter on this ground. The correction of a palpable error is not one of the recognized exceptions to the *functus officio* rule, nor is it a ground for redetermination under section 66.52 of the *Copyright Act*, which authorizes the Board to vary its decision to take into consideration a change in circumstances postdating the decision.

[70] The Board erred in law by citing three decisions of the Quebec Court of Queen's Bench – *Munger*, *Fortin* and *Paré* – that in no way support the idea that an administrative tribunal may revisit one of its decisions on the basis of a palpable error. Indeed, these decisions are more in line with the teachings of the Supreme Court in *Chandler c. Alberta Association of Architects*, [1989] 2 R.C.S. 848 (*Chandler*), as follows:

> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in [*Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186, at p. 188, namely] …
>
> > 1. where there had been a slip in drawing it up, and,
> >
> > 2. where there was an error in expressing the manifest intention of the court. …
>
> [Emphasis added]

[71] Yet, in its Decision to Reopen, the Board specifically rejected these two exceptions to the *functus officio* rule, stating that the error in the Original Decision was not a simple clerical error (reasons at para. 16); and that the issue was not to give effect to the Board's intention, which, in any event, was not manifest (reasons at para. 29). The Board incorrectly relied on the concept of palpable error, which was of no assistance in justifying the reopening of the Original Decision.

[72] In my opinion, it is the role of the Federal Court of Appeal, seized with an application for judicial review, to determine the validity of the Original Decision. In acting as it did, the Board seems to have performed a judicial review of its own decision, using moreover the standard of review applicable on appeal.

[73] As acknowledged by the Board, the error it committed was not a simple clerical error, and, contrary to its assertion, its source was not "inadvertence" or "distraction" (Decision to Reopen at para. 27). Only the Board's misunderstanding of the core issue (*i.e.*, the tariff structure proposed by one of the parties) can explain its error. This type of error, however palpable it may be, is not one that permits an exception to be made to the *functus officio* rule.

[74] I also do not believe that the greater flexibility that administrative tribunals should be given in applying the *functus officio* rule could lead to a different outcome (*Chandler* at 861 and 862). In fact, this greater flexibility, even though it is significant, does not allow administrative tribunals to expand the recognized exceptions to the *functus officio* rule (*Metropolitan Toronto Police Services Board (Re)*, 1997 CanLII 11673 (ON IPC) at page 5; *Herzig v. Canada*, 2002

FCA 36 at para. 16), which is precisely what would have to be done in order to allow the Board to correct its palpable error.

[75] It follows that the Board did not have the authority to review its Original Decision to correct the error which it identified.

Third question

[76] According to the applicant, the Board was permitted and had to make an exception to the finality of decisions rule, but only to remove the words "per minute" from the table of royalties. Rather than referring the matter back to the Board, the applicant suggests that the Court render the decision that the Board should have made. According to the applicant, this is the appropriate action in this case since the Board's manifest intention on the face of the Original Decision was to certify the tariff structure as it was proposed.

[77] There is no doubt that the intentional or inadvertent addition of the words "per minute" if that be the case could allow us to make the correction proposed by the applicant. However, it would have to be established that the Board's manifest intention was to adopt the applicant's tariff and that these two words were added inadvertently.

[78] Contrary to the applicant's assertion, I do not believe that it is possible to identify the Board's manifest intention from reading the Original Decision with the result that the finality of decisions rule cannot be circumvented on the basis of this criterion.

[79] The parties disagree in their interpretation of the Board's manifest intention and, for all intents and purposes, fall back on different excerpts from the decisions in question to support their positions. The applicant for its part refers to paragraph 176 of the Original Decision to establish that the Board intended to accept the tariff structure that it actually proposed (applicant's memorandum at para. 44). In turn, the respondents rely on the Decision to Reopen to argue that the Board never intended to accept CAFDE's proposed tariff structure (respondents' memorandum at paras. 43 and 45).

[80] To rely on the manifest intention exception, it must be clearly understood what the administrative decision maker intended to do:

> The *functus officio* principle holds that a tribunal cannot revisit a matter which it has finally decided. However, there are some exceptions. One is that a tribunal can revisit a matter if that is necessary to give effect to its "manifest intent". To apply this exception, one must determine what the "manifest intent" was and then whether the impugned language gave effect to that intent. (*Nova Scotia Government and General Employees Union v. Capital District Health Authority*, 2006 NSCA 85 (CanLII) at para. 22)
>
> [Emphasis added]

[81] To be "manifest", the expressed intention logically requires a certain level of clarity (*Health & Wellness (P.E.I.) v. CUPE*, 2011 PESC 1 (CanLII) at paras. 50 and 51):

> [50] The next step in the analysis is to determine what "manifest intention" means. *Black's Law Dictionary* defines "manifest" (adj.) as:
>
> > Evident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident
>
> [51] *Oxford English Dictionary* defines "manifest" [adjective] as:

> 1. Clearly revealed to the eye, mind or judgment; open to view or comprehension; obvious

[82] This clarity is absent in the case at bar. In the Decision to Reopen, the Board admits that its intention was not to adopt the applicant's actual proposal: in fact, "[i]t believed it was using one tariff structure while it was actually certifying another" (reasons at para. 27). The Decision to Reopen also acknowledges that it is impossible to identify the Board's manifest intention in the Original Decision. In fact, while recognizing that it committed a palpable error, the Board indicated that "this is enough to reopen the matter, even if the Board's intention – the tariff structure it would have certified if it had properly understood CAFDE's position – was not manifest" [emphasis added] (reasons at para. 29).

[83] Independently of the Decision to Reopen, it is impossible, in my view, to determine the Board's manifest intention. In fact, paragraph 166 of the reasons for the Original Decision contains an inherent contradiction which precludes any conclusions regarding the Board's intention: on the one hand, the Board states that it accepts the applicant's position, while, on the other, it fixes a "per-minute, per-copy" royalty rate that greatly exceeds what was proposed by the applicant. This may be a simple clerical error – with the inadvertant addition of the words "per minute"—as the applicant argues, or the result of a misunderstanding the tariff proposed by the applicant. The remainder of the Original Decision does not make it possible to resolve this question or to clarify the Board's intention.

[84] Consequently, no manifest intention can be discerned from the Original Decision one way or the other, with the result that no exception to the *functus officio* principle allowed the

Board to reopen its decision. It follows that this Court could not even aspire to correct the error the Board committed, as the applicant is hoping.

Fourth and fifth questions

[85] Given that the Redetermination Decision was rendered without jurisdiction, there is no reason to review the issue whether the Board could render this decision without hearing the parties or whether it certified a tariff that is not supported by the evidence. I believe it useful, however, to point out that the Redetermination Decision disposes of substantive legal issues that should not have been dealt with without the input of the parties. For example, the Board could not conclude that a new tariff was required because the schedule proposed by the applicant was "unreasonably low" without giving the applicant an opportunity to demonstrate that this was not the case (Redetermination Decision at para. 16).

Sixth question

[86] The sixth issue concerns the reasonableness of the Original Decision. For the reasons given above, it must be concluded that the Original Decision did not meet the transparency and intelligibility criteria required by *Dunsmuir*. Indeed, in claiming to choose one tariff structure but certifying another, the Board said one thing but did the opposite, which makes the decision unreasonable.

CONCLUSION

[87] Even though the applicant has submitted that the matter should not be returned before the Commission by reason of the fact that it could not decide the issue with impartiality, it has in effect abandoned this position by requesting, in the alternative, that the matter be returned before it (see para. 34 above).

[88] I would therefore allow both applications for judicial review and set aside the Original Decision and the Redetermination Decision. Moreover, I reluctantly conclude, given the efforts invested to date, that the matter must be referred back to the Board so that it can recommence and complete the process to certify a new tariff for the years 2009 to 2012 as soon as possible. In the meantime, SODRAC Tariff, 2004–2008, will remain in effect. The applicant will be entitled to costs in both dockets for the proceedings instituted before the consolidation order and to only one set of costs in docket A-265-13 for subsequent proceedings.

"Marc Noël"

Chief Justice

"I agree
Johanne Trudel J.A."

"I agree
Richard Boivin J.A."

Translation

RELEVANT STATUTORY PROVISIONS

***Copyright Act* (R.S.C., 1985, c. C-42)**	***Loi sur le droit d'auteur* (L.R.C. (1985), ch. C-42)**
Variation of decisions	*Modifications de décisions*
66.52 A decision of the Board respecting royalties or their related terms and conditions that is made under subsection 68(3), sections 68.1 or 70.15 or or subsections 70.2(2), 70.6(1), 73(1) or 83(8) may, on application, be varied by the Board if, in its opinion, there has been a material change in circumstances since the decision was made.	**66.52** La Commission peut, sur demande, modifier toute décision concernant les redevances visées au paragraphe 68(3), aux articles 68.1 ou 70.15 ou aux paragraphes 70.2(2), 70.6(1), 73(1) ou 83(8), ainsi que les modalités y afférentes, en cas d'évolution importante, selon son appréciation, des circonstances depuis ces décisions.
Filing of proposed tariffs	*Dépôt d'un projet de tarif*
70.13 (1) Each collective society referred to in section 70.1 may, on or before the March 31 immediately before the date when its last tariff approved pursuant to subsection 70.15(1) expires, file with the Board a proposed tariff, in both official languages, of royalties to be collected by the collective society for issuing licences.	**70.13** (1) Les sociétés de gestion peuvent déposer auprès de la Commission, au plus tard le 31 mars précédant la cessation d'effet d'un tarif homologué au titre du paragraphe 70.15(1), un projet de tarif, dans les deux langues officielles, des redevances à percevoir pour l'octroi de licences.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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STYLE OF CAUSE:	CANADIAN ASSOCIATION OF FILM DISTRIBUTORS AND EXPORTERS v. SOCIETY FOR REPRODUCTION RIGHTS OF AUTHORS, COMPOSERS AND PUBLISHERS IN CANADA (SODRAC) INC. and SODRAC 2003 Inc.
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CONCURRED IN BY:	TRUDEL J.A. BOIVIN J.A.

DATED: OCTOBER 20, 2014

APPEARANCES:

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