Federal Court of Appeal Cour d'appel fédérale

Date: 20210722

Dockets: A-45-19
A-47-19

Citation: 2021 FCA 148

CORAM: **RENNIE J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

Docket: A-45-19

BETWEEN:

BELL CANADA, COGECO CABLE INC., ROGERS COMMUNICATIONS INC., SHAW COMMUNICATIONS INC., VIDÉOTRON LTD. AND TELUS COMMUNICATIONS INC.

Applicants

and

COPYRIGHT COLLECTIVE OF CANADA, BORDER BROADCASTERS INC., CANADIAN BROADCASTERS RIGHTS AGENCY, CANADIAN RETRANSMISSION COLLECTIVE, CANADIAN RETRANSMISSION RIGHT ASSOCIATION, DIRECT RESPONSE TELEVISION COLLECTIVE INC., FWS JOINT SPORTS CLAIMANTS INC., MAJOR LEAGUE BASEBALL COLLECTIVE OF CANADA, SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA AND CANADIAN CABLE SYSTEMS ALLIANCE

Respondents

Docket: A-47-19

AND BETWEEN:

COPYRIGHT COLLECTIVE OF CANADA, CANADIAN BROADCASTERS RIGHTS AGENCY, CANADIAN RETRANSMISSION COLLECTIVE, FWS JOINT SPORTS CLAIMANTS, INC., BORDER BROADCASTERS INC., CANADIAN RETRANSMISSION RIGHT ASSOCIATION, SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA, AND DIRECT RESPONSE TELEVISION COLLECTIVE INC.

Applicants

and

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Respondents

Heard by online video conference hosted by the Registry on March 1 and 2, 2021.

Judgment delivered at Ottawa, Ontario, on July 22, 2021.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: RENNIE J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Six broadcasting distribution undertakings – Bell Canada, Cogeco Cable Inc., Rogers Communications Inc., Shaw Communications Inc., Videotron Ltd., and Telus Communications Inc. (the BDUs) applied for judicial review (A-45-19) of a decision of the Copyright Board of Canada (the Board) dated December 18, 2018, for which reasons were issued on August 2, 2019. The Board determined the quantum of royalty rates payable under the *Tariff for the Retransmission of Distant Television Signals, 2014-2018* (the Tariff, 2014-2018), thereby

exercising the discretion conferred by section 70 of the *Copyright Act*, R.S.C. 1985, c. C-42 (the Act).

[2] This decision is also challenged, in a separate application for judicial review (A-47-19), by eight collective societies – the Copyright Collective of Canada, Border Broadcasters Inc., the Canadian Broadcasters Rights Agency, the Canadian Retransmission Collective, the Canadian Retransmission Right Association, Direct Response Television Collective Inc., FWS Joint Sports Claimants Inc. and the Society of Composers, Authors and Music Publishers of Canada (the Collectives).

[3] Both parties accept the Board's overall "proxy" approach to setting the royalty rates. This approach involves determining the initial value of a "proxy" set of analogous services and then applying adjustments to bring that value into line with the characteristics of the distant signals to which the royalty applies. They disagree, however, with the application of that methodology in light of the evidentiary record.

[4] The BDUs submit that the royalty rates fixed by the Board exceed the amounts that would be fair and equitable in the circumstances, contrary to section 66.501 of the Act. In particular, the BDUs take issue with the Board's failure to make adjustments for simultaneous substitution and for relative viewing of distant signals as compared to viewing of the proxy services, as well as with what they allege to be a reduction of the substitutability adjustment by half.

[5] The Collectives, for their part, argue that the Board erred in: 1) failing to use the latest available version of the key pricing and subscribership data based upon which the initial proxy price was calculated; 2) using a profit margin figure that was inapplicable to the speciality services selected to form the proxy set; 3) imposing an arbitrary input and overhead reduction; and 4) misapplying its own precedent with respect to a purported market power deduction. Each of these errors, in the Collectives' view, reduced the royalty rates that should have been calculated pursuant to the Board's proxy approach.

[6] For the reasons set out below, I am of the view that this Court should dismiss the application for judicial review brought by the BDUs (A-45-19), while partially granting the Collectives' application (A-47-19). The following are my reasons to so conclude.

I. Factual and Procedural Context

[7] The BDUs are "retransmitters" within the meaning of subsection 31(1) of the Act; they distribute over-the-air distant television signals in Canada as part of cable, satellite or internet protocol television (IPTV) subscription services they distribute to their customers.

[8] The Collectives are authorized under the Act to represent the rights of copyright holders, including thousands of Canadian and foreign broadcasters and program producers, who are entitled to royalties for the retransmission of their works on over-the-air distant television signals in Canada. The Collectives' copyright holders cannot exercise their rights directly, but must do so through the statutory compulsory licensing regime established by the Act.

[9] The Canadian retransmission regime allows BDUs to retransmit over-the-air broadcast signals without authorization of the programs' copyright owners. Contrary to "local signals" (defined as a TV signal that covers an area within a 32 km radius of the station: see *Definition of Local Signal and Distant Signal Regulations*, S.O.R./89-254), the retransmission of "distant" signals requires payment of royalties to the various collective societies that have filed tariffs (Act, paragraph 31(2)(d)). The Board is vested with the authority to approve the proposed tariffs, and to make any alterations to royalty rates that it deems appropriate (Act, subsection 70(1)). In *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 S.C.R. 489, the Supreme Court has aptly summarized this regime in the following way:

> [58] It bears underlining that, in the case of works carried in both local and distant signals, the copyright owner has *no right to prohibit* the simultaneous retransmission of the work; recourse is limited to receiving through a collective society the prescribed royalty, but only for the simultaneous retransmission of works carried in distant signals (ss. 76(1) and 76(3) of the *Copyright Act*). On the one hand, the copyright owner is granted a general right to retransmit the work. This retransmission right is part of the right, under s. (3)(1)(*f*), to communicate the work by telecommunication to the public. On the other hand, the owner's general right to retransmit is restricted by a carve-out in s. 31(2) of the *Copyright Act*, which effectively grants to a specific class of retransmitters two retransmission rights. The first right lets these users simultaneously retransmit without a royalty payment, works carried in a local signal. The second right lets them simultaneously retransmit works carried in distant signals, but only subject to the payment of royalties under a form of compulsory licence regime (*Copyright Act*, s. 31(2)(*a*) and (*d*)). Both user rights are, subject to s. 31(2), beyond the owner's control.
>
> [Emphasis in original.]

[10] On March 28, 2013, the Collectives initiated the underlying proceeding by filing a proposed tariff for the retransmission of distant television signals for the years 2014-2018 (the

Proposed Tariff). The proposed royalty rate was $1.06 per subscriber per month for 2014 for "large" retransmitters (those serving over 6,000 premises), rising to $1.38 in 2018.

[11] The Board certified the first retransmission tariff in 1990, at $0.70 per subscriber per month (the 1990 Decision). A second hearing took place in 1993, following which the Board decided that there was no reason to abandon or modify the rate-setting principles adopted in its 1990 Decision, and left the rates for the period 1992-1994 unchanged (the 1993 Decision). For the periods between 1993 and 2014, the Board certified tariffs agreed upon by the relevant broadcasting distribution undertakings and collective societies. The BDUs and the Collectives were unable to reach an agreement, however, for the period 2014-2018. On July 31, 2013, the BDUs, along with two other undertakings and the Canadian Cable System Alliance, jointly filed timely objections to the Proposed Tariff.

[12] This led the Board to conduct its first hearing on tariff rates since 1993. The hearing took place over 15 days divided into four hearing sessions in November and December 2015, and January, March and August 2016. During the proceeding, the Board received evidence from ten experts and five industry witnesses.

[13] Pending the Board's final decision, the BDUs and the Collectives requested the certification of an interim tariff which would, as proposed, continue the terms of the recently certified *Tariff for the Retransmission of Distant Radio and Television Signals, 2009-2013*. In an interim decision dated December 19, 2013, the Board acceded to the parties' request. The

Television Retransmission Tariff, 2009-2013 would remain applicable, unless modified, until the final tariff was certified for the years 2014-2018.

[14] In the course of a tariff proceeding, the Board must set the amount of royalties that each retransmitter is required to pay to the collective societies (the quantum). It must also determine how the total amount of royalties is to be distributed amongst the collective societies (the allocation). In the present case, at the request of the Collectives, the Board addressed the two issues separately. Indeed, while the allocation issue was left to be further determined, the oral hearing before the Board exclusively concerned the quantum issue.

[15] As previously mentioned, the Collectives' proposed rates for the years 2014-2018 initially ranged from $1.06 to $1.38. After the exchange of interrogatories, the Collectives proposed in May 2015 a further increase of the retransmission royalty rate to $2.00 per subscriber per month for 2014, with an annual adjustment factor of 4.4 per cent for the years 2015 through 2018 (leading to a monthly rate of $2.38 for 2018). The Collectives justified these higher rates by relying on the new information that was not previously available to them, showing the significant changes that occurred in the industry since the early 1990s. For instance, they referred to the significant increase in the number of distant signals retransmitted by BDUs, the increased value of these distant signals, and the new feature of time shifting allowing distant signals to duplicate local signals from a different time zone. Needless to say, the BDUs disputed the significance of these changes.

[16] In the course of the hearing, the BDUs and the Collectives presented the Board with extensive written and oral evidence, and counsel for both sides made detailed written and oral submissions. The Collectives and the BDUs jointly commissioned a study to provide information on the average number of distant signals per residential subscriber from 2004 to 2014. As for the expert economist witnesses, their general approach was to use the market-based amounts paid by BDUs for permission to distribute various U.S. and Canadian specialty television services as a "proxy" for estimating the value of distant television signals. On that basis, they opined on the royalty rates that BDUs should pay to the Collectives for the retransmission of those distant signals.

[17] Following the conclusion of the hearing, the Collectives requested, without objection from the BDUs, that a decision with respect to the quantum be issued as soon as possible. A decision on the quantum, the Collectives argued, might prove helpful in negotiating the remaining allocation issues, in addition to alleviating the burden of maintaining significant monetary reserves and/or holding back on the distribution of royalties.

[18] On December 18, 2018, the Board released its decision, without reasons, in respect of the quantum of the Tariff, 2014-2018. The Board noted that the certification of the Tariff as approved pursuant to section 73 of the Act would only follow the determination of the allocation. The royalty rates were set as per the following table:

Number of premises	**2014**	**2015**	**2016-2018**
Up to 1,500	0.49	0.57	0.60
1,501 - 2,000	0.54	0.62	0.65
2,001 - 2,500	0.60	0.68	0.71
2,501 - 3,000	0.66	0.74	0.77
3,001 - 3,500	0.71	0.79	0.82
3,501 - 4,000	0.77	0.85	0.88
4,001 - 4,500	0.83	0.91	0.94
4,501 - 5,000	0.89	0.97	1.00
5,001 - 5,500	0.94	1.02	1.05
5,501 - 6,000	1.00	1.08	1.11
6,000+	1.06	1.14	1.17

[19] On January 31, 2019, the Board was informed that an agreement on the allocation among all of the Collectives had been reached.

[20] The reasons of the Board, which I detail below, were released on August 2, 2019. While the reasons cover both the quantum and the allocation of royalties, I only discuss the Board's treatment of the former since the latter, as acknowledged by the parties, is not at issue.

II. The decision below

[21] After having reviewed the evidence submitted by the parties, the Board first considered the Act's legal framework with respect to the retransmission regime and dealt with a few legal issues that are of no bearing for the resolution of this application for judicial review. It is the economic analysis that is at the heart of this litigation.

[22] Three methodologies were presented to the Board to set tariffs for the retransmission of distant signals: the proxy approach, the trend-analysis approach, and the direct-market approach.

Both the BDUs and the Collectives agree that the Board appropriately adopted a comparative services "proxy" methodology in order to value distant signals.

[23] Different proxy approaches were proposed by the Collectives' expert Professor Church and the BDUs' expert Dr. Chipty. The Board characterized its chosen proxy approach as an "amalgam" between the views of these experts (Reasons, para. 418). Adjustments to their respective methodologies and assumptions were applied, the Board noted, in order to "yield[] the fair and equitable price" (*ibid*). The Board did this in a series of steps.

[24] First, the Board constructed a proxy for distant signals which, in its words, "adequately resembles the content of Canadian distant signals, and at the same time, ensures that the price of the proxy is the result of a competitive market" (Reasons, para. 420). The Board found that the royalties to retransmit programming on distant over-the-air signals should be based on the amounts paid by BDUs to Canadian and U.S. specialty television services to retransmit programming. To this end, the Board considered the 24 U.S. speciality services proposed by Professor Church, and the 47 Canadian category B speciality services proposed by Dr. Chipty. From this set of speciality services, the Board first excluded vertically-integrated Canadian category B speciality services, holding that "the price of a proxy including these services may not resemble a competitive market price" (Reasons, para. 421). The Board also excluded certain U.S. speciality services whose content greatly differed from distant signal content (*ibid*). The Board finally selected a subset of the remaining services in order to obtain "a proxy that most closely resembles the genre distribution of distant signals" (Reasons, para. 422). The Board's

choice landed on 20 U.S. speciality services and 3 Canadian “category B” speciality services (Reasons, para. 424).

[25] Second, the Board calculated the total monthly payments made by four English-Canadian BDUs to the proxy services (Reasons, para. 425). The four BDUs were chosen for the completeness of their payment information. The amount of $21,187,297 was obtained by multiplying the per subscriber rate for each service by the number of the four BDUs’ subscribers who actually subscribed to the service.

[26] Third, the Board divided the total monthly payments ($21,187,297) by the number of all of the four BDUs’ subscribers (8,078,000), rather than the number of the four BDUs’ subscribers who actually subscribed to the services (Reasons, para. 426). This yielded an average proxy price of $2.62 per subscriber per month. This approach constituted a “penetration adjustment”, as it effectively assumed that, if the proxy services were distributed to all BDUs’ subscribers (like distant signals), it would be without any increase in the total amounts paid to them by the BDUs.

[27] Fourth, the Board applied a series of downward adjustments to the initial proxy price for it to reflect the price of distant signals (Reasons, para. 427). These adjustments can be summarized as follows:

a) “Cost of programming” adjustment: The Board held that the tariff should only apply to the programming portion of the proxy price, and proceeded to isolate the cost of programming (Reasons, para. 428). It first applied a 25% adjustment factor to exclude the average profit margin of all of the proxy services, whether U.S. or Canadian based

(Reasons, para. 430). It further applied a 10% adjustment factor to exclude input and overhead costs (Reasons, para. 431). As a result, the proxy price went from $2.62 to $1.70.

b) “Market power” adjustment: The Board reasoned that certain proxy services, targeting very specific audiences in “niche” markets, exercise greater market power than more general channels (Reasons, paras. 432-433). To account for this disparity, the Board applied the same 25% adjustment factor it had used in its 1990 Decision (Reasons, para. 434). Despite recognizing that two changes in the speciality services market had occurred since 1990 (an increase in number and a higher degree of program specialization), the Board assumed that the effects of these changes cancelled out (Reasons, para. 435). This market power adjustment reduced the proxy price from $1.70 to $1.28.

c) “Program substitutability” adjustment: The Board held that distant signal programs tend to be substituted, by way of alternate viewing sources, more than specialty services programs (Reasons, para. 437). The value of distant signals, therefore, decreases more than does the value of speciality services (Reasons, para. 438). In fixing an adjustment factor, the Board relied on the data detailing the use of personal video recorders (PVR) and “over-the-top” (OTT) services. In the Board’s view, an adjustment factor of 16.5%, modelled after the PVR and OTT services’ combined percentage of use, “would [have] overestimate[d] the true impact of alternative viewing opportunities” (Reasons, para. 442). The Board divided the figure by half, resulting in the application of an 8.25% adjustment factor. The proxy price of $1.28 was thereby reduced to $1.17 (Reasons, para. 443).

[28] The Board declined to make any other adjustments for which it was unable to obtain an estimate due to the lack of reliable evidence. For example, the Board refused to make an adjustment to the price of the proxy based on relative viewing of distant signals to the speciality channels contained in the proxy, and did not consider whether similar genres on the speciality services and distant signals have similar values to subscribers. The Board similarly refused to take into account the potential disparity of bargaining power between the BDUs and the Collectives, and also assumed that payments for the same service from different BDUs should roughly be the same (Reasons, paras. 446-450).

[29] As a result, the Board found that the royalty rate of $1.17 per subscriber per month, to be paid by large BDUs, could have been reasonable for the year 2014 (Reasons, para. 451). The same could have been said for the years 2015-2018, since inflation and possible declines in viewership would likely offset each other (Reasons, paras. 452-453).

[30] However, the Board held that it was “not prepared to approve a tariff in excess of the amounts initially proposed by the Collectives” (Reasons, para. 451). In keeping with this approach, the Board capped the royalty rates for 2014 and 2015 at the levels originally proposed by the Collectives, respectively $1.06 and $1.14 (Reasons, paras. 451 and 453). For the years 2016-2018, the originally proposed rates were not lower, but higher than $1.17, and thus the Board approved this figure (Reasons, para. 453).

III. Issues

[31] The application for judicial review brought by the BDUs (A-45-19) raises three questions, which can be reformulated as follows:

(1) Did the Board err in failing to make an adjustment for simultaneous substitution?

(2) Did the Board err in failing to make an adjustment for relative viewing?

(3) Did the Board err in its determination of the appropriate program substitutability adjustment?

[32] The Collectives' application for judicial review (A-47-19), on the other hand, raises five questions which I have restated as follows:

(1) Did the Board use an incomplete and superseded version of the payment data in its calculations?

(2) Did the Board use the wrong profit margin figure in its calculations?

(3) Did the Board err in applying an adjustment for input and overhead costs without evidence?

(4) Did the Board err in applying a market power adjustment without evidence?

(5) Did the Board fail to properly apply the principles of procedural fairness in capping the 2014 and 2015 royalty rates?

IV. Standard of review

[33] There is no issue between the parties that the Board's royalty-setting decisions involve questions of mixed fact and law that should be reviewed on the reasonableness standard on

applications for judicial review. As this Court stated in *Re:Sound v. Canadian Association of Broadcasters*, 2017 FCA 138, 148 C.P.R. (4th) 91 [*Re:Sound*], such decisions are suffused with subjective judgment calls, policy considerations and regulatory experience, and courts are not in the best position to opine on policy issues involving public interest and economic aspects. The following statement is as apposite here as it was in that case:

> [50] A decision about the quantum of "equitable remuneration", such as the one in this case, is not a simple one, arrived at by processing information objectively and logically against fixed, legal criteria. Rather, it is a complex, multifaceted decision involving sensitive weighings of information, impressions and indications using criteria that may shift and be weighed differently from time to time depending upon changing and evolving circumstances. Accordingly, the Board's decision on such an issue is [relatively unconstrained]…

[34] The amendments that have been made to the Act following that decision and the decision of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*] are of no impact on the applicable standard of review in the case at bar. Subsection 70(1) of the Act, much like paragraph 68(2)(*b*) at issue in *Re:Sound*, still instructs the Board to approve the Proposed Tariff after making any alterations "that the Board considers appropriate". As for *Vavilov*, it made no change to the existing law in this respect; if anything, it reinforced the presumption that reasonableness is the default standard of review and this case clearly does not fall into one of the few exceptions where correctness should apply: see *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at paras. 14-21 *CMRRA-SODRAC Inc. v. Apple Canada Inc.*, 2020 FCA 101 at paras. 4-7 [*CMRRA-SODRAC*].

[35] For a decision to be considered reasonable, it must be "based on an internally coherent and rational chain of analysis" and "justified in relation to the facts and law that constrain the

decision maker" (*Vavilov* at para. 85). Accordingly, a reviewing court must refrain from deciding the issue itself, or seek to determine what would have been the correct solution to the problem (*Vavilov* at para. 83). This is particularly the case when the enabling statute confers on a decision maker a broad policy mandate with an unconstrained range of options to choose from. This is not to say that a reviewing court should not intervene when the challenged decision exemplifies a failure of rationality internal to the reasoning process, or where there is no line of analysis that could reasonably lead the tribunal from the evidence in the record to the conclusion it reached. But this is not a conclusion to be arrived at lightly, as *Vavilov* instructs:

> [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[36] As for the allegation by the Collectives that the Board improperly applied procedural fairness in capping the royalty rates for 2014-2015, it must be reviewed on the correctness standard. For a discussion on the application of the correctness standard to procedural fairness issues, in the post-*Vavilov* era, see: *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para. 35. See also, in an analogous context of the private copying regime: *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424, [2005] 2 F.C.R. 654 at para. 172 [*CPCC*].

V. Analysis

A. *A-45-19*

(1) Did the Board err in failing to make an adjustment for simultaneous substitution?

[37] Simultaneous substitution has been part of the Canadian broadcasting landscape for many years, and refers to the process whereby Canadian broadcasters can request that their signals be simultaneously substituted for a distant signal programming (usually an American channel) when they are broadcasting a similar program at the same time. In these instances, viewers may be tuned to the distant signal channel, but they are in effect watching a simultaneously substituted program (including the advertising embedded in that programming) from a local signal. This practice, which is required or authorized pursuant to section 7(a) of the *Broadcasting Distribution Regulations*, S.O.R./97-555 and the *Simultaneous Programming Service Deletion and Substitution Regulations*, S.O.R./2015-240, is meant to protect Canadian broadcasters who have bought programs from American producers, and to keep advertising dollars in the Canadian market.

[38] The BDUs contend that the Board's failure to make an adjustment for simultaneous substitution is unreasonable in two respects. First, the Board purportedly erred by departing from past decisions, in which adjustments for simultaneous substitution has been applied, without providing reasons. In advancing this argument, the BDUs note that a 20% adjustment for simultaneous substitution was applied in the Board's 1990 Decision; the same rate setting principle was applied in its 1993 Decision and was carried through subsequent agreements

between the parties. In essence, the BDUs argue that the Board chose not to follow these precedents without providing any justification.

[39] Second, the Board would have further erred by ignoring the “uncontroverted and unequivocal evidence” tendered by the parties on simultaneous substitution. On this point, the BDUs emphasize that the approaches of Dr. Chipty (an expert for the BDUs) and Dr. Wall (an expert for the Collectives) both included, albeit in a different manner, an adjustment for simultaneous substitution.

[40] The Collectives counter that neither side argued for the application of a “stand-alone” simultaneous substitution adjustment. The Collectives submit that the only proposed use of simultaneous substitution information, which came from Dr. Chipty, was narrowly construed. This information’s sole purpose would have been to refine Dr. Chipty’s set-top box data, and to determine the true amount of distant signal viewing that it comprised. The approach of Dr. Wall, on the other hand, did not even call for the use of a separate simultaneous substitution adjustment. Under Dr. Wall’s approach, the proxy price first established in the 1990 Decision was understood as a “given” which ought to be updated, without any particular reference to simultaneous substitution. In brief, upon dismissing Dr. Chipty’s set-top box data as biased and unrepresentative, the Board discredited the only viewing data set for which simultaneous substitution could have been relevant.

[41] The Collectives add that no prior decisions of the Board stand for the application of a “stand-alone” simultaneous substitution adjustment in the present context, where the Board

chose a different proxy methodology than the one employed in its 1990 Decision. In any event, the Board is not bound by its prior decisions.

[42] Having carefully considered the evidence that was before the Board and given appropriate consideration to the parties' submissions, I am of the view that the BDUs' argument calling for the application of a separate, stand-alone simultaneous substitution adjustment, is without merit.

[43] First of all, it need not be repeated that the Board is not bound by its prior decisions and that *stare decisis* does not apply to administrative decision making: *Vavilov* at para. 129. Of course, a decision maker that does depart from past practices or longstanding practices bears the burden of explaining why it is doing so, because those affected by a tribunal's decision are entitled to expect that like cases will be treated alike: *Vavilov* at para. 131. In the case at bar, however, there was no precedent requiring the application of a stand-alone simultaneous substitution adjustment whatever the context and irrespective of the methodology adopted by the Board.

[44] In its 1990 Decision, the Board used as a starting point the wholesale price for only one speciality service (A&E), and considered that the value of a distant signal should be discounted by 20% because programs on distant signals are simultaneously substituted while those on A&E are not. In its latest decision, the Board refused to build on that approach and to use the growth of the price of A&E and the growth of the number of distant signals per subscribers to update the last certified price, as suggested by Dr. Wall. The Board was of the view that A&E, which was a

good proxy for distant signals in 1990, could no longer serve as a good proxy for a number of reasons and therefore decided to opt for the amalgam proxy methodology based on Dr. Chipty and Professor Church's approaches (Reasons, paras. 394-398).

[45] In that new context, the Board was not required to explain why it did not apply an adjustment for simultaneous substitution; such an adjustment has never been designed as a stand-alone adjustment but was very much tied to the methodology adopted in 1990. The only obligation of the Board was to consider the evidence before it, to develop a methodology that would result in a fair and equitable tariff, and to explain its reasoning for setting the rates as it did: see *CMRRA-SODRAC* at para. 17. In coming to its conclusion, the Board was entitled to prefer one set of experts and their approaches over others, and that kind of assessment is entitled to considerable deference.

[46] I also agree with the Collectives that the BDUs' argument, calling for the application of a stand-alone simultaneous substitution adjustment, was never formally presented to the Board. Dr. Wall never suggested that simultaneous substitution ought to be used in every proxy model either in his report or during his examination or cross-examination. His first two methods to estimate the value of distant signals do not rely on the use of the total or relative amount of viewing to distant signals, whereas his third method, which is based on an update of the 1990 Decision, does not formally involve the application of a revised simultaneous substitution adjustment. In any event, as previously mentioned, the Board rejected that approach.

[47] As for Dr. Chipty, who was the only one to make explicit use of simultaneous substitution, she narrowly construed it as an aid to the assessment of another type of adjustment – the relative viewing adjustment, to which I will turn next. Dr. Chipty proposed to adjust her initial proxy price by a relative viewing adjustment factor, calculated as the ratio of distant signal viewing relative to proxy services viewing. The viewing minutes on which Dr. Chipty relied came from set-top box tuning data, which failed to distinguish between (1) viewing to a distant signal; and (2) viewing to a simultaneously substituted local signal on a distant signal channel. To isolate the latter type of viewing, which ought to be removed from the calculation, Dr. Chipty proposed to use the simultaneous substitution information from a narrow sample of data, encompassing the popular services of three BDUs from the three largest cities over a two-week period. Upon reviewing Dr. Chipty's approach and the underlying data, the Board found the selected sample to be "problematic", "unrepresentative of nation-wide viewership" and susceptible to "bias" (Reasons, para. 360). I agree with the Collectives that, as a result, the Board discredited the only viewing data for which simultaneous substitution could have been relevant.

[48] Finally, Professor Church's approach contemplated the notion of simultaneous substitution, but applied no discount for it because the viewing minutes to a simultaneously substituted local signal had already been excised from his proposed distant viewing data. No further adjustment, as the one applied in the 1990 Decision, was therefore required.

[49] In this light, I am of the view that the Board did not ignore the evidence that was before it and provided reasons not to apply a simultaneous substitution adjustment. Such an adjustment is relevant only to the measurement of distant signal viewing. To the extent that the Board's

amalgam proxy methodology does not in any way include or depend on the use of the total or relative amount of viewing to distant signals, there was no logical basis for the Board to apply a stand-alone adjustment to account for simultaneous substitution.

[50] The BDUs' request for a stand-alone simultaneous substitution adjustment is therefore raised for the first time in the context of this application for judicial review. For that reason, it ought not be entertained by this Court: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 22-29. This Court is deprived of the evidentiary record necessary to consider the issue and does not have the benefit of the Board's views on that issue. Moreover, the Board cannot be faulted for not having addressed an issue that was not clearly raised by the BDUs before it.

(2) Did the Board err in failing to make an adjustment for relative viewing?

[51] The BDUs argue that, having recognized the need to adjust for relative viewing, the Board erred by making no such adjustment in the face of appropriate evidence – namely the set-top box data used by Dr. Chipty – which was either ignored or dismissed without adequate explanation. With all due respect, this argument is entirely without merit.

[52] Relative viewing accounts for the alleged difference in value between distant signal programming and speciality services. The Board did consider Dr. Chipty's proposed adjustment for relative viewing but chose not to apply it and never considered that it was required in the context of its methodology. As an amalgam of Dr. Chipty and Dr. Church's approaches, the Board's methodology involved the choice of adjustments that would yield a fair and equitable

price. The fact that other adjustments may have been appropriate does not in any way elevate them to the level of being necessary.

[53] Moreover, the Board gave an explanation as to why such an adjustment was not warranted. As previously mentioned, the Board found that the set-top data upon which Dr. Chipty based her adjustment suffered from important drawbacks, being inconsistent with other broadcasting industry data sources and unrepresentative of nation-wide viewership (Reasons, para. 358). It is on that basis that the Board refused to venture into making an estimate:

> First, due to the lack of data, no adjustment on the price of the proxy can be done based on the relative viewing of distant signals to the specialty channels contained in the proxy. As explained by Dr. Chipty, the price of the proxy should be adjusted by the ratio of viewing attributed to distant signals relative to the viewing attributed to the selected proxy. Since the parties did not provide reliable viewing data for each specialty service, it is not possible to make that adjustment.
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> Reasons, para. 447.

[54] Contrary to the BDUs' submission, therefore, I find that the Board's reasons are reasonable, "based on an internally coherent and rational chain of analysis" and "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at para. 85. The Board's findings that no relative viewing adjustment was necessary, and that in any event there was no reliable data with which to make it, were open to it on the basis of the evidence on the record. Indeed, Dr. Chipty herself acknowledged on cross-examination before the Board that her proposed relative viewing adjustment should be set aside if the set-box data was to be found unreliable.

(3) Did the Board err in its determination of the appropriate program substitutability adjustment?

[55] The BDUs contend that it was unreasonable to reduce the 16.5% program substitutability adjustment by half, as the Board did, without any evidence. Moreover, the Board ruled on the program substitutability adjustment without requiring additional evidence from the parties, although it had previously done so on two occasions.

[56] In my opinion, the whole of the BDUs' argument in that respect is flawed, in that it rests on an erroneous premise. I agree with the Collectives that the Board never contemplated two different figures, *i.e.* 16.5% and 8.25%, as fairly accounting for the program substitutability impact of PVR and OTT services. It only ever considered a single figure, *i.e.* 8.25%, to be a "reasonable" estimate of the overall effect of such services.

[57] It is clear from the Board's reasons that the 16.5% figure, based on the combined usage data from PVR and OTT services, was always an entry point for the subsequent analysis – never a possible figure of the program substitutability adjustment. While the Board agreed that it was reasonable to apply a downward adjustment on the price of the proxy to take into account PVR use (7.5%) and viewing of OTT services (9%), there is no doubt that the total of these two figures (16.5%) was only the first step of the Board's reasoning; it could not be held to be the proper adjustment factor because it was clearly an overestimate. Drawing on its specialized expertise, it provided the following reasons for holding that the substitution rate must necessarily be lower than the usage rate of PVR and OTT services:

> However, we believe that a 16.5 per cent adjustment would overestimate the true impact of alternative viewing opportunities for two reasons. First, local signals are only a proportion of all programming being recorded on the PVR, and a reduction should be done to the adjustment to take this into account. Second, OTT services are not perfect substitutes for distant signals. Therefore, it would be incorrect to assume that all usage of such services substitutes for distant-signal viewing.
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> Reasons, para. 442.

[58] That explanation certainly provides a rational basis for setting the program substitutability adjustment at a significantly lower rate than the total usage of PVR and OTT services. Whether the Board erred by reducing the 16.5% figure by half, without specific evidence to this effect, is a different question.

[59] While the Board could not rely on clear and detailed evidence as to the exact portion of usage of PVR and OTT services that did substitute for distant signal viewing, it nonetheless had some evidence which allowed for an estimate.

[60] I agree that the Board's reasons for setting the adjustment at 8.25% could have been more thorough, but it was the BDUs' burden to provide the Board with sufficient evidence in the first place. In any event, these are not circumstances where, as in *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada*, 2006 FCA 337, 354 N.R. 310, the Board had merely referred to the evidence as a whole for justifying a particular quantification, thereby implying that "We are the experts. This is the figure: trust us." (at para. 17).

[61] In the case at bar, the Board did explain how it came to an estimate by holding that such "figure better reflects the fact that the substitution rate is lower than the usage rate of these services" (Reasons, para. 443). It assessed and evaluated the evidence before it, and we are not in those exceptional circumstances where the reviewing court should reweigh and reassess the evidence. Moreover, the Board's decision is well within the range of reasonable outcomes available to it based on the evidentiary record.

B. *A-47-19*

(1) Did the Board use an incomplete and superseded version of the payment data in its calculations?

[62] The Collectives contend that the Board, upon calculating the Canadian proxy services payment, relied on an incomplete and superseded version of the pricing data. The payment information originally supplied by the BDUs during the discovery phase was incomplete, and it is only as a result of the undertakings made at the hearing that the missing payment data was entered into evidence. This new information added $274,265.95 per month to the total BDUs' payments for the three Canadian services included in the Board's proxy. Yet, the Board failed to take into account this updated information from its initial proxy calculation. Such omission, the Collectives argue, is material because it creates roughly a $4 million shortfall, before the applicable downward adjustments, in annual retransmission royalty payments.

[63] At the hearing before this Court, the BDUs conceded that the Board made a mistake in not taking the most up-to-date data, but that it is for the Board to correct that error, not for this

Court. The BDUs also emphasize that the Board's downward adjustments have a far greater impact than using slightly different payment data to establish the proxy rate.

[64] In my view, there is no doubt that the Board erred and relied on superseded information in calculating the total BDU payments to the proxy services. The Board used the data in Dr. Chipty's pre-hearing written report, not as a result of conscious choice, but involuntarily and most likely as an oversight. While the difference in the annual retransmission royalty payments may not represent a substantial amount, relatively speaking, the result arrived at by the Board is still unreasonable as it is not based on the evidence that was before it.

[65] The real issue for this Court relates to the appropriate remedy. Should the Court remit the matter to the Board for redetermination, or should it substitute its own decision for that of the Board? Since the Collectives allege that the Board made other reviewable errors in applying its proxy approach, I shall return to that question later on in these reasons.

(2) Did the Board use the wrong profit margin figure in its calculations?

[66] The retransmission scheme is designed to compensate the owners of copyright in works (television programs, films, music) that are carried on distant signals, and not the broadcasters. Since the proxy of specialty services used by the Board includes all payments made by the BDUs, the Board has to try to identify and eliminate the portion of the total payment attributable to the value of the signal in order to arrive at a just and reasonable royalty rate for the works in distant signals. The profit margin adjustment reflects this requirement.

[67] The Collectives contend that the Board's 25% downward adjustment to exclude the profit margin of Canadian proxy services is based on its flawed understanding of Dr. Chipty's opinion. In fact, Dr. Chipty had advanced that the profit margin for the specific type of Canadian services encompassed by the proxy, *i.e.* non-vertically integrated services, was about 10%. The profit margin for all types of Canadian services, whether vertically integrated or non-vertically integrated, was deemed to be 25%. In the Collectives' words, the Board could not apply the 25% profit margin figure associated with and dominated by the very services, *i.e.* vertically integrated services, that it had previously excluded from the proxy. Therefore, the 10% profit margin figure was the sole figure that the Board, given its stated reliance on Dr. Chipty's views, could select.

[68] The Board further compounded its error, the Collectives say, when attributing a 25% profit margin to the U.S. proxy services. In her expert report, Dr. Chipty combined the profit margins of the U.S. and Canadian proxy services (all of which are non-vertically integrated), thus calling for an undifferentiated profit margin adjustment of 10%.

[69] Once again, I agree with the Collectives and their account of the views expressed by Dr. Chipty on profit margins. Indeed, the Board itself accurately summarized Dr. Chipty's findings earlier on in its reasons:

> …To isolate the profit from total payments, Dr. Chipty uses the CRTC's report, where a 25 per cent average profit is calculated for all Canadian Category B specialty services and a 10 per cent average profit is calculated for non-vertically integrated Canadian Category B specialty services. Since there is no profit margin available for the U.S. specialty services, Dr. Chipty assumes at least 10 per cent profit for the U.S. specialty services. This is under the assumption that since the U.S. specialty services are not vertically integrated with BDUs, they have a lower profit, like the non-vertically integrated Category B specialty services.
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> Reasons, para. 313 [Footnote omitted].

[70] It seems clear from that excerpt that the Board properly understood Dr. Chipty's report as distinguishing between vertically integrated and non-vertically integrated Canadian services. Under Dr. Chipty's approach, and as recounted by the Board, the former and the latter combined attract a 25% profit margin while the latter, due to their corporate structure, only produce a 10% profit margin. Dr. Chipty further assumes that the non-vertically integrated U.S. services generate a minimum 10% profit margin because, similar to non-vertically integrated Canadian services, they have a lower profit than vertically integrated services.

[71] While it had adequately summarized the available expert evidence, the Board went on to misrepresent Dr. Chipty's position at a latter stage of its reasons. Indeed, upon purportedly setting an adjustment for the profit margin of non-vertically integrated Canadian proxy services, the Board relied on the 25% figure associated to all types of Canadian services. In doing so, the Board not only overlooked the distinction that Dr. Chipty herself had carefully drafted, but also indirectly reintroduced the previously excluded vertically integrated services by using their profit margin data. This also led the Board into further error when applying the same 25% figure to the U.S. specialty services, on the basis that "there is no reason to believe that the profit margin of the U.S. specialty services is lower than that of the Canadian category B specialty services" (Reasons, para. 430). This assessment is based on a false premise and overlooks Dr. Chipty's evidence that U.S. specialty services included in the proxy have a lower profit margin because they are not vertically integrated with the BDUs.

[72] I agree with the BDUs that the Board cannot be expected to follow blindly every expert's opinion. However, in this case, the Board assigned a 25% profit margin to Canadian and U.S.

proxy services on its mistaken reading of Dr. Chipty's opinion. Under Dr. Chipty's approach, the only correct profit margin adjustment for Canadian and U.S. proxy services would have been set at 10%. This part of the Board's reasons is therefore unreasonable, as it "fail[s] to reveal a rational chain of analysis" and "fundamentally misapprehend[s] or fail[s] to account for the evidence before [the Board]": *Vavilov* at paras. 103, 126.

(3) Did the Board err in applying an adjustment for input and overhead costs without evidence?

[73] The Collectives argue that there was no evidence supporting the Board's decision to apply a further 10% downward adjustment to account for input and overhead costs. Dr. Chipty, on whom the Board relied in deciding to exclude non-programming costs, made no adjustment for input and overhead costs because she lacked the information to make such an adjustment. The Board acknowledged that there was no evidence as to the amount of any input or overhead cost reduction, but nevertheless decided to apply one anyway on the assumption that these costs are real and must be excluded to isolate the costs of the retransmitted works:

> Dr. Chipty does not make any adjustment for input and overhead costs due to the lack of information. While we do not have figures for input and overhead costs, we know that these costs exist, and even a conservative estimate would place these at 10 per cent. Therefore, we find that it is reasonable to apply a 10 per cent deduction on the price of the proxy to exclude input and overhead costs. This adjustment reduces the price to $1.70.
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> Reasons, para. 431 [Footnote omitted].

[74] In my view, this aspect of the Board's reasons is reasonable and is entirely justified, intelligible and transparent. It is beyond dispute that an input and overhead adjustment is necessary to distinguish between, on the one hand, the value of the works being retransmitted

and, on the other hand, the profits or costs of the broadcasters. The object of retransmission rights is to reward the owners of programs for the former, not for the latter. Once we accept the necessity of such an adjustment, it is up to the Board, as an expert decision maker, to come up with its best estimate in the absence of firm evidence. In doing so, the Board was obviously not bound by the opinion of one of the experts before it. Nor is it an instance where the tribunal misapprehended the evidence that was put to it by the parties. Quite to the contrary, the Board acknowledged that it had no figures to rely upon and made a conservative assessment based on its own expertise. Far from being unreasonable, this course of action was the only available one in the circumstances.

(4) Did the Board err in applying a "market power" adjustment without evidence?

[75] The Collectives also challenge the Board's market power adjustment on the same basis that there was no evidence for it. The Board applied a 25% downward adjustment in the initial proxy price in recognition of the fact that some specialty services included in the proxy target very specific audiences in "niche" markets, which enables them to exercise market power and to ask higher prices for their services. According to the Collectives, the 25% figure is not supported by any evidence and rests only on a similar adjustment made by the Board in its 1990 Decision. Not only did the Board offer no justification for using the same reduction that had been applied in a different set of circumstances 29 years earlier, but it allegedly misread and misapplied that precedent because the price adjustment in that earlier decision was not related to market power but to simultaneous substitution and penetration adjustment.

[76] I have not been persuaded that the Board's reasons with respect to the so-called "market power" are unreasonable. Once again, the dispute between the parties does not seem to relate to the justification for the adjustment, but rather on the alleged absence of evidence to support the quantification of that adjustment. At the hearing, counsel for the Collectives acknowledged that specialty services have more market power because of their "niche" clientele, but took issue with the 25% reduction.

[77] First, it is worth pointing out that the Board does explain why it decided to apply the same reduction that had been applied in 1990. It identified two developments (many more specialty services, and their more specialized nature) that might have affected the 25% adjustment, but chose to assume that they both cancelled out in the absence of any evidence to the contrary. This is a finding that was open to the Board, as an expert adjudicative and regulatory tribunal. The reasoning of the Board in that respect is "rational and logical", and does not exhibit any "clear logical fallacies": *Vavilov* at paras. 102, 104.

[78] Second, I agree with the BDUs that the fixation of the Collectives on a very narrow meaning of "market power" is misplaced. Relying on a paragraph of the 1990 Decision that referred to "market power" as being associated with the ability of a specialty service to exclude viewers who are not willing to pay, the Collectives fault the Board for using the same concept in relation to the power arising from niche programming. Yet in both cases, what is at stake is the pricing power originating from the unavailability of a service other than from a single source. I must therefore disagree with the Collectives when they argue that the Board is "plucking an entirely irrelevant figure from another hearing to quantify and justify its market power

adjustment" (Collectives' Memorandum of Fact and Law, para. 61). On the contrary, the market power concept used in both decisions refers to a similar, if not the same reality.

[79] As for the other factors to which the Board referred in the conclusion of its 1990 Decision (simultaneous substitution and penetration adjustment), they may not relate strictly speaking to market power, but they certainly impact the value of programming offered by specialty services. When the Board refers to the market power of the specialty services, it is clear that it refers to a larger analysis of the various factors that may explain why the price for these services may be higher.

[80] For all of the above reasons, I must therefore dismiss that argument.

[81] This brings me to a consideration of the remedies. The Collectives have urged us to substitute our own decision to that of the Board, and to make the adjustments that should have been made. In their view, the Board's calculation errors are easy to fix and can be remedied by plucking the right numbers into the methodology adopted by the Board. The Collectives also argue that time is of the essence, and that the parties are already well into the next five-year tariff period.

[82] *Vavilov* teaches us that it "will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision" (at para. 141). I do not think that this case is one of the scenarios where following this general rule would create excessive delays not contemplated by Parliament. I appreciate that the two errors identified by this Court in assessing

the adjustment to the proxy price, namely the use of an incomplete and superseded version of the payment data as well as the use of the wrong profit margin figure, are quite straightforward and do not involve a reconsideration of the overall approach implemented by the Board. At the same time, the amounts at stake are considerable, and as much as the Collectives filed with this Court (as an appendix to their factum) a calculation of the effect of correcting each error, we do not have the views of the BDUs on that issue.

[83] Moreover, Parliament has created the Board, an expert administrative tribunal, and entrusted it to determine the fair and equitable royalties to be paid for the retransmission of distant signals. Ultimately, it is for the Board to approve a proposed tariff and publish it in the *Canada Gazette*, pursuant to subsection 73(1), now section 70.

[84] I understand that the retransmission royalty rates for the period 2014-2018 were only released in December 2018, and that the Tariff was only approved and published on August 3, 2019. We are now, in effect, reconsidering royalty rates that should have applied between three and seven years ago. This long delay is obviously of concern, and is the source of uncertainty for all the players involved. I trust that the Board will be able to amend its Tariff in conformity with these reasons in an expeditious way. In the meantime, the parties will be able to govern themselves and make whatever business decisions they may have to make in light of the adjustments that will be required as a result of this decision.

(5) Did the Board fail to properly apply the principles of procedural fairness in capping the 2014 and 2015 royalty rates?

[85] Finally, the Collectives argue that the Board failed to properly apply the principles of procedural fairness and made three errors in imposing a cap on the 2014 and 2015 royalty rates. First, the Board compared the revised rates to those contained in the initial Proposed Tariff, instead of comparing the rates it intended to certify on the basis of the economic evidence that was before it with the original tariff proposals. Had the Board focussed on the right difference, it would not have found such difference to be "significant". The difference for 2014 and 2015 would have been respectively $0.11 and $0.03, as opposed to $0.94 and $0.95.

[86] Second, it is contended that the Board exaggerated the importance of the statutory notice period. Following the decision of this Court in *CPCC*, the Board accepted that it is not bound by the *non ultra petita* principle and can set a tariff that is higher than the rate originally proposed by the parties. Yet the Board is said to have failed to evaluate the competing interests of the Collectives by putting too much emphasis on the benefit they would gain if allowed to rely on the revised tariff, without taking into account that they were required to file their proposed tariffs long before obtaining the BDUs' confidential business information.

[87] Third, the Collectives submit that there was no material evidence of prejudice before the Board, despite the fact that both the Canadian Cable Systems Alliance (CCSA) and its members had notice that they could object to a proposed tariff and had an opportunity to present their case. In the absence of clear evidence of harm, the Collectives claim that the Board should have refrained from making assumptions as to the capacity of the BDUs to pay "such a significant

potential retroactive increase in royalties over such an extended period of time" (Reasons, para. 238).

[88] After having carefully considered these arguments, I have concluded that they ought to be rejected. The Board was correct to frame the issue as one of procedural fairness, and rightly considered that these proceedings do not attract the application of the *non ultra petita* principle (which does not apply to the Board in any event, following the decision of this Court in *CPCC*). The Board also rightly recognized that it was authorized, under section 73 of the Act (now section 70), to modify or vary a proposed tariff and impose terms and conditions as it considers appropriate, with the following *caveat*:

> … In doing so, and in determining whether it should approve rates other than those originally proposed and published in the *Canada Gazette*, however, the Board must attempt to ensure that doing so would not unfairly prejudice interested or affected persons or give rise to some other procedural or substantive unfairness or violation of the principles of natural justice.
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> Reasons, para. 234.

[89] The Board was also mindful of the fact that there might be an imbalance in the available information between the parties, but correctly pointed out that this is not the only consideration in play. It then identified three concerns that needed to be addressed in order to ensure that the amendment did not undermine the integrity of the tariff-setting process set out in the Act.

[90] The first, which relates to the significant increase in the proposed rates, did not in and of itself lead the Board not to approve the revised tariff for the period preceding its filing in May 2015. Contrary to the Collectives' submission, it was not the "main" reason the Board gave for imposing its cap on the 2014 and 2015 royalty rates. It merely emphasized the need to carefully

scrutinize the proposed increases out of “fairness concerns”, to paraphrase the Board at paragraph 228 of its reasons.

[91] It is no doubt true that the Board used, as its comparative base for the original tariff proposals, the revised tariff proposals instead of the rates actually certified by the Board. I do not think, however, that the Board is to blame in that respect. After all, as it noted in its reasons, “[t]he entire hearing, and the expert and other evidence presented, revolved around the revised request” (Reasons, para. 233). The issue that was to be decided was whether the Board should consider the revised claim, and if so to what extent, and not whether the Board’s own assessment of the tariff should apply for the entire period including the two years preceding the filing of the revised tariff proposals. I also fail to understand how the decision of the Board can be considered to be contrary to *CPCC*, as suggested by the Collectives, as no revised tariff proposals were filed in that case. Finally, I am also unable to agree with the Collectives that this finding affected other portions of the Board’s fairness analysis, as I shall try to demonstrate in the following paragraphs of these reasons.

[92] The main reason for not approving a tariff in excess of the amounts originally claimed by the Collectives for the period preceding the filing of the revised tariff appears to stem from a concern not to upset the scheme of the Act, and not to allow a party the possibility to do indirectly what it could not do directly. The Board was concerned, rightly so in my view, that allowing the Collectives to file revised rates more than two years after filing their initial proposal would effectively enable them to take advantage retroactively from the new rates prior to the date of their filing, despite the impact that such a course of action could have on other parties:

> … Although a tariff can have a retroactive effect when it is approved by the Board, a proposed tariff always operates prospectively from the start of its effective date, which runs no earlier than from January 1st following its proper filing. There is no mechanism in the *Act* whereby a tariff proposal may take effect prior to such effective date, and certainly not prior to its filing with the Board. Permitting the Collectives to file significantly "revised rates" in the fashion they have in the present case would enable them to benefit retroactively as if the amendment were made at the original filing date more than two years earlier, once approved – an advantage to which they would not otherwise be entitled. Generally speaking, we do not think the Board's broad power to amend should be interpreted in a manner that would permit a party, in effect, to substitute for an initial proposed tariff another substantially different proposed tariff, in the guise of an "amendment", after consideration of the initially proposed tariff is already substantially underway. The Board must have regard to the potential impact of such an initiative on the parties and other interested or affected persons.
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> Reasons, para. 236 [Emphasis added].

[93] This line of reasoning has nothing to do with the significance of the increased rates, and everything to do with respect for the intention of Parliament. Of course, the size of the increase compounds the problem, but the real issue is one of principle. The same is true with the related concern of notice to the potential users of the tariff. At the time, subsection 71(2) of the Act required that a tariff proposal be filed at least nine months before its effective date, so as to allow potential users to plan and protect themselves from the increased liabilities associated with potential retroactive tariffs ultimately approved by the Board, as well as to inform them of the possibility to object to such a proposal. While it appears that such notice was given to both CCSA and its members by way of letter on June 18, 2015 (five months before the retransmission hearings), and that CCSA eventually withdrew its initial objection, the Board noted that it was not clear whether that letter was equivalent to a formal notice under the Act.

[94] Of course, we do not know whether any BDU would have been prejudiced by the certification of rates in excess of the rates originally sought for the tariff periods prior to the

revised claims. No such evidence beyond vague and unsupported claims by CCSA was presented to the Board. However, this is beside the point. Matters of procedural fairness are not predicated on demonstrable and actual prejudice, and in my view the Board amply justified why it should not exercise its power to vary the initial Proposed Tariff and apply the revised rates for the years 2014-2015.

[95] For the above reasons, I am of the view that the Board did not err in capping the rates for 2014 and 2015 at the rates originally proposed by the Collectives.

VI. Conclusion

[96] For all of the foregoing reasons, I would dismiss the application for judicial review in file A-45-19, grant the application for judicial review in part in file A-47-19, and set aside the Board's decision to the extent of its use of the wrong pricing data in its proxy price calculation and of the wrong profit margin. In light of the divided success, each party should bear its own costs.

"Yves de Montigny"
J.A.

"I agree
Donald J. Rennie J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-45-19
STYLE OF CAUSE:	BELL CANADA et al. v. COPYRIGHT COLLECTIVE OF CANADA et al.
AND DOCKET:	A-47-19
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