Copyright Board Canada

Commission du droit d'auteur Canada

Date of Decision	2010-12-23
Date of Reasons	2011-03-16
Citation	File: Reprographic Reproduction, 2011-2013
Regime	Collective Administration in Relation to Rights Under Sections 3, 15, 18 and 21 *Copyright Act*, ss. 66.51 and 70.15(1)
Members	Mr. Justice William J. Vancise Mr. Claude Majeau Mrs. Jacinthe Théberge
Proposed Tariffs Considered	(Post-Secondary Educational Institutions – 2011-2013)

Interim statement of royalties to be collected by access copyright for the reprographic reproduction, in Canada, of works in its repertoire

Reasons for decision

I. INTRODUCTION

[1] On March 31, 2010, the Canadian Copyright Licensing Agency ("Access Copyright" or "Access") filed pursuant to section 70.14 of the *Copyright Act*[1] a proposed statement of royalties for the reprographic reproduction, in Canada, of works in its repertoire by post-secondary educational institutions ("Institutions") and persons acting under their authority. The proposal was published in the *Canada Gazette* on June 12, 2010, with a notice advising prospective users and their representatives of their right to object. One hundred and one persons and Institutions filed

[1] R.S.C. 1985, c. C-42 ("*Act*").

timely objections. Doubts were raised as to whether some were objectors within the meaning of the *Act*. None of them however are relevant to the disposition of this matter.

[2] On October 13, 2010, Access applied pursuant to section 66.51 of the *Act* for an interim decision. It asked that starting January 1, 2011 and until the Board certifies a tariff in the above-referenced proceedings, (the "Gap Period") the existing licensing regime continue to apply, with some exceptions outlined below. Access sent a copy of the application to all of its current licensees and their representative associations as well as to some Institutions that currently operate without a licence.

[3] On November 25, 2010, the Board ruled that 17 persons and Institutions (collectively the "Objectors") could participate in these proceedings as objectors or intervenors with full participatory rights to oppose the proposed statement of royalties; of those, a majority had not received a copy of the application for an interim decision. On November 26, all Objectors received a copy of the application and were given until December 6, 2010 to respond to it. That deadline was extended twice.

[4] On December 8, the Board reminded participants that dealing with the application would require it to address, at a minimum, four questions or sets of questions that logically flow from such application.

1. Should the Board grant Access Copyright's application for an interim decision?
2. If the Board decides to issue an interim decision, what form should that decision take?
3. If the Board decides to issue an interim decision, what should the substantive content of the decision be? Access proposes maintaining what it refers to as the *status quo*, with additional, potential uses being allowed at no additional cost. Does the proposal achieve what it purports to achieve? Is that what the interim decision should indeed achieve? If not, what else?
4. Once the content or substance of the decision has been determined, does the proposed text reflect that substance or content and if not, how should it be modified?

[5] Objectors were asked to file their submissions on the first question by December 10, 2010, and one week later for the remainder. Access was granted five days to reply in each case, so that its final submissions were received on December 22, 2010.

[6] Access described the object of its application as "(1) to preserve the *status quo* for 'notice, record keeping, payment, auditing and sampling' in the Existing Agreements (as that term is defined in the Interim Application); and (2) to provide for the uses described in the Proposed Tariff."[2] This would authorize, at no immediate cost, a variety of digital uses that are not currently

[2] Access December 15 reply at 2.

licensed. The intention was to alleviate the confusion expressed by some Institutions about their ability to make digital uses during the Gap Period. The extension of the interim tariff to digital uses would attract no additional reporting requirements.

[7] Access argued that an interim decision was needed to avoid disruption, legal uncertainty and other deleterious effects due to the length of the proceedings. Before applying for an interim decision, Access sought agreements to extend the application of existing licences on an interim basis during the Gap Period. It approached the Association of Universities and Colleges of Canada ("AUCC") and the Association of Canadian Community Colleges ("ACCC") with no success. Access then contacted each Institution individually. Less than one hundred, representing 1.5 per cent or so of Access revenues from the post-secondary educational sector, signed that interim agreement. According to Access, maintaining the existing arrangements would avoid disrupting a relationship that has existed since 1994, would avoid jeopardizing infrastructures set up to facilitate the efficient conduct of that relationship, would avoid a potentially disruptive interruption of revenue flow and would confirm that Institutions who wish to continue to use the repertoire can legally do so until the Board certifies a final tariff. An interim decision would cause no prejudice to the Institutions; it would merely require them to continue to act as they had agreed to in the past.

[8] Ten of the 17 Objectors opposed the application on a number of grounds raising similar issues. First, the Board lacks jurisdiction to issue an interim tariff in the circumstances of this case. Second, the conditions for issuing an interim decision have not been met; for example, Access has not demonstrated it will suffer any deleterious effects if no interim tariff is adopted. Third, this is not an appropriate case for issuing such a decision. Access is the author of its own misfortune in so far as any negative consequences may result, having refused to conduct good faith negotiations and insisted on moving from a voluntary, market-based licensing scheme to a mandatory tariff regime. Fourth, the remedy sought by Access does not preserve the *status quo*.

[9] On December 23, 2010, we issued the following decision.

> [1] The October 13, 2010 application by Access Copyright for an interim decision is granted. The interim tariff will apply from January 1, 2011 until the earlier of December 31, 2013 and the date a final tariff is certified in these proceedings. The interim tariff tracks the wording of the Association of Universities and Colleges of Canada (AUCC) model licence to the extent possible.
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> [2] The purpose of the interim tariff is to achieve the following main objectives:
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> - to provide certainty to targeted institutions by informing them now of what they may or may not do in using the repertoire of Access Copyright pursuant to the interim tariff starting January 1, 2011;
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> - to maintain the *status quo* to the extent possible. The indemnity provisions are maintained. Payment and reporting schedules reflect existing agreements. Institutions have

the option of dealing with Access Copyright only for uses already targeted in those agreements;

- to allow targeted institutions to make digital copies pursuant to the interim tariff, but only if they so elect;

- to make it clear that since Access Copyright's proposed tariff does not target musical works, institutions cannot rely on the interim tariff to copy musical works;

- to confirm that institutions that do not require a licence from Access Copyright are not required to deal with it, whether pursuant to the interim tariff or otherwise.

[3] Pursuant to section 66.71 of the *Copyright Act*, the Board orders Access Copyright to post this decision, the interim tariff and the version tracking the differences between the interim tariff and the AUCC model licence on its website, and to prominently post hyperlinks to these documents on its Home page. The Board also orders Access Copyright to send these documents by email if possible, and by hand, postage paid mail or fax if not, to any institution targeted in the interim tariff that Access Copyright licensed, at any time in 2010, for any use targeted in its proposed tariff.

[4] The interim tariff, as any interim measure, may be modified or replaced at any time, on application. Since this tariff is being issued even though its provisions would benefit from fuller discussion, participants wishing to propose immediate changes are asked to file an application to that effect no later than on Friday, January 21, 2011. Other participants will have until Friday, February 4 to respond. Replies shall be filed no later than on Friday, February 11. Further applications to vary the interim tariff will be considered as required.

[5] This decision is being issued without reasons because the Board considers this matter to be urgent. Reasons will follow.

[10] The following are the reasons for our decision.

II. PRINCIPLES

[11] The leading authority on the nature and purpose of interim orders remains *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*.[3] Mr. Justice Gonthier speaking for the Court, stated:

Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits

[3] [1989] 1 S.C.R. 1722. [*Bell Canada*]

> of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order.[4]

[12] Over the years, the Board has developed a number of principles in dealing with applications for interim decisions. These principles reflect Gonthier J.'s succinct propositions. They can be stated as follows.

[13] An interim decision serves above all to counteract the negative consequences caused by the length of the proceedings.[5]

[14] An interim decision may be issued to prevent a legal vacuum. A vacuum or void exists when someone uses a repertoire without authorization[6] or when copyright owners and users disagree on the need for a licence.[7] Ensuring that what may be in breach of copyright definitely not be so, thereby avoiding that a collective be compelled to resort to lengthy and costly legal proceedings, may in itself justify issuing an interim decision.[8]

[15] An interim decision may be issued if the main application is not plainly without merit; there is no need to demonstrate, *prima facie* or otherwise, that the main application is likely to succeed.[9]

[16] Interim decisions are made expeditiously on the basis of evidence often insufficient for the purposes of the final decision, and even in the absence of any evidence. The Board may ask for evidence, and will tend to if the application seeks to modify the *status quo*.[10]

[17] Balance of convenience is taken into account in deciding whether to issue an interim decision and if so, what it should contain.[11]

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[4] *Ibid.* at 1754.
[5] *SODRAC v. MusiquePlus inc.* (22 November 1999) Copyright Board Decision at 2 [*MusiquePlus*]; *SOCAN- NRCC Tariff 1.A (Commercial Radio) forthe Years 2003 to 2007* (24 November 2006) Copyright Board Decision at para. 11 [*Commercial Radio 2006*]; *AVLA/SOPROQ (Commercial Radio) for the Years 2008 to 2011* (29 February 2008) Copyright Board Decision at para. 3[*AVLA*]; *SODRAC v. SRC* (31 March 2009) Copyright Board Decision at para. 9 [*SRC*]; *SODRAC v. Les chaînes Télé Astral and Teletoon Inc.* (14 December 2009) Copyright Board Interim Decision at 3 [*Astral*].
[6] *MusiquePlus*, *supra* note 5 at 2; *Astral*,*supra* note 5 at 3.
[7] *Astral*, *supra* note 5 at 3.
[8] *MusiquePlus*, *supra* note 5 at 2-3.
[9] *Retransmission of Distant Radio and Television Signals for the Years 1992 to 1994* (28 February 1994) Copyright BoardReports at 242 [*Retransmission 1994*]; *AVLA*, *supra* note 5 at para. 3.
[10] *Commercial Radio 2006*, *supra* note 5 at para. 11; *MusiquePlus*, *supra* note 5 at 2-3; *Retransmission 1994*, *supra* note 9 at 242.
[11] *Commercial Radio 2006*, *supra* note 5 atpara. 20.

[18] An interim decision should focus not on what may be later, but on what is certain now.[12]

[19] An interim tariff will not be issued merely to avoid a collective having to use other income to fund proceedings of first impression.[13]

[20] Generally, the best way to achieve the purposes of an interim decision is to maintain the *status quo* while preventing a legal vacuum. Thus, when an agreement exists between the parties, it is generally preferable to extend that agreement on an interim basis.[14]

[21] When there is no pre-existing agreement or tariff or when new uses are involved, the Board prefers to establish a symbolic interim royalty unless the context requires a different approach.[15]

[22] Generally speaking, the Board will not address in an interim decision disputes on the interpretation of previously existing provisions of an agreement.[16]

[23] An interim decision may include provisions that would be inappropriate in a final decision.[17]

[24] An interim decision does not determine the merits of any issue to be settled in a final decision. It is not an attempt to guess what the final result will be. It does not prejudge the final result.[18] That being said, the Board may refrain from making an interim decision if the risk of appearing to prejudge the issue is too great.[19]

[25] The Board can substitute a further interim decision to another if the circumstances so warrant.[20]

[26] The Board can make interim decisions even when the *Act* provides for the automatic continuation of an existing tariff on an interim basis.[21]

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[12] *Ibid*. at para. 21.
[13] *AVLA*, *supra* note 5 at para. 4.
[14] *Astral*, *supra* note 5 at 3-4, citing *SRC*, *supra* note 5 at para. 13. The Board has issued at least one interim licence for use of works whose copyright owner could notbe located: *(Interim licence) Musée de la Civilisation, Quebec City, Quebec, authorizing the reproduction and translation of extracts from a book writtenby Ubald Paquin and a book written by Raymond Tanghe* (14 May 1992) Copyright Board Decision. In those instances, it goes without saying that the interim licence almost invariably changes the *status quo*.
[15] *SRC*, *supra* note 5 at para. 13; *Astral*,*supra* note 5 at 3-4.
[16] *ADISQ v. SODRAC* (28 May 2009) Copyright Board Decision at para. 8.[*ADISQ 2009*]
[17] *Ibid.* at para. 12.
[18] *MusiquePlus*, *supra* note 5 at 3; *Commercial Radio 2006*, *supra* note 5 atparas. 11, 21.
[19] *Ruling of the Board denying CBRA's application for an interim tariff (Commercial 2000-2002)* (3 May 2001) Copyright Board Decision.
[20] *SODRAC v. ADISQ* (31 August 1999)Copyright Board Decision at 5.
[21] *Commercial Radio 2006*, *supra* note 5 atpara. 13.

III. APPLYING THESE PRINCIPLES TO THE MATTER AT HAND

[27] We granted the application of Access for the following reasons.

[28] A licensing regime allowing the Institutions to use the repertoire of Access has been in place since 1994. Since then, most if not all members of the AUCC and of the ACCC have paid royalties and reported usage pursuant to largely similar model agreements. Eleven non-affiliated Institutions have signed the ACCC model licence. The most recent versions of the model licences, whose application was always made to coincide with the academic year, became effective on September 1, 2003. Originally set to expire on August 31, 2007, they were extended twice, the last time in 2009. Access and most of the Institutions agreed to extend their term until December 31, 2010.[22] Access has negotiated similar licences with other Institutions; all expire on December 31, 2010. All licences authorize two main types of copies: those inserted in "coursepacks" [the 2(b) licence], which attract a set price per copy, and those made for general use [the 2(a) licence], which attract a set fee per year per full-time equivalent (FTE) student. Some differences exist in the rates, terms and conditions of the various licences; most are not sufficiently important to warrant discussion in the context of an interim decision.[23]

[29] An interim decision will prevent legal voids. Absent such a decision, some Institutions will use the repertoire of Access without authorization where one is needed. Access and the Objectors disagree on whether a tariff is needed at all, even for those Institutions who intend to continue to use the relevant repertoire. This disagreement only serves to reinforce the need for an interim decision. As stated earlier, an interim decision is justified when parties disagree on the need for a licence or to avoid legal proceedings.[24]

[30] An interim decision will allow Institutions to continue to avail themselves of the existing licensing scheme if they so wish. It will provide certainty until the Board certifies a final tariff. It will not impose a single licensing solution; instead, it will add a tool Institutions can use to comply with their copyright obligations. Since Access secures rights on a non-exclusive basis, Institutions remain free to seek licences from others, even for their uses of the Access repertoire. As always, Institutions that do not make protected uses of that repertoire are not targeted by the decision in any event.

[31] An interim decision provides another important benefit. Section 38.2 of the *Act* caps the liability of an Institution for certain protected uses of works that are not in the repertoire of Access, but only if it has signed a licence or if a tariff applies.

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[22] This was necessary because any tariff theBoard certifies must be effective for a period of one or more calendar years.
[23] The interim tariff reflects those that are.
[24] Above, at para. 14.

[32] The balance of convenience favours Access. Access and the Institutions have created and maintained infrastructures to facilitate the administration of the licence. Key personnel have been hired. These will remain critical to the orderly administration of the tariff when certified. Absent an interim decision, these resources may be left unused or even be abandoned as unnecessary, possibly for an extended period of time. The amounts in issue are significant for Access, far less so for the Institutions. Fixed royalties for all Institutions represent approximately $4 million,[25] which is barely a few ten-thousandths of their operating expenditures.[26] Yet some Institutions appear overly preoccupied with their ability to cope with any rate increase.[27] This leaves the impression that seeking payment from them at a later date may involve significant concessions on the collection of catch-up payments, were a rate increase to be imposed. All of this would be to the detriment of Access.

[33] We do not however find it necessary to consider the arguments concerning the potential impact of a cash flow interruption on the ability of Access to operate or to pursue its application for the proposed tariff.

[34] Some Objectors emphasized the difficulties associated with having to refund royalties to past and present students were the final rates to be lower than the interim ones. None alluded to the difficulties associated with the final tariff being higher. Yet it is necessarily easier for Institutions to refund money after the fact than to collect it after the fact. It is difficult to even see the relevance of this objection by reason that under both the current arrangements and the proposed tariff the Institutions, not the students, pay the royalties.

[35] The differences between this application and requests for interim decisions in previous matters of first impression are significant. In those previous applications, there was no pre-existing relationship. Now, one exists. Previously the disputes arose concerning the very existence of protected uses. Now, long standing arrangements tend to confirm recognition on the part of the Institutions that they use the repertoire, though the extent of that use is under dispute. Previously the collectives asked for something they had never obtained. Now, Access is asking for what the Objectors have admitted it was entitled to for all these years.[28]

[36] One of the objects of the *Act* is to ensure that rights holders get paid for protected uses of their works. Adopting an interim tariff favours this objective by providing a mechanism for royalty

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[25] Coursepacks generate 75 per cent of royalties. Since those royalties are a priceper page, Institutions are free to reduce their amount by reducing their consumption.

[26] Access December 15 reply at 21 and Appendix C. Official statistics confirm this information: http://www.statcan.gc.ca/pub/81-582-x/20 10004/tbl/tblb2.13-eng.htm.

[27] The conduct of the University of WesternOntario in this respect is revealing: see *infra* note 61. See also below, at para. 34.

[28] Presumably, if the Institutions were convinced that they owed nothing to Access, they would have taken action to assert their rights.

payments to rights holders during the Gap Period. As noted above, it does not prevent alternative arrangements such as source licensing or using works that are not in the repertoire of Access. For the Institutions, the interim tariff is an option, not an imposition.

IV. FORM AND SUBSTANCE OF INTERIM DECISION

[37] Access' original application appeared to be for an extension of the existing licences. This prompted AUCC to argue that the application for an interim decision amounted to an improper request to fix royalties pursuant to section 70.2 of the *Act*. We interpreted the application throughout the process leading to this decision as one for an interim decision of some sort, irrespective of its final form. What Access proposed or appeared to propose ought not to determine what that form should be. In the end, Access and most Objectors agreed that any decision granting the application of Access should be in the form of a tariff.

[38] The interim tariff, in form and substance tracks the AUCC model licence to the extent possible. On the whole, the text proposed by Access reflected earlier agreements and in fact better corresponded to the form of tariff the Board usually certifies. However, given the intent of the decision and the apprehensions of users, we found it preferable to rely on the wording of the model licence, as unsatisfactory as it otherwise might be.

V. REVIEW AND ANALYSIS OF THE OBJECTIONS TO THE INTERIM TARIFF

[39] The Objectors raised numerous arguments in asking us to reject the application. Those concerning whether the Board can or should issue an interim decision in this instance misrepresent either the nature of the regime pursuant to which the Board operates or the facts that are relevant to the case. A few however, concern the substance of the decision and do have merits.

A. A REMINDER ABOUT AN IMPORTANT PRINCIPLE OF COPYRIGHT LAW

[40] Under the *Act* and subject to specific exceptions, copyright owners or their agents are under no obligation to inform users of what they own or of the conditions under which they are willing to allow the use of what they own. The onus is on users to determine whether a contemplated use requires a licence and if so, to seek the copyright owner and ask for permission *before* any such use.

[41] Much of what the Objectors advanced seems to disregard this principle. To argue that a user is entitled to use a work without the permission of the copyright owner until such time as the owner seeks payment is as reasonable as stating that a person is entitled to use a telecommunication signal without the permission of the service supplying the signal until such time as the service insists on being paid.

B. AN INTERIM TARIFF IS AKIN TO AN INJUNCTION

[42] Most Objectors sought to equate any interim decision of the Board in general, and an interim tariff in particular, with an injunction. This is simply wrong.

[43] In matters the Board decides, interim measures are not unusual or extraordinary. They are the norm, not the exception, for what the participants referred to as the Gap Period.[29]

[44] An injunction is fundamentally different from an interim decision of the Board. An injunction prevents a person from doing what he or she would otherwise be free to do. An interim decision settles the terms according to which a person may, if he or she so wishes and without the consent of the copyright owner, make protected uses that would otherwise require a permission that can be withheld. An injunction restrains a person's freedom of action while an interim decision provides users with an option: an Institution cannot avail itself of a tariff that does not exist. By contrast, once a tariff is in place, Access has one less option: it cannot prevent an Institution from using its repertoire simply by complying with the tariff.

[45] An interim tariff does not force Institutions to pay royalties absent any evidence that they require a licence.[30] A tariff applies only to those who need the licence; those who do not, need not pay. Under the general regime, which applies in this instance, users whose consumption patterns justify different rates remain free to secure, from Access or from others, transactional or other licences that will trump the tariff.[31] The fact that the interim tariff can be modified at any time ensures that Access will display good faith in such negotiations. Any misconduct on its part would necessarily be reported to the Board, which would take it into account in any further consideration of this matter.

[46] In addition, an interim tariff does not force Institutions to prove a negative, i.e. that they do not need the tariff. In order to succeed in an action for copyright infringement, Access must first prove unauthorized uses of its repertoire in a way that is *prima facie* protected.

[47] Finally, the criteria applied in making an interim decision are not the same as those used to decide whether to issue an interim (or interlocutory) injunction. In dealing with an application for an injunction, a court assesses, among other things, the existence of a *prima facie* case and irreparable harm that could not be remedied if the decision on the merits does not accord with the injunction. The first test is not relevant to the Board's interim decisions."[I]t is not necessary for a

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[29] Indeed, in two of the regimes the Board administers, a certified tariff is automatically extended on an interim basis until a new tariff is certified for the same use: see ss. 68.2(3) and 70.18 of the *Act*.
[30] ACCC and AUCC (rightly) concede that an interim tariff does not prevent Institutions from avoiding to pay the tariff by source licensing or by not using the repertoire: ACCC December 17 responseat 3; AUCC December 17 response at 6.
[31] *Act*, s. 70.191.

party to demonstrate *prima facie* that the main application is likely to succeed";[32] it is sufficient that the main application is not plainly without merit, and clearly, this one is not. The second is foreign to what the Board does. Injunctions can be denied if there is no irreparable harm because if the applicant then goes on to win, the court can order the respondent to compensate the applicant for any damage caused by the respondent's actions during the proceedings.[33] The Board determines fair prices, it does not assess damages.

C. AN INTERIM TARIFF IS MANDATORY

[48] Many of the Objectors' arguments presupposed that any tariff, including an interim tariff, is mandatory. The objectors do not even agree among themselves on this issue. While some argue they can function without the Access repertoire, others state that the tariff is in effect mandatory because it is impossible to "practically opt out" of it.

[49] To a large extent, this assumption is based on the incorrect proposition that the relationship between copyright owner and user is purely contractual. As should be clear from paragraph 40, no contract is needed for a user engaged in an unauthorized protected use to be obligated to a copyright owner.

[50] In any event, the interim tariff we adopt in this matter is not mandatory. An Institution can avoid its application by purchasing the work, negotiating a licence to copy the work with Access or its affiliates, not using any work in the repertoire of Access or engaging only in conduct exempt from liability.

D. THE POWER TO MAKE INTERIM DECISIONS DOES NOT INCLUDE THE POWER TO APPROVE AN INTERIM TARIFF

[51] Some Objectors argued that the Board's powers do not extend to the adoption of an interim tariff. According to them, an interim tariff exists only when the *Act* so provides. This occurs only under the SOCAN and general regimes, and only where there is a pre-existing tariff.[34] Otherwise, nowhere does the *Act* mention the power to approve a temporary tariff, and this power cannot be inferred.

[52] A logical, purposive reading of the relevant statutory provision is sufficient to conclude that this argument is without merit. Section 66.51 of the *Act* provides, expressly and without imposing any constraint as to the scope of the power, that the Board may make interim decisions. An interim decision deals "in an interlocutory manner with issues which remain to be decided in a final

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[32] *Retransmission 1994*, *supra* note 9 at 242.
[33] Thus subsection 373(2) of the *Federal Court Rules* provides that the party applying for an interlocutory injunction must undertake to abide by any order "concerning damages caused by the granting or extension of the injunction".
[34] *Act*, ss. 68.2(3) and 70.18.

decision".[35] In this instance, the relevant final decision is the tariff proposed by Access.[36] If the interim decision is meant to deal with issues to be addressed in the final tariff, the Board has the power to issue an interim tariff.

[53] A number of textual and contextual arguments serve to reinforce this conclusion. First, the evolution of the Board's powers demonstrates Parliament's intent in this regard. The power to make interim decisions was added in June 1988 at the same time as the power to vary decisions.[37] At the same time, the Board was empowered to perform four functions, three of which were new that is: to set SOCAN tariffs pursuant to subsection 68(3); to set the terms of licences pursuant to subsection 70.2(2); to change the terms of licensing agreements at the request of the Commissioner of Competition pursuant to subsection 70.6(1); and, to issue a licence for the use of a work whose copyright owner could not be located pursuant to subsection 77(1).[38] Significantly, the power to make interim decisions was set out in general terms, while the power to vary decisions specified which ones could be so varied: s. 77(1) licences were not included.

[54] Over time, Parliament empowered the Board to perform more functions. In December 1988, the retransmission regime was set up.[39] In 1994, the Board was empowered to determine a compensation when contractual arrangements are frustrated as a result of implementing the World Trade Organization (WTO) Agreement.[40] In 1997, the Board was granted the authority to perform four new functions that is: to set the remuneration for the performance or communication of sound recordings of musical works;[41] to set tariffs pursuant to the general regime at the request of the relevant collectives;[42] to set royalties for the use of radio or television broadcast programs in classrooms;[43] and, to set the private copying levy.[44] Every time, section 66.51 was not amended. Every time with one exception, section 66.52 was amended to reflect additions to the Board's mandate.[45] Clearly, Parliament's intention has consistently been that the power to make interim decisions be general and that the power to vary past decisions be specific.

[55] Second, the proposition that the Board cannot adopt interim tariffs would apply to the retransmission and private copying regimes. This would lead to absurd results. These regimes do not provide for the automatic continuation of existing tariffs on an interim basis, yet both were set

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[35] *Bell Canada*, *supra* note 3 at 1754.
[36] A tariff is a "decision": *Act*, s. 68(4)(*b*).
[37] *Act*, s. 66.52.
[38] In this sentence, references are to the *Act* as it now stands.
[39] *Act*, s. 73(1).
[40] *Act*, s. 78.
[41] *Act*, ss. 68(3) and 68.1.
[42] *Act*, s. 70.15.
[43] *Act*, s. 73(1).
[44] *Act*, s. 83(8).
[45] In the result, the Board cannot vary decisions made pursuant to ss. 77(1) or 78of the *Act*.

up after section 66.51 was first adopted. If the existence and application of an interim tariff is contingent on the *Act* to clearly so provide, Parliament purposely structured these regimes so that a legal hiatus will exist every time the Board certifies a replacement tariff at a later date than that at which it takes effect. And neither regime allows right holders to be paid other than through a tariff.

[56] Third, the fact that the Board has the power to make interim decisions even in regimes where existing tariffs are continued as interim measures does not make these provisions redundant. The continuation clause does not apply to tariffs of first impression. And even where a tariff exists, section 66.51 permits a party to convince the Board that the *status quo* is unsatisfactory. That would be the case, for example, if a user and a collective agreed that the rate should be lowered, though they disagreed by how much.

[57] Professor Katz argued that the power to make interim decisions is limited to issues that are necessary and inexorably linked to the exercise of the Board's function. This proposition misapplies a decision of the Federal Court of Appeal which deals with the extent of the Board's implied powers, not the interpretation of its express powers.[46]

[58] Some Objectors also argued that the power to make interim decisions concerned not interim tariffs or licences, but matters such as interrogatories, scheduling and admissibility of evidence. This proposition is plainly incorrect. Those powers were expressly granted to the Copyright Appeal Board on its creation.[47] This Board was also separately granted these same powers[48] at the same time as the power to issue interim decisions. The addition of section 66.51 of the *Act* cannot have been meant to address an issue that was otherwise expressly (and always) settled.

E. BEFORE AN INTERIM DECISION CAN BE ISSUED, ALL THE PROCEDURAL AND SUBSTANTIVE CONDITIONS REQUIRED FOR THE FINAL DECISION MUST BE COMPLIED WITH

[59] Some Objectors argued that an interim decision must meet the same procedural and substantive tests as the final decision. That proposition is antithetical to *Bell Canada*,[49] according to which interim decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. More importantly, the proposition would lead to patently absurd results. For example, since only a collective can file a tariff, a user targeted in an existing tariff could not request interim changes to a tariff automatically continued

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[46] "[T]he Board possesses the incidental powers which are necessary and inexorablylinked to the exercise of its function" (not underlined in the original) *CTV Television Network Ltd. v. Canada (Copyright Board)*, [1993] 2 F.C. 115 at 123j.
[47] *Act* s. 68(4) as it stood then. The originalprovision was s. 10B(4) of the *CopyrightAmendment Act, 1931*, 1931 S.C. c. 8, asenacted by 1938 S.C. c. 28, s. 2.
[48] *Act*, s. 66.7.
[49] *Supra* note 3 at 1754.

on an interim basis, even if those changes were obviously necessary, as is the case if the new tariff proposes lower rates for the same use. As well, before adopting an interim tariff, the Board would be required to hear and consider all objections as provided for in section 70.15 of the *Act* and other similar provisions. As a result, the Board could only issue an interim decision once in a position to issue a final decision.

[60] Access is correct in stating that the procedural and substantive conditions imposed on the final decision create the context within which the interim decision is issued. Once the conditions have been complied with respect to the proposed final decision, these have not to be repeated for the interim decision.

[61] An interim decision should comply with the substantive and procedural conditions applicable to the final decision it anticipates, but only to the extent these are compatible with the intrinsic characteristics of an interim decision. For example, an interim retransmission tariff probably should apportion royalties among collectives and certainly must set a preferential rate for small systems;[50] an interim tariff for the performance of sound recordings of musical works must provide for a single payment.[51]

[62] The argument according to which a collective cannot file a proposed tariff and then propose a different interim tariff unless both are reflected in the proposed tariff is not totally without merit. An interim tariff cannot licence a use that the final tariff cannot target. This sort of limitation is best addressed not by dismissing the application altogether, but by omitting from an interim tariff provisions that it should not contain, as we do for musical works, below.

F. ACCESS FILED INSUFFICIENT EVIDENCE TO SUPPORT ITS APPLICATION FOR AN INTERIM DECISION

[63] Several Objectors complained that little evidence other than bald assertions was provided in support of the application and asked that evidence be filed in the form of affidavits on which witnesses could be cross-examined.

[64] The Board is entitled to rely on any evidence it considers reliable. There is no need to further test the evidence or statements of Access for the purposes of this application, since there is no dispute about the facts relevant to the interim application such as the existence and prevalence of previous arrangements, the conditions they set and the quasi-certainty that some Institutions will continue to use the repertoire without a licence.

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[50] *Act*, ss. 73(1)(*b*) and 74(1).
[51] *Act*, s. 68(2)(*a*)(iii).

[65] Furthermore, an interim decision can be issued in the absence of any evidence, especially if the decision merely seeks to maintain the *status quo*.[52] To date the Board has granted every application for an interim tariff that sought to maintain the existing state of affairs. And every time an application sought to add to the *status quo*, the *status quo* was maintained, whether or not the additions were granted.[53] Even in those decisions where the Board refused to issue an interim measure, it maintained the *status quo*: in three instances, as before, no money flowed from users to the collective; in the fourth, an application to change the *status quo* was denied.[54]

[66] Granted, this is the first time the Board is asked to maintain the *status quo* in the context of an inaugural tariff filed pursuant to the general regime, in a market where previous licensing arrangements existed. This in and of itself requires using a different legal instrument (a tariff instead of a series of licences) to achieve the same result. This is not reason enough to refuse to maintain that *status quo*, especially since the existing agreements were so similar in their essence and so prevalent in the marketplace as to operate as a *de facto* tariff. The *status quo* is a matter of fact, not of form.

G. ACCESS SHOULD PROVIDE EVIDENCE OF THE EXTENT OF ITS REPERTOIRE

[67] Most Objectors argued that setting an interim tariff without knowing exactly the works to which it will apply is both legally impossible and unfair. That proposition rests on a number of misapprehensions.

[68] The first relates to the current state of affairs. The licences the interim tariff replaces contain no detailed information about the works included in the repertoire. The repertoire is what it is. More importantly, there is no reason to believe that its nature is different today than it was, say, a year ago, when existing agreements were renewed by consent.

[69] The second pertains to the nature of any collective repertoire. It changes daily, if not hourly. Just as importantly, a repertoire contains what affiliated rights holders own, not of what they think or declare they own. Finally, while it is often possible to determine, at any point in time, if a specific work or list of works is in a repertoire, it is *never* possible to determine all that it contains. This will remain true even if a collective could legitimately claim to represent all that is protected by copyright, if only because "all that is protected by copyright" always remains indeterminate.

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[52] Above, at para. 16.
[53] Of course, what is the *status quo* may notalways be obvious: see for example *Commercial Radio 2006*, *supra* note 5.
[54] The first three are *Ruling on CBRA's Application for an Interim Tariff* (3 May 2001), *Ruling of the Board* (11 June 2003)and *AVLA/SOPROQ*, *supra* note 5. The fourth is *CSI – Online Music Services, 2008* (22 April 2008).

[70] The third reflects a misunderstanding of a basic principle of copyright already alluded to in paragraphs 40 and 41: the starting point of the user-owner relationship is the user's duty to inquire, not any owner's duty to inform.

[71] Section 70.11 of the *Act* is of no help to the Objectors in this regard. The provision requires collectives to answer within a reasonable time all reasonable requests from the public for information about their repertoire. Though included into two of the regimes the Board administers, this provision is irrelevant to what the Board does, including to making an interim decision. An interim tariff should reflect not so much what is in the repertoire as how much it is used. More importantly, the provision does not change the principle that it is for the user to inquire, not for the copyright owner to seek.

H. COMPLIANCE WITH 70.17 MAKES AN INTERIM TARIFF UNNECESSARY

[72] Section 70.17 of the *Act* provides that "no proceedings may be brought for the infringement of a right referred to in section 3, 15, 18 or 21 against a person who has paid or offered to pay the royalties specified in an approved tariff."

[73] Some Objectors maintain that the provision is applicable whether or not a tariff has been certified. According to them, Institutions who offer *now* to pay the tariff *later*, once it has been certified, cannot be sued for copyright infringement. The combined effect of section 70.17 and of the retroactive application of any certified tariff back to January 1, 2011 would ensure that there will be no legal vacuum for those who intend to conduct their copying practices in accordance with the proposed tariff.

[74] In our view, section 70.17 sets out the parameters for the private enforcement of an *approved* tariff, interim or final. Its equivalent has existed since 1936, when the Copyright Appeal Board was created. In the SOCAN regime, that equivalent is paired with a provision setting out the collective's right to collect royalties pursuant to the tariff, making this a clear *quid pro quo*.[55] The "offer to pay" provision merely confirms that a user does not need the permission of the collective to use the repertoire as long as royalties are tendered: a refusal to accept payment becomes irrelevant. The collective is barred from suing a user who offers to pay only to the extent that the collective is entitled to collect. There can be no *quid pro quo* if the offer to pay can be made in the absence of an obligation to pay, as there can be no refusal of an offer to pay that does not come with a payment. Furthermore, how can a user comply with terms and conditions that have not been set?

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[55] *Act*, s. 68.2.

[75] There is a difference between the SOCAN and general regimes that is important here. In the SOCAN regime, a collective cannot proceed with an action for copyright violation if no tariff has been filed.[56] This prohibition is not found in the general regime, because a collective that is subject to the regime and does not file tariffs is still entitled to enforce compliance where its repertoire is used. This further supports the proposition that section 70.17 applies only to the extent that a payment can be made pursuant to a tariff, whether interim or final.

[76] This interpretation is supported by the wording of section 70.4 of the *Act*, the equivalent provision to section 70.17 in matters of arbitration. This provides that an offer to pay is a defence "[w]here any royalties are fixed". Clearly, the immunity is triggered only once the decision is issued, not before.

[77] In any event, we agree with the Board's earlier decisions that the existence of a dispute as to the meaning of section 70.17 is in itself sufficient to create a legal void justifying the adoption of an interim tariff.[57]

[78] Finally, the fact that the final tariff may apply back to January 1, 2011 is not a sufficient reason in and of itself not to issue an interim tariff. To deny an application for an interim decision only on that basis would make section 66.51 of the *Act* redundant.

I. THERE IS NO LEGAL VOID SINCE COPYRIGHT OWNERS CAN SUE FOR COPYRIGHT INFRINGEMENT

[79] Some Objectors argued that as long as copyright owners can prosecute unauthorised uses, there is no reason for an interim tariff. At least one suggested that if an uncertainty exists, it should be settled by the ordinary courts in the context of an action for copyright infringement. We agree with earlier decisions of the Board that do not accept this point of view. The fact that when there is no interim tariff, a collective's only resort may be to proceed before a court of law may in and of itself justify issuing an interim decision.[58] There can be a legal void, as interpreted by the Board in its previous decisions, even where a legal recourse exists.

J. THE PROPOSAL DOES NOT REFLECT THE STATUS QUO

[80] The Objectors argue that Access seeks to change the rules of the game. To the extent this is true, the solution is not to deny the application for an interim tariff, but to ensure that our decision does reflect the *status quo* to the extent possible.

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[56] *Act*, s. 67.1(4).
[57] *Astral*, *supra* note 5 at 3.
[58] *MusiquePlus*, *supra* note 5 at 2-3.

[81] One change to the *status quo* challenged by some Objectors concerned musical works. Current licences authorize the reproduction of these works. Access offered to include this use in the interim tariff. We have expressly excluded musical works from the ambit of the interim tariff, for the simple reason that the proposed tariff clearly excludes them. As a rule, the certified tariff cannot target uses that are not mentioned in the proposed tariff. If the final tariff cannot extend to musical works, the interim tariff should not authorize their use. In principle, this limitation of the scope of the licence could justify a drop in the FTE price. However, since we do not know the amount of royalties musical works generated under the current arrangements, we leave it to the Objectors, if they so wish, to raise the issue.

K. THE STATUS QUO WOULD NOT REFLECT CHANGING COPYING HABITS

[82] Some Objectors argue that the Institutions' copying practices have changed so significantly that the Board ought to set a nominal fee. These arguments are based on conjecture[59] and prejudge the very debate that this matter is all about, something the Objectors are urging us not to do. While the advent of Internet has undoubtedly had some impact on copying practices, we cannot presume its effect on the Institutions' consumption of the relevant repertoire: just as the omnipresence of the computer did not result in the paperless office, the advent of Internet may not have resulted in the paperless Institution.

[83] What the record does show is that the Institutions maintained a relationship with Access that the interim tariff is meant to extend. All relevant agreements were renewed twice, the last time in 2009.[60] The only Institution known to us to have changed its fees on account of the decision of Access to file a tariff, the University of Western Ontario, has increased the amounts it charges students based on the assumption that the final rate will be set at $30.[61] This is clearly incompatible with a claim that the tariff rate is bound to go down.

[84] Some Objectors did offer indications of possible shifts in compensable uses. New approaches are emerging to making published works available within Institutions. Significant amounts are being spent in acquiring the licences needed to use those approaches. Some of these expenses may well duplicate what was paid until now to Access.[62] Were the Objectors to offer some evidence of

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[59] Given the Objectors' insistence that Accessprovide more reliable evidence in support of its application, this is somewhat surprising.

[60] For the purpose of this decision, wedisregard the four-month extensionStarting September 1, 2010.

[61] See Access December 15 reply at 22.

[62] Alberta also relied on the fact that few Institutions signed an interim agreement for the Gap Period as evidence of a significant shift in copying habits. Accessrightly points out that this may just as wellshow a collective assertion of monopsony power intended to erode the resolve of Access and its affiliates. That action in turn seems based on what might be a serious misapprehension of the meaning ofsection 70.17 of the *Act*, as discussed above in paras. 72 to 78.

the existence and extent of some forms of double-dipping, we may consider reviewing the FTE rate.

[85] Some Objectors also raised the possibility that Bill C-32,[63] if adopted, may change radically the extent of uses for which the Institutions require a licence. That issue can be addressed if and when the proposed legislation receives royal assent.

[86] It was also argued that the draft interim tariff does not reflect the notion of fair dealing as interpreted by the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*.[64] Fair dealing is essentially fact and context based. The Objectors' assertions are unsupported by any evidence. The existing licences were renewed twice after *CCH* was issued. Finally, any statement to the effect that *CCH* must result in a reduction in the FTE rate must be viewed against the fact that the Board decided to increase the FTE for primary and secondary schools taking full account of that decision.[65]

L. GIVEN THE LEGAL AND EVIDENTIARY ISSUES INVOLVED, ISSUING AN INTERIM TARIFF WOULD APPEAR TO PREJUDGE THE ISSUES

[87] According to the Objectors, the evidence will show that most of the copies now made do not require an Access licence. If so, they state, an interim decision may set policy precedent on a substantive matter to be addressed at the hearings in these proceedings.

[88] An interim decision does not prejudge the final result. This is especially true of a decision that simply extends the *status quo* when, as is the case here, the facts and principles necessary to decide on the application are clear and largely uncontested. The alternative would involve a preliminary determination, without supporting evidence, that things have changed significantly, something much more likely to convey the impression that the decision-maker has formed some preliminary opinion as to the relevant facts.

[89] A similar argument suggested the Board should proceed on a conservative interpretation of the law. We reject this submission. Where it is necessary to interpret the law, the Board strives to be correct.

M. ACCESS IS THE AUTHOR OF ITS OWN MISFORTUNE

[90] The Objectors argued that Access is largely or solely responsible for the sequence of events that led it to apply for an interim decision. It filed its proposed tariff only nine months before it was due to take effect, when it knew that these proceedings would take considerably longer and

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[63] *Copyright Modernization Act*, SecondReading and referred to a legislative committee, November 5, 2010.
[64] *CCH Canadian Ltd. v. Law Society ofUpper Canada*, [2004] 1 S.C.R. 339. [*CCH*]
[65] *Access Copyright (Educational Institutions) 2005-2009* (26 June 2009) Copyright Board Decision. [*Access K-12*]

could have filed its proposal years ahead of time. They contend that Access failed to negotiate in good faith and as a result the time constraints it now seeks to invoke were all of its own making.

[91] An examination of the record reveals that the Objectors are at least as responsible as Access for the current state of affairs. After claiming that there would be ample time to negotiate a new licence, AUCC failed to discuss any element of the key features Access presented to it in October 2009 for a period of six months. Access interpreted this conduct as an invitation to file a tariff, with negotiations to follow. That interpretation was not unreasonable. AUCC and ACCC have not responded to Access' most recent entreaties since that time and have rejected all attempts to discuss how to deal with the Gap Period.

[92] To contend that Access has only itself to blame for the current situation is somewhat disingenuous. Again, from a legal perspective, it is up to the Institutions to seek out Access, not the other way around. And in any event, it takes two to tango. In this case the Institutions have refused to even walk to the dance floor. More importantly, whether Access chose to file a tariff or whether it felt compelled given the circumstances is largely irrelevant. Access has the right to seek a tariff instead of licences. The transparent exercise of a clear right is not a sign of bad faith.

[93] Apparently, some provisions of the arrangement Access proposed to deal with the Gap Period left the impression that by agreeing to the arrangement, Institutions would be abandoning certain rights. Whether or not this was so is irrelevant. Our concern is not with what Access proposed, but with what it asks us to decide. No tariff, interim or otherwise, can entail the forfeiture of the right to judicial review or of a possible Supreme Court of Canada appeal.

N. THE FINANCIAL REASONS ADVANCED BY ACCESS TO JUSTIFY THE INTERIM DECISION ARE INSUFFICIENT TO JUSTIFY IT

[94] Access claimed that the absence of a tariff would have such impact on its revenue flow as to force it to jettison key infrastructures and personnel that will still be necessary to administer the certified tariff. The Objectors responded that Access has other resources from which it can subsidize the current proceedings. We have already stated in paragraph 34 that our decision does not rely on this line of argument.

[95] Financial impact may be part of an analysis of balance of convenience. In this instance, such an analysis can be based on other considerations. An interim decision should focus not on what might happen or be found later, but on what is certain now.[66] What "is" now is a structure that has

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[66] *Commercial Radio 2006*, *supra* note 5 atpara. 21.

operated satisfactorily. While the amount of royalties is at issue, no one has yet offered any serious, supported argument that the tariff should be abandoned altogether.[67]

O. THE INTERIM APPLICATION RAISES ANTI-COMPETITIVE CONCERNS

[96] That this argument is even raised is surprising, for three reasons. First, if the Access repertoire is as unimportant to the Institutions as some claim, then Access clearly is not in a position to exert monopoly power. Second, Access is not a monopoly in at least two respects. It does not represent the world repertoire and what it does is represented on a non-exclusive basis. The users remain free to deal directly with its affiliates. Third, it is now settled that the Board's mandate is not to protect users against potential abuse of monopoly power by collectives, but to maintain a balance in the relevant markets.[68] This principle is very relevant here since, as Access pointed out,[69] the Board may be confronted with a collective exertion of market power similar to that which once led the Board to protect copyright owners from the exertion of such power.[70]

P. IF THERE IS A TARIFF, THE INDEMNITY CLAUSE SHOULD BE MAINTAINED

[97] All current licences contain an indemnity clause. In effect, Access licences everything that is not in an Exclusions List, whether or not it is actually in its repertoire.[71] The proposed tariff and the draft interim tariff do not contain such a clause.

[98] Not all Objectors take the same position on the indemnity clause. AUCC, ACCC and others consider it an important part of the package. Professor Katz, on the other hand, views its disappearance as a serious breach of *status quo*, but then goes on to state that it is both outrageous and unlawful.

[99] An interim decision may contain provisions that may not find their way in the final decision.[72] The Board has already ruled that an indemnity clause is unnecessary in Access tariffs.[73] That being

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[67] A significant difference may exist betweenthis instance and *AVLA*, *supra* note 5. In *AVLA*, it was highly probable that the same rights holders would receive the sameshare of royalties for commercial radio reproductions as for existing tariffs (commercial radio performance of sound recordings, private copying), since radio air play is an important factor in determining royalty distribution in all thesecases. Put another way, any subsidization was from one tariff to another, not from a set of rights holders to another. Here, theopposite probably is true: the author of auniversity treatise on physics or constitutional law receives no royalties from primary schools, and the author of abook destined to teach kindergartners to read receives no royalties from universities.

[68] *Canadian Association of Broadcasters v.SOCAN* (1994), 58 C.P.R. (3d) 190 (F.C.A.) at 196.

[69] Access December 22 reply at 7.

[70] *Public Performance of Music* (6 December1993) Copyright Board Decision at 358, 362, where the Board declined to allow source clearance of television music because "the balance of power would be too unfavourable to the rights owners in the Canadian market."

[71] What is or not in the repertoire of Accessas a matter of law, either directly or by implication, need not be addressed at thispoint.

[72] *ADISQ 2009*, *supra* note 16 at para. 12.

[73] *Access K-12*, *supra* note 65 at paras. 178-183.

said, that decision is binding on no one. The issue will probably be revisited in these proceedings. To maintain the *status quo*, the indemnity clause should be included in the interim tariff. We are willing to take for granted, for the purposes of this interim decision, that the clause serves a purpose. This is one instance where we choose to reflect the wording of existing arrangements rather than interpreting them or ruling on their validity.[74]

[100] Access does not oppose the indemnity clause as long as it applies only to the types of reproductions authorized in existing licences. According to the Objectors' own evidence and arguments, the manner in which digital rights are managed may be significantly different and the extent of the digital repertoire Access administers may be considerably less. Access should not be required to warrant uses that the Objectors maintain it is not up to it to licence.

[101] That leaves the issue of the Exclusions List. Access should be allowed to maintain the list by reason that it cannot licence (or warrant to licence) what it has expressly been told not to.

Q. THE INTERIM TARIFF SHOULD NOT EXTEND TO DIGITAL COPIES

[102] Access Copyright applied to licence digital copies. It offers to include them in the interim tariff without increasing the FTE rate. Most Objectors claim that the right to make digital copies is of marginal value to Institutions. Be that as it may, since these rights are being granted at no extra fixed cost for the time being, the Institutions would not be prejudiced by being so authorized.

[103] The possibility that some, or even all, of the additional uses Access wishes to authorize in the interim tariff at no extra cost may not be protected by copyright is of little consequence, as is the possibility that Access may not "own" some of the rights. If the Objectors are right, they pay nothing for what they use. If they are wrong, they can shelter under the tariff at no extra cost. Finally, whether *all* such uses are unprotected by copyright is *prima facie* doubtful and certainly must be left to be decided at the hearing.

[104] Nevertheless, given the Institutions' reticence in this regard, and given the need to treat digital copies somewhat differently than paper copies, we decided to offer the licensing of digital copies pursuant to the interim tariff as an option to the Institutions.

R. THE PROCESS WAS UNFAIR

[105] Access filed its application for an interim decision on October 13, 2010. It only sent it to Institutions, not to all 101 persons who filed timely notices of objections to the proposed tariff. On November 26 the application was sent to the 17 persons and Institutions the Board had identified one day earlier as allowed to oppose the proposed statement of royalties. Five of those had already

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[74] *ADISQ 2009*, *supra* note 16 at para. 8.

received the application. In the end, the time allowed for Objectors to respond to the various aspects of the application once the Board put the process for its examination in motion was three weeks.[75]

[106] The Objectors complained repeatedly that the Board imposed unreasonable deadlines to respond to the application. Some also argued that the matter required an oral hearing. In their view, anything short of that involves a breach of procedural fairness.

[107] Access correctly described the parameters to be used in assessing whether the process was fair, as outlined in *Baker v. Canada (Minister of Citizenship and Immigration)*[76] and the manner in which they should be applied in this instance. The nature of the decision being made by the Board, which is to set fair royalties, does not attract the same level of fairness as determining human rights. The *Act* expressly gives the Board the power to make interim decisions, and the fact that such decisions are inherently made on the basis of an imperfect record was recognized in *Bell Canada*.[77] When we examine the importance of the decision to the parties affected, it is clear the interim decision will have little or no effect on the day to day operations of Institutions, and benefits individuals (teachers, students) whose conduct is thereby legitimized where it might otherwise be in breach of copyright. More importantly, the consequences of the decision on the Institutions are, to a large extent, within their control: they can eliminate three-quarters of their liability by not using the licence for coursepacks and any liability by not engaging in other conduct requiring an Access licence. Finally, the time afforded to the Objectors to respond to the application was consistent with what most courts allow. On the other hand the time Access had to reply was significantly shorter. Furthermore, there could be no legitimate expectation by the Objectors of an oral hearing in this matter. The Board has never held an oral hearing before issuing an interim decision.

[108] In addition, Access filed three further sets of documents at the request of the Board: a confirmation of the amounts payable under the interim decision it proposed; a draft interim tariff, as well as tables indicating the source for each proposed provision of the interim tariff; and, a correlation of the model licence with the proposed interim tariff, with an indication of the nature and reasons for differences between the two. These additional filings triggered requests by the Objectors for further time to respond. It may be worth repeating here what the Board stated on December 8, 2010. The draft interim tariff was not a new proposal. The only proposal of which we are seized is the application filed on October 13, 2010. Access did not change the relief requested; nor would we have allowed this to happen without giving other participants additional

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[75] Since Access did not serve its application on all those who had attempted to object tothe proposed tariff, the Institutions had more time to prepare than other Objectors.That cannot be undone. Therefore, the sufficiency of the time allowed for Objectors to respond to the applicationmust be assessed based on the shorter period, as we do here.
[76] [1999] 2 S.C.R. 817 at paras. 21-28. See Access December 15 reply, at 4-5.
[77] *Supra* note 3.

time to respond. The purpose of the requests for additional information was not to help us understand the terms of the application or to accommodate the inadequacy of Access Copyright's material. It was to make it easier for Objectors to understand the relationship between the text proposed by Access and the application for an interim decision. We could have left the participants to act on the sole basis of the application originally filed with the Board, which was sufficient for anyone to respond to the application and adequate for the purposes of making a decision.

[109] The participants had ample opportunity to comment on whether the application of Access should be granted and if so, what form it should take and what it should contain. Since any interim decision is *per se* open to modification, any further issues about the content and wording of the interim tariff can be addressed at any time by bringing the question to the attention of the Board.

S. THERE IS NO URGENCY

[110] The Objectors argued that there was no urgency in the matter. We disagree. Clearly, there is uncertainty that will put in doubt what Institutions can or cannot do. This uncertainty must be resolved so that Institutions have clear options. These options must be in place before Institutions, staff and students make unlicensed protected used of the relevant repertoire.

VI. OTHER ISSUES

[111] The Objectors raised many other issues. Some are plainly misguided. Others appear to be of little or no relevance either of themselves or as a result of our decision to model the interim tariff on the existing licences. Here are number of them, in no particular order.

[112] *The proposed interim tariff imposes restrictions unwarranted by copyright law*. It is implicit in any tariff that it does not licence what need not be licensed. Nevertheless, since this appears to be unclear to so many, the tariff's Note to readers restates this otherwise trite principle.

[113] *Access cannot sue for copyright infringement in its own name*. This argument is based on the nature of the relationship between Access and its affiliates. We fail to see its relevance to the matter at hand. Standing before a court is a matter for that court, not for us.

[114] *By operation of section 70.191, the Act does not allow for the simultaneous application of tariffs and licenses: the collective must choose between a mandatory or voluntary regime.* This statement misrepresents the provision. If, as this section provides, licences trump tariffs, both must be allowed to co-exist in the same market.

[115] *Absent an interim tariff, Institutions wishing to obtain an interim licence, if unable to agree with Access on its terms, may apply to the Board to arbitrate the terms of the interim licence.* This is incorrect. The licences the Board issues pursuant to subsection 70.2(2) of the *Act* are final licences. Interim decisions, including interim licences, are issued pursuant to section 66.51. The

Board can only be asked to set the terms of an interim licence if arbitration for a final licence has been applied for.

[116] *The tariff presumes that Institutions will violate copyright.* The Board does not approve tariffs to prevent infringements, but to set the terms under which users can use a repertoire if they so wish. The Institution that does not "violate copyright" simply can abstain from complying with the tariff.

[117] *The Board cannot force upon an unwilling user the continuation of a voluntary agreement when the agreement expires*. This statement is wrong in at least two respects. First, it supposes that users are free to make protected uses of the works of others once an agreement allowing those uses has expired. This is incorrect: see paragraph 41. Second, it ignores that the Board can impose the terms of a licence pursuant to subsection 70.2(2) of the *Act*.

[118] *Access's entitlement to collect royalties is subject to the ordinary rules of contract law, and expires on the date specified in the agreement*. That entitlement is a function of the *Act*, not of a contract.[78] The contract merely sets the terms and conditions of that entitlement for the duration of the contract, where otherwise a court would be asked to do so *ex post facto* in an action for copyright infringement. The only thing that ends with the contract is the user's entitlement to use the repertoire, not the rights holder's entitlement to be paid.

[119] *This matter should be left to the marketplace.* To the extent possible, this decision does so. Institutions retain the option not to deal with Access. The marketplace continues to exist. Institutions simply must ensure that they do not use the repertoire of Access without a licence.

[120] *The Board may, instead of a tariff, recommend a template for a license that Access and Institutions might use if they wish to enter into contractual relations*. The Board renders decisions, it does not recommend templates. Neither can the interim decision just make it possible to reach voluntary arrangements.

[121] *Teachers and students will be affected*. The only effect of the tariff on these users is to ensure that they are not subject to prosecutions for copyright violation if they make certain protected uses and if their Institution complies with the tariff.

[122] *The interim tariff could apply longer than the main tariff Access applied for.* To the extent that this is even possible, the issue is simply avoided by ensuring that the interim tariff cease to apply on the earlier of December 31, 2013 and the date a final tariff is certified.

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[78] It is therefore also a fallacy to pretend thata licence or tariff, interim or otherwise, grants the right to be paid to a collective subject to the general regime.

[123] *The proposed tariff's information distribution, reporting, attribution and audit requirements are excessive*. These complaints are premature; in the interim tariff, the Institutions' obligations remain as before. The same is true of most other controversies between the parties.

[124] AUCC asked that all current audit and sampling requirements be abandoned so as to prevent Access from circumventing any survey protocol arrived at for the purpose of adducing evidence in these proceedings. On the contrary, we find there is no need to depart from the current licences. Audits and sampling serve other purposes than setting a tariff. Any risk of abuse is greatly reduced given that the current agreements, reflected in the interim tariff, already limit what Access can do with the information so obtained.

[125] Some Objectors complained that Access was attempting to change the rules applying to coursepacks. Access replied that a disagreement may exist as to what precisely those rules are. We have opted to use the words of the existing licences, leaving it for later (or to others) to settle precisely what the so-called 2(b) licences authorize.[79]

[126] Once a reprographic licence or tariff is in place, section 38.2 of the *Act* caps the financial remedy for making any unauthorized use of a work not in the repertoire to the price set in the licence or tariff. Professor Katz argues that this prejudices the rights of non members. That argument misses several important points. First, the fact that section 38.2 provides as it does shows that the existence of a cap, far from being a problem, is precisely what Parliament is looking for. Second, prices will not be capped at the interim rates on a permanent basis. Third, the cap limits the available financial compensation but does not deprive the copyright owner of other remedies, such as the right to seek an injunction. Any subsequent violation is then subject to the usual sanctions that apply when a person breaches an injunction.

[127] Professor Katz also argued that no interim tariff should be adopted since it was far from certain a tariff would be certified in the end. Objections in this case pertain among other things to the ability of the Board to impose the proposed tariff. A final decision could not retroactively remedy that problem if an interim tariff is adopted. In our view, the proposition that the Board cannot (or will not) certify a tariff in this instance is highly debatable, since Access is entitled in principle to a tariff as soon as *some* Institutions *may* use the repertoire of Access; the rest is a matter of terms and conditions. The proposition that a final decision declining to certify a tariff cannot retroactively remedy the effects of an interim tariff is plainly wrong: all that is needed is to order Access to refund what was paid pursuant to the tariff and to return whatever information may have been supplied pursuant to its terms and conditions.[80]

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[79] *ADISQ 2009*, *supra* note 16 at para. 8.

[80] One should always keep in mind that thoseterms and conditions are virtually identicalto those agreed to by the Institutions for over 15 years.

[128] The Objectors raised certain constitutional questions that we do not address. They appear to question the constitutionality of some provisions of the *Act*, and as a result notice should have been given pursuant to section 57 of the *Federal Courts Act*.[81]

VII. TARIFF WORDING

[129] A few additional comments are warranted on the wording of the tariff.

[130] The Note to readers outlines a few basic principles. Given the misapprehensions displayed by certain participants as to the impact of a tariff, we find it helpful to mention them.

[131] The tariff tracks the AUCC model licence to the extent possible. Changes were made only where necessary. For example, the definition of FTE in the AUCC model licence is premised on an Institution providing certain information to Statistics Canada. Since some may not supply that information, an alternative, taken from the proprietary colleges licence, is offered. The tariff sets the date by which an Institution must report its FTE number at the latest one provided in the existing agreements, leaving Institutions free to report at an earlier time. It also sets higher rates for proprietary colleges to reflect the current state of affairs. Finally, all provisions dealing with the term, renegotiation and termination of the licence were deleted as irrelevant.

[132] Reporting requirements deserve a special mention. Objectors seemed to take the position that existing requirements might suddenly compromise academic freedom and privacy once they were transferred from licences to a tariff. With Access, we fail to see why.

[133] Wherever the AUCC model licence left it open for an Institution and Access Copyright to agree on certain terms, the terms of the latest agreement in force between each Institution and Access are incorporated by reference to the tariff, unless both parties come to a different agreement: see for example section 15.1.

[134] We deleted paragraph 2(c) for two reasons. First, its purpose is unclear: it seems to authorize the commercialization of coursepacks, which appears to us incompatible with the rest of the licence. If that interpretation is correct, the provision may open the door to an unwarranted extension of the ambit of the tariff. Second, paragraph 2(c) was mentioned only peripherally in the parties' submissions; its purpose was never addressed. The provision can be reinstated later on if the parties so wish.

[135] For the reasons stated earlier, the Exclusions List is maintained. To ensure that it is available to the greatest number of persons and Institutions, the list is to be posted on Access Copyright's

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[81] R.S.C. c. F-7.

website. Our decision contains other measures, meant to ensure the widest possible circulation and availability of the relevant information, that require no further explanation.

[136] Schedule G of the interim tariff offers Institutions the option to licence digital copies pursuant to the interim tariff. All digital copies made pursuant to Schedule G are subject to the protection measures set out in the draft interim tariff filed by Access, including restrictions on access and the use of a secure network, all of which reflect the proposed tariff. These conditions are *prima facie* necessary given the inherent characteristics of any digital copy. They do not impose any undue burden on the Institutions for two reasons. First, an Institution's resort to Schedule G is at its sole option. Second, the Schedule clearly provides that the Institution need not comply with the Schedule in respect of copies for which the Access licence is not required.

Gilles McDougall
Secretary General