Federal Court of Appeal  Cour d'appel fédérale

Date: 20151217

Docket: A-369-14

Citation: 2015 FCA 289

CORAM: **NADON J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

NETFLIX, INC.

Applicant

and

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA, APPLE CANADA, APPLE INC., BCE INC., CANADIAN ASSOCIATION OF BROADCASTERS, CINEPLEX ENTERTAINMENT LP, FACEBOOK INC., ROGERS COMMUNICATION PARTNERSHIP, SHAW COMMUNICATIONS INC., VIDEOTRON G.P., and YAHOO! CANADA CO.

Respondents

Heard at Montreal, Quebec, on October 5, 2015.

Judgment delivered at Ottawa, Ontario, on December 17, 2015.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: BOIVIN J.A.
DE MONTIGNY J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20151217

Docket: A-369-14

Citation: 2015 FCA 289

CORAM: **NADON J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

NETFLIX, INC.

Applicant

and

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA, APPLE CANADA, APPLE INC., BCE INC., CANADIAN ASSOCIATION OF BROADCASTERS, CINEPLEX ENTERTAINMENT LP, FACEBOOK INC., ROGERS COMMUNICATION PARTNERSHIP, SHAW COMMUNICATIONS INC., VIDEOTRON G.P., and YAHOO! CANADA CO.

Respondents

REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] This is an application for judicial review by the applicant, Netflix, Inc. ("Netflix") of a decision of the Copyright Board (the "Board") dated July 18, 2014 certifying the tariff of royalties for audiovisual webcasts ("Tariff 22.D.1" sometimes referred to as the "Tariff") for the

period running from 2007 to 2013 inclusively. More particularly, Netflix challenges paragraph 3(b) of the Tariff which establishes a monthly minimal fee for free trials of subscription services.

[2] In my view, the application for judicial review should be allowed.

II. Facts

[3] Netflix provides an online streaming service that delivers movies and television programs. Its subscribers pay a monthly fee and, as a result, obtain unlimited access to Netflix's collections of programs and movies. Subscribers cannot, however, keep a copy of the materials on their own devices. As a marketing tool to attract prospective subscribers, Netflix offers a non-renewable one month free trial. According to Netflix, virtually all of its subscribers join its service after the end of the free trial period.

[4] The Society of Composers, Authors and Music Publishers of Canada ("SOCAN") is a copyright collective society within the meaning of section 2 of the *Copyright Act*, R.S.C. 1985 c. C-42 and thus is entitled to receive copyright royalties pursuant to the tariffs certified by the Board. SOCAN is the only entity among the named respondents that has interests that are directly opposed to those of Netflix. The other respondents offer various kinds of Internet transmissions of audiovisual works. Other than Canadian Association of Broadcasters and Facebook Inc., these respondents (the "Objectors") participated in the Board's objection process that I shall shortly discuss and were parties to an agreement with SOCAN which resulted in the Board's certification of the Tariff.

[5] From 2007 to 2013, SOCAN filed annual statements of the royalties that it proposed to collect for audiovisual works transmitted online and these proposed tariffs were published annually in the *Canada Gazette*. These statements provided for royalties calculated as a percentage of revenue or expense without specific provisions for subscription services or free trials thereof. At no time did Netflix object to SOCAN's proposed tariffs.

[6] In April, 2011, the Board made it known that it would consider certifying, *inter alia,* Tariff 22-D (later renumbered as 22.D.1) for the period of 2007 to 2011. The process was initiated by the issuance of a Directive on Procedure on June 8, 2011 (the "Directive") which set out the procedure which the Board intended to follow in considering the proposed tariffs and the objections thereto. In due course, the Board scheduled a hearing set to begin on June 19, 2012. However, for the reasons which I will now explain, the hearing did not proceed as scheduled and, in fact, never took place.

[7] On March 5, 2012, SOCAN filed its Statement of Case with the Board which set out its submissions and the evidence on which it proposed to rely. However, prior to the filing by the Respondents of their respective Statements of Case in response to SOCAN's Statement of Case, the Board suspended the hearing process in order to allow settlement negotiations between the parties to be pursued.

[8] I should point out here that Netflix was not a party to the proceedings commenced by SOCAN following the issuance of the Board's Directive.

[9] On June 28, 2012, SOCAN and the Objectors entered into an Agreement which extended the application of Tariff 22.D.1 so as to include the years 2012 and 2013. Of greater importance is the fact that the royalty provisions provided for in the Agreement were substantially different from those contained in the previously published versions of proposed Tariff 22.D.1.

[10] More particularly, the earlier versions of the Tariff made no distinctions between business models, did not distinguish subscription based services from other services and, finally, did not propose royalties for free trials. However, the proposed Tariff, as found in the Agreement, now proposed to distinguish among services that charged consumers a fee per program, offered subscriptions and earned advertising revenue.

[11] Specifically, the royalty for subscription services was to be calculated not only as a percentage of the total amount paid by subscribers, but also included, in the case of free trials, a minimum monthly fee of 6.8¢ for the years 2007 – 2010 and 7.5¢ for the years 2011 – 2013 per free trial subscriber.

[12] It is of importance to point out that the Objectors, signatories to the Agreement, either charged fees per program or received advertising revenue, or both. None of the Objectors offered subscriptions and consequently no Objector was affected by the new separate royalty calculation for subscriptions or by the extra royalties for free trials.

[13] On November 28, 2012, pursuant to paragraph 4 of the Agreement, SOCAN filed a joint request on behalf of the signatories to the Agreement and sought certification of a new proposed

Tariff (which the Agreement refers to as the "Settlement Tariff"). Should certification ensue, the Tariff would then apply to all users of SOCAN's repertoire operating audio visual Internet services in Canada, including Netflix, whether they were signatories to the Agreement or not.

[14] On December 5, 2012, the Board invited SOCAN and the Objectors to submit written submissions regarding the Settlement Tariff no later than Friday, January 11, 2013, indicating that the parties could respond to other participants' written submissions no later than Friday, January 25, 2013. As Netflix was not a party to the proceedings, it was not invited by the Board to participate in this process.

[15] On January 11, 2013, SOCAN filed its submissions with the Board. No submissions were received by the Board from any of the other parties to the Agreement.

[16] On January 11, 2013, Netflix also provided written submissions to the Board concerning the Settlement Tariff. In providing its submissions, Netflix relied on paragraph 2 of the Board's Directive which allowed for anyone to comment in writing on any aspect of the proceedings resulting from its Directive. The submissions filed by Netflix were restricted to the extra free trial royalties in regard to which it said that free trials were fair dealing and that extra royalties were not in accordance with the Supreme Court's recent jurisprudence on technological neutrality and prohibiting layering of royalties.

[17] On February 1, 2013, the Board made an order pursuant to which it directed that Netflix's submissions of January 11, 2013 would not be made part of the record of the proceedings. The

Board so concluded for two reasons. First, since Netflix's submissions were not based on the record as it stood, additional evidence would be required in order to address the points raised by Netflix in its submissions. Second, the issues raised by Netflix had not been raised by any of the parties to the proceedings. In making this determination, the Board pointed out that although Netflix had been aware of the proceedings "for some time", it had chosen not to participate.

[18] However, the Board decided that because of the existence of exceptional circumstances it would allow Netflix to participate in a new process. In its view, as Netflix was a dominant player in its market, it was preferable, notwithstanding the disruption which would ensue, that it be allowed to participate.

[19] As a result, the Board ordered a new process for the filing of submissions concerning the Agreement and the Settlement Tariff. The new process, which the Board restated in orders dated March 8, 2013 and March 26, 2013, would now include Netflix. However, the Board made it clear that parties were expected to address issues which had already been raised, i.e. in effect by SOCAN and the Objectors and that the introduction of new evidence was to be avoided unless that evidence consisted of noncontroversial facts which "shed significant light on the proper course of action" (Board's order of February 1, 2013, page 2).

[20] On April 16, 2013, Netflix provided submissions pursuant to which it objected to the imposition of extra royalties on free trials, arguing that free trials constituted fair dealing under the *Copyright Act* and that the extra free trial royalties violated the principles enunciated by the Supreme Court of Canada.

[21] On May 21, 2013, SOCAN responded to Netflix's submissions arguing that there was no evidence in the record to support Netflix's submissions. None of the Objectors filed submissions.

[22] On June 10, 2013, Netflix sought leave, pursuant to paragraph B of the Board's order of March 26, 2013, to provide limited and targeted information relevant to the free trial issue and to file a reply to SOCAN's submissions.

[23] On June 11, 2013, the Board allowed SOCAN to reply to Netflix's request for leave and allowed Netflix, in turn, to respond to SOCAN's reply.

[24] On June 13, 2013, SOCAN responded to Netflix's submissions. More particularly, it took the position that Netflix should be precluded from making submissions in respect of the Agreement and the Settlement Tariff as it had intentionally chosen not to participate in the proceedings resulting from the Directive. SOCAN's arguments read, in part, as follows:

> SOCAN maintains its objection to Netflix being able to make submissions in respect of the settlement agreement when Netflix intentionally chose not to participate in the Board's proceeding, did not have to answer interrogatories, and now seeks to convince the Board that it is entitled to a preferential deal than the one that was negotiated between SOCAN and the Objectors who did participate.
>
> Netflix' approach threatens to make a mockery of the Board's procedure and will encourage other potential licensees to wait on the sidelines, refuse to participate in the interrogatory process and then attempt to parachute into the proceeding when it suits their purposes. It will also act as a disincentive to parties to negotiate settlements if other users under the same proposed tariff can come forward after the fact and attempt to secure a special tariff rate or structure for themselves on the basis of evidence that was not tested in the context of the interrogatory process.

[25] In the alternative, SOCAN argued that should the Board be disposed to allow Netflix's request of June 10, 2013, it should order Netflix to answer 19 questions which, in its view, were relevant to the issues before the Board. On June 17, 2013, Netflix responded to SOCAN indicating that it was prepared to answer most of the questions posed by SOCAN.

[26] On July 2, 2013, the Board dismissed Netflix's application for leave to introduce new evidence and also dismissed its proposal to provide answers to the questions posed by SOCAN. The Board's reasons are short and read as follows:

> The application to introduce new evidence is denied, for two reasons. First, the proposed rate for free trials, a price in cents, per subscriber, is such that a tariff can be certified without deciding whether free trials are fair dealing. Any free trial that does not require a SOCAN licence will not attract royalties. It is up to a court of law to decide whether a given trial requires a SOCAN licence. Second, even if Netflix could prove that its free trials currently constitute fair dealing for an allowable purpose, it could not prove that all free trials always will constitute fair dealing for the life of the tariff. The Board would still be required to certify a tariff for free trials.
>
> The application to reply is moot to the extent that it concerns fair dealing. As for the rest, the application is granted. Netflix shall file its reply no alter (sic) than **Tuesday, July 9, 2013**.

[27] Netflix's reply, to the extent allowed by the Board, was filed on July 10, 2013.

III. The Board's Decision

[28] On July 18, 2014, the Board rendered its decision. In essence, the Settlement Tariff proposed by the parties to the Agreement was certified by the Board. The Settlement Tariff, as certified, included the provisions for extra royalties for free trials challenged by Netflix.

[29] In brief, the Board's reasons are as follows. First, the Board indicated that it had set out in its decision in *Re:Sound Tariff 5 – Use of Music to Accompany Live Events, 2008-2012* (May 25, 2012) (Copyright Board), para 10 [*Re:Sound 5*] the framework pursuant to which it would certify a tariff based on an agreement and it then stated that in the matter before it there were no *Re:Sound 5* reasons not to certify the Tariff at issue.

[30] The Board then dealt with Netflix's arguments that imposing royalties on free trials violated the Supreme Court's principle of technological neutrality as enunciated in its decision in *Entertainment Software Association v. Society of Composer, Authors and Music Publishers of Canada*, 2012 SCC 34, 2002 2 SCR 231. In the Board's view, there was "no issue with technological neutrality" because there was "no alternative technology equivalent to a Netflix free trial" (paragraph 58 of the Board's Decision).

[31] The Board then went on to reject Netflix's arguments that its free trials constituted "fair dealing" in the same way iTunes free previews were. The Board dealt with this argument as follows at paragraph 60, 61 and 62 of its decision.

> 60. First, the analogy between free previews and free trials is weak. In a free preview, the customer can hear a portion of a musical work in a degraded format. In a free trial, the customer can hear complete musical works, to the extent that such works are fixed in the audiovisual work being watched.
>
> 61. Second, it is not altogether clear that Netflix is the only provider that offers free trials. When the Board was examining the free previews offered by iTunes, it was possible to argue that iTunes was the dominant provider of permanent downloads. Thus, in examining the practices of iTunes, the Board was essentially examining the practices of the permanent-download industry. However, in the case of Netflix, it is not clear that they dominate the market for videos. Without the argument of market dominance, an analysis of Netflix's policy of free trials would necessarily be incomplete with respect to the overall video industry.

> 62. Third, and equally importantly, we do not have the evidentiary base with which to make that decision. While we could delay this decision for several more months during which time we would be collecting evidence from the parties on this issue, the fact that Netflix declined to participate in the process for many months is sufficient reason for us to decline to do so. If Netflix now wants to argue that it does not owe anything for its free trials, the appropriate forum in which to do so is not the Board.
>
> [Emphasis added]

[32] The Board then went on to hold that SOCAN was not required to justify the existence of a minimum fee as, in its view, that justification was obvious. In the Board's words, "if there were no minimum fee, there would be no compensation to rights holders for free trials, regardless of duration" (paragraph 64 of the Board's decision).

[33] Finally, the Board held, at paragraph 65 of its reasons, that even if Netflix was correct in asserting that none of the Objectors offered free trials, that factor was not determinative since neither SOCAN nor Netflix had adduced evidence regarding the fairness of the minimum fee and hence, in the absence of such evidence, it could "only presume that the minimum fee emerging from negotiations among experienced parties is the object of an agreement as much as any other element of this agreement".

IV. Issues

[34] Although the application for judicial review raises a number of issues, I need only address the issue of whether the process pursuant to which the Board certified the Tariff was procedurally fair. In my view, it was not.

V. Analysis

[35] In addressing the issue of procedural fairness, I need not say much regarding the standard of review other than that the standard of correctness is the applicable standard (See *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, paragraph 34 (*"Fitness Industry"*); *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, paragraph 43).

[36] I should point out that there is no disagreement between the parties with respect to this standard.

[37] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court, at paragraph 79 of its reasons, opined that "[p]rocedural fairness is a cornerstone of modern Canadian administrative law". As an administrative body, the Board has a duty to act fairly in coming to decisions that affect persons' rights, privileges and interests. For example in *Fitness Industry*, this Court set aside a decision of the Board because a party was "deprived of a fair hearing because it had no prior notice of the basis of the Board's decision, and thus had no opportunity to make submissions on the appropriateness of the Board's methodology" (paragraph 75).

[38] Administrative decision makers enjoy great latitude in setting their own procedure, including aspects that fall within the scope of procedural fairness such as whether a request for adjournment should be granted, the extent of disclosure by parties, the extent of cross-examination that will be allowed and whether representations by a lawyer should be allowed. "Context and circumstances will dictate the breadth of the decision- maker's discretion on any of

these procedural issues, and whether a breach of the duty of fairness occurred" (*Fitness Industry*, paragraph 37).

[39] Pursuant to section 67.1 of the *Copyright Act*, copyright collective societies, such as SOCAN, have a duty to file on or before March 31 of each year, statements of proposed royalties with the Board which will, in turn, be published in the *Canada Gazette*. Prospective users then have 60 days to object. In the present matter, the Board relied on Netflix's failure to participate in the opposition process and on the delays which would necessarily occur if Netflix were allowed to participate at a late stage of the proceedings, to justify its refusal to allow Netflix to introduce new evidence or make submissions with respect to the fair dealing issue. The Board's decision no doubt affected Netflix's right to be heard, which right encompassed the right to receive prior notice of the Board's decision, to adduce evidence and to make submissions (See Brown and Evans, *Judicial Review of Administrative Action in Canada*, Loose-leaf, Toronto, Carswell 2015, Volume 2, Chapter 10 at 10-1.

[40] SOCAN says that Netflix did not abstain from objecting because the initial proposals contained in the published tariffs "contained nothing objectionable" but rather because Netflix relied on the Objectors to challenge the proposed royalties thereby avoiding the interrogatory process. Whether this be the case or not, SOCAN's assertion cannot, in the circumstances of this case, deny Netflix of its procedural rights with regard to the subject matters which did not appear in the Tariff initially proposed and published in the *Canada Gazette*.

[41] I agree with SOCAN that restricting the right of a party which did not avail itself of its right in a timely fashion does not, *per se*, constitute a breach of the duty of procedural fairness. However, in the present instance Netflix only objects to paragraph 3(b) of the Tariff which deals with royalties for free trial subscriptions, a provision that did not appear in the version of the Tariff that was publicly available during the entirety of the regular objection period.

[42] The question that arises is whether Netflix had a right to be heard with respect to free trial royalties notwithstanding the fact that it did not participate in the initial opposition process. In my opinion, the answer must be in the affirmative. Although Netflix itself did not have this right, the industry affected by the provision at issue enjoyed that right and therefore should have the opportunity to be heard and put its case forward.

[43] Since tariffs certified by the Board are of general application, the interests that must be considered are those of an industry as opposed to those of an individual or an entity. This is a relevant factor that must be taken into account when determining whether a breach of the duty of procedural fairness has occurred.

[44] Another factor that must necessarily be considered is that through section 67.1 of the *Copyright Act* Parliament established an opposition mechanism allowing affected parties to be heard. That right cannot be lost or denied whenever the Board certifies a tariff which contains subject matter that did not appear in the tariff publicly advertised. There can be no doubt that the notice publicly given to the industry by way of the *Canada Gazette* is crucial to the decision to object or not to a proposed tariff.

[45] At paragraph 10 of its decision in *Re:Sound 5*, the Board enunciated the factors which, in its view, ought to be considered before certifying a tariff negotiated by objectors and a collective society:

> [10] Before certifying a tariff based on agreements, it is generally advisable to consider (a) the extent to which the parties to the agreements can represent the interests of all prospective users and (b) whether relevant comments or arguments made by former parties and non-parties have been addressed.

[46] In the present matter, as I indicated earlier, the Board, at paragraph 43 of its decision, referred to its decision in *Re:Sound 5* as providing the framework for determining whether a proposed tariff resulting from an agreement should be certified. As I also indicated earlier, the Board determined, at paragraph 48 of its decision, that there were no *Re:Sound 5* reasons in this case justifying a refusal to certify the proposed Tariff which resulted from the Agreement concluded by SOCAN and the Objectors. In my respectful view, the Board was wrong to come to this conclusion.

[47] First, though the Board appears to have considered the factors which it enumerated in *Re:Sound 5*, it did not, in my view, consider factor (a), i.e. whether the parties to the Agreement represented the interests of prospective users which, in this case, necessarily include Netflix. Elsewhere in its decision the Board recognized that the Objectors, i.e. those who signed the Agreement with SOCAN, did not offer free trials. This, in its view, was not a determinative factor because the proposed Tariff which the parties to the Agreement sought to have certified was, in the Board's words, one that "emerg[ed] from negotiations among experienced parties". It goes without saying that experience is not a substitute criterion to the representativeness of affected interests.

[48] Second, with respect to factor (b) of *Re:Sound 5*, the Board refused to address the substantial and relevant arguments put forward by Netflix, the only non-party to the Agreement that had made comments regarding royalties for free trials of subscription services.

[49] Third, I disagree with the Board's general statement in *Re:Sound 5* that "prospective users who did not file a timely objection no longer have a right to air their views before the Board" (paragraph 10). In normal circumstances, the Board's comment does not pose a problem in that objection processes must have an end to them and hence parties should be diligent in defending their interests. However, where, as here, a settlement agreement deals with subject matter that did not appear in the published proposed royalties and where none of the parties at the negotiating table are adversely affected by the change, as is the case here, it seems to me that procedural fairness requires that a representative member of the affected segment of the industry be given the opportunity, if it so chooses, to make its comments and point of view known and dealt with by the Board.

[50] Fourth, at paragraphs 62 and 65 of its reasons, the Board points out that evidence relevant to some of the determinations that it is being asked to make is not before it. I agree that such evidence was not before the Board but I must point out that such evidence was not before the Board because the Board refused to allow it in.

[51] Consequently, I am of the view that the Board erred in certifying provisions of the Tariff which did not affect any of the negotiating parties. In the circumstances of this case, procedural fairness required the Board to allow Netflix, if found to be a representative member of the

affected industry (there does not appear to be any doubt that Netflix is a representative member of the affected industry), the opportunity to fully make its case, including the possibility of introducing fresh evidence and submitting new arguments on subject matters that were not included in the proposed Tariff published in the *Canada Gazette*. The Board's refusal to allow Netflix to put forward its position constitutes, in my respectful view, a breach of Netflix's procedural right to be heard.

[52] Before concluding, I would simply say that, in the end, rules of procedure are there to serve the interests of justice. In my view, justice in this case required that Netflix be given the opportunity of putting its case forward with regard to the issues of fair dealing and technological neutrality.

VI. Conclusion

[53] I would therefore allow the application for judicial review with costs, I would set aside the Board's decision insofar as it pertains to royalties on free trials and I would return the matter to a differently constituted panel of the Board for redetermination in accordance with these reasons.

"M Nadon"

J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-369-14
(APPLICATION FOR JUDICIAL REVIEW FROM A DECISION OF THE COPYRIGHT BOARD DATED JULY 18, 2014 FOR CERTIFYING SOCAN 22.D.1 TARIFF)	
STYLE OF CAUSE:	NETFLIX, INC. v. SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA, APPLE CANADA, APPLE INC., BCE INC., CANADIAN ASSOCIATION OF BROADCASTERS, CINEPLEX ENTERTAINMENT LP, FACEBOOK INC., ROGERS COMMUNICATION PARTNERSHIP, SHAW COMMUNICATIONS INC., VIDEOTRON G.P., AND YAHOO! CANADA CO.
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	OCTOBER 5, 2015
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	BOIVIN, DE MONTIGNY JJ.A.
DATED:	DECEMBER 17, 2015

APPEARANCES:

David W. Kent Jonathan O'Hara	FOR THE APPLICANT
D. Lynne Watt Matthew Estabrooks	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

McMillan LLP Toronto, Ontario	FOR THE APPLICANT
Gowling Lafleur Henderson LLP Ottawa, Ontario	FOR THE RESPONDENTS