2004 CAF 424, 2004 FCA 424
Federal Court of Appeal

Canadian Private Copying Collective v. Canadian Storage Media Alliance

2004 CarswellNat 4681, 2004 CarswellNat 5345, 2004 CAF 424, 2004 FCA 424, [2004] F.C.J. No. 2115, [2005] 2 F.C.R. 654, 136 A.C.W.S. (3d) 48, 247 D.L.R. (4th) 193, 329 N.R. 101, 36 C.P.R. (4th) 289

Canadian Private Copying Collective, Applicant and Canadian Storage Media Alliance [Sony of Canada Ltd.; Verbatim Corporation; Fuji Photo Film Canada Inc.; Compaq Computer Corporation; Intel Corporation; Maxell Canada Corp.; Thomson Multimedia Ltd.; Imation Canada Inc.; Hewlett Packard (Canada) Ltd.; Apple Canada Inc.; Memorex Canada Ltd.; AVS Technologies Inc.; Dell Computer Corporation; Samsung Electronics Canada Inc.] and Canadian Wireless Telecommunications Association, Cognos Inc., Consumer Electronic Marketers of Canada, Costco Wholesale Canada Ltd.; Intertan, Inc. (d.b.a. RadioShack Canada); London Drugs Limited; Retail Council of Canada; The Business Depot Ltd. (d.b.a. Staples Business Depot); Wal-Mart Canada Corporation; Future Shop Ltd., Hydraulic Design, Vencon Technologies Inc., Mr. Jeremy Hellstrom, Mr. Martin Hemmings, Mr. Brian M. Hunt, Mr. V. Kuz, Mr. Richard C. Pitt, Mr. Tom A. Trottier, Respondents Canadian Broadcasting Corporation, Intervener

Apple Canada Inc., Dell Computer Corporation of Canada, Hewlett Packard (Canada) Co., and Intel Corporation, Applicants and Canadian Private Copying Collective (CPCC), Canadian Wireless Telecommunications Association (CWTA), Cognos Inc., Consumer Electronic Marketers of Canada (CEMC), "Retailers Coalition" (Being Costco Wholesale Canada Ltd.; Intertan, Inc. (D.B.A. Radioshack Canada); London Drugs Limited; Retail Council of Canada; The Business Depot Ltd. (D.B.A. Staples Business Depot); Wal-Mart Canada Corp.; Future Shop Ltd), Hydraulic Design, Vencon Technologies Inc., Mr. Jeremy Hellstrom, Mr. Martin Hemmings, Mr. Brian M. Hunt, Mr. V. Kuz, Mr. Richard C. Pitt, and Mr. Tom A. Trottier, Respondents The Copyright Board, Intervener

Retail Council of Canada, Wal-Mart Canada, The Business Depot Ltd. (Staples Business Depot), London Drugs Limited, Intertan Inc. (Radioshack Canada), Future Shop Ltd. and Costco Wholesale Canada Ltd. (the "retailers"), Applicants and Canadian Private Copying Collective ("CPCC") and Canadian Storage Media Alliance, Canadian Wireless Telecommunications Association, Cognos Inc., Consumer Electronic Marketers of Canada, Hydraulic Design, Vencon Technologies Inc., Jeremy Hellstrom, Martin Hemmings, Brian M. Hunt, V. Kuz, Richard C. Pitt, Tom A. Trottier, Respondents

Evans J.A., Linden J.A., Noël J.A.

Heard: October 12-13, 2004
Judgment: December 14, 2004
Docket: A-9-04, A-10-04, A-11-04

Counsel: Mr. David Collier, for Canadian Private Copying Collective
Mr. J. Aidan O'Neill, for Canadian Broadcasting Corporation
Mr. Howard P. Knopf, Mr. John Macera, for Retail Council of Canada
Mr. Randall J. Hofley, Mr. Nicholas McHaffie, for Canadian Storage Media Alliance
Mr. Mario Bouchard, for Copyright Board of Canada

Subject: Intellectual Property; Property; Public

Related Abridgment Classifications

Administrative law

IV Standard of review
IV.2 Correctness

Intellectual property

I Copyright
I.2 Copyright legislation
I.2.b Federal statutes

Intellectual property

I Copyright
I.16 Copyright Board
I.16.b Jurisdiction

Intellectual property

I Copyright
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I.16.d Judicial review of decisions

Headnote

Intellectual property --- Copyright — Copyright legislation — Federal statutes

Constitutional issues — Private copying levy — Copyright Board of Canada certified tariff pursuant to Part VIII of Copyright Act imposing levies on copying recorded music for private use — Board ruled that Part VIII of Act is constitutionally valid as federal copyright law that imposed regulatory charge and that levy does not constitute tax — Coalition of retailers of blank media brought application for judicial review challenging decision on constitutional validity of Part VIII — Application dismissed — Pith and substance of Part VIII is copyright law which is matter within competence of federal Parliament under s. 91 para. 23 of Constitution Act, 1867 — Federal legislative scheme establishes legal framework rewarding rights holders for reproduction of recorded music by third parties — Private copying levy is validly enacted regulatory charge and not tax in constitutional sense — Levy is necessarily incidental to detailed regulatory scheme within federal head of jurisdiction.

Intellectual property --- Copyright — Copyright Board — Jurisdiction

Copyright Board of Canada certified tariff pursuant to Part VIII of Copyright Act imposing levies on copying recorded music for private use — Tariff allowed levy to be imposed on audiocassettes, MiniDiscs, recordable compact discs (CD-Rs), rewritable compact discs (CD-RWs), recordable audio compact discs (Audio CD-Rs) and rewritable audio compact discs (Audio CD-RWs) — Board ruled that recordable or rewritable DVDs, removable memory cards and removable micro hard drives are not subject to private copying levies, but that memories embedded in digital audio recorders (MP3 players and similar devices) are subject to levies — Board ruled that there was no legal basis for copyright collective's zero-rating program that exempted certain groups of purchasers from paying levy and that its impact ought not to be recognized in setting levy — Collective applied for judicial review of ruling on zero-rating program — Alliance of major manufacturers and importers applied for judicial review of ruling that memory embedded in MP3 players is leviable under Part VIII — Collective's application dismissed — Alliance's application granted — Zero-rating program has no statutory underpinning — Part VIII provides for exemptions to levy, but does not give board or collective authority to create exemptions — Part VIII does not provide authority for certifying levy on permanently embedded or nonremovable memory incorporated into digital audio recorder — It was for Parliament to decide whether digital audio recorders were to be brought within class of items subject to levy.

Intellectual property --- Copyright — Copyright Board — Judicial review of decisions

Standard of review — Copyright Board of Canada certified tariff pursuant to Part VIII of Copyright Act imposing levies on copying recorded music for private use — Board ruled that Part VIII of Act is constitutionally valid as federal copyright law that imposed regulatory charge and that levy does not constitute tax — Board ruled that recordable or rewritable DVDs, removable memory cards and removable micro hard drives are not subject to private copying levies, but that memories embedded in digital audio recorders (MP3 players and similar devices) are subject to levies — Board ruled that there was no legal basis for copyright collective's zero-rating program that exempted certain groups of purchasers from paying levy and that its impact ought not to be recognized in setting levy — Coalition of retailers of blank media brought application for judicial review of ruling on constitutional validity of Part VIII — Collective applied for judicial review of ruling on zero-rating program — Alliance of major manufacturers and importers applied for judicial review of ruling that memory embedded in MP3 players is leviable under Part VIII — Coalition and collective's applications dismissed — Alliance's application granted — "Correctness" is standard of review of board's decision that Part VIII of Act is constitutionally valid and that private copying levy is validly enacted regulatory charge and not tax — Board's decision on constitutionality satisfied standard — "Unreasonableness simpliciter" is standard of review of board's decision that implementation of zero-rating program could not have been intended by Parliament — Board's decision on program satisfied standard — "Correctness" is standard of review of board's interpretation of definitions in s. 79 of Act — Board erred in ruling that it can certify levy on permanently embedded or nonremovable memory incorporated into digital audio recorder (MP3 player) — No such authority is given in Part VIII of the Act and definition of "audio recording medium" in s. 79 of the Act.

Pursuant to Part VIII of the Copyright Act, the Copyright Board of Canada certified tariffs imposing levies on copying recorded music for private use. The board designated CPCC to collect and distribute levies to collective rights organizations representing authors, performers and makers of recorded music. CPCC sought to impose levies on recording media used to copy music such as recordable or rewritable digital versatile disks (DVDs), removable electronic memory cards and non-removable memory permanently embedded in digital audio recorders (MP3 players and similar devices.) The tariff certified by the board allowed a levy to be imposed on audiocassettes, MiniDiscs, recordable compact discs (CD-Rs), rewritable compact discs (CD-RWs), recordable audiocompact discs (Audio CD-Rs) and rewritable audio compact discs (Audio CD-RWs). The board ruled that recordable or rewritable DVDs, removable memory cards and removable micro hard drives are not subject to private copying levies, but that the memories embedded in digital audio recorders are subject to the levies.

The board ruled that there was no legal basis for the CPCC "zero-rating program" that exempted certain groups of purchasers from paying the levy. The program was initiated by CPCC on a voluntary basis. It allowed certain users who did not private copy to purchase blank media levy-free from authorized manufacturers, importers and distributors. Users registered with the CPCC and obtained a certificate allowing levy-free purchases from authorized manufacturers, importers and distributors. Users undertook to not sell or dispose of the levy-free blank media to any other person and to not use the media for personal use or to copy music without authorization. Manufacturers, importers and distributors wishing to sell levy-free registered with the CPCC and signed agreements to sell levy-free to certificate-bearing users. Authorized manufacturers, importers and distributors reported their levy-free sales to CPCC and were subject to audit. Contracting parties paid an annual fee to offset the administration costs of the program.

The board ruled that Part VIII of the Act is constitutionally valid as federal copyright law that imposed a regulatory charge and that the levy does not constitute a tax.

A coalition of retailers of blank media challenged the constitutional validity of Part VIII, but supported the board's ruling that the zero-rating program is without legal basis. CPCC challenged the illegality ruling on the zero-rating

program. An alliance of major manufacturers and importers of blank media supported the zero-rating ruling, but challenged the ruling that the memory embedded in MP3 players is leviable under Part VIII.

Three applications for judicial review were brought. One application was a constitutional attack on Part VIII. The second was an attempt to uphold the zero-rating program. The third was an attack on the ruling that Part VIII extended to the memory embedded in MP3 players.

Held: The applications regarding Part VIII of the Act and the zero-rating program were dismissed; the application regarding imposing a levy on memory embedded in MP3 players was granted.

"Correctness" is the standard of review of the board's decision that Part VIII of the Act is constitutionally valid and that the private copying levy is a validly enacted regulatory charge and not a tax. The pith and substance of Part VIII of the Act is copyright law, a matter within the competence of Parliament pursuant to s. 91 para. 23 of the Constitution Act, 1867. The federal legislative scheme establishes a legal framework rewarding rightsholders for the reproduction of recorded music by third parties. Part VIII achieves this by legalizing private copying by a class of users while providing that rightsholders are compensated for the expropriation of their exclusive rights. The levy supported creators and cultural industries by balancing the rights of creators and users.

The private copying levy is a validly enacted regulatory charge and not a tax in the constitutional sense. The four traditional indicia of a tax were present: (1) enforceable by law, (2) imposed pursuant to the authority of Parliament, (3) levied by a public body, and (4) imposed for a public purpose. However, the levy is better described as a regulatory charge because it is necessarily incidental to a detailed regulatory scheme within a federal head of jurisdiction. Part VIII implements a complex and detailed regulatory scheme. It has: (1) a complete and detailed code of regulation, (2) a specific regulatory purpose which seeks to affect the behaviour of individuals, (3) an actual or properly estimated cost of the regulation, and (4) a relationship between the regulation and the person being regulated where the person being regulated either causes the need for the regulation or benefits from it.

The board, a public authority, has jurisdiction to determine the levies and their related terms and conditions. In setting the levy the board correlated the extent of private copying using the blank media and the levies certified with respect to such media. Making blank media available to consumers promoted consumer copying and caused the need for Parliament to implement Part VIII. Part VIII affects the behaviour of individuals because it encourages creation by compensating rightsholders for their creation in circumstances where they previously were not compensated. Viewed from its purpose and its legal effects, every aspect of the regime is tightly linked to Parliament's goal to compensate rightsholders in respect of the reproduction of music for private use.

"Unreasonableness simpliciter" is the standard of review of the board's decision that the implementation of the zero-rating program could not have been intended by Parliament. The board relied on its considerable rate-setting expertise in assessing the impact of the program and reaching its conclusion. The board did not err when ruling that the zero-rating program has no statutory underpinning and that its impact ought not to be recognized in setting the levy. Part VIII provides for an exemption to the levy for manufacturers or importers where the blank medium is exported from Canada. It provides another exemption to manufacturers or importers selling or disposing of a blank medium to a society, association or corporation representing persons with a perceptual disability. Lastly, it provides an exemption where the Cabinet exempts certain media. Part VIII does not give the board or a collective the authority to create exemptions. The board did not err when ruling that it would no longer compensate the CPCC for the impact of the program on its revenues because that would in effect provide for an exemption from the scheme contrary to Parliament's intention. The board's decision was linked to its rate-setting function. Any impact which it might have on contractual rights was a necessary incident of the exercise of its jurisdiction.

"Correctness" is the standard of review of the board's interpretation of the definitions in s. 79 of the Act. The board erred when it ruled that it could certify a levy on a permanently embedded or nonremovable memory incorporated into a digital audio recorder (MP3 player). No such authority is given in Part VIII of the Act and the definition of "audio recording medium" in s. 79 of the Act. Part VIII does not provide authority for certifying a levy on such devices or the memory embedded therein. It was for Parliament to decide whether digital audio recorders such as MP3 players were to be brought within the class of items that can be levied under Part VIII.

Table of Authorities

Cases considered by *Noël J.A.*:

Australian Tape Manufacturers Association Ltd. v. Commonwealth (1993), 176 C.L.R. 480, 67 A.L.J.R. 315, 112 A.L.R. 53, 25 I.P.R. 1, [1993] A.I.P.C. 39,181 (Australia H.C.) — considered

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — referred to

Bishop v. Stevens (1990), 72 D.L.R. (4th) 97, [1990] 2 S.C.R. 467, 31 C.P.R. (3d) 394, 111 N.R. 376, 1990 CarswellNat 738, 1990 CarswellNat 1028 (S.C.C.) — considered

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — referred to

Canada (Procureure générale) c. Hydro-Québec (1997), 1997 CarswellQue 849, (sub nom. *R v. Hydro-Québec*) 118 C.C.C. (3d) 97, (sub nom. *R. v. Hydro-Québec*) 151 D.L.R. (4th) 32, 9 C.R. (5th) 157, (sub nom. *R. v. Hydro-Québec*) 217 N.R. 241, (sub nom. *R. v. Hydro-Québec*) [1997] 3 S.C.R. 213, 24 C.E.L.R. (N.S.) 167, 1997 CarswellQue 3705 (S.C.C.) — referred to

City National Leasing Ltd. v. General Motors of Canada Ltd. (1989), 93 N.R. 326, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255, 32 O.A.C. 332, 43 B.L.R. 225, 24 C.P.R. (3d) 417, 68 O.R. (2d) 512 (note), 1989 CarswellOnt 956, 1989 CarswellOnt 125 (S.C.C.) — referred to

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Eurig Estate, Re (1998), 1998 CarswellOnt 3950, 1998 CarswellOnt 3951, 40 O.R. (3d) 160 (headnote only), (sub nom. *Eurig Estate v. Ontario Court (General Division), Registrar)* 231 N.R. 55, 23 E.T.R. (2d) 1, 165 D.L.R. (4th) 1, (sub nom. *Eurig Estate v. Ontario Court (General Division), Registrar)* 114 O.A.C. 55, [1998] 2 S.C.R. 565, [2000] 1 C.T.C. 284 (S.C.C.) — followed

Friesen v. R. (1995), 95 D.T.C. 5551, (sub nom. *Friesen v. Minister of National Revenue)* 186 N.R. 243, (sub nom. *Friesen v. Minister of National Revenue)* 102 F.T.R. 238 (note), (sub nom. *Friesen v. Canada)* [1995] 2 C.T.C. 369, (sub nom. *Friesen v. Canada)* 127 D.L.R. (4th) 193, 1995 CarswellNat 988, [1995] 3 S.C.R. 103, 1995 CarswellNat 422 (S.C.C.) — referred to

FWS Joint Sports Claimants v. Canada (Copyright Board) (1991), 81 D.L.R. (4th) 412, 129 N.R. 289, 36 C.P.R. (3d) 483, 4 T.C.T. 6192, 1991 CarswellNat 157, 1991 CarswellNat 157F, [1992] 1 F.C. 487 (Fed. C.A.) — considered

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Global Securities Corp. v. British Columbia (Securities Commission) (2000), 2000 SCC 21, 2000 CarswellBC 751, 2000 CarswellBC 752, [2000] 5 W.W.R. 1, 74 B.C.L.R. (3d) 1, 185 D.L.R. (4th) 439, [2000] 1 S.C.R. 494, 134 B.C.A.C. 207, 219 W.A.C. 207 (S.C.C.) — referred to

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Lawson v. British Columbia (Interior Tree Fruit & Vegetable Committee of Direction) (1930), [1931] S.C.R. 357, [1931] 2 D.L.R. 193, 1930 CarswellBC 129 (S.C.C.) — followed

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Royal Bank v. Sparrow Electric Corp. (1997), 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 46 Alta. L.R. (3d) 87, 208 N.R. 161, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411, (sub nom. *R. v. Royal Bank*) 97 D.T.C. 5089, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113 (S.C.C.) — referred to

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Thibaudeau v. R. (1995), (sub nom. *R. v. Thibaudeau*) 95 D.T.C. 5273, 12 R.F.L. (4th) 1, (sub nom. *Thibaudeau v. Canada*) [1995] 1 C.T.C. 382, (sub nom. *Thibaudeau v. Canada*) 124 D.L.R. (4th) 449, (sub nom. *Thibaudeau v. Canada*) [1995] 2 S.C.R. 627, (sub nom. *Thibaudeau v. Minister of National Revenue*) 182 N.R. 1, (sub nom. *Thibaudeau v. Canada*) 29 C.R.R. (2d) 1, 1995 CarswellNat 281, 1995 CarswellNat 704 (S.C.C.) — referred to

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Trans Mountain Pipe Line Co. v. Canada (National Energy Board) (1979), [1979] 2 F.C. 118, 29 N.R. 44, 1979 CarswellNat 28, 1979 CarswellNat 28F (Fed. C.A.) — considered

Westbank First Nation v. British Columbia Hydro & Power Authority (1999), 1999 CarswellBC 1929, 1999 CarswellBC 2092, [1999] 9 W.W.R. 517, 176 D.L.R. (4th) 276, 67 B.C.L.R. (3d) 1, 246 N.R. 201, [1999] 3 S.C.R. 134 (S.C.C.) — followed

Statutes considered:

Canada Corporations Act, R.S.C. 1970, c. C-32
Pt. II — referred to

Code de procédure civile, L.R.Q., c. C-25
art. 468 — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
s. 53 — considered

s. 54 — referred to

s. 91(23) — referred to

s. 125 — referred to

Copyright Act, R.S.C. 1985, c. C-42
Generally — referred to

Pt. VIII — considered

s. 79 — considered

s. 79 "audio recording medium" — referred to

s. 79 "blank audio recording medium" — referred to

s. 79 "collecting body" — referred to

s. 79 "eligible author" — referred to

s. 79 "eligible maker" — referred to

s. 79 "eligible performer" — referred to

s. 80 — referred to

s. 81 — referred to

s. 82 — referred to

s. 82(1) — referred to

s. 82(1)(a) — referred to

s. 82(2) — referred to

s. 83 — referred to

s. 83(6) — referred to

s. 83(8) — considered

s. 83(8)(a)(ii) — referred to

s. 83(8)(c) — referred to

s. 83(9) — considered

s. 84 — referred to

s. 85 — referred to

s. 86 — referred to

s. 86(1) — referred to

s. 87 — referred to

s. 87(a) — referred to

s. 87(b) — referred to

s. 88 — referred to

National Transportation Act, R.S.C. 1985, c. N-20
s. 61 — referred to

Words and phrases considered

AUDIO RECORDING MEDIUM

[Per Noël J.A. (Linden and Evans JJ.A. concuring):] The Board [Copyright Board of Canada] acknowledges that, when it enacted Part VIII [*Copyright Act,* R.S.C. 1985, c. C-42], Parliament could not have envisioned recent technological developments [. . .]. Indeed, the legislative history of Bill C-32, which amended the Act to include Part VIII, shows that at the time, Parliament was looking at blank audio tapes as the cause of the harm to rightsholders and had been made aware of proposals in other countries (including the U.S.) to extend the levy to the hardware which recorded and played these blank audio tapes. Nevertheless, Parliament chose to limit the levy to blank medium (House of Commons, 35th Parl., 2nd Session, Standing Committee on Canadian Heritage, Meeting No. 24, October 9, 1996 at 2150, Application Record, Vol. III, Tab 5-B-13, pp. 651-662; House of Commons, 35th Parl., 2nd Session, Standing Committee on Canadian Heritage, see also Meeting No. 36, November 6, 1996 at 2035, where the Société Professionelle des Auteurs et des Compositeurs du Québec submitted as a flaw that "Bill C-32 makes no provision for the payment of levies by manufacturers of recorders," Application Record, Vol. III, Tab 5-B-15, p. 682; House of Commons, 35th Parl., 2nd Session, Standing Committee on Canadian Heritage, Meeting No. 27, October 22, 1996 at 1925 (B. Andriessen), Application Record, Vol. III, Tab 5-B-14, pp. 663-674; House of Commons, 35th Parl., 2nd Session, Second Report of the Standing Committee on Canadian Heritage, December 1996, Application Record, Vol. III, Tab 5-B-16, pp. 698-717).

This shows that Parliament's definition of "audio recording medium" [s. 79] stands in contra-distinction with a recorder or similar devices as these were known to exist at the time and whose function it is to record and play blank audio tapes. No one has ever pretended that tape recorders came within the ambit of the definition.

A digital audio recorder is not a medium [. . .]. The Board erred when it held that it could certify a levy on the memory integrated into a digital audio recorder.

CANADIAN PRIVATE COPYING COLLECTIVE

[Per Noël J.A. (Linden and Evans JJ.A. concuring):] CPCC [Canadian Private Copying Collective] is the "collecting body" designated by the Board under the Act [*Copyright Act,* R.S.C. 1985, c. C-42] to collect and distribute the levies to rightsholders. Manufacturers and importers of blank media sold in Canada must pay the levy to the CPCC. The collecting body must distribute the levy to the collective societies that represent the above-mentioned categories of rightsholders [eligible authors, performers and makers of recorded music] in the proportion determined by the Board.

[. . .]

The CPCC is a non-share, non-profit corporation established under Part II of the Canada Corporations Act [R.S.C. 1970, c. C-32]. Its members are collective societies that hold private copying remuneration rights on behalf of rightsholders. As noted, it is the collecting body designated by the Board under the Act.

COPYRIGHT BOARD OF CANADA

[Per Noël J.A. (Linden and Evans JJ.A. concuring):] The Board [Copyright Board of Canada] is an administrative tribunal created by the Copyright Act, R.S.C. 1985, c. C-42, (the Act). Among other things, the Board is responsible for the adoption of levies and their related terms and conditions in respect of the private copying of recorded musical works, performances and sound recordings (recorded music) on blank audio recording media (blank media or medium) that are sold or otherwise disposed of in Canada.

ZERO-RATING PROGRAM

[Per Noël J.A. (Linden and Evans JJ.A. concuring):] In addition to establishing the private copying levies for 2003-2004, the Board [Copyright Board of Canada] also held that the so-called "zero-rating program" operated by the CPCC [Canadian Private Copying Collective] had no legal basis. The zero-rating program consists of a scheme operated by the CPCC since 1999, pursuant to which certain groups of purchasers are not required to pay the levy authorized by the Board.

[. . .]

The zero-rating program was initiated by the CPCC on a voluntary basis. It allows certain users who do not private copy to purchase blank media levy-free from authorized manufacturers, importers and distributors. The program initially applied to four media formats: audiocassettes, MiniDiscs, Audio CD-Rs and Audio CD-RWs. It was subsequently expanded by the CPCC to include CD-Rs and CD-RWs. [. . .]

Under the CPCC's zero-rating program, users wishing to buy blank media levy-free must first register with the CPCC and obtain a certificate number allowing them to purchase media from authorized manufacturers, importers and distributors. In their agreements with the CPCC, users undertake not to sell or dispose of the blank media they acquire levy free to any other person, and not to use the media for personal use or to copy music without authorization.

Manufacturers, importers and distributors who wish to sell levy-free are also required to register with the CPCC and sign agreements. They may only sell levy-free to users holding a certificate from the CPCC. Authorized manufacturers, importers, and distributors must report their levy-free sales to the CPCC and are subject to audit. Retailers are not allowed to participate in the program.

[. . .]

The certified buyers who can purchase blank media levy-free from authorized participants are institutions and entities who duplicate audio and data for business rather than personal use. Included within this class of users are educational institutions, broadcasters, law enforcement agencies, advertising agencies, the music, film and video industries, courts, tribunals and court reporters, religious organizations, telemarketing firms, software companies, duplication facilities, medical institutions, technology companies, conference and training companies, and government.

APPLICATIONS for judicial review of decisions of Copyright Board of Canada that Part VIII of *Copyright Act* is constitutionally valid as federal copyright law that imposed regulatory charge and that levies on copying recorded music for private use do not constitute tax; that zero-rating program exempting certain groups of purchasers from levy was without basis in law; and that memories embedded in digital audio recorders (MP3 players and similar devices) are subject to levies.

***Noël J.A.*:**

1 These are three applications for judicial review of a decision of the Copyright Board of Canada (Board) which established the private copying levies to be collected by the Canadian Private Copying Collective (CPCC) for the years 2003 and 2004. The applications were joined and heard together by order of the Court.

Background

2 The Board is an administrative tribunal created by the Copyright Act, R.S.C. 1985, c. C-42, (the Act). Among other things, the Board is responsible for the adoption of levies and their related terms and conditions in respect of the private copying of recorded musical works, performances and sound recordings (recorded music) on blank audio recording media (blank media or medium) that are sold or otherwise disposed of in Canada.

3 Part VIII of the Act legalizes copying recorded music for private use and thus provides a statutory exception to the exclusive reproduction rights of eligible authors, performers and makers of recorded music (rightsholders). At the same time, it entitles rightsholders to compensation for their loss of exclusivity by imposing a levy on media used to record music. For ease of reference, Part VIII is reproduced in full as Appendix 1 to these reasons.

4 Since the coming into force of Part VIII in March of 1998, the Board has certified three private copying tariffs, and one interim tariff. In 1999, the Board issued its first decision regarding the tariff for private copying levies (Private Copying I) and, in 2001, issued its second decision (Private Copying II). In 2002, the Board, on application, reconsidered its second decision on the ground that a material change had occurred in the rapidly evolving market for blank media, and amended the tariff accordingly. The present applications are directed against the latest decision dealing with private copying which was rendered on December 12, 2003 (Private Copying III).

5 CPCC is the "collecting body" designated by the Board under the Act to collect and distribute the levies to rightsholders. Manufacturers and importers of blank media sold in Canada must pay the levy to the CPCC. The collecting body must distribute the levy to the collective societies that represent the above-mentioned categories of rightsholders in the proportion determined by the Board.

6 Although manufacturers and importers are charged with the payment of the levy under the Act, they do not necessarily assume its cost. In the normal course, manufacturers and importers will include the amount of the levy in their sale price to purchasers, with the result that consumers usually bear the cost of the levy.

7 The Act authorizes the CPCC to file a proposed tariff with the Board for the benefit of rightsholders. After considering the proposed tariff and any objection to it, the Board must certify a tariff it determines to be fair and equitable.

8 In its proposed tariff for 2003-2004, the CPCC asked that levies be imposed for the first time on several new types of recording media used to copy music such as recordable or rewritable "digital versatile disks" (DVDs), removable electronic memory cards, and non-removable memory permanently embedded in "digital audio recorders", a term used by the Board to identify MP3 players and similar devices.

9 In the decision under review, the Board maintained the status quo for the levy rates applicable to audiocassettes, MiniDiscs, recordable compact discs (CD-Rs), rewritable compact discs (CD-RWs), recordable audio compact discs (Audio CD-Rs) and rewritable audio compact discs (Audio CD-RWs). The Board held that recordable or rewritable DVDs and removable electronic memory cards were not to be subject to private copying levies. However, it held that the memories embedded in digital audio recorders were.

10 The levy rates certified by the Board were lower than those requested by the CPCC, except with respect to the $2 levy set by the Board on digital audio recorders. The CPCC had asked for a levy of 2.1 cents per megabyte for MP3 players with a storage capacity of less than 1 GB, which would have translated into levies of 67 cents and $1.34 respectively.

11 In addition to establishing the private copying levies for 2003-2004, the Board also held that the so-called "zero-rating program" operated by the CPCC had no legal basis. The zero-rating program consists of a scheme operated by the CPCC since 1999, pursuant to which certain groups of purchasers are not required to pay the levy authorized by the Board.

12 The Board also upheld the constitutional validity of Part VIII as a federal copyright law that imposes a regulatory charge and therefore does not constitute a tax.

The Litigants

13 The CPCC is a non-share, non-profit corporation established under Part II of the Canada Corporations Act. Its members are collective societies that hold private copying remuneration rights on behalf of rightsholders. As noted, it is the collecting body designated by the Board under the Act.

14 The CPCC challenges the decision of the Board insofar as it held that the zero-rating program is illegal. The Canadian Broadcasting Corporation, as intervener, agrees with the position of the CPCC in this respect and submits that it should be entitled to continue to purchase blank media levy free under the program. The CPCC supports the decision of the Board in the other two applications.

15 The "retailers", as they are referred to in the Board's decision, consist of a coalition of retailers of blank media represented by the "Retailers Coalition" who claim to sell about 75% of the blank media in Canada. The retailers challenge the decision of the Board insofar as it upheld the constitutional validity of Part VIII, but support the Board's ruling that the zero-rating program is illegal. Unlike to the other main participants, they did not participate in Private Copying I or II.

16 The Canadian Storage Media Alliance (CSMA) represents the major manufacturers and importers of blank media. The CSMA supports the decision of the Board as to zero-rating. However, it challenges the Board's ruling that the memory embedded in MP3 players is leviable under Part VIII and its imposition of a levy thereon in an amount greater than that proposed by the CCPC. The Board was granted leave to intervene on this last point. The retailers' involvement in this application essentially amounts to an endorsement of CSMA's position.

Order of Disposition

17 These reasons first address the more general issue raised by the retailers' constitutional attack on Part VIII (A-11-04). CPCC's attempt to uphold the zero-rating program will then be addressed (A-9-04), followed by the more specific questions raised by the CSMA in A-10-04 as to whether Part VIII extends to the memory embedded in MP3 players and whether the rate set by the Board in this respect was in breach of the ultra petita principle or was otherwise unfair.

Application A-11-04- The Constitutional Issue

18 The retailers argue that Part VIII of the Act is not, in pith and substance, copyright law. In the alternative, they assert that the levy scheme established by Part VIII gives rise to a tax and, as such, is unconstitutional by virtue of section 53 of the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 53, as amended (the Constitution Act, 1867).

19 Section 53 of the Constitution Act, 1867 provides that "Bills for appropriating any part of the public revenue, or for imposing any tax or import, shall originate in the House of Commons." Although Part VIII was introduced in the House of Commons, it is common ground that it was not treated as a tax and was not introduced by a ways and means motion (see section 54 of the Constitution Act, 1867 which requires that so called "money bills" be preceded by a "Message of the Governor General" recommending their passage).

20 Lastly, the retailers argue that if the levy scheme does not give rise to a tax, it is ultra vires the authority of Parliament because it is excessively broad and vague, and not sufficiently connected to copyright law or any other matter within federal jurisdiction.

The Decision of the Board

21 The Board identified two questions that go to the constitutional validity of the levy: is Part VIII copyright law in pith and substance and, if so, is the private copying levy a tax in the constitutional sense?

22 With respect to the latter, the Board referred to its reasons in Private Copying I, where it held (p. 17):

> The private copying levy is not a tax, but a compulsory charge, imposed pursuant to a regulatory scheme related to copyright. It is meant to provide for a payment, in lieu of a royalty, as compensation for the copying of copyrighted works as a result of the legalization of private copying of recorded musical works.

23 In reaching this conclusion, the Board adopted the approach set out by the Supreme Court of Canada in *Westbank First Nation v. British Columbia Hydro & Power Authority*, [1999] 3 S.C.R. 134 (S.C.C.). After applying the five indicia adopted by the Supreme Court in that case, the Board concluded that the levy was not a tax but a regulatory charge.

24 In Private Copying III, the Board reiterated the reasoning advanced in Private Copying I in response to the constitutional attack made at that time. It did so on the basis that nothing material had been brought forth by the retailers to warrant a change in the Board's earlier analysis of the issue.

25 The Board further added that the question of nomenclature should be addressed. The Board rejected the retailers' argument that the overlap in the translation of "levy" and "redevance" involved the word "tax" because it would attach too much importance to mere labels. The Board preferred to ask whether the regime was, by design or in practice, a tax or a type of regulatory charge.

26 The Board also stated that it remained of the view (expressed in Private Copying I) that the levies were not imposed by a public body, since the Board can neither set the tariff process in motion nor collect any amounts owing. Finally, the Board concluded that, although the Act was enacted at least in part to benefit the Canadian public, it was inaccurate to say the levies are for a public purpose.

27 With respect to the first constitutional question (i.e., whether Part VIII is copyright law), the Board reiterated the view which it had expressed in Private Copying I that the pith and substance of Part VIII is copyright law.

28 In order to determine the pith and substance of Part VIII, two aspects of the legislation must be examined: the purpose of the legislation and its legal effects. Part VIII was enacted to address the practical inability of rightsholders to enforce their reproduction rights in the context of mass infringement resulting from the accelerating access to blank media. This, according to the Board, goes to the "mischief" which Part VIII sought to address.

29 The effects of the legislation address this mischief: consumers who indulge in private copying now do so legally and rightsholders are remunerated. The Board went on to conclude that Part VIII is a valid exercise of Parliament's jurisdiction over copyright law.

Analysis

30 The issues to be decided are as follows:

1. Was the Board correct in ruling that the private copying levy is a validly enacted regulatory charge and not a tax in the constitutional sense?

2. Was the Board correct in ruling that Part VIII of the Act is constitutionally valid because, in pith and substance, it falls within Parliament's exclusive legislative authority over "copyrights"?

31 Since these are questions of constitutional law, the Board's decision must be assessed against a standard of correctness.

The Pith and Substance Issue

32 The argument that Part VIII of the Act is not in pith and substance copyright law can be disposed of fairly quickly. The essential element of the federal legislative competence over copyright, which is enumerated at section 91(23) of the Constitution Act, 1867, involves the establishment of a legal framework allowing rightsholders to be rewarded for the reproduction of recorded music by third parties. That is precisely what Part VIII achieves. It legalizes private copying by a class of users while providing that rightsholders are compensated for the expropriation of their exclusive rights.

33 In order for federal legislation to be constitutionally valid, the essential character or dominant purpose of the legislation - its pith and substance - must concern a matter that falls within the exclusive constitutional power of Parliament. Federal legislation which meets this test will be upheld as constitutionally valid, even if it has incidental effects on matters falling outside Parliament's constitutional competence (typically property and civil rights within the Province).

34 The Supreme Court has refined the pith and substance doctrine for determining whether a particular provision in a federal statute is constitutionally valid (see *City National Leasing Ltd. v. General Motors of Canada Ltd.*, [1989] 1 S.C.R. 641 (S.C.C.) as applied in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494 (S.C.C.)). The determination involves three basic questions:

1. Does the pith and substance of the provision concern a matter that falls within the competence of Parliament?

2. If the provision intrudes upon the powers of the provincial legislatures, is it part of a valid federal legislative scheme?

3. If it is part of a valid legislative scheme, is it sufficiently integrated into the legislative scheme and important to insure its efficacy?

35 The retailers do not take issue with the legal approach used by the Board in reaching the conclusion that Part VIII is in pith and substance copyright law. Rather, they reiterate the argument that the levy scheme is not connected to "sound copyright law principles" and is thus not connected to copyright law.

36 The argument essentially boils down to this. While Part VIII legalizes private copying and provides a practical means for rewarding rightsholders, the price of doing so is arguably borne, in part, by persons who do not private copy.

37 The Board acknowledges as much in its reasons. However, the pith and substance analysis requires that, viewed from its purpose and its legal effects, every aspect of the regime must be tightly linked to Parliament's goal to compensate rightsholders in respect of the reproduction of music for private use. In my view, all the provisions of Part VIII are so linked.

38 The retailers have been unable to point to any provision in Part VIII that is extraneous to that goal. I can detect no error in the Board's conclusion that Part VIII is in pith and substance copyright law.

Tax v. Regulatory Levy

39 The analysis must begin with the five criteria set out by the Supreme Court in Westbank which, if they are all found to exist, will generally indicate the presence of a tax. The first four criteria reflect the traditional hallmarks of a tax as these were identified by the Supreme Court some seventy years ago in *Lawson v. British Columbia (Interior Tree Fruit & Vegetable Committee of Direction)* (1930), [1931] S.C.R. 357 (S.C.C.). It was there noted (pp. 362-63), that a tax will usually be: (1) enforceable by law, (2) imposed pursuant to the authority of Parliament, (3) levied by a public body, and (4) imposed for a public purpose. Still today, it is difficult to conceive of a tax in the absence of these four basic elements.

40 The fifth criterion originates from a series of cases leading to the decision of the Supreme Court in *Eurig Estate, Re*, [1998] 2 S.C.R. 565 (S.C.C.). In that case, Major J., writing for the majority, noted (para. 21): "another factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided." The Supreme Court in Westbank described this "nexus" as "another possible factor to consider" when attempting to distinguish a tax from a user fee (para. 22). It held that user fees were "a subset of "regulatory charges"" (idem).

41 This last criterion is conceptually distinct from the other four since it is derived from Canada's particular constitutional make-up. Speaking for a unanimous Court in Westbank, Gonthier J. said with respect to this indicium (para. 2):

> The proper approach to characterizing a governmental levy has been considered on numerous occasions by this Court in various contexts. The characterization is relevant when determining the constitutionality of a provincial levy that has indirect tendencies, for if it is a regulatory charge, or otherwise is a component of a regulatory scheme, then the provinces are constitutionally competent to impose such a charge. It is equally relevant when considering s. 53 of the Constitution Act, 1867, because if the levy is a tax, then it must be imposed by the legislature. And, as I discuss below, if the levy is characterized as a tax, then it is constitutionally inapplicable to the other level of government.

42 After setting out the constitutional principle which underlies section 125 of the Constitution Act, 1867 (the effect of which is to prohibit intergovernmental taxation as between the Provinces and Canada) he stated at the beginning of his analysis (paragraph 15):

> It is these constitutional values [underlying s. 125] that inform the constitutional distinction between "taxes" and "regulatory charges", and which explain why s. 125 applies to the former but not the latter.

43 He went on to explain these values and the guiding structure:

> 17. The section [section 125] is one of the tools found in the Constitution that ensures the proper functioning of Canada's federal system. It grants to each level of government sufficient operational space to govern without interference. It is founded upon the concept that imposing a tax on a level of government may significantly harm the ability of that government to exercise its constitutionally mandated governmental functions. In *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), at p. 431, Marshall C.J. explained this concept as follows:
>
> > That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. In Re Exported Natural Gas Tax, [1982] 1 S.C.R. 1004, the majority of this Court referred to these statements at p. 1056, explaining at p. 1065 that "s. 125 is plainly intended to prevent inroads, by way of taxation, upon the property of one level of government, by another level of government".
>
> . . .
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> 19. While the primary constitutional value served by s. 125 is federalism, it also secondarily advances the constitutional value of democracy. As this Court recently explained in Eurig Estate (Re), [1998] 2 S.C.R. 565, at para. 30, the Canadian Constitution (through the operation of s. 53 of the Constitution Act, 1867) demands that there should be no taxation without representation. In other words, individuals being taxed in a democracy have the right to have their elected representatives debate whether their money should be appropriated, and determine how it should be spent. Intergovernmental taxation is prohibited, in part, because one group of elected representatives should not be allowed to decide how taxes levied under and within the authority of another group of elected representatives should be spent. At the same time, governments are not immune from paying user fees, such as water rates, in part because the government can choose whether to use the service, and the money charged is spent solely on providing that service: *Canada (Attorney General) v. Toronto (City)*, 23 S.C.R. 514; *Canada (Attorney General) v. British Columbia (Registrar of Titles of Vancouver Land Registration District)*, [1934] 4 D.L.R. 764, at pp. 771-72. In this way, imposing a user fee is more like charging a fee for a merchantable commodity than imposing any form of taxation.

44 The Court then addressed the constitutional distinction between "regulatory charges" and "taxes". After referring to the four traditional indica, Gonthier J. said:

> 22. These indicia of "taxation" were recently adopted by this Court in Eurig Estate, supra, at para. 15. Major J., writing for the majority of this Court, added another possible factor to consider when characterizing a governmental levy, stating at para. 21 that "[a]nother factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided". This was a useful development, as it helps to distinguish between taxes and user fees, a subset of "regulatory charges".
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> 23. A distinction is made between simple "taxation" and "regulation", or what has elsewhere been described as "regulatory charges": P. W. Hogg, Constitutional Law of Canada (loose-leaf ed.), vol. 1, at p. 30-28; J. E. Magnet, Constitutional Law of Canada (7th ed. 1998), vol. 1, at p. 481; G. V. La Forest, The Allocation of Taxing Power Under the Canadian Constitution (2nd ed. 1981). The distinction between taxes, on the one hand, and regulatory charges, on the other, was highlighted by the majority of this Court in Re Exported Natural Gas Tax, supra, at pp. 1055, 1070, 1072 and 1075. In that case, the majority explained at p. 1070 that a tax is to be distinguished from a "levy [imposed] primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme".

45 After stating that user fees cannot be considered to be "taxation" within the "constitutional meaning of the word", Gonthier J. went on to explain why the same is true with respect to regulatory charges:

> 32. Nor does s. 125 apply to other types of regulatory charges, as I have described them above. Where a charge itself is the mechanism for advancing a regulatory purpose, such as a charge that encourages or discourages certain types of behaviour, or where a charge is "ancillary or adhesive to a regulatory scheme" which may be used to defray the costs of that scheme, then they will usually be applicable to the other order of government. As the majority of the Court explained in Re Exported Natural Gas Tax, supra, at p. 1070:
>
> > If the primary purpose is the raising of revenue for general federal purposes then the legislation falls under s. 91(3) and the limitation in s. 125 is engaged. If, on the other hand, the federal government imposes a levy primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme, such as the "adjustment levies" considered in Reference respecting the Agricultural Products Marketing Act, R.S.C. 1970, s. A-7 et al., [1978] 2 S.C.R. 1198 or the unemployment insurance premiums in *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 355, then the levy is not in pith and substance "taxation" and s. 125 does not apply.
>
> 33. By protecting each level of government from taxation, but not from other types of regulatory charges, the Constitution accords a degree of operational space to the governments in a manner which best advances the goals of Canada's flexible federalism. It is with these concepts in mind that I now turn to the governmental levy at issue in this case.

46 This fifth indicium thus brings into the analysis a refinement of a different nature from the other four. In Canada, a levy which bears the features of a tax may nevertheless not be a tax, if it can be shown that the levy is so connected to a regulatory scheme that treating it as a tax would frustrate federalism, the primary constitutional value served by section 125 of the Constitution Act, 1867.

47 Against this background, the decision of the High Court of Australia in *Australian Tape Manufacturers Association Ltd. v. Commonwealth* (1993), 176 C.L.R. 480 (Australia H.C.) , on which the retailers place great reliance, is of little assistance on the question whether the levy is a tax or a regulatory charge.

48 In that case, the High Court of Australia held, with respect to structurally similar legislation, that the levy was a tax. It did so after determining that the four traditional indicia to which I have referred were present. The fifth criterion was not addressed as Australia's constitution does not call for the distinction which must be made in Canada between a tax and a regulatory charge.

49 The retailers rely on the reasoning of the High Court of Australia to argue that the Board erred in holding that two of the four traditional indicia of a tax were not present. Specifically, the retailers take issue with the Board's finding that the levy was not intended for a public purpose or levied by a public body.

50 In reaching this last conclusion, the Board reasoned that the levies were not imposed by it since it cannot set the tariff process in motion nor collect the amounts owing. Rather, the levies were imposed by the CPCC, an organization devoted to the protection of the private interests of the rightsholders, which by definition is not a public body. It also held that, although the Act was enacted for the benefit of the Canadian public, it is inaccurate to say that the levies were for a public purpose. In so holding, the Board was focussing on the immediate purpose of the levy which is to compensate the rightsholders for lost revenues resulting from private copying.

51 It is difficult to support the conclusion reached by the Board with respect to either of these indicia. It seems clear that the levy was created for the purpose of supporting the creators and the cultural industries by striking a balance between the rights of creators and those of users. As Binnie J. states in *Galerie d'art du Petit Champlain inc. c. Théberge*, [2002] 2 S.C.R. 336 (S.C.C.) (at para. 30):

> The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately,

> to prevent someone other than the creator from appropriating whatever benefits may be generated). Part VIII of the Act fits within this balance. As such, the levy is collected for a public purpose. That the levy is paid directly to the rightsholders through the CPCC is not inconsistent with this purpose and does not transform the Act into a statute whose prime purpose is to advance private interests.

52 The conclusion that the levy is not levied by a public body is equally problematic. Pursuant to section 83 of the Act, the Board is the entity that sets the levy, decides on the media to which it will be applied, and determines its quantum. Under paragraph 83(8)(c), the Board is vested with the authority to determine the levies and the terms and conditions relating to the levies. While the CPCC initiates the process and collects the levies, the Board sets the levy. As such the levy is levied by a public body.

53 I am therefore of the view that the four traditional indicia of a tax are present which leaves the question whether the last criterion identified by the Supreme Court in Westbank is present, i.e., whether the levy can properly be labelled as a tax, or whether it is better described as a regulatory charge.

54 According to Westbank, this requires an assessment of whether the levy is connected to a regulatory scheme. To the extent that it is, a further question arises about the extent of that connection or "nexus", since only a close and necessary connection can save what would be a tax, in the traditional sense, from being treated as such in the constitutional sense (Westbank para. 24):

> It goes without saying that in order for charges to be imposed for regulatory purposes, or to otherwise be "necessarily incidental to a broader regulatory scheme", one must first identify a "regulatory scheme". Certain indicia have been present when this Court has found a "regulatory scheme". The factors to consider when identifying a regulatory scheme include the presence of: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of the regulation; and (4) a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation, or benefits from it. This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.

55 Applying these factors, the Board held that Part VIII was a "regulatory scheme" and that the necessary connection between the levy and this scheme had been established.

56 The retailers argue that the Board erred in so concluding as none of the factors identified by the Supreme Court in Westbank are present. In particular, the retailers argue that Part VIII does not provide for a complete and detailed code; that there are no actual or properly estimated costs relating to Part VIII, and that there is no direct relationship between persons being regulated and Part VIII, in that the persons charged with the payment of the levy have not benefited from nor caused the need for Part VIII.

57 The retailers further argue that Part VIII is too vague to give any guidance and direction. This is amply demonstrated by the zero-rating program which, in the eyes of the retailers, highlights the uncertainty surrounding the fundamental question of the amount and manner of calculation of the levies.

58 I note in this connection that any uncertainty which might have been created by the zero-rating program in the past has been eliminated by the Board's concurrent finding in Private Copying III that this program has no statutory legitimacy (see paragraphs 75 to 127 of these reasons).

59 In my view, the retailers have been unable to demonstrate that the levy is not intimately connected to the scheme which Part VIII of the Act implements, or that it is not necessarily incidental to that scheme. All the factors identified by the Supreme Court in Westbank point in that direction.

60 Dealing with first factor (the existence of a complete and detailed code of regulation), although the provisions in Part VIII are simply expressed and organized, the scheme which they implement is both complex and detailed.

61 Section 79 provides definitions that determine who benefits from the levy. Section 80 legalizes copying recorded music onto blank media for private use; section 81 entitles rightsholders to be remunerated for such use; for that purpose, section 82 imposes a private copying levy on blank media sold by manufacturers and importers; section 83 prescribes how the levy is to be set; and subsection 83(9) requires that the levies which the Board sets be fair and equitable.

62 Consistent with the objective of establishing a fair and equitable levy, the Board has adopted the valuation model developed by Messrs. Stone and Audley (the Stone and Audley model) in setting levy rates. This model has three basic elements: a) the value of each private copy of a sound recording; b) the estimated average number of private copies made onto each blank medium; and c) the remuneration of rightsholders calculated as a fixed rate per unit.

63 The formula involves identifying, first, the entitlement of the rightsholders by reference to the amount they are paid on a per unit retail sale of a pre-recorded CD, and then adjusting that amount according to the total number of blank CDs sold in Canada less those sold to persons other than individuals. Further deductions are made to account for individuals who do not copy and to account for the fact that a second copy has a lower value than the first (secondary value discount), and for waste and spoilage.

64 It is not necessary to go into the details of this formula, which are set out in full in the Board's earlier decisions. Suffice it to say that the Board chose the Stone and Audley model because it fairly and equitably links the levy rate to the revenue shortfall for rightsholders resulting from copying by consumers through the use of the blank media with respect to which a tariff is certified (Private Copying III, p. 48).

65 In my view, the scheme implemented by Part VIII is a complete and detailed code of regulation which comes within the description set out by the Supreme Court in Westbank.

66 In establishing the third factor (actual or properly estimated cost of the regulation), the Supreme Court in Westbank first focussed on the correlation which usually exists between a service and a user fee. The Court noted that a feature distinguishing a "user fee" from a "tax" is that, in the case of the former, "a nexus must exist between the quantum charged and the cost the service provided." Drawing an analogy, the Court said that, like a user fee (para. 29), "A regulatory charge may exist to defray the expenses of the regulatory scheme, ... or the regulatory charges themselves may be the means of advancing a regulatory purpose."

67 In this case, the levy is clearly computed in order to advance the statutory scheme. In setting the levy, the Board must ensure that there is a correlation between the extent of the private copying that occurs by the use of the blank media and the levies that are certified with respect to such media.

68 With regard to the fourth factor (whether the person being regulated caused the need for the regulation or benefited from it), it seems clear that, by making blank media available to consumers, the manufacturers and importers of blank media allowed for the proliferation of consumer copying and thereby caused the need which led Parliament to implement Part VIII. Nevertheless, the retailers argue that the manufacturers and importers are not responsible for the illegal acts of consumers.

69 I accept that this may be so. However, to have "caused the need" for a regulation, it is not necessary for the manufacturers and importers to have been responsible for private copying in the legal sense. It is enough that they have provided consumers with the means by which private copying takes place, thereby giving rise to the need for Parliament's intervention.

70 The remaining factor (that the levy has a regulatory purpose which seeks to affect the behaviour of individuals) is also present. The CPCC argues that, by legalizing the copying of recorded music, Part VIII enables and may encourage individuals to copy recorded music on blank media. This in turn may encourage the wider dissemination of recorded music and increase creative efforts by rightsholders through increased sales of blank media.

71 The retailers submit that all this is within the realm of speculation. While there is a degree of speculation in what the CPCC asserts, I have no doubt that Part VIII encourages creation by ensuring that rightsholders obtain some financial reward for their creation in circumstances where they previously did not. As such, the levy affects the behaviour of individuals.

72 In the end, it is apparent that the levy possesses all the characteristics of a regulatory charge as these were identified by the Supreme Court in Westbank. It is necessarily incidental to a detailed regulatory scheme which falls squarely within a federal head of jurisdiction. It follows that the Board correctly held that the levy was not a tax in the constitutional sense.

73 The foregoing reasons also dispose of the retailers' alternative argument that Part VIII is unconstitutional by reason of being overly vague and insufficiently connected to copyright law.

74 I would therefore dismiss the retailers' judicial review application, with costs.

Application A-9-04 -The Legality of the Zero-Rating Program

75 The zero-rating program was initiated by the CPCC on a voluntary basis. It allows certain users who do not private copy to purchase blank media levy-free from authorized manufacturers, importers and distributors. The program initially applied to four media formats: audiocassettes, MiniDiscs, Audio CD-Rs and Audio CD-RWs. It was subsequently expanded by the CPCC to include CD-Rs and CD-RWs. This occurred in September 2003, several months after the Board's hearing in Private Copying III, but before the decision was rendered.

76 Under the CPCC's zero-rating program, users wishing to buy blank media levy-free must first register with the CPCC and obtain a certificate number allowing them to purchase media from authorized manufacturers, importers and distributors. In their agreements with the CPCC, users undertake not to sell or dispose of the blank media they acquire levy free to any other person, and not to use the media for personal use or to copy music without authorization.

77 Manufacturers, importers and distributors who wish to sell levy-free are also required to register with the CPCC and sign agreements. They may only sell levy-free to users holding a certificate from the CPCC. Authorized manufacturers, importers, and distributors must report their levy-free sales to the CPCC and are subject to audit. Retailers are not allowed to participate in the program.

78 The record before the Board indicates that, as of December 2002, approximately fifty manufacturers, importers, and distributors had signed zero-rating agreements with the CPCC authorizing them to sell blank media at a zero-rate to buyers certified by the CPCC.

79 The certified buyers who can purchase blank media levy-free from authorized participants are institutions and entities who duplicate audio and data for business rather than personal use. Included within this class of users are educational institutions, broadcasters, law enforcement agencies, advertising agencies, the music, film and video industries, courts, tribunals and court reporters, religious organizations, telemarketing firms, software companies, duplication facilities, medical institutions, technology companies, conference and training companies, and government.

80 Commencing in September 2003, the CPCC required contracting parties to pay an annual fee to offset the CPCC's costs of administrating the zero-rating program.

The Decision of the Board

81 As the CPCC highlights in its submissions, the zero-rating program has been the subject of inconsistent rulings by the Board. However, the Board has throughout taken the position that the exemption extended by the CPCC under the program to persons who do not private copy is not authorized under the Act.

82 In Private Copying I, the Board, without objecting to the zero-rating program, indicated that it could not take this program into account in setting the levy under the Act. It said (p. 57):

> The Board cannot shelter from the levy users who do not make private copies. The only exception can be found in section 86 of the Act, which provides that no levy is payable on sales to associations representing persons with perceptual disabilities. Principles of statutory interpretation require the Board to conclude that it cannot create further exceptions.
>
> Furthermore, it cannot be seriously argued that institutional or corporate buyers are exempt from the levy. The levy targets media, not persons. It is paid by manufacturers and importers, who are then free to integrate it to their pricing decisions in any manner they wish.
>
> To help alleviate the effect of the levy on certain groups, CPCC has proposed to enter into agreements according to which manufacturers and importers would be allowed to sell recording media to certain categories of users without having to pay the levy. Much time was spent discussing CPCC's proposal. As the Board cannot create exemptions, the tariff is not the place to deal with such a theme. Again, no account was taken of that proposal in setting the levy.

83 Two years later, in Private Copying II, the Board held that, although it could not create exemptions, it could take the zero-rating program into account in setting the levy for audiocassettes (p. 16):

> The Board continues to believe that it cannot itself create exemptions but concludes for legal, practical and public reasons that it is permissible to take the zero-rating scheme into account by excluding audio cassettes that are sold levy-free from the calculation of the levy.
>
> First, this does not involve creating exceptions for anyone's benefit or including the scheme in the tariff. All that is done is to take into account, in setting the amount of the levy, a mechanism that is now a market reality, like any other.
>
> Second, a tariff that did not take the zero-rating scheme into account would not be a fair tariff. In practice, the private copying regime's continued existence depends on the availability of some exemption scheme. Including zero-rating media in the calculation of the levy imposes on authors the cost of not collecting the levy as well as the cost of maintaining the administrative structure required to operate what is now an essential element of the system.
>
> Third, excluding zero-rated media from the calculation of the levy ensures that a more targeted group, more likely to engage in private copying, bears the cost of the regime. This meets and promotes the regime's objectives. Far from weakening the nexus between the activity and the medium on which the levy is paid, it strengthens it.

84 In Private Copying III, the Board reversed its position. It held both that it could not take the program into account in setting the levy and that the program had no legal basis and was therefore illegal (p. 23):

> The Board believes that if Parliament intended to insulate non copiers from the effects of the regime, it could have and would have established mechanisms within the Act. Yet Part VIII includes only one exception, to accommodate perceptually disabled persons. The Governor in Council has the power to exclude from the regime media that would otherwise be subject to a levy. That power has not been exercised. Alternatively, Parliament might have provided the Board with the tools to accommodate those who do not use blank media to copy music. But the Act delegates no such authority to the Board.
>
> All of these considerations suggest strongly that, under the existing legal framework, only those mentioned expressly were intended to be exempt from payment of the levies. It is not for the Board, nor CPCC, to assume the role of the legislator by implying additional exemptions, reasoning that they should be implied from the wording of the Act.

85 The Board went on to conclude (pp. 27 and 28):

> As structured, the zero-rating program creates exemptions. For all these reasons, the Board considers that the program has no legal basis and is therefore illegal.
>
> . . .
>
> Aside from the lack of legal support for zero-rating, the Board has some serious reservations about the fairness of the proposed implementation of CPCC's extended program. The program has been tested on the audiocassette market, to the extent that end users complain much less about the levy on that medium. However, its possible effects on other markets, especially blank CD's, cause grave concerns.
>
> First, the stakes are much higher in the context of blank CD's because of the number of units that might be zero-rated....By even the most conservative estimates, one would not be surprised if tens of millions of units were diverted from existing channels of distribution. Second, objectors expressed reluctance to pay any registration fees. Some objectors also expressed concerns about the potential for arbitrary application of the program.
>
> . . .
>
> The potentially serious effects of zero-rating on the CD market are themselves sufficient to explain the change in the Board's views. Yet, to be blunt, the reason that the Board has reconsidered its response to zero-rating is that it could not foresee the effects of the program....This decision is based upon a more complete record.
>
> (emphasis added)

86 Consistent with this reasoning, the Board in Private Copying III did not take into account the zero-rating program in determining the amount of the levy which it certified except with respect to audiocassettes. In this respect, the Board noted that the levy rate should logically be adjusted. However, it did not do so because (Private Copying III, p. 51):

> ..., the audiocassette market has reached its maturity. Consumers have apparently accepted the levy on these media as an intrinsic component of the price. Thus, the rate should stay the same.

87 Invoking a lack of clarity in the Board's decision, the CPCC chose to maintain the program in place for all blank media previously covered.

Objections Against the Decision of the Board

88 The CPCC submits that the Board exceeded its jurisdiction in declaring to be illegal the zero-rating program and, by extension, the CPCC's zero-rating agreements with program participants.

89 The CPCC submits that, although the Board has a broad statutory power to set levies and determine their terms and conditions, the Act does not grant the Board the power to rule upon the legality of private agreements between a collective society and third parties. In this respect, the CPCC relies on the decision of this Court in *CTV Television Network Ltd. v. Canada (Copyright Board)* (1993), 46 C.P.R. (3d) 343 (Fed. C.A.) , in which it was held that the Board's incidental powers are limited to what is necessarily linked to the Board's rate-setting function.

90 The CPCC argues that the Board does not have jurisdiction to rule upon the legality of the zero-rating program in order to fix the amount of the private copying levies or their terms and conditions. Instead, it should have limited its inquiry to whether the Board had the power under the Act to take the program into account in setting the levies. By going beyond this and declaring the program to be illegal, the Board ignored CPCC's right to waive the collection of statutory debts owing to it.

91 If the Board does have jurisdiction to declare the zero-rating program illegal, the CPCC argues that the Board's decision is both incorrect in law, and unreasonable in that it cannot withstand "a somewhat probing examination".

92 The CPCC submits that the reasonableness of the Board's decision is doubtful because it contradicts the Board's previous pronouncements on the same question which rest on more compelling reasoning. According to the CPCC, the Board got it right in the first place.

93 Both the retailers and the CSMA oppose the position advocated by the CPCC and support the decision reached by the Board. They add that, in maintaining the zero-rating program in place, the CPCC is flouting the decision of the Board.

Analysis

94 The principal issue to be decided is whether the Board erred in law when it held that, in setting a levy that is fair and equitable, it should disregard the CPCC's zero-rating program. First, though, it is important to deal with an issue on which the parties agreed: the inability of the CPCC or the Board to create exemptions from the levy. An analysis of this issue provides valuable context to the question of whether the Board may take the zero-rating program into account when setting the levy. It is also helpful in the resolution of the principal issue.

Exemptions from the statutory scheme

95 The gist of the reasoning advanced by the Board for holding that the zero-rating program is not authorized by the Act is reflected in the following passage (Private Copying III, p 23):

> The Board believes that if Parliament intended to insulate non-copiers from the effects of the regime, it could have and would have established mechanisms within the Act. Yet Part VIII includes only one exception, to accommodate perceptually disabled persons. The Governor in Council has the power to exclude from the regime media that would otherwise be subject to a levy. That power has not been exercised. Alternatively, Parliament might have provided the Board with the tools to accommodate those who do not use blank media to copy music. But the Act delegates no such authority to the Board.

96 As noted, the Board's conclusion that it does not have the power to create exemptions is not contested, and is consistent with a well-recognized rule of statutory interpretation. The rule is that the expression of one thing in a statute usually suggest the exclusion of another (expressio unius est exclusio alterius). Pursuant to this maxim, if a statute specifies one exception (or more) to a general rule, other exceptions are not to be read in. The rationale is that the legislator has turned its mind to the issue and provided for the exemptions which were intended.

97 This principle was applied by the Supreme Court in *Bishop v. Stevens*, [1990] 2 S.C.R. 467 (S.C.C.), at 480, where at issue was whether the right to make ephemeral recordings is implicitly included in the Act as part of the right to broadcast a performance:

> Furthermore, an implied exemption to the literal meaning of s. 3(1)(d) is all the more unlikely, in my opinion, in light of the detailed and explicit exemptions in s. 17(2) (now s. 27(2)) of the Act, providing for matters as diverse as private study, research or critical review, educational use, disclosure of information pursuant to various federal Acts, and performance of a musical work without motive of gain at an agricultural fair.
>
> (see also Blacks Law Dictionary, 7th ed., Appendix "B" at p. 192 and R. Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002), Appendix "B" at page 241)

98 Applying this rule to Part VIII, the first exemption to the levy is found in subsection 82(2), which provides that "no levy is payable" by manufacturers or importers where the blank medium is exported from Canada. Subsection 86(1) contains the other exemption, providing that "no levy is payable" where a manufacturer or importer sells or disposes of a blank medium to a "society, association or corporation that represents persons with a perceptual disability." Parliament also expressly empowered the Cabinet to exclude from liability certain media by virtue of section 79 and paragraph 87(b) of the Act.

99 It is also worth noting that paragraph 87(a) of the Act provides that Cabinet, and not the Board or collecting bodies, may make regulations respecting procedures for the operation of the section 86 exemption. Given that Parliament has reserved to Cabinet the task of creating the procedures for administering a legislated exemption, it cannot credibly be suggested that Parliament envisaged that the CPCC could create and administer exemptions in the form of the zero-rating program that are not explicitly created by the statute.

100 There is no doubt that the Board's conclusion is supported by the rule of construction which it invoked. However, the analysis must go beyond this. As the Supreme Court has repeated on numerous occasions and in various contexts (see for instance *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.), *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.); *Canada (Procureure générale) c. Hydro-Québec*, [1997] 3 S.C.R. 213 (S.C.C.); *Friesen v. R.*, [1995] 3 S.C.R. 103 (S.C.C.)):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (E.A. Driedger, Construction of Statutes (2nd ed. 1983, at p. 87).

101 The strongest argument for reading into the Act the implicit authority for the grant of the exemptions which underlie the zero-rating program is the suggestion by the Board that this program goes some way to achieving statutory objectives. The Board said at p. 26 of its reasons (Private Copying III):

> There are valid arguments in favour of zero-rating. By definition, a business or other organization cannot engage in private copying. Thus, from a policy standpoint, they may not be the purpose for, nor the beneficiaries of the private copying regime. A mechanism that removes such stakeholders from the ambit of the levies might further strengthen the nexus between the regime and its goal, and might also reduce the incentive to turn to foreign suppliers for blank media purchases.
>
> There are less compelling reasons for an exemption for individual consumers who do not private copy. The evidence suggests, for example, that 80-90 per cent of consumers use some blank CDs to copy music, and 40 per cent use blank CDs for no other purpose. Although not all individuals use all media for that purpose, we must bear in mind that the rate is discounted to reflect this fact. Also, the Act legalizes private copying in Canada; there is value in the option to private copy, even for those who choose not to exercise that option.

102 An implicit power which can be shown to advance the object of the legislation within which it is said to exist is easier to read in. However, it must still be shown that Parliament intended such a grant.

103 The Board confronted this question (Private Copying III, p. 27):

> ... the question is not whether or not zero-rating is desirable, but whether or not the Board, or CPCC, is legally authorized to initiate such a program. Because there is no legislative guidance to the contrary, the Board believes it does not have the legal authority delegated from Parliament to exempt those who are, under the Act, liable for the payment of levies.

104 In coming to this conclusion, the Board noted the total absence of legislative control over the power being claimed by the CPCC and the importance of the consequences flowing from the zero-rating program, particularly with respect to blank CDs (the Board noted that, by even the most conservative estimates, tens of millions of blank CDs could be diverted from existing channels of distribution (Private Copying III, p. 28)).

105 The Board saw that the CPCC would effectively regulate the market for blank CDs and was concerned by the serious distribution problems which the program could engender by forcing sales outside the normal supply chain (Private Copying III, p. 28). The Board also expressed reservations about the fairness of CPCC's program and its potential for arbitrariness (Private Copying III, p. 28). According to the Board (Private Copying III, p. 27):

> As the Act now stands, the most untenable response is to delegate ultimate control [of the program] to the beneficiaries of the regime.

106 It seems clear that, given its past experience with the program, the Board became struck by the extent of the discretionary power which the CPCC would yield in the market place if the program was extended as proposed. Realizing the impact of the program, the Board did not accept that Parliament could have intended such an extensive grant without providing for a framework for its exercise.

Is the zero-rating program relevant to setting the levy?

107 The question to be answered is whether Parliament intended the cost of the levy set by the Board to be passed on to all end users, or only to those who actually copy music. In the words of the Board (Private Copying III, p. 26):

> If Parliament intended the burden of the levy to be borne by all end users, except those specifically exempted by legislation, then zero-rating goes against that purpose. If instead Parliament intended the costs of the levy to be borne ultimately only by those end users who engage in private copying, then zero-rating works toward that end.

108 In order to address this question, it is first necessary to determine the applicable standard of review on the basis of a pragmatic and functional analysis. Whether the Board may, must or must not take account of a factor in the exercise of its discretion in setting a "fair and equitable" levy is a question of statutory interpretation. Determining an appropriate levy is a discretionary decision that lies at the heart to the Board's mandate and expertise.

109 Deciding what factors are relevant to fixing the levy is so intimately connected with determining what is "fair and equitable" as to fall within the Board's regulatory expertise. Thus, in *Trans Mountain Pipe Line Co. v. Canada (National Energy Board)*, [1979] 2 F.C. 118 (Fed. C.A.), at 121, Pratte J. said, writing for the Court:

> Whether or not tolls are just and reasonable is clearly a question of opinion which, under the Act, must be answered by the Board and not by the Court. The meaning of the words "just and reasonable" in section 52 is obviously a question of law, but that question is very easily resolved since those words are not used in any special technical sense and cannot be said to be obscure and need interpretation. What makes difficulty is the method to be used by the Board and the factors to be considered by it in assessing the justness and reasonableness of tolls. The statute is silent on these questions. In my view, they must be left to the discretion of the Board which possesses in that field an expertise that judges do not normally have. If, as it has clearly done in this case, the Board addresses its mind to the right question, namely, the justness and reasonableness of the tolls, and does not base its decision on clearly irrelevant considerations, it does not commit an error of law merely because it assesses the justness and reasonableness of the tolls in a manner different from that which the Court would have adopted.
>
> (emphasis added)

110 Consequently, while the relevance of the zero-rating program to the setting of the levy raises an issue of statutory construction which may seem to point towards correctness as the appropriate standard of review, the Board resorted to its considerable rate-setting expertise in assessing the impact of the zero-rating program, and in concluding therefrom that the implementation of the program could not have been intended by Parliament. In my view, a degree of deference is owed to the Board on that aspect of the decision: see *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers* (2002), 19 C.P.R. (4th) 289 (Fed. C.A.) at para. 51.

111 Accordingly, the Court should not interfere unless it can be shown that the conclusion reached by the Board does not conform to reason. Absent a privative clause, and because the issue in dispute involves the interpretation of the Copyright Act, unreasonableness simpliciter would seem to be the appropriate standard of review.

112 For the reasons that follow, it is my view that the Board's reasons easily withstand the "somewhat probing examination" to which decisions reviewable for unreasonableness are subject: *Canada (Director of Investigation &*

Research) v. Southam Inc., [1997] 1 S.C.R. 748 (S.C.C.), at 776. Indeed, given my conclusion on the exemption issue, it would have been unreasonable for the Board to have concluded that it should take the zero-rating program into account.

113 In Private Copying III, the Board explained that the levy was intended to apply to all blank media regardless of their use and that the zero-rating program created an exemption contrary to that intent in excluding from the levy persons who do not private copy (pp. 22, 23 and 27):

> ... the private copying regime, in particular s. 82, is universal. By this is meant that a levy is payable on every blank audio recording medium manufactured or imported in Canada. One limited exemption aside [s. 86], the law states that every manufacturer or importer acting for the purpose of trade is liable to pay the levy on every audio recording medium, regardless of the ultimate purchaser's identity or the medium's ultimate use.
>
> . . .
>
> All of these considerations suggest strongly that, under the existing legal framework, only those mentioned expressly were intended to be exempt from payment of the levies.
>
> . . .
>
> As structured, the zero-rating program creates exemptions.

114 These exemptions have a direct impact on the levies set by the Board. If the exemptions are not authorized, the levy must be calculated on the basis that all purchasers of blank media will pay it. If the exemptions are authorized, the levy must be adjusted upwards to account for the levy-free purchases of blank media under the program.

115 The treatment of audio cassettes in Private Copying II illustrates this. Upon deciding, on that one occasion, that the impact of the program could be taken into account in setting the levy, the Board had to increase the levy by some 20 per cent in order to account for the sales on which the levy was no longer being collected by reason of the program (Private Copying II, p. 18). The question is thus inexorably linked to the exercise of the Board's rate-setting function.

116 In my view, the holding by the Board that the zero-rating program is "illegal" simply means that the Board will disregard it when setting the levy. Nevertheless, the CPCC argues that the Board exceeded its jurisdiction by ruling on the legality of private agreements with the program participants. It quotes in this regard a passage of the decision of this Court in *Posen v. Canada (Minister of Consumer & Corporate Affairs)* (1979), 46 C.P.R. (2d) 63 (Fed. C.A.) at p. 66:

> In my view, it is clear that Parliament never intended, in setting up the Copyright Appeal Board as a regulatory agency for rate fixing that the Board also would have the power to adjudicate upon contractual rights between parties claiming an interest in performing rights. The Board sets the rates. The societies must still establish their legal right to collect the tariff and if a user contests that right, then the Courts are the proper forum for a determination of the rights of the respective parties, not the Board.
>
> With respect, I do not think the Board had any jurisdiction to inquire into the matters raised before it by the applicants since the applicants did not contest the quantum of the tariffs either before the Board or at the hearing before us. In my view, that should have been an end of the matter since the quantum of the rates is the only matter entrusted to the Board by the statute.

117 However, the rule set out in Posen is not absolute. As was held in this Court in *FWS Joint Sports Claimants v. Canada (Copyright Board)* (1991), 36 C.P.R. (3d) 483 (Fed. C.A.) , the Board may indeed make pronouncements which impact on contractual rights if its rate-setting function so requires (p. 488).

> As for the matter of the board deciding questions of contractual rights, it is clear that the board must do so, at least in a preliminary way, as a necessary incident to the exercise of its jurisdiction. It cannot value a right unless it exists. The board's conclusion as to legal rights may not bind everyone for all time, but it cannot perform its mandate

> without making a legal determination about these rights. It may be different, however, where all that the board is asked to do is to determine the rights of the parties: see Posen ...

118 In this instance, the Board decided that it had to resolve the ambiguity arising from its prior decisions by making it clear that the zero-rating program had no statutory underpinning and that the exemption from liability to pay the levy extended to program participants by the CPCC was therefore illegal. In my view, the Board said no more than this when it held (Private Copying III, p. 27) that the program "has no legal basis and is therefore illegal".

119 The CPCC suggests that the effect of the Board's decision is to take away the common law right of rightsholders to waive the payment of levies. According to the CPCC, the waiver by rightsholders of their right to collect levies is the sole legal basis for the program. Hence, the legality of the program does not rest on the Act, and the Board exceeded its jurisdiction in holding that the program and the underlying third party agreements are illegal.

120 I agree that the Board had no statutory authority to pronounce on the legality of the program so described. However, I do not read the Board's decision as holding that the program, to the extent that it is based on the waiver by rightsholders of their rightful entitlement, is illegal.

121 Indeed, the Board made it clear in the course of its reasons that the CPCC can forego the collection of levies legally owing to it, if it so wishes (Private Copying III, p. 28). However, the CPCC can no longer expect that the Board will compensate it for the negative impact of the program on its revenues (Private Copying III, p. 51).

122 The CPCC argues that the Board has no choice but to take the impact of the program into account, once it is implemented, just as it must take into account any other market reality. This is how the Board summarized the argument (Private Copying III, p. 25):

> In the present proceedings, rights-holders [through the CPCC] argue that the Board has no control over, or power to stop them from, zero-rating. Once zero-rating has occurred, they say it is fair and equitable that they not suffer as a result. In short, rights-holders say zero-rating is only relevant to the Board as a market reality that should be accounted for after it has occurred.

123 The Board rejected this proposition outright. It came to realize that the CPCC was attempting to introduce through the back door the very exemption which it had twice refused to recognize. Blank media sales to purchasers who do not private copy were being excluded from the levy base by the CPCC, and the Board was being told that it had no choice but to take account of the reduced number of units on which the levy was being collected.

124 This is what led the Board in Private Copying III to hold, consistently with its prior rulings that the exemptions underlying the program were contrary to Part VIII, that it would no longer compensate rightsholders for the effect of the program on CPCC's revenues.

125 In my view, the Board did not commit any reviewable error when it held that the zero-rating program is not authorized under the Act and "illegal" in that limited sense, and that it would no longer compensate the CPCC for the impact of the program on its revenues because that would, in effect, provide for an exemption from the scheme, contrary to Parliament's intention. The Board's decision is thus inexorably linked to its rate-setting function, and any impact which it might have on contractual rights is a necessary incident of the exercise of its jurisdiction (see FWS Joint Sports Claimant, supra, at 488).

126 I therefore conclude that the Board properly held that the zero-rating program has no statutory underpinning and that, accordingly, its impact ought not to be recognized in setting the levy.

127 The application for judicial review brought by the CPCC should accordingly be dismissed, with costs.

Interim Relief

128 At the close of the hearing, the CPCC requested that, if the ruling of the Board as to zero-rating is upheld, the decision of the Court be stayed, pending an eventual leave application to the Supreme Court.

129 The CPCC argued that participants have left the program as a result of the Board's decision and that it will suffer irreparable harm unless a stay is granted. According to the CPCC, the balance of convenience favours the issuance of a stay as nothing will be lost to anyone if a stay is granted.

130 I do not believe that irreparable harm has been established, nor do I believe that the balance of convenience favours the issuance of a stay. I accept that signatories to the program may leave it as a result of the Board's decision, as confirmed by this Court. But this will not prevent the CPCC from recouping all participants in the event that the statutory legitimacy of the program is re-established on appeal. Furthermore, there is a public interest in ensuring that meanwhile, the program is understood for what it is, i.e., a voluntary waiver of levies and no more.

131 The retailers have also asked for interim relief in the event that the Board's decision is confirmed. They ask for an order compelling the CPCC to comply with the Board's decision.

132 There is no need for such an order. The decision of the Court is binding on the CPCC notwithstanding appeal. It follows that the CPCC can no longer promote the program on the basis that it has statutory legitimacy or justify its existence to rightsholders on the basis that they will be compensated for its negative impact on CPCC's revenues. I do not believe that an interim order is required to ensure this result.

Application A-10-04 - Digital Audio Recorder (MP3 Player) Levy and Rate Setting

133 The third judicial review application raises two issues. The first is whether a permanently embedded or non-removable memory, incorporated into a digital audio recorder (MP3 player), retains its identity as an "audio recording medium" and can be levied as such under Part VIII.

134 The second is whether the Board could set a levy on this embedded memory beyond that sought by the CPCC and, if so, whether the levy in question was set within the bounds of fairness. First Issue

135 The term "audio recording medium" (medium) is defined in section 79:

> "audio recording medium" means a recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose, excluding any prescribed kind of recording medium.« _support audio_ » Tout support audio habituellement utilisé par les consommateurs pour reproduire des enregistrements sonores, à l'exception toutefois de ceux exclus par règlement.

136 The levy is imposed on a "blank audio recording medium" (previously identified as "blank media" or "blank medium") which is defined, in its relevant part, as (section 79):

> (a) an audio recording medium onto which no sounds have ever been fixed, and (b) any other prescribed audio recording medium.
>
> Tout support audio sur lequel aucun son n'a encore été fixé et tout autre support audio précisé par règlement.

The Decision of the Board

137 The Board denied CPCC's request to establish a levy on recordable or rewritable DVDs, removable memory cards and removable micro hard drives. It found that these were not ordinarily used by individuals for the purpose of copying music (Private Copying III, pp. 42 and 43).

138 However, it held that digital audio recorders (MP3 players) were so used and that the memory embedded therein qualified as a medium within the meaning of the definition. The fact that this memory was incorporated into a device did not cause it to lose its identity so as to take it outside the statutory definition.

139 The Board's exact reasoning for holding that memory permanently embedded in a digital audio recorder was leviable rests on the above quoted definition of an "audio recording medium". The Board said (Private Copying III, p. 33):

> There are two aspects of [the definition] that are relevant to the Board in these proceedings. The first relates to the proper interpretation of the phrase "ordinarily used by individual consumers for that purpose". The second relates to the relevance of a medium's physical attributes ("a recording medium, regardless of its material form"), particularly the significance of its incorporation into a device.

140 Addressing the first aspect, the Board held that the intrinsic physical attributes of a digital audio recorder, including its size, convenience and compatibility, supported the conclusion that it was "ordinarily used by individual consumers" for copying music (Private Copying III, p. 45). It follows that the memory embedded therein was also so used. This conclusion so far as it goes is not contested.

141 The reasoning with respect to the second aspect of the definition is a function of substance over form (Private Copying III, pp. 36 and 38):

> A second aspect of the definition of an "audio recording medium" relates to the form of the medium. This issue is important because the Board was asked to establish a levy on memory in devices, although not on devices themselves. Hence, the question at this stage is whether or not the incorporation of a product into a device can affect its status as an audio recording medium.
>
> [...]
>
> As regards the physical characteristics of the product itself, the definition of an "audio recording medium" could hardly have been drafted more broadly. Specifically, the English version of the text contains the clause, "regardless of its material form". To the Board, the plain and ordinary meaning of this phrase rules out the possibility that the levy was intended to apply only to "removable" media, let alone only to audiocassettes.
>
> This language also demonstrates that it is not determinative whether the medium is affixed, incorporated or otherwise integrated in a device. Its breadth supports the conclusion that liability to pay a levy cannot be dependant [sic] upon physical characteristics alone. A medium that is incorporated into a device remains a medium.

Alleged Errors in Decision Under Review

142 The four members of the CSMA who appear as applicants in this judicial review application argue that the Board erred in law in holding that a permanently embedded memory in a digital audio recorder (MP3 player) is a medium and, as such, leviable under Part VIII.

143 The applicants argue that, when incorporated into a digital audio recorder, the embedded memory becomes integrated in, and inseparable from, this device, and thus loses its separate identity. Hence, it cannot be said that a manufacturer or importer who sells a digital audio recorder also sells the embedded memory.

144 In the alternative, the applicants submit that the Board has created an exemption from the scope of Part VIII of the Act, by only imposing a levy on memory when it is embedded in digital audio recorders, and not when the identical memory is embedded in other electronic devices (such as heart-rate monitors, digital cameras, personal digital assistants or telephones).

Analysis

145 It is not necessary to undertake a lengthy analysis to ascertain the applicable standard of review as it turns on the definitions set out in section 79 and this Court has already held that the Board's interpretation of these definitions must be assessed against a standard of correctness.

146 In *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers* , supra, this Court said:

> [98] The heart of the Board's expertise is in the administration of those provisions of the Copyright Act pertaining to the setting and allocation of royalties. While necessary for enabling the Board to perform that function, its decisions defining Activities that infringe copyright have implications that "stray from the core expertise of the tribunal": Pushpanathan, supra, at paragraph 38.
>
> [...]
>
> [104] In my opinion, the scale is tipped decisively in favour of correctness review by the fact that the Copyright Board's interpretation of provisions of the Copyright Act in dispute here is not within its exclusive domain, but may arise in court proceedings other than judicial review applications. This is both because the Board's expertise on these issues cannot be said to be greater than the Court's and because, in the context of the administration of this statute, judicial deference is unlikely to serve the interests of consistency, adjudicative efficiency and economy.
>
> [105] Accordingly, in my respectful opinion, the Court was wrong in AVS, supra, to prescribe patent unreasonableness as the standard of review applicable to the Board's interpretation of those provisions [specifically, section 79] of the Copyright Act that are not within the Board's exclusive domain. Taken as a whole the scheme of the Copyright Act indicates that on an application for judicial review, the Court should apply a standard of correctness to the Board's interpretation of those provisions of the Copyright Act that could also be the subject of infringement proceedings in the courts.
>
> [emphasis added]

147 Although the CPCC maintains that the meaning of "audio recording medium" as defined in section 79 has no infringement implications, this is not so. If, indeed, digital audio recorders (or the memories embedded therein) fall outside the scope of the definition, copyright infringement could result from the use of such devices to private copy. Consistent with the proposition set forth in the above passage, the decision of the Board must be tested against the standard of correctness.

148 Applying this standard, I do not believe that it was open to the Board to establish a levy on memory embedded in digital audio recorders. In my respectful view, Part VIII of the Act and the definition of "audio recording medium" gave the Board no such authority.

149 The Board established the levy on the basis that it could, in effect, look through the device being sold and reach the permanently embedded memory found therein. The Board twice noted that the levy sought by the CPCC, and approved by it was on "memory in devices" but not on "devices" (Private Copying III, pp. 36 and 54).

150 The conceptual difficulty inherent in the exercise on which the Board embarked in certifying a levy on the memory embedded in a device, but not on the device itself, is illustrated by the tariff which it certified (Private Copying III, p. 63):

> For non-removable memory permanently embedded in a digital audio recorder, the Board adopts rates of $2 for each recorder that can record no more than 1 GB of data, 15$ for each recorder that can record more than 1 GB and no more than 10 GBs of data, and $25 for each recorder that can record more than 10 GBs of data.
>
> [emphasis added]

151 Although the Board purported to establish a levy on the embedded memory, it acknowledged that this memory could not, looked at on its own, allow for the establishment of the levy; the device into which the memory was embedded had to be considered (Private Copying III, p. 44):

> Hard discs in personal computers are technically indistinguishable from those in some digital audio recorders. It appears therefore, inappropriate to generalize about the uses of all embedded memory. However, the distinction, in the Board's view, is that where a medium is permanently incorporated into a certain type of device, it becomes possible to categorize that medium and evaluate its use as a unique "kind" of "audio recording medium", based on the intrinsic characteristics of the device into which the medium has been incorporated.
>
> [emphasis added]

Hence according to the Board, permanent memory embedded in an MP3 player comes within the definition, whereas the identical memory embedded into other devices does not (Private Copying III, p. 45).

152 It can be seen from the Board's own reasoning and from the tariff which it certified that it is the device that is the defining element of the levy and not the memory incorporated therein. The Board cannot establish a levy and determine the applicable rates by reference to the device and yet assert that the levy is being applied on something else.

153 One can readily understand why the Board wanted to go as far as it could to bring MP3 players within the ambit of Part VIII. The evidence establishes that these recorders allow for extensive private copying by individuals. Their use can potentially inflict on rightsholders harm beyond any "blank audio recording medium" as this phrase has been understood to date. However, as desirable as bringing such devices within the ambit of part VIII might seem, the authority for doing so still has to be found in the Act.

154 The Board found this authority in the definition of "audio recording medium". It focussed on the phrase "regardless of its material form" to hold that Parliament intended that a levy be established on a medium, regardless of its incorporation into a device. In the words of the Board, "A medium that is incorporated into a device remains a medium" (Private Copying III, p. 38).

155 There are a number of problems with the Board's analysis. First, according to the Board's own reasoning, a memory does not become an "audio recording medium" unless and until it is incorporated into the appropriate device (Private Copying III, pp. 44 and 46). It is therefore difficult to see how such a memory can be said to remain a medium when embedded into a device.

156 Second, upon being incorporated into a device, a memory undergoes no change in form. It is therefore difficult to see how the Board can rely on the phrase "regardless of its material form" to justify its conclusion. Furthermore, to rely on this phrase, the Board first had to identify an "audio recording medium". According to its own reasons, a memory is not an "audio recording medium" unless and until embedded into a digital audio recorder.

157 It is apparent that the phrase on which the Board relied to "see through" a digital audio recorder and reach the memory embedded therein does not support its conclusion when regard is had to its own findings.

158 The Board acknowledges that, when it enacted Part VIII, Parliament could not have envisioned recent technological developments (Private Copying III, p. 38). Indeed, the legislative history of Bill C-32, which amended the Act to include Part VIII, shows that at the time, Parliament was looking at blank audio tapes as the cause of the harm to rightsholders and had been made aware of proposals in other countries (including the U.S.) to extend the levy to the hardware which recorded and played these blank audio tapes. Nevertheless, Parliament chose to limit the levy to blank medium (House of Commons, 35th Parl., 2nd Session, Standing Committee on Canadian Heritage, Meeting No. 24, October 9, 1996 at 2150, Application Record, Vol. III, Tab 5-B-13, pp. 651-662; House of Commons, 35th Parl., 2nd Session, Standing Committee on Canadian Heritage, see also Meeting No. 36, November 6, 1996 at 2035, where

the Société Professionelle des Auteurs et des Compositeurs du Québec submitted as a flaw that "Bill C-32 makes no provision for the payment of levies by manufacturers of recorders," Application Record, Vol. III, Tab 5-B-15, p. 682; House of Commons, 35th Parl., 2nd Session, Standing Committee on Canadian Heritage, Meeting No. 27, October 22, 1996 at 1925 (B. Andriessen), Application Record, Vol. III, Tab 5-B-14, pp. 663-674; House of Commons, 35th Parl., 2nd Session, Second Report of the Standing Committee on Canadian Heritage, December 1996, Application Record, Vol. III, Tab 5-B-16, pp. 698-717).

159 This shows that Parliament's definition of "audio recording medium" stands in contra-distinction with a recorder or similar devices as these were known to exist at the time and whose function it is to record and play blank audio tapes. No one has ever pretended that tape recorders came within the ambit of the definition.

160 A digital audio recorder is not a medium; the CPCC recognized so much when it asked that the levy be applied on the memory found therein but not on the recorder itself. The Board erred when it held that it could certify a levy on the memory integrated into a digital audio recorder.

161 Subsection 82(1) of the Act imposes a levy on manufacturers and importers of blank media. By the words of paragraph (a) thereof, the liability for the payment of the levy can only arise "on selling or otherwise disposing of those blank audio recording media".

162 The Board therefore had to look at what was being sold or disposed of by the importers (it is common ground that there are no manufacturers of digital audio recorders in Canada), and determine whether the subject matter of the sale or disposition came within the ambit of the definition.

163 The Board did not ask itself that question. However, it seems clear that if it had, the subject matter of the sale or disposition was a digital audio recorder or a device as the Board called it, but not a medium as defined. In the absence of such a sale, no liability can arise for the levy.

164 In my respectful view, it is for Parliament to decide whether digital audio recorders such as MP3 players are to be brought within the class of items that can be levied under Part VIII. As Part VIII now reads, there is no authority for certifying a levy on such devices or the memory embedded therein.

165 I would therefore allow the judicial review application insofar as the first issue raised by the applicants is concerned.
Second Issue

166 Given this conclusion, it is not necessary to dispose with the second issue. However, in the event that I am wrong on the first issue, it is useful to deal with the second. The question to be decided in this respect is whether the Board erred in setting the rate for permanently embedded memory in a digital audio recorder at an amount in excess of the amount proposed by the CPCC and published in advance of the hearing.

The Decision of the Board

167 The Board held that it could not set the rate based on the model proposed by the CPCC because it was too complex. As a result, it set the levy at $2 for each recorder with a memory capacity of up to 1 gigabyte. The CPCC had asked for a levy of 2.1 ¢ per megabyte for non-removable memory with a storage capacity of less than 1 gigabyte, which would have translated into levies of 67 ¢ and $1.34 respectively.

168 The Board explained why it decided to authorize a levy beyond that requested (Private Copying III, pp. 56 and 63):

> [T]he Board cannot set the rate based on the model proposed by CPCC. Instead, it establishes the rate by combining some of the principles underlying CPCC's proposal with other observations from the record about this kind of media. [...] The levy rate for non-removable memory permanently embedded in. a digital audio recorder is set at $2.00 for each recorder that can record no more than 1 Gigabyte of data, $15.00 for each recorder that can record

> more than 1 GB and no more than 10 GBs of data, and $25.00 for each recorder than can record more than 10GBs of data.
>
> [...]
>
> The Board is conscious that the rate certified for low capacity recorders is higher than the rate proposed by CPCC. This decision is unavoidable considering the Board's wish to simplify the rate structure for those particular media as much as possible. Finally, given the small difference between the proposed and certified rates (a matter of a few pennies or a dollar per recorder at most) the Board is of the view that the unfairness created by overly complicating the rate structure would far outweigh any increased benefits that may result of capping the rate to the amounts proposed by CPCC.

Alleged Errors in Decision Under Review

169 The CSMA members submit that nothing in the Act empowers the Board to disregard the ultra petita principle. In accordance with subsection 83(6) of the Act, proposed tariffs are published in the Canada Gazette and stakeholders are given a 60-day period within which to file written objections to the tariff with the Board. According to the applicants, if the Board could unilaterally certify a tariff higher than that proposed, the purpose of the statutory notice period would, to a large extent, be undermined.

170 Alternatively, the applicants argue that setting a levy beyond the tariff published is fundamentally unfair to those who might have intervened if the approved rate had been advertised.

Analysis

171 The standard of review must be ascertained by reference to the question to be decided. There are two such questions: the first is whether the ultra petita principle applies to the decisions of the Board establishing tariffs pursuant to Part VIII. This raises a question of general law, with precedential effect on tariff setting decisions (compare *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 (S.C.C.) on the application of abuse of process doctrine to arbitral proceedings). As such, correctness seems to be the appropriate standard.

172 The second question is whether, assuming that the ultra petita principle does not apply, the levy set by the Board was unfair. The answer to this question requires an evaluation of the purpose of the public notice of proposed tariffs pursuant to the Act, and whether concerned persons were unfairly treated by virtue of the tariff being set at an amount greater than that announced. This last aspect raises an issue of procedural fairness, on which it is generally accepted that no judicial deference is owed.

173 Turning to the first question, the ultra petita principle is generally understood to mean that a Court will not make a ruling beyond what is requested by the parties. For instance, a judgment which grants a monetary award that goes beyond that sought by the claimant is said to be ultra petita or extra petita.

174 At civil law, this principle is codified in article 468 of the Code of Civil Procedure. At common law, it is recognized by the case law (see for instance, *Johnston v. Buckland* (1936), [1937] S.C.R. 86 (S.C.C.); *Corp. Agencies Ltd. v. Home Bank of Canada*, [1925] S.C.R. 706 (S.C.C.); *Thibaudeau v. R.*, [1995] 2 S.C.R. 627 (S.C.C.) per McLachlin J. (as she then was) in dissent).

175 The legislator is free to remove administrative tribunals from the constraints of ultra petita. This will often be the case, as administrative tribunals are generally created to advance interests that can go beyond the immediate interests of the parties who appear before them (see for example section 61 of the National Transportation Act, R.S.C. 1985, c. N-20, as it read prior to its repeal in 1996, which conferred on the CRTC the right to grant relief "in addition to ... that applied for, ...")

176 In the present case, subsections 83(8) and (9) of the Act are particularly relevant:

83(8) Duties of Board

(8) On the conclusion of its consideration of the proposed tariff, the Board shall

(a) establish, in accordance with subsection (9),

(i) the manner of determining the levies, and

(ii) such terms and conditions related to those levies as the Board considers appropriate, including, without limiting the generality of the foregoing, the form, content and frequency of the statements of account mentioned in subsection 82(1), measures for the protection of confidential information contained in those statements, and the times at which the levies are payable,

(b) vary the tariff accordingly,

(c) certify the tariff as the approved tariff, whereupon that tariff becomes for the purposes of this Part the approved tariff, and

(d) designate as the collecting body the collective society or other society, association or corporation that, in the Board's opinion, will best fulfil the objects of sections 82, 84 and 86, but the Board is not obligated to exercise its power under paragraph (d) if it has previously done so, and a designation under that paragraph remains in effect until the Board makes another designation, which it may do at any time whatsoever, on application.

83(9) Factors Board to consider

(9) In exercising its power under paragraph (8)(a), the Board shall satisfy itself that the levies are fair and equitable, having regard to any prescribed criteria.

83(8) Mesures à prendre

(8) Au terme de son examen, la Commission_:

a) établit conformément au paragraphe (9)_:

(i) la formule tarifaire qui permet de déterminer les redevances,

(ii) à son appréciation, les modalités afférentes à celles-ci, notamment en ce qui concerne leurs dates de versement, la forme, la teneur et la fréquence des états de compte visés au paragraphe 82(1) et les mesures de protection des renseignements confidentiels qui y figurent;

b) modifie le projet de tarif en conséquence;

c) le certifie, celui-ci devenant dès lors le tarif homologué pour la société de gestion en cause;

d) désigne, à titre d'organisme de perception, la société de gestion ou autre société, association ou personne morale la mieux en mesure, à son avis, de s'acquitter des responsabilités ou fonctions découlant des articles 82, 84 et 86.

La Commission n'est pas tenue de faire une désignation en vertu de l'alinéa d) si une telle désignation a déjà été faite. Celle-ci demeure en vigueur jusqu'à ce que la Commission procède à une nouvelle désignation, ce qu'elle peut faire sur demande en tout temps.

83(9) Critères particuliers

(9) Pour l'exercice de l'attribution prévue à l'alinéa (8)a), la Commission doit s'assurer que les redevances sont justes et équitables compte tenu, le cas échéant, des critères réglementaires.

177 While this language is not as clear as that just cited, it can be seen that, upon being seized with a proposed tariff, the Board retains the discretion to establish a tariff that is "fair and equitable" (subsection 83(9)), and to set "such terms and conditions related to those levies as the Board considers appropriate," (emphasis added) (paragraph 83(8)(ii)).

178 In this instance, the Board explained that it could not set the rate based on the model proposed by the CPCC because it was too complex (Private Copying III, p. 56). Instead, the Board chose to set the rate based on its own model which resulted in a marginal increase (Private Copying III, p. 63).

179 In fixing royalties the Board must take account of numerous factors, including the competing interests of the parties and the requirement that the levy be fair and equitable. Given the Board's role, its broad discretion and the language of subsections 83(8) and (9), I am of the view that the ultra petita principle did not prevent the Board from deviating as it did from the proposed tariff.

180 Turning to the issue of fairness, the applicants allege that certain importers who could have participated in the Board's hearing might not have done so on the belief that the tariff would not be higher than that published.

181 In considering this argument, it is important to recall that the levy of $2.00 only exceeds the amount requested by CPCC for two of the four typical formats of non-removable solid state or "flash" memory incorporated into digital audio recorders (32, 64, 128 and 256 megabytes). Conversely, the levy is less than the $2.68 and $5.37 which would have applied to recorders containing non-removable flash memory of 128 or 256 megabytes if CPCC's proposed rate of 2.1 cents per megabyte had been accepted by the Board. Furthermore, the levy of $2.00 certified by the Board is far less than the $21.00 per gigabyte levy sought by CPCC for non-removable hard disk with one gigabyte of memory.

182 It is significant that the applicants have led no evidence remotely suggesting that concerned persons who did not participate in the Board's hearing would have done so if they had known that the resulting tariff would be marginally higher than that applied for. This shows in my view that the Board properly assessed the situation and arrived at the correct conclusion when it said (see paragraph 168 above), that no unfairness would result from the increase which it authorized.

183 For these reasons, I conclude that the Board committed no error in setting the levy at a rate higher than that applied for.

184 I would nevertheless allow the application for judicial review on the first issue and grant the applicants their costs.

***Linden J.A.*:**

I agree.

***Evans J.A.*:**

I agree.

Applications dismissed regarding Part VIII constitutionality and zero-rating program; application granted regarding imposing levy on memory embedded in MP3 players.

APPENDIX I

Part VIII

Private Copying

Interpretation

79 Definitions

79. In this Part,

79. "audio recording medium" « _support audio_ »

"audio recording medium" means a recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose, excluding any prescribed kind of recording medium;

79 "blank audio recording medium" « _support audio vierge_ "blank audio recording medium" means

(a) an audio recording medium onto which no sounds have ever been fixed, and

(b) any other prescribed audio recording medium;

79 "collecting body" « _organisme de perception_ »

"collecting body" means the collective society, or other society, association or corporation, that is designated as the collecting body under subsection 83(8);

79 "eligible author" « _auteur admissible_ »

"eligible author" means an author of a musical work, whether created before or after the coming into force of this Part, that is embodied in a sound recording, whether made before or after the coming into force of this Part, if copyright subsists in Canada in that musical work;

79 "eligible maker" « _producteur admissible_ »

"eligible maker" means a maker of a sound recording that embodies a musical work, whether the first fixation of the sound recording occurred before or after the coming into force of this Part, if

(a) both the following two conditions are met:

(i) the maker, at the date of that first fixation, if a corporation, had its headquarters in Canada or, if a natural person, was a Canadian citizen or permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and

(ii) copyright subsists in Canada in the sound recording, or

(b) the maker, at the date of that first fixation, if a corporation, had its headquarters in a country referred to in a statement published under section 85 or, if a natural person, was a citizen, subject or permanent resident of such a country;

79 "eligible performer" « _artiste-interprète admissible_ » "eligible performer" means the performer of a performer's performance of a musical work, whether it took place before or after the coming into force of this Part, if the performer's performance is embodied in a sound recording and

(a) both the following two conditions are met:

(i) the performer was, at the date of the first fixation of the sound recording, a Canadian citizen or permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and

(ii) copyright subsists in Canada in the performer's performance, or

(b) the performer was, at the date of the first fixation of the sound recording, a citizen, subject or permanent resident of a country referred to in a statement published under section 85;

"prescribed" Version anglaise seulement

"prescribed" means prescribed by regulations made under this Part.

1997, c. 24, s. 50; 2001, c. 27, s. 240.

Copying for Private Use

80(1) Where no infringement of copyright

80. (1) Subject to subsection (2), the act of reproducing all or any substantial part of

(a) a musical work embodied in a sound recording,

(b) a performer's performance of a musical work embodied in a sound recording, or

(c) a sound recording in which a musical work, or a performer's performance of a musical work, is embodied onto an audio recording medium for the private use of the person who makes the copy does not constitute an infringement of the copyright in the musical work, the performer's performance or the sound recording.

80(2) Limitation

(2) Subsection (1) does not apply if the act described in that subsection is done for the purpose of doing any of the following in relation to any of the things referred to in paragraphs (1)(a) to (c):

(a) selling or renting out, or by way of trade exposing or offering for sale or rental;

(b) distributing, whether or not for the purpose of trade;

(c) communicating to the public by telecommunication; or

(d) performing, or causing to be performed, in public.

1997, c. 24, s. 50.

Right of Remuneration

81(1) Right of remuneration

81. (1) Subject to and in accordance with this Part, eligible authors, eligible performers and eligible makers have a right to receive remuneration from manufacturers and importers of blank audio recording media in respect of the reproduction for private use of

(a) a musical work embodied in a sound recording;

(b) a performer's performance of a musical work embodied in a sound recording; or

(c) a sound recording in which a musical work, or a performer's performance of a musical work, is embodied.

81(2) Assignment of rights

(2) Subsections 13(4) to (7) apply, with such modifications as the circumstances require, in respect of the rights conferred by subsection (1) on eligible authors, performers and makers.

1997, c. 24, s. 50.

Levy on Blank Audio Recording Media

82(1) Liability to pay levy

82. (1) Every person who, for the purpose of trade, manufactures a blank audio recording medium in Canada or imports a blank audio recording medium into Canada

(a) is liable, subject to subsection (2) and section 86, to pay a levy to the collecting body on selling or otherwise disposing of those blank audio recording media in Canada; and

(b) shall, in accordance with subsection 83(8), keep statements of account of the activities referred to in paragraph (a), as well as of exports of those blank audio recording media, and shall furnish those statements to the collecting body.

82(2) No levy for exports

(2) No levy is payable where it is a term of the sale or other disposition of the blank audio recording medium that the medium is to be exported from Canada, and it is exported from Canada.

1997, c. 24, s. 50.

Filing of proposed tariffs

83. (1) Subject to subsection (14), each collective society may file with the Board a proposed tariff for the benefit of those eligible authors, eligible performers and eligible makers who, by assignment, grant of licence, appointment of the society as their agent or otherwise, authorize it to act on their behalf for that purpose, but no person other than a collective society may file any such tariff.

83(2) Collecting body

(2) Without limiting the generality of what may be included in a proposed tariff, the tariff may include a suggestion as to whom the Board should designate under paragraph (8)(d) as the collecting body.

83(3) Times for filing

(3) Proposed tariffs must be in both official languages and must be filed on or before the March 31 immediately before the date when the approved tariffs cease to be effective.

83(4) Where no previous tariff

(4) A collective society in respect of which no proposed tariff has been certified pursuant to paragraph (8)(c) shall file its proposed tariff on or before the March 31 immediately before its proposed effective date.

83(5) Effective period of levies

(5) A proposed tariff must provide that the levies are to be effective for periods of one or more calendar years.

83(6) Publication of proposed tariffs

(6) As soon as practicable after the receipt of a proposed tariff filed pursuant to subsection (1), the Board shall publish it in the Canada Gazette and shall give notice that, within sixty days after the publication of the tariff, any person may file written objections to the tariff with the Board.

83(7) Board to consider proposed tariffs and objections

(7) The Board shall, as soon as practicable, consider a proposed tariff and any objections thereto referred to in subsection (6) or raised by the Board, and

(a) send to the collective society concerned a copy of the objections so as to permit it to reply; and

(b) send to the persons who filed the objections a copy of any reply thereto.

83(8) Duties of Board

(8) On the conclusion of its consideration of the proposed tariff, the Board shall

(a) establish, in accordance with subsection (9),

(i) the manner of determining the levies, and

(ii) such terms and conditions related to those levies as the Board considers appropriate, including, without limiting the generality of the foregoing, the form, content and frequency of the statements of account mentioned in subsection 82(1), measures for the protection of confidential information contained in those statements, and the times at which the levies are payable,

(b) vary the tariff accordingly,

(c) certify the tariff as the approved tariff, whereupon that tariff becomes for the purposes of this Part the approved tariff, and

(d) designate as the collecting body the collective society or other society, association or corporation that, in the Board's opinion, will best fulfil the objects of sections 82, 84 and 86, but the Board is not obligated to exercise its power under paragraph (d) if it has previously done so, and a designation under that paragraph remains in effect until the Board makes another designation, which it may do at any time whatsoever, on application.

83(9) Factors Board to consider

(9) In exercising its power under paragraph (8)(a), the Board shall satisfy itself that the levies are fair and equitable, having regard to any prescribed criteria.

83(10) Publication of approved tariffs

(10) The Board shall publish the approved tariffs in the Canada Gazette as soon as practicable and shall send a copy of each approved tariff, together with the reasons for the Board's decision, to the collecting body, to each collective society that filed a proposed tariff, and to any person who filed an objection.

83(11) Authors, etc., not represented by collective society

(11) An eligible author, eligible performer or eligible maker who does not authorize a collective society to file a proposed tariff under subsection (1) is entitled, in relation to

(a) a musical work,

(b) a performer's performance of a musical work, or

(c) a sound recording in which a musical work, or a performer's performance of a musical work, is embodied, as the case may be, to be paid by the collective society that is designated by the Board, of the Board's own motion or on application, the remuneration referred to in section 81 if such remuneration is payable during a period when an approved tariff that is applicable to that kind of work, performer's performance or sound recording is effective, subject to the same conditions as those to which a person who has so authorized that collective society is subject.

83(12) Exclusion of other remedies

(12) The entitlement referred to in subsection (11) is the only remedy of the eligible author, eligible performer or eligible maker referred to in that subsection in respect of the reproducing of sound recordings for private use.

83(13) Powers of Board

(13) The Board may, for the purposes of subsections (11) and (12),

(a) require a collective society to file with the Board information relating to payments of moneys received by the society pursuant to section 84 to the persons who have authorized it to file a tariff under subsection (1); and

(b) by regulation, establish the periods, which shall not be less than twelve months, beginning when the applicable approved tariff ceases to be effective, within which the entitlement referred to in subsection (11) must be exercised.

83(14) Single proposed tariff

(14) Where all the collective societies that intend to file a proposed tariff authorize a particular person or body to file a single proposed tariff on their behalf, that person or body may do so, and in that case this section applies, with such modifications as the circumstances require, in respect of that proposed tariff.

1997, c. 24, s. 50.

Distribution of Levies Paid

84 Distribution by collecting body

84. As soon as practicable after receiving the levies paid to it, the collecting body shall distribute the levies to the collective societies representing eligible authors, eligible performers and eligible makers, in the proportions fixed by the Board.

1997, c. 24, s. 50.

Reciprocity

85. (1) Where the Minister is of the opinion that another country grants or has undertaken to grant to performers and makers of sound recordings that are Canadian citizens or permanent residents within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act or, if corporations, have their headquarters in Canada, as the case may be, whether by treaty, convention, agreement or law, benefits substantially equivalent to those conferred by this Part, the Minister may, by a statement published in the Canada Gazette,

(a) grant the benefits conferred by this Part to performers or makers of sound recordings that are citizens, subjects or permanent residents of or, if corporations, have their headquarters in that country; and

(b) declare that that country shall, as regards those benefits, be treated as if it were a country to which this Part extends.

85(2) Reciprocity

(2) Where the Minister is of the opinion that another country neither grants nor has undertaken to grant to performers or makers of sound recordings that are Canadian citizens or permanent residents within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act or, if corporations, have their headquarters in Canada, as the case may be, whether by treaty, convention, agreement or law, benefits substantially equivalent to those conferred by this Part, the Minister may, by a statement published in the Canada Gazette,

(a) grant the benefits conferred by this Part to performers or makers of sound recordings that are citizens, subjects or permanent residents of or, if corporations, have their headquarters in that country, as the case may be, to the extent that that country grants those benefits to performers or makers of sound recordings that are Canadian citizens or permanent residents within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act or, if corporations, have their headquarters in Canada; and

(b) declare that that country shall, as regards those benefits, be treated as if it were a country to which this Part extends.

85(3) Application of Act

(3) Any provision of this Act that the Minister specifies in a statement referred to in subsection (1) or (2)

(a) applies in respect of performers or makers of sound recordings covered by that statement, as if they were citizens of or, if corporations, had their headquarters in Canada; and

(b) applies in respect of a country covered by that statement, as if that country were Canada.

85(4) Application of Act

(4) Subject to any exceptions that the Minister may specify in a statement referred to in subsection (1) or (2), the other provisions of this Act also apply in the way described in subsection (3).

1997, c. 24, s. 50; 2001, c. 27, s. 241.

Exemption from Levy

86(1) Where no levy payable

86. (1) No levy is payable under this Part where the manufacturer or importer of a blank audio recording medium sells or otherwise disposes of it to a society, association or corporation that represents persons with a perceptual disability.

86(2) Refunds

(2) Where a society, association or corporation referred to in subsection (1)

(a) purchases a blank audio recording medium in Canada from a person other than the manufacturer or importer, and

(b) provides the collecting body with proof of that purchase, on or before June 30 in the calendar year following the calendar year in which the purchase was made, the collecting body is liable to pay forthwith to the society, association or corporation an amount equal to the amount of the levy paid in respect of the blank audio recording medium purchased.

86(3) If registration system exists

(3) If regulations made under paragraph 87(a) provide for the registration of societies, associations or corporations that represent persons with a perceptual disability, subsections (1) and (2) shall be read as referring to societies, associations or corporations that are so registered.

1997, c. 24, s. 50.

Regulations

87 Regulations

87. The Governor in Council may make regulations

(a) respecting the exemptions and refunds provided for in section 86, including, without limiting the generality of the foregoing,

(i) regulations respecting procedures governing those exemptions and refunds,

(ii) regulations respecting applications for those exemptions and refunds, and

(iii) regulations for the registration of societies, associations or corporations that represent persons with a perceptual disability;

(b) prescribing anything that by this Part is to be prescribed; and

(c) generally for carrying out the purposes and provisions of this Part.

1997, c. 24, s. 50.

Civil Remedies

88(1) Right of recovery

88. (1) Without prejudice to any other remedies available to it, the collecting body may, for the period specified in an approved tariff, collect the levies due to it under the tariff and, in default of their payment, recover them in a court of competent jurisdiction.

88(2) Failure to pay royalties

(2) The court may order a person who fails to pay any levy due under this Part to pay an amount not exceeding five times the amount of the levy to the collecting body. The collecting body must distribute the payment in the manner set out in section 84.

88(3) Order directing compliance

(3) Where any obligation imposed by this Part is not complied with, the collecting body may, in addition to any other remedy available, apply to a court of competent jurisdiction for an order directing compliance with that obligation.

88(4) Factors to consider

(4) Before making an order under subsection (2), the court must take into account

(a) whether the person who failed to pay the levy acted in good faith or bad faith;

(b) the conduct of the parties before and during the proceedings; and

(c) the need to deter persons from failing to pay levies. 1997, c. 24, s. 50.

Partie VIII

Copie Pour Usage Privé

Définitions

79 Définitions

79. Les définitions qui suivent s'appliquent à la présente partie.

79 « _artiste-interprète admissible_ » "eligible performer"

« _artiste-interprète admissible_ » Artiste-interprète dont la prestation d'une oeuvre musicale, qu'elle ait eu lieu avant ou après l'entrée en vigueur de la présente partie_:

a) soit est protégée par le droit d'auteur au Canada et a été fixée pour la première fois au moyen d'un enregistrement sonore alors que l'artiste-interprète était un citoyen canadien ou un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés;

b) soit a été fixée pour la première fois au moyen d'un enregistrement sonore alors que l'artiste-interprète était sujet, citoyen ou résident permanent d'un pays visé par la déclaration publiée en vertu de l'article 85.

79 « _auteur admissible_ » "eligible author"

« _auteur admissible_ » Auteur d'une oeuvre musicale fixée au moyen d'un enregistrement sonore et protégée par le droit d'auteur au Canada, que l'oeuvre ou l'enregistrement sonore ait été respectivement créée ou confectionné avant ou après l'entrée en vigueur de la présente partie.

79 « _organisme de perception_ » "collecting body"

« _organisme de perception_ » Société de gestion ou autre société, association ou personne morale désignée aux termes du paragraphe 83(8).

79 « _producteur admissible_ » "eligible maker"

« _producteur admissible_ » Le producteur de l'enregistrement sonore d'une oeuvre musicale, que la première fixation ait eu lieu avant ou après l'entrée en vigueur de la présente partie_:

a) soit si l'enregistrement sonore est protégé par le droit d'auteur au Canada et qu'à la date de la première fixation, le producteur était un citoyen canadien ou un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés ou, s'il s'agit d'une personne morale, avait son siège social au Canada;

b) soit si le producteur était, à la date de la première fixation, sujet, citoyen ou résident permanent d'un pays visé dans la déclaration publiée en vertu de l'article 85 ou, s'il s'agit d'une personne morale, avait son siège social dans un tel pays.

79 « _support audio_ » "audio recording medium"

« _support audio_ » Tout support audio habituellement utilisé par les consommateurs pour reproduire des enregistrements sonores, à l'exception toutefois de ceux exclus par règlement.

79 « _support audio vierge_ » "blank audio recording medium"

« _support audio vierge_ » Tout support audio sur lequel aucun son n'a encore été fixé et tout autre support audio précisé par règlement.

1997, ch. 24, art. 50; 2001, ch. 27, art. 240.

Copie pour usage privé

80(1) Non-violation du droit d'auteur

80. (1) Sous réserve du paragraphe (2), ne constitue pas une violation du droit d'auteur protégeant tant l'enregistrement sonore que l'oeuvre musicale ou la prestation d'une oeuvre musicale qui le constituent, le fait de reproduire pour usage privé l'intégralité ou toute partie importante de cet enregistrement sonore, de cette oeuvre ou de cette prestation sur un support audio.

80(2) Limite

(2) Le paragraphe (1) ne s'applique pas à la reproduction de l'intégralité ou de toute partie importante d'un enregistrement sonore, ou de l'oeuvre musicale ou de la prestation d'une oeuvre musicale qui le constituent, sur un support audio pour les usages suivants_:

a) vente ou location, ou exposition commerciale;

b) distribution dans un but commercial ou non;

c) communication au public par télécommunication;

d) exécution ou représentation en public.

1997, ch. 24, art. 50.

Droit à rémunération

81(1) Rémunération

81. (1) Conformément à la présente partie et sous réserve de ses autres dispositions, les auteurs, artistes-interprètes et producteurs admissibles ont droit, pour la copie à usage privé d'enregistrements sonores ou d'oeuvres musicales ou de prestations d'oeuvres musicales qui les constituent, à une rémunération versée par le fabricant ou l'importateur de supports audio vierges.

81(2) Application des paragraphes 13(4) à (7)

(2) Les paragraphes 13(4) à (7) s'appliquent, avec les adaptations nécessaires, au droit conféré par le paragraphe (1) à l'auteur, à l'artiste-interprète et au producteur admissibles.

1997, ch. 24, art. 50.

Redevances

82(1) Obligation

82. (1) Quiconque fabrique au Canada ou y importe des supports audio vierges à des fins commerciales est tenu_:

a) sous réserve du paragraphe (2) et de l'article 86, de payer à l'organisme de perception une redevance sur la vente ou toute autre forme d'aliénation de ces supports au Canada;

b) d'établir, conformément au paragraphe 83(8), des états de compte relatifs aux activités visées à l'alinéa a) et aux activités d'exportation de ces supports, et de les communiquer à l'organisme de perception.

82(2) Exportations

(2) Aucune redevance n'est toutefois payable sur les supports audio vierges lorsque leur exportation est une condition de vente ou autre forme d'aliénation et qu'ils sont effectivement exportés.1997, ch. 24, art. 50.

Dépôt d'un projet de tarif

83. (1) Sous réserve du paragraphe (14), seules les sociétés de gestion agissant au nom des auteurs, artistes-interprètes et producteurs admissibles qui les ont habilitées à cette fin par voie de cession, licence, mandat ou autrement peuvent déposer auprès de la Commission un projet de tarif des redevances à percevoir.

83(2) Organisme de perception

(2) Le projet de tarif peut notamment proposer un organisme de perception en vue de la désignation prévue à l'alinéa (8)d).

83(3) Délai de dépôt

(3) Il est à déposer, dans les deux langues officielles, au plus tard le 31 mars précédant la cessation d'effet du tarif homologué.

83(4) Société non régie par un tarif homologué

(4) Lorsqu'elle n'est pas régie par un tarif homologué au titre de l'alinéa (8)c), la société de gestion doit déposer son projet de tarif auprès de la Commission au plus tard le 31 mars précédant la date prévue pour sa prise d'effet.

83(5) Durée de validité

(5) Le projet de tarif prévoit des périodes d'effet d'une ou de plusieurs années civiles.

83(6) Publication

(6) Dès que possible, la Commission le fait publier dans la Gazette du Canada et donne un avis indiquant que quiconque peut y faire opposition en déposant auprès d'elle une déclaration en ce sens dans les soixante jours suivant la publication.

83(7) Examen du projet de tarif

(7) Elle procède dans les meilleurs délais à l'examen du projet de tarif et, le cas échéant, des oppositions; elle peut également faire opposition au projet. Elle communique à la société de gestion en cause copie des oppositions et aux opposants les réponses éventuelles de celle-ci.

83(8) Mesures à prendre

(8) Au terme de son examen, la Commission:

a) établit conformément au paragraphe (9)_:

(i) la formule tarifaire qui permet de déterminer les redevances,

(ii) à son appréciation, les modalités afférentes à celles-ci, notamment en ce qui concerne leurs dates de versement, la forme, la teneur et la fréquence des états de compte visés au paragraphe 82(1) et les mesures de protection des renseignements confidentiels qui y figurent;

b) modifie le projet de tarif en conséquence;

c) le certifie, celui-ci devenant dès lors le tarif homologué pour la société de gestion en cause;

d) désigne, à titre d'organisme de perception, la société de gestion ou autre société, association ou personne morale la mieux en mesure, à son avis, de s'acquitter des responsabilités ou fonctions découlant des articles 82, 84 et 86.

La Commission n'est pas tenue de faire une désignation en vertu de l'alinéa d) si une telle désignation a déjà été faite. Celle-ci demeure en vigueur jusqu'à ce que la Commission procède à une nouvelle désignation, ce qu'elle peut faire sur demande en tout temps.

83(9) Critères particuliers

(9) Pour l'exercice de l'attribution prévue à l'alinéa (8)a), la Commission doit s'assurer que les redevances sont justes et équitables compte tenu, le cas échéant, des critères réglementaires.

83(10) Publication

(10) Elle publie dès que possible dans la Gazette du Canada les tarifs homologués; elle en envoie copie, accompagnée des motifs de sa décision, à l'organisme de perception, à chaque société de gestion ayant déposé un projet de tarif et à toutes les personnes ayant déposé une opposition.

83(11) Auteurs, artistes-interprètes non représentés

(11) Les auteurs, artistes-interprètes et producteurs admissibles qui ne sont pas représentés par une société de gestion peuvent, aux mêmes conditions que ceux qui le sont, réclamer la rémunération visée à l'article 81 auprès de la société de gestion désignée par la Commission, d'office ou sur demande, si pendant la période où une telle rémunération est payable, un tarif homologué s'applique à leur type d'oeuvre musicale, de prestation d'une oeuvre musicale ou d'enregistrement sonore constitué d'une oeuvre musicale ou d'une prestation d'une oeuvre musicale, selon le cas.

83(12) Exclusion d'autres recours

(12) Le recours visé au paragraphe (11) est le seul dont disposent les auteurs, artistes-interprètes et producteurs admissibles en question en ce qui concerne la reproduction d'enregistrements sonores pour usage privé.

83(13) Mesures d'application

(13) Pour l'application des paragraphes (11) et (12), la Commission peut_:

a) exiger des sociétés de gestion le dépôt de tout renseignement relatif au versement des redevances qu'elles reçoivent en vertu de l'article 84 aux personnes visées au paragraphe (1);

b) fixer par règlement des périodes d'au moins douze mois, commençant à la date de cessation d'effet du tarif homologué, pendant lesquelles la rémunération visée au paragraphe (11) peut être réclamée.

83(14) Représentant

(14) Une personne ou un organisme peut, lorsque toutes les sociétés de gestion voulant déposer un projet de tarif l'y autorisent, déposer le projet pour le compte de celles-ci; les dispositions du présent article s'appliquent alors, avec les adaptations nécessaires, à ce projet de tarif.

1997, ch. 24, art. 50.

Répartition des redevances

84 Organisme de perception

84. Le plus tôt possible après avoir reçu les redevances, l'organisme de perception les répartit entre les sociétés de gestion représentant les auteurs admissibles, les artistes-interprètes admissibles et les producteurs admissibles selon la proportion fixée par la Commission.

1997, ch. 24, art. 50.

Réciprocité

85. (1) Lorsqu'il est d'avis qu'un autre pays accorde ou s'est engagé à accorder, par traité, convention, contrat ou loi, aux artistes-interprètes et aux producteurs d'enregistrements sonores qui sont des citoyens canadiens ou des résidents permanents au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés ou, s'il s'agit de personnes morales, ayant leur siège social au Canada, essentiellement les mêmes avantages que ceux conférés par la présente partie, le ministre peut, en publiant une déclaration dans la Gazette du Canada, à la fois_:

a) accorder les avantages conférés par la présente partie aux artistes-interprètes et producteurs d'enregistrements sonores sujets, citoyens ou résidents permanents de ce pays ou, s'il s'agit de personnes morales, ayant leur siège social dans ce pays;

b) énoncer que ce pays est traité, à l'égard de ces avantages, comme s'il était un pays visé par l'application de la présente partie.

85(2) Réciprocité

(2) Lorsqu'il est d'avis qu'un autre pays n'accorde pas ni ne s'est engagé à accorder, par traité, convention, contrat ou loi, aux artistes-interprètes ou aux producteurs d'enregistrements sonores qui sont des citoyens canadiens ou des résidents permanents au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés ou, s'il s'agit de personnes morales, ayant leur siège social au Canada, essentiellement les mêmes avantages que ceux conférés par la présente partie, le ministre peut, en publiant une déclaration dans la Gazette du Canada, à la fois_:

a) accorder les avantages conférés par la présente partie aux artistes-interprètes ou aux producteurs d'enregistrements sonores sujets, citoyens ou résidents permanents de ce pays ou, s'il s'agit de personnes morales, ayant leur siège social dans ce pays, dans la mesure où ces avantages y sont accordés aux artistes-interprètes ou aux producteurs d'enregistrements sonores qui sont des citoyens canadiens ou de tels résidents permanents ou, s'il s'agit de personnes morales, ayant leur siège social au Canada;

b) énoncer que ce pays est traité, à l'égard de ces avantages, comme s'il était un pays visé par l'application de la présente partie.

85(3) Application

(3) Les dispositions de la présente loi que le ministre précise dans la déclaration s'appliquent_:

a) aux artistes-interprètes ou producteurs d'enregistrements sonores visés par cette déclaration comme s'ils étaient citoyens du Canada ou, s'il s'agit de personnes morales, avaient leur siège social au Canada;

b) au pays visé par la déclaration, comme s'il s'agissait du Canada.

85(4) Autres dispositions

(4) Les autres dispositions de la présente loi s'appliquent de la manière prévue au paragraphe (3), sous réserve des exceptions que le ministre peut prévoir dans la déclaration. 1997, ch. 24, art. 50; 2001, ch. 27, art. 241.

Exemption

86(1) Aucune redevance payable

86. (1) La vente ou toute autre forme d'aliénation d'un support audio vierge au profit d'une société, association ou personne morale qui représente les personnes ayant une déficience perceptuelle ne donne pas lieu à redevance.

86(2) Remboursement

(2) Toute société, association ou personne morale visée au paragraphe (1) qui achète au Canada un support audio vierge à une personne autre que le fabricant ou l'importateur a droit, sur preuve d'achat produite au plus tard le 30 juin de l'année civile qui suit celle de l'achat, au remboursement sans délai par l'organisme de perception d'une somme égale au montant de la redevance payée.

86(3) Inscriptions

(3) Si les règlements pris en vertu de l'alinéa 87a) prévoient l'inscription des sociétés, associations ou personnes morales qui représentent des personnes ayant une déficience perceptuelle, les paragraphes (1) et (2) ne s'appliquent qu'aux sociétés, associations ou personnes morales inscrites conformément à ces règlements.

1997, ch. 24, art. 50.

Règlements

87 Règlements

87. Le gouverneur en conseil peut, par règlement_:

a) régir les exemptions et les remboursements prévus à l'article 86, notamment en ce qui concerne_:

(i) la procédure relative à ces exemptions ou remboursements,

(ii) les demandes d'exemption ou de remboursement,

(iii) l'inscription des sociétés, associations ou personnes morales qui représentent les personnes ayant une déficience perceptuelle;

b) prendre toute mesure d'ordre réglementaire prévue par la présente partie;

c) prendre toute autre mesure d'application de la présente partie.

1997, ch. 24, art. 50.

Recours civils

88(1) Droit de recouvrement

88. (1) L'organisme de perception peut, pour la période mentionnée au tarif homologué, percevoir les redevances qui y figurent et, indépendamment de tout autre recours, le cas échéant, en poursuivre le recouvrement en justice.

88(2) Défaut de payer les redevances

(2) En cas de non-paiement des redevances prévues par la présente partie, le tribunal compétent peut condamner le défaillant à payer à l'organisme de perception jusqu'au quintuple du montant de ces redevances et ce dernier les répartit conformément à l'article 84.

88(3) Ordonnance

(3) L'organisme de perception peut, en sus de tout autre recours possible, demander à un tribunal compétent de rendre une ordonnance obligeant une personne à se conformer aux exigences de la présente partie.

88(4) Facteurs

(4) Lorsqu'il rend une décision relativement au paragraphe (2), le tribunal tient compte notamment des facteurs suivants_:

a) la bonne ou mauvaise foi du défaillant;

b) le comportement des parties avant l'instance et au cours de celle-ci;

c) la nécessité de créer un effet dissuasif en ce qui touche le non-paiement des redevances.

1997, ch. 24, art. 50.

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