

Federal Court of Appeal



Cour d'appel fédérale

Date: 20260629

Docket: A-26-26

Citation: 2026 FCA 122

**CORAM: LASKIN J.A.
MONAGHAN J.A.
ROUSSEL J.A.**

BETWEEN:

**SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS
OF CANADA**

Applicant

and

**APPLE CANADA INC., APPLE INC., CANADIAN ASSOCIATION OF
BROADCASTERS, BELL CANADA, QUÉBECOR MÉDIA INC.,
ROGERS COMMUNICATIONS CANADA INC., DAZN LIMITED,
BUENA VISTA INTERNATIONAL, INC., WARNER BROS.
ENTERTAINMENT INC., COGECO COMMUNICATIONS INC.,
TELUS COMMUNICATIONS INC., STINGRAY GROUP INC.,
GOOGLE INC., GOODLIFE FITNESS CENTRES INC., NETFLIX
INC. and THE CANADIAN COMMUNICATION SYSTEMS ALLIANCE**

Respondents

Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on June 29, 2026.

REASONS FOR JUDGMENT BY:

MONAGHAN J.A.

CONCURRED IN BY:

**LASKIN J.A.
ROUSSEL J.A.**

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Respondents

REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] The Society of Composers, Authors and Music Publishers of Canada (SOCAN) initiated a proceeding before the Copyright Board seeking an order of the Board establishing the royalty

rates (*i.e.*, setting tariffs) SOCAN will collect for 2014–2026 from users of musical works in online audiovisual services and user-generated content services. The Copyright Board has the authority to set such rates under the *Copyright Act*, R.S.C. 1985, c. C-42.

[2] During case management, the Board decided to divide the proceeding into two phases and identified “four preliminary issues” to be considered in Phase I:

1. Does the Supreme Court’s decision in *CBC v SODRAC*, 2015 SCC 57, apply to tariff proceedings before the Board? If so, how?
2. Is it possible for the statutory exceptions (listed in the Order) [ss. 29.21, 29.24, 30.7, 30.71 and 31.1 of the *Copyright Act*] to apply to a class of services covered by the Proposed Tariffs?
3. What is the interpretation of paragraph 66.501(a) of the [the Act]?
4. When offline viewing copies are offered, created, and used, which rights are triggered?

Notice CB-CDA 2024-061, dated July 24, 2024 (Phase I Notice), as summarized in Ruling CB-CDA 2025-109, dated November 21, 2025.

[3] In response to concerns raised by certain parties to the proceeding, the Board’s Phase I Notice included what it described as two safeguards. The second of those safeguards, relevant to this matter, was that “if evidence in Phase II significantly throws into doubt a conclusion from Phase I, parties can ask the Board to reconsider that conclusion”: Phase I Notice at para. 23.

[4] On November 21, 2025, the Board issued a ruling setting out its “conclusions on these preliminary issues” stating the ruling “does not constitute [the Board’s] final determinations on the Proposed Tariffs under consideration”: Ruling CB-CDA-2025-109 (the Phase I Ruling) at

paras. 1–2. The Board also reminded the parties of its safeguard that “if evidence in Phase II significantly throws into doubt a conclusion from Phase I, parties can ask the Board to reconsider that conclusion”: Phase I Ruling at para. 3.

[5] SOCAN filed an application for judicial review of the Phase I Ruling.

[6] Three respondents, Buena Vista International, Inc., Warners Bros. Entertainment Inc. and Netflix Inc., now bring a motion to strike the application. They contend that the Phase I Ruling is an interlocutory one in a larger and ongoing administrative process and is therefore not a “decision” amenable to judicial review; that even if it were a decision that could be judicially reviewed in principle, SOCAN has not exhausted adequate and effective alternative recourse; and that no exceptional circumstances exist to justify early judicial intervention. These respondents seek lump sum costs of \$20,000, or costs on a heightened basis, on the ground SOCAN’s application should never have been brought.

[7] SOCAN has a different view of the matter. However, it contends that if the respondents’ motion is successful, heightened costs are not justified and that a \$5,000 costs award is more appropriate.

[8] For the following reasons, I would grant the motion to strike and dismiss the application for judicial review. While I agree the respondents are entitled to costs, I agree with SOCAN that a costs award of \$5,000 is more appropriate in the circumstances.

I. Motions to Strike and the Doctrine of Prematurity

[9] To succeed in this motion, the respondents must demonstrate that SOCAN's application for judicial review is "so clearly improper as to be bereft of any possibility of success":

JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue), 2013 FCA 250 at para. 47 [*JP Morgan*] citing *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.) at 600. This is admittedly a high threshold to meet.

[10] No evidence is admissible on a motion to strike, and with limited exceptions, we must presume the facts asserted in the notice of application are true; documents referred to in the notice of application or incorporated by reference can be taken into account: *JP Morgan* at para. 54. Here, those documents include the Phase I Notice and the Phase I Ruling, as well as an earlier Board ruling, CB-CDA 2025-004 dated January 16, 2025.

[11] Absent exceptional circumstances, parties to an administrative process cannot proceed to the court system until that process has run its course: *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 at para. 31 [*C.B. Powell*]; *Dugré v. Canada (Attorney General)*, 2021 FCA 8 at paras. 34, 37 [*Dugré*].

[12] This principle applies "to all matters that arise" before the administrative decision maker: *Klos v. Canada (Attorney General)*, 2021 FCA 238 at para. 6. A procedural fairness concern does not meet the "exceptional circumstances" threshold: *Herbert v. Canada (Attorney General)*, 2022 FCA 11 at para. 11.

[13] The purpose of this rule is to prevent “fragmentation of the administrative process and piecemeal court proceedings”, to eliminate “the large costs and delays associated with premature forays to court”, and to avoid “the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway”: *C.B. Powell* at para. 32, cited in *Dugré* at para. 34.

[14] Indeed, for an applicant to bypass the administrative process, “the consequences of an interlocutory decision [must] be so ‘immediate and radical’ that they call into question the rule of law”: *Dugré* at para. 35, quoting from *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17 at paras. 31–33 [*Wilson*].

II. SOCAN’s Application for Judicial Review is Premature

[15] SOCAN’s notice of application seeks an order quashing the Phase I Ruling as well as various declarations, including declarations that (i) the Board failed to discharge its duty of procedural fairness by deciding an issue that was outside the scope of Phase I; (ii) the Board erred in fact and law or reached a decision that is unreasonable; (iii) the Board shall not decide certain issues until the completion of Phase II; and (iv) two exceptions in the *Copyright Act* do not apply in particular circumstances.

[16] While the threshold to be met for striking an application for judicial review is a high one, the respondents have persuaded me that that threshold is met here. I find SOCAN’s application for judicial review premature for the following reasons.

A. *The Phase I Ruling is not amenable to judicial review*

[17] First, only administrative action that affects rights, imposes legal obligations, or causes prejudicial effects is amenable to judicial review: *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 69 at para. 19; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 at paras. 175–176, leave to appeal to SCC refused, 38379 (2 May 2019); *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15 at para. 10 [*Democracy Watch*]; *Air Canada v. Toronto Port Authority Et Al*, 2011 FCA 347 at para. 29 [*Toronto Port Authority*]; *(Canada (Citizenship and Immigration) v. Canadian Council for Refugees)*, 2021 FCA 72 at para. 94 [*Canadian Council for Refugees*]; *Air Passenger Rights v. Canada (Attorney General)*, 2024 FCA 128 paras. 18–31.

[18] The Board’s decision determining the tariffs at the end of Phase II would be such an action. However, I am not persuaded the Phase I Ruling affects legal rights, imposes legal obligations, or causes prejudicial effects to SOCAN that warrant judicial review at this stage of the proceeding. While I accept that the Phase I Ruling may affect the way the balance of the proceeding to determine the tariffs is conducted, that may be said of many interlocutory orders.

[19] SOCAN posits that the Board’s decision is final in substance no matter how the Board describes it. In doing so, SOCAN says it is not suggesting that the Board intended to manipulate the prematurity doctrine. Yet, it relies on Federal Court decisions where the relevant administrative decision maker was seen as trying to shield itself from judicial review: *Whalen v. Fort McMurray No. 468 First Nation*, 2019 FC 732 at para. 23, and *GCT Canada Limited*

Partnership v. Vancouver Fraser Port Authority, 2020 FC 1062 at para. 44, appeal dismissed, 2021 FCA 183. The circumstances at issue here are simply not comparable to those addressed in those cases.

[20] SOCAN also submits that this Court has previously recognized a first order of the Board in a bifurcated proceeding as a matter amenable to judicial review. That is true. But I agree with the respondents that *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers (C.A.)*, 2002 FCA 166 [CAIP] is distinguishable. First, the decision under review in CAIP—the Board’s first decision in a bifurcated proceeding—disentitled SOCAN from collecting royalties from an entire class of users and thus was final in that respect: CAIP at paras. 2, 4, 23. Second, the parties consented to the Court’s jurisdiction, and prematurity was not addressed: CAIP at paras. 33–34. Finally, CAIP predates *Democracy Watch*, *Toronto Port Authority*, and *Canadian Council for Refugees*.

[21] I also agree with the respondents that SOCAN’s reliance on *Wilson* is misplaced. In *Wilson* the administrative decision maker bifurcated the proceeding into a merits and remedy phase—creating a “natural break between two separate phases of the proceedings”, which, in the words of this Court, “often does not cause the ills identified in *C.B. Powell*”: *Wilson* at para. 36.

[22] In contrast, here the Board bifurcated the proceeding in consultation with the parties but has yet to apply the legal interpretations set out in its Phase I Ruling. Thus, the impact of the Phase I Ruling will crystallize only when a formal decision on the tariffs is made under the

Copyright Act: Çolakoğlu Metalurji A.S. v. Altasteel Inc., 2025 FCA 29 at para. 11. In other words, Phase I and Phase II together concern the merits of the proceeding.

B. *SOCAN has not exhausted available adequate alternative remedies*

[23] Second, even if the Phase I Ruling were amenable to judicial review in principle, SOCAN has not exhausted the available alternative remedies. The Phase I Ruling explicitly expresses its preliminary nature and acknowledges the parties' right to ask the Board to reconsider a Phase I conclusion if the evidence in Phase II significantly throws that conclusion into doubt.

[24] In this regard, SOCAN alleges that the Board's safeguard is inadequate and ineffective for two reasons. First, insofar as the Phase I Ruling addresses questions of law, they cannot be thrown into doubt by evidence. Second, the Board's conclusions will limit the evidence that may be tendered in Phase II.

[25] In response to these points, I note that the Board is the master of its own procedure: *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58 at para. 171. More specifically, the Board has broad discretion and powers concerning its processes, including the examination of witnesses and the production of documents: *Copyright Act*, s. 66.7. It also has broad powers to make orders in the context of case management; and the power to vary the rules governing its practice as appropriate, to vary orders made in a

proceeding, and to grant leave to amend a statement of issues to be considered and a case record:

Copyright Board Rules of Practice and Procedure, SOR/2023-24 at ss. 3(a), 4, 28-32, 39.

[26] As noted, the Board bifurcated the proceeding in consultation with the parties as part of its case management, as it was empowered to do.

[27] Moreover, I see nothing that precludes SOCAN from raising the matters it seeks to raise in its application for judicial review of the Phase I Ruling before the Board, either in case management before Phase II starts (see paragraph 207 of the Phase I Ruling and paragraph 26 of the Phase I Notice), or during Phase II. SOCAN has an alternative remedy that it has not exhausted. To the contrary, the Board has been consistently transparent with the parties through the Phase I Notice and the Phase I Ruling—Phase I conclusions may be revisited should Phase II evidence significantly throw any one of them into doubt.

C. *There are no exceptional circumstances*

[28] Finally, I agree with the respondents that there are no exceptional circumstances that would justify early recourse to the courts in respect of the Phase I Ruling. The consequences of the Phase I Ruling, as an interlocutory one, cannot be described in the terms outlined in *Dugré* and *Wilson*: the consequences are not so immediate and radical that they call into question the rule of law. In other words, the situation before me is not analogous to circumstances that could “justify the issuance of a writ of prohibition”: *Dugré* at para. 36, citing *Wilson* at para. 33, and *Forner v. Professional Institute of the Public Service of Canada*, 2016 FCA 35 at paras. 14–15.

[29] In this regard, this Court has held that “even constitutional questions or questions qualified as ‘jurisdictional’ questions cannot attract interlocutory relief”: *Lafond v. Canada (Immigration, Refugees and Citizenship)*, 2023 FCA 227 at para. 10; *Dugré* at para. 36, citing *C.B. Powell* at paras. 39–46, and *Black v. Canada (Attorney General)*, 2013 FCA 201 at paras. 18–19. The same must be said here—the circumstances are not exceptional.

D. *SOCAN may succeed or later raise the same challenges*

[30] I close with one other point. It is important to remember that at the end of Phase II, SOCAN may succeed in obtaining the tariffs it seeks: *C.B. Powell* at para. 32. If it does not and chooses to challenge that decision by way of judicial review, SOCAN is not precluded from raising the matters raised in its current application for judicial review.

[31] Indeed, to the extent SOCAN can raise issues before the Board, including the alleged breach of procedural fairness, it is appropriate that it do so. If it does not, but could have, it risks this Court exercising its discretion to not consider the issue on a subsequent application for judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61 at paras. 22–23; *Sierra Club Canada Foundation v. Canada (Environment and Climate Change)*, 2026 FCA 110 at paras. 70–71 and cases there cited. This Court will ordinarily not consider on judicial review an argument that was not made before the administrative decision-maker.

III. Conclusion

[32] Accordingly, I would grant the motion to strike and dismiss the application for judicial review. And, while it should be clear from these reasons, I reiterate that if SOCAN decides, upon completion of the administrative process, to seek judicial review of the Phase II decision, this dismissal is without prejudice to its right to then raise the issues it raises in its application for judicial review of the Phase I Ruling, subject to the principles described in preceding paragraph.

[33] I would award costs to the three respondents in the lump sum all-inclusive amount of \$5,000.

"K.A. Siobhan Monaghan"

J.A.

"I agree.
J.B. Laskin J.A."

"I agree.
Sylvie E. Roussel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-26-26

STYLE OF CAUSE:

SOCIETY OF COMPOSERS,
AUTHORS AND MUSIC,
PUBLISHERS OF CANADA v.
APPLE CANADA INC. ET AL.

DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR JUDGMENT BY:

MONAGHAN J.A.

CONCURRED IN BY:

LASKIN J.A.
ROUSSEL J.A.

DATED:

JUNE 29, 2026

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