

Publisher's Note

An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication. <i>Distribution List</i>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

FOX ON CANADIAN LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS, 4th EDITION

John S. McKeown

Release No. 5, September 2025

This comprehensive statement of Canadian law and practice has been the bedrock of Canadian copyright research and argument for more than half a century.

What's New in This Update

This release features updates to Appendix B1—*Copyright Act*—Amended by 2024, c. 26; 2024, c. 27. This release also features updates to Appendix G—Remedies Table—Misuse of Confidential Information. This release also features updates to Appendix PS—Procedural Summaries including updates to Appendix § PS:1—Summary of Procedure—Conduct of Proceedings for Proposed Tariffs Before the Copyright Board of Canada, and to Appendix § PS:3—Copyright Board Practice Notices.

THOMSON REUTERS®

Customer Support

1-416-609-3800 (Toronto & International)

1-800-387-5164 (Toll Free Canada & U.S.)

E-mail CustomerSupport.LegalTaxCanada@TR.com

This publisher's note may be scanned electronically and photocopied for the purpose of circulating copies within your organization.

Highlights

- **Remedies Table—Misuse of Confidential Information—Damages**—The damages awarded by the trial judge were reduced from \$1,534,000 to \$77,000, plus pre- and post-judgment interest. As Justice Pfuetzner had explained, there was no fiduciary relationship between Marsh and PRM and the trial judge erred in principle in so concluding. It was clear that his damages award was based on fiduciary principles. Assessing damages on the basis that a breach of fiduciary duty took place was an error in principle and no deference was owed to the trial judge’s award. It was also apparent that the trial judge had a strong distaste for Marsh’s business tactics. Justice Pfuetzner repeated the apt observation of Justice Binnie in *Cadbury Schweppes* that “[m]oral indignation is not a factor that is to be used to inflate the calculation of a compensatory award”. In Justice Pfuetzner’s view, the breach of confidence found by the trial judge had a contractual flavour as illustrated by the significant overlap in his analysis of the claims in breach of confidence and breach of contract. While it was not possible to know precisely how events would have played out in the absence of the breach of confidence, Justice Binnie noted that courts are “free to draw inferences from the evidence as to what would likely have happened ‘but for’ the breach”. In the present case, there could be no dispute that Marsh was entitled to compete with PRM for its clients after their relationship terminated. However, PRM was entitled to expect that Marsh would not use the schedule of values in doing so. The trial judge’s adoption of PRM’s expert’s calculation of damages—providing a full indemnity of lost profits—effectively granted to PRM a restrictive covenant prohibiting competition that ended only because PRM was sold to BFL. The advantage that Marsh had from misusing the schedule of values was a springboard that gave it a head start in contacting the insured members and gathering the information necessary to place insurance on their behalf. Justice Pfuetzner noted there was evidence that Marsh could have contacted the insured members without using the confidential information. Indeed, Marsh’s pre-existing relationships with Gould and with other contacts in the Manitoba agricultural sector would have allowed it to do so with relative ease. Marsh’s expert calculated PRM’s damages to be its lost profits from the insured members that stayed with Marsh during the period of time it would have taken Marsh to create the confidential information on its own. The expert’s opinion was that Marsh could have gathered the necessary data and approached the insured members in one to three months. He estimated the lost profits to PRM during this time to be in the range of \$26,000 to \$77,000: *Prairie Risk Management Inc. v. Marsh Canada Ltd.*, 2025 CarswellMan 20, 2025 MBCA 6 (Man. C.A.).
- **Summary of Procedure—Conduct of Proceedings for Proposed Tariffs Before the Copyright of Canada**—The summary has been updated to reflect the Practice Notice on Confidential Information issued by the Board that became effective on December 18, 2024, and the Guidelines on Inflation. In

past decisions, the Board has held that adjustments to royalty rates (in dollars and/or cents) to account for inflation may be appropriate to preserve the purchasing power of copyright owners. Failing to make such adjustments could, over time, erode the value of the royalties collected through tariffs. To promote consistency in decisions related to increases to royalty rates to account for inflation, these non-binding guidelines set out a default methodology for such adjustments. As these guidelines are not binding, they do not exclude the use of other methods by the Board. Rather, if Members depart from this approach, they are encouraged to explain the reasons for using another approach in that particular case. Similarly, it does not prevent parties from proposing other methodologies, provided that they are explained. Like any other change proposed to a tariff, a collective society that seeks an increase related to inflation, should identify and explained this in the related Notices of Grounds for Proposed Tariff. In the same way, once notified of a proposed increase related to inflation, objectors may express their concerns regarding such a proposed inflation increase in their Notices of Grounds for Objection. The consideration of all proposed changes to tariffs, including inflation, will occur at the same time as all other issues relevant to the case. There are many ways to calculate inflation. Approaches vary in economic literature as well as among organizations that engage in such calculations. The period covered by the calculation, the index selected, and the specific data series used can all vary and any difference in the methodology or key variables used may lead to different results. The default methodology described below was used by the Board in several past decisions over the years, from SOCAN, Re: Sound - Tariff for CBC Radio (2006-2011) to more recently in SOCAN Tariffs 10.A & 10.B (2023-2025). This methodology is only to be applied to royalty rates expressed in dollars and/or cents. For rates expressed as percentages, it should be assumed that, everything else being equal, all market prices fluctuate at the same rate as inflation or close to it. As such, royalty rates expressed as percentages of revenues adjust automatically to account for any inflation.

John McKeown
Goldman Sloan Nash & Haber LLP
480 University Avenue, Suite 1600
Toronto, Ontario M5G 1V2
Direct Line: (416) 597-3371
Fax: (416) 597-3370
Email: mckeown@gsnh.com

ProView Developments

Your ProView edition of this product now has a new, modified layout:

- The opening page is now the title page of the book as you would see in the print work
- As with the print product, the front matter is in a different order than previously displayed
- The Table of Cases, Table of Statutes and Index are now in PDF with no searching and linking
- The Table of Contents now has internal links to every chapter and section of the book within ProView
- Images are generally greyscale and size is now adjustable
- Footnote text only appears in ProView-generated PDFs of entire sections and pages