

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

THE CANADIAN COPYRIGHT LICENSING AGENCY
(“ACCESS COPYRIGHT”)

Appellant
(Respondent)

- and -

YORK UNIVERSITY

Respondent
(Appellant)

FACTUM OF THE APPELLANT
THE CANADIAN COPYRIGHT LICENSING AGENCY,
(“ACCESS COPYRIGHT”)
(Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. The history of copyright is the law trying to keep up with technology and society. Technological and social change requires Parliament to make regular refinements to the *Act*, to preserve the fair balance between encouraging the creation and dissemination of works, and a just reward for creators.
2. In the 1930s, the problem Parliament faced was performing rights societies. A small group controlled public performance rights over the vast majority of music, and started charging excessive prices to license those rights. Users had no choice but to pay these rates, as public performances were easy to detect. This was not in the public interest, as it tilted the playing field too far towards copyright owners. Parliament intervened with a legislative solution to rebalance the playing field in a way that was fair to users. This included various restrictions on the powers of these performing rights societies, and, importantly, a regulator to monitor the prices that users had to pay: the Copyright Appeal Board.
3. When Parliament amended the *Act* in the 1980s and 1990s, the social and technological context was very different. The photocopier and (later) the internet ushered in an era of instant mass reproduction and use of copyright-protected works. Printed works could be copied privately. Detection of unauthorized and uncompensated copying was nearly impossible. This dramatically undermined the incentive to create these important books and articles. Once again, the playing field was far out of balance, but this time the “tilt” favoured users, who could suddenly make endless copies at little cost, with neither consent nor fear of detection.
4. Parliament did not want to stifle technological progress or detract from the benefits of the photocopier, especially in the educational setting. But it also recognized that this technology was competing directly with authors and publishers, who earn a living selling copies of their works. Its response was to introduce a scheme of collective administration, to provide copyright owners with a mechanism to more readily licence or enforce their rights.
5. Collective administration permits rights-holders to create licensing and enforcement bodies, known as “collective societies.” Collective societies obtain rights from numerous creators, and then license those rights to users, ideally through negotiations. But if users refuse to

negotiate, or negotiations fail, collective societies can apply to the regulator – now called the Copyright Board – to set a tariff that addresses the entire scope of copying across a sector, including a royalty for that copying. The Board’s tariff-setting process is an extensive and robust administrative procedure. Any party affected by a proposed tariff has the right to fully participate in the tariff-setting process, including leading evidence and making arguments to the Board about the appropriate terms, including how royalties should be calculated.

6. Collective administration of published works gives users two options to avoid infringing copyright: they can reach an agreement with collective societies through negotiation, or pay the tariff-specified royalties. Both provide authorization for copying and thereby permit the user to avoid infringement.

7. This action and this appeal arises because York University rejected both options. York makes millions of unauthorized copies every year, largely as part of digital or physical collections of book excerpts and journal articles that professors assign to students. Instead of the students purchasing the underlying works, they receive photocopies compiled into coursepacks or PDFs posted to internal websites. In doing this, York copies and uses works without authorization, and without any fair return to the authors and publishers who created the work.

8. After post-secondary institutions declined to negotiate with Access Copyright for the permission to copy works beyond 2010, Access Copyright sought and obtained a tariff, which set a royalty for universities copying published works. York continued to use the works subject to the tariff, but refused to pay the royalties. Access therefore sued York to collect them under the enforcement provisions of the *Act*, sections 70.15 and s. 68.2(1). York’s defence was to argue that tariffs could not be enforced against a user who “opts out” of the tariff regime.

9. The trial judge examined the text, context and purpose of the *Copyright Act* and concluded that once the Copyright Board certifies a tariff for a category of users, York cannot “opt out.” As he put it, “[i]f York did not copy any works in Access’s repertoire, if it obtained

proper permission to copy those works, or if the copying was exempt by law [i.e., fair dealing] then the tariff would not be applicable. Absent these conditions, the tariff is mandatory.”¹

10. The Federal Court of Appeal reversed this conclusion, neutering the scheme that Parliament enacted to address mass reproduction. It made five major errors, misreading the text, context and purpose of the *Act* and reaching the wrong conclusion.

11. First, the Court of Appeal failed to adhere to the clear and unambiguous language of section 68.2(1),² which states that “a collective society may, for the period specified in its approved tariff, collect the royalties specified in the tariff, and, in default of their payment, recover them in a court of competent jurisdiction.” There is no language that modifies this right to collect and recover royalties, by allowing a user to opt out.

12. Second, the Court of Appeal erred by giving s. 68.2(1) an exceptionally narrow purpose, rendering it superfluous. It conducted a strained analysis of contract law, which caused it to conclude that this section was necessary to address a hypothetical user who *offers* to pay royalties but does not actually pay them. But both its contract analysis and its statutory interpretation was incorrect.

13. Third, the Court of Appeal misunderstood the structure of the *Act*. It referred to a “common law” position that does not exist, since copyright is purely statutory. It misunderstood the nature of a copyright “licence,” which is nothing more than permission to copy, and a defence against infringement, and does not need to be part of a comprehensive agreement. And it ignored other sections of the *Act* that presume that tariffs are enforceable.

14. Fourth, the decision below undermines the role and function of the Copyright Board as an independent administrative tribunal, chaired by a current or retired Superior Court Judge. The Board, a creature of the *Copyright Act*, has the same objectives as the *Act*: to balance the public

¹ [*Canadian Copyright Licensing Agency v. York University*, 2017 FC 669](#) at para. 220 [*FC Decision*], Appeal Record (“AR”), Vol. I, Tab 2, p.70.

² This case was brought and is being argued under the version of the *Copyright Act* that existed prior to amendments in 2019. The section numbers in this factum refer to the pre-2019 version of the *Act*.

interest in promoting the creation and dissemination of works of the arts and intellect with obtaining a just reward for their creator. Treating its decisions as merely advisory is inconsistent with this Court's recent instruction that we must "recognize the legitimacy and authority of administrative decision makers within its proper spheres" and "adopt an appropriate posture of respect" to their statutory mandate and function.

15. Finally, the Court of Appeal's decision deprives authors and publishers from the benefits collective administration is intended to provide. It leaves rights-holders stuck in a game of "catch me if you can," with users. But it is a game they cannot win, as it requires thousands of creators to try to monitor and enforce copyright in thousands of works, at hundreds of educational institutions across the country, most of whom engage in copying behind literal or digital "closed doors."

16. The central question in this appeal is whether infringers can avoid paying the tariffs simply by saying "we opt out; catch us if you can and sue us for infringement." Access Copyright submits that, contrary to the Court of Appeal's decision, they cannot. It therefore asks this Court to reverse the Court of Appeal and reinstate the trial judge's decision, to ensure fair balance under the *Act* in the era of mass reproduction.

The Problem: York's Mass Reproduction

17. York University copies millions of pages every year from an enormous selection of copyrighted works published by hundreds of different rights-holders, without authorization. The trial judge found that in 2013, York's faculty and staff copied 17.6 million unauthorized pages. This high volume of copying is encouraged by York's "Fair Dealing Guidelines" that authorize its faculty and staff to copy and disseminate entire chapters and journal articles among other long excerpts from published works. These excerpts show up primarily in physical and digital compilations known as "coursepacks" and "digital learning management systems" respectively.

18. York's unlawful copying is neither done in public, nor easily detected. Coursepacks are sold in campus "bookstores," where students purchase copies by course code. Copies uploaded to digital learning management systems are even harder to detect because they are located on password protected sites, with access restricted to staff and students.

19. To enforce their copyright through infringement proceedings, individual authors and publishers would have to identify and monitor this copying, and then each bring individual proceedings for infringement, assuming it was economic to do so. For York alone, this would require hundreds of individual copyright infringement proceedings every academic year.

20. Scaled across all of Canada's post-secondary institutions, most of whom have also adopted digital learning management systems, the transaction costs associated with individual copyright infringement actions render individual enforcement an ineffective option. Similarly, the transaction costs of licensing individual copies of individual works make individual permissions logistically impossible.

21. The result is predictable: unauthorized copying runs rampant through these institutions. This upsets the balance between users and creators that the *Copyright Act* is supposed to provide, and causes significant damage to the incentives created by the copyright regime. As the trial judge found, this copying adversely affects the market for printed and digital works. As a result, authors and publishers of works that are copied by post-secondary institutions are deprived of the just reward that copyright is meant to provide.

22. Similar structural impediments exist in many different industries, including music, TV and film. That is why Parliament extended collective administration to numerous types of works and numerous rights under the *Act*. But to properly understand the regime, it is important to understand the history of collective administration in Canada.

Legislative history of collective administration

23. The objective of the *Copyright Act* is to promote the creation and dissemination of literary, artistic, musical and other works, while ensuring a just reward to their creators.

24. Advancements in technology, and an ever-changing social context, means that Parliament has had to intervene and amend the *Act* for a wide variety of reasons. Sometimes technological and social changes require amendments to regulate or curtail the rights of creators, as in the 1930s when performance rights societies started acquiring extensive collections of musical works. Other times, amendments are enacted to ensure that, in the face of technological change, creators can continue to earn a just reward from their works while facilitating the use and

adoption of new technologies. This was the case in the 1980s and 1990s, as the tools of mass reproduction became increasingly available to users. Both of these histories are explained below.

1930s Amendments: Limiting the Performance Rights Societies

25. In the 1920s, societies, associations and companies had become active in acquiring the public performance right in much of the music that was commonly performed in public. These “performance rights societies” charged users (*e.g.*, theatres, radio broadcasting stations and gramophone manufacturers) fees for the public performance of these works. The fees increased to the point where the government of the day began to be concerned that they were growing excessive.³ The Parliamentary debates are colourful, describing these societies as “highwaymen,” “evil” and running a “racket.”⁴ The government established two separate Commissions of Inquiry to examine this problem, the Ewing Commission of 1931 and the Parker Commission of 1936.

26. The Parker Commission accepted and acknowledged that changes in technology made collective administration an important means of ensuring that creators are properly compensated for the use of their works. However, it also recommended a regulator to approve their fees. Parliament made amendments to the *Copyright Act*⁵ to limit the market power of these societies in order to restore the desired balance between copyright holders in musical works and users of music. It created the Copyright Appeal Board and gave it the power to approve societies’ fees.⁶

27. The creation of the Board was accompanied by a number of other limitations on the powers of performing rights societies. They had to list their repertoire with the Commissioner of Patents (later Industry Canada), and their ability to enforce their rights directly against performing venues was significantly curtailed. Instead, the *Act* required them to file with the Board all proposed statements of all fees, charges or royalties that they proposed to collect for

³ [Vigneux v. Canadian Performing Right Society Ltd., \[1943\] SCR 348](#) at pages 352-354.

⁴ [House of Commons Debates, 18th Parl., 1st Sess. \(February 28, 1936\) at 644-645](#) (Hon. C.H. Cahan and Hon. H. Rinfret).

⁵ *The Copyright Amendment Act, 1931*, Dom., 1931, c.8, [s.10](#).

⁶ Hon. J. Parker, [Report of the Royal Commission Appointed to Investigate the Activities of the Canadian Performing Rights](#) (Ottawa, ON: JO Patenaude, 1935) at page 49 [*Parker Report*].

the use of their repertoire. The Board would then adjudicate whether those statements were fair to both users and creators, and make any necessary adjustments.

28. From the time these provisions were enacted, there was uncertainty about whether Board-approved royalties were enforceable against all users, or enforceable only against the users who had opted to take a licence with the Board-approved royalties. By the mid-1980s, the relevant section stated:

50(9) The statements of fees, charges or royalties so certified as approved by the Copyright Appeal Board shall be the fees, charges or royalties which the society, association or company concerned may respectively lawfully **sue for or collect in respect of the issue or grant by it of licences** for the performance of all or any of its works in Canada during the ensuing calendar year in respect of which the statements were filed as aforesaid.

29. The Federal Court reviewed this provision in its 1987 *Lion D'Or* decision, and concluded that the use of the words “in respect of the issue or grant by it of licences” meant that collectives could not enforce the Board-approved royalty terms against users who declined to “take out a licence” from the collective. In other words, they were only enforceable if the user agreed to be bound by them.

30. The purpose of the 1930s amendments was to rebalance the *Act* that had tilted too far towards copyright owners. But the amendments of the 1980s and 1990s were a response to the opposite problem. Technological change that permitted instant, undetectable mass reproduction had tilted the playing field much too far towards users, and was depriving creators of both their just reward and their incentive to create. The Court of Appeal ignored the enormous difference in social and technological context, which is explained below.

1970s: Technology creates a copyright crisis

31. The widespread use of the photocopier since at least the 1970s had a profound impact on the creators of printed works. While copying had previously required a printing press, printed works could now be copied by almost any user with the push of a button. Copyright owners faced enormous problems limiting copying of their works, or obtaining compensation when their

works were copied. An influential report from the UK⁷ recognized the “**sheer impossibility of policing infringements** and the probability that the detection of any individual instance of infringement and the institution of proceedings for such infringement would cost far more than any sum which might be recouped by way of damages.”

32. Similar reports by Consumer and Corporate Affairs Canada,⁸ a White Paper⁹ and a Parliamentary Sub-Committee report entitled “A Charter of Rights for Creators” pointed out the same problems, and recommended the same solution: “the formation of collective societies of copyright owners is the best solution to the problems created by modern reproduction technology such as photocopiers” and the “only practical way” to administer creator’s rights.¹⁰ It also predicted “**the demise of the collective exercise of copyright if users are permitted to circumvent the tariff system and bargain with the essentially weaker individual creator, rather than pay an approved tariff.**”¹¹ The expansion of collective administration in the 1980s and 1990s was in direct response to this problem and these recommendations.

Parliament’s first response to the crisis in copyright: 1988 Amendments

33. After years of study and consideration, the Federal government began to respond to the difficulties created by new reproduction technologies. It introduced Bill C-60, *An Act to Amend the Copyright Act*, in 1987. During the House of Commons debates, the Minister of

⁷ *Report of the Committee to consider the Law on Copyright and Designs*, (Her Majesty’s Stationary Office, 1977), paras. 268, 285 [emphasis added], Access Copyright’s Book of Authorities (ABOA), Tab 8.

⁸ Andrew A. Keyes and Claude Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Ottawa: Consumer and Corporate Affairs Canada, 1977), pages 162-165, 209-223, ABOA, Tab 2.

⁹ Canada. Department of Communications and Department of Consumer and Corporate Affairs, *From Gutenberg to Telidon: A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act*, 1984, pages 1-6, ABOA, Tab 3; In an accompanying companion guide, *Copyright and the Cultural Community*, Minister of Supply and Services Canada, 1984, page 4, ABOA, Tab 4, the Minister of Communications recognized that “effective control by an individual copyright owner has been rendered virtually impossible.”

¹⁰ [Canada. House of Commons, Sub-Committee on the Revision of Copyright](#), *A Charter of Rights for Creators: A Report of the Sub-committee on the Revision of Copyright*, Standing Committee on Communications and Culture (Ottawa: Queen’s Printer, 1985), pages 85, 87-88.

¹¹ *Ibid.*

Communications, Flora MacDonald, discussed the challenges created by copying technology. She stated that the motivation for the bill was that it has become “almost impossible” for creators to monitor potential infringements, which “is why Bill C-60 explicitly encourages the creation of new collective societies of copyright owners.”¹²

34. The Honourable Ms. MacDonald indicated that under the new regime, the Copyright Board will “continue to set and regulate royalty rates” and “be able to make **binding decisions** whenever collectives and those who wish to use their members’ works are unable to reach an agreement.” She described the new Board as “a fully independent agency” with “**quasi-judicial authority**,” which would act as the “**final arbiter in financial disputes between creator and user**.”¹³

35. As part of the 1988 amendments, Parliament specifically changed the previous s. 50(9). The new provision omitted the reference to “licences” that had previously caused the Federal Court in *Lion D’Or* to conclude that royalties set by the Board were not enforceable. The new provision stated:

49.2(2) Without prejudice to any other remedies available to it, a society, association or corporation may, for the period specified in its approved statement, collect the royalties specified in the statement or, in default of their payment, recover them in a court of competent jurisdiction.

36. Parliament’s intention to make tariffs enforceable was apparent even after these amendments were passed. In 1989, after Bill C-60 had become law, a private member’s bill was introduced in the Senate to provide educational institutions with an exemption from paying copyright owners for the use of materials in classrooms if an agreement was not obtained on reasonable terms and conditions. The deputy government leader in the Senate stated that the government viewed this as incongruous with the philosophy behind Bill C-60, which already

¹² *House of Commons Debates*, 33rd Parl., 2nd Sess. (June 15, 1987) at 7109 (Hon. F. MacDonald), ABOA, Tab 5.

¹³ *House of Commons Debates*, 33rd Parl., 2nd Sess. (May 17, 1988) at 15520 (Hon. F. MacDonald) [emphasis added], ABOA, Tab 6.

contemplated the Copyright Board as an impartial arbiter in such disputes, capable of setting a reasonable royalty that would be **binding on the parties**.¹⁴

Further amendments in 1997 strengthen collective administration

37. The powers given to “licensing bodies” in 1988 were strengthened in another series of amendments, passed in 1997. Licensing bodies were redefined as “collective societies,” and granted new powers under sections 70.1 through 70.191, known as the “general regime” to distinguish it from the performing rights regime that was created in the 1930s.

38. The newly added s. 70.12(a) granted collective societies (like Access Copyright) the right to file a proposed tariff with the Copyright Board setting out the terms and conditions under which reproduction of the works in their repertoire would be permitted. More importantly, after the Copyright Board heard any objections and approved a tariff, section 70.15¹⁵ specifically gave general regime collectives the same enforcement rights as performing rights societies. Those rights were re-stated in the new section 68.2(1), which states:

68.2(1) Without prejudice to any other remedies available to it, a collective society may, for the period specified in its approved tariff, collect the royalties specified in the approved tariff and, in default of their payment, recover them in a court of competent jurisdiction.¹⁶

39. In other words, Parliament expressly provided creators: (a) a means by which creators can collectively administer or licence their rights; (b) an administrative agency – the Copyright Board – with the power to set the terms and conditions of collective licences if the parties cannot agree, including royalty rates; and (c) a statutory enforcement mechanism that specifically provides that collective societies may collect the royalties specified by the Board, or in default,

¹⁴ [Senate Debates, 34th Parl., 2nd Sess. \(December 13, 1989\)](#) at 840 (Hon. C. William Doody).

¹⁵ 70.15 (1) The Board shall certify the tariffs as approved, with such alterations to the royalties and to the terms and conditions related thereto as the Board considers necessary, having regard to any objections to the tariffs.

(2) Where a tariff is approved under subsection (1), subsections 68(4) and 68.2(1) apply, with such modifications as the circumstances require.

¹⁶ *An Act to Amend the Copyright Act*, S.C. 1997, c.24, [s. 46](#), enacting ss. [70.1-70.191](#)

recover them in a Court of competent jurisdiction, that (d) omitted the language that the Court had previously found limits this collection to users who agree to take a licence.

40. Collective administration provides an effective mechanism for users to more easily obtain permission to reproduce and use copyrighted works published by multiple rights-holders, while ensuring these right-holders receive fair remuneration when the individual exercise of their copyrights is impossible or impractical. It has the benefit of “minimize[ing] the costs of enforcement.”¹⁷ In this way, collective administration acts as a policy bridge between creators and users.

The operation of the collective administration regime

41. The 1988 and 1997 amendments combined to create the legislative regime that governs collective administration today. It is contained in Part VII of the *Act*, which contains two closely related collective administration regimes. In the version of the *Act* at issue in this case¹⁸, sections 67 through 69 relate to the collective administration of performing and communication rights over musical works, sound recordings and performers’ performances (the “performing rights regime”). Section 70.1 through 70.191 allows for the collective administration of other rights, such as the reproduction right in s. 3 (the “general regime”).

42. This case concerns the general regime. It has three main features: collective societies, the Copyright Board and tariffs.

43. **Collective societies.** According to the definitions in s. 2 of the *Act*, a “collective society” is a society, association or corporation in the business of collective administration of copyright or related rights. Essentially, it is an organization that obtain rights from similarly situated creators for the purpose of licensing those rights, collecting royalties, and distributing associated royalties. The works administered by a collective society are known as its “repertoire.”

44. **Copyright Board.** The Copyright Board is an administrative tribunal established by s. 66 of the *Act*. It consists of a chair who is a sitting or retired Superior Court Judge, and four other

¹⁷ [*Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada*, 2003 FCA 302](#) at para. 62 [*Neighbouring Rights Collective*].

¹⁸ Please see footnote 2.

members. As the Federal Court has said, the Board is an “independent specialist administrative tribunal,” whose main function is to “set the rates of remuneration payable to the collective societies that represent various copyright holders, and to determine what terms and conditions, if any, should be attached to the royalties.”¹⁹

45. The Copyright Board’s mandate is to set fair and equitable rates and make its decisions in the public interest, by balancing the interests of copyright holders and users of copyrighted materials. As the Board itself has recognized, “it is now settled that the Board’s mandate is not to protect users against potential abuse of monopoly power by collectives, but to maintain a balance in the relevant markets.”²⁰ Courts have also recognized the Board’s unique and important role, stating “[r]apid and profound technological developments are reshaping the market and require sophisticated regulatory responses in order to ensure that all who contribute value to [a copyrighted work] are fairly compensated, and that consumers are not prejudiced.”²¹ The Board ensures there is a functional marketplace when the collective and users are not able to agree to a negotiated rate.

46. It discharges this mandate by holding hearings that look much like court proceedings, including a discovery process, expert reports, and *viva voce* evidence. The proceedings can take years to get to a hearing, the hearings often go on for several weeks, and the Board often takes lengthy reserve periods to write very detailed reasons for its decisions. The post-secondary tariff proceeding at issue in this case lasted over nine years from the date the proposed tariff was filed to the date the Board approved the final tariff. The Board’s reasons for the final tariff were 363 paragraphs long.

47. Most of the Board’s decisions are vigorously contested. They are frequently litigated to the Federal Court of Appeal and sometimes beyond. For example, all five of this Court’s Copyright Pentology cases from 2012 were judicial reviews from the Copyright Board.²² The

¹⁹ [Neighbouring Rights Collective](#) at paras. 42-43.

²⁰ [Decision of the Copyright Board Re: Reprographic Reproduction 2011-2013, Interim Statement of Royalties to be collected by Access Copyright \(Post-Secondary Educational Institutions\)](#), 2011, 92 C.P.R. (4th) 434 at para. 96 [*Interim Tariff Decision*].

²¹ [Neighbouring Rights Collective](#) at para. 62.

²² [Alberta \(Education\) v. Canadian Copyright Licensing Agency \(Access Copyright\)](#), 2012 SCC 37, [2012] 2 SCR 345 at paras. 4-11, [Entertainment Software Association v. Society of](#)

“Tariff 22” proceeding began with a tariff filed in 1995, proceeding to this Court twice²³ until this Court’s decisions of 2012 finally determined the key legal issues. The stakes are high, and so is the time and effort required to have a tariff approved.

48. **Tariffs.** When a collective society and its users cannot agree on licensing terms, the collective society can file a proposed tariff with the Copyright Board. The approved tariff provides users with a statutory licence to copy works, in exchange for royalties. Anyone affected by the proposed tariff can object to it, in which case the Board will decide (i) whether there is a valid legal underpinning for the tariff; (ii) the scope of the rights granted to users in the tariff; and (iii) the amount of the royalties that users must pay the collective society. Once final tariffs have been approved by the Copyright Board, they are required to be published in the *Canada Gazette* “as soon as practicable.”²⁴

49. There is no set formula that dictates how tariffs approved by the Board will operate. For example, tariffs can be structured as a single royalty for an entire institution, a royalty based on the number of users in an institution, a per-work fee for the works in the repertoire, or a per-copy fee for copies made from the repertoire. The Board decides the payment structure based on the evidence before it in a tariff-setting proceeding. The final post-secondary tariff implicated in this case fixes a royalty per full-time or full-time equivalent student (or “FTE”). This was not the only option available to the Board. Rather, the Board approved it after concluding it was the most efficient, fair and equitable structure, based on the evidence before it.²⁵

[Composers, Authors and Music Publishers of Canada, 2012 SCC 34, \[2012\] 2 SCR 231](#) at para. 2 [ESA] [Re:Sound v. Motion Picture Theatre Associations of Canada, 2012 SCC 38, \[2012\] 2 SCR 376](#) at paras. 5-8, [Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35, \[2012\] 2 SCR 283](#) at para. 1 [Rogers], [Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36](#) at paras. 5-7 [SOCAN v. Bell].

²³ [Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers](#), 1 CPR (4th) 417 and [Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45](#) [SOCAN v. CAIP]; [Public Performance of Musical Works, Re](#), 61 CPR (4th) 353 and [ESA, SOCAN v. Bell](#) and [Rogers](#).

²⁴ [Copyright Act, R.S.C. 1985, c. C-42, s. 68\(4\) and 70.15](#).

²⁵ [Decision of the Copyright Board Re: Access Copyright Post-Secondary Educational Institutions Tariff, 2011-2014 and 2015-2017, 2019 CarswellNat 9042](#) at paras. 287-295 [Final Tariff Decision].

50. A key part of the collective management regime is a prohibition against enforcement. A user that pays or offers to pay royalties set out in a tariff cannot be sued for infringement.²⁶ In other words, by asking the Copyright Board to set a tariff, the collective society is voluntarily agreeing to set a maximum on what infringers covered by the tariff would have to pay in damages. Good or bad, a collective must abide by the rate fixed in its tariff and cannot “opt out.”

51. Only institutions that make unauthorized copies from the collective society’s repertoire of works must pay tariff royalties. Non-users, or users who only make authorized copies (or copies that are exempt from payment), do not. A user who does not want to pay royalties can forebear from copying the collective’s repertoire works, obtain direct permission to copy from rights-holders, or fit into a statutory exemption (*e.g.*, fair dealing). But York does not fall into any of these categories: it makes unlawful copies without permission.

52. Once tariffs are set by the Copyright Board, s. 68.2(1) provides that the collective society can collect them from users, and “in default of their payment, recover them in a court of competent jurisdiction.” This section is expressly incorporated into the general regime through s. 70.15(2), which states that it applies “with such modifications as the circumstances require.” The issue on this appeal is whether s. 68.2(1) and 70.15(2) can be enforced against a user who purports to “opt out.”

Access Copyright and the Post-Secondary Sector

53. Access Copyright was created to advance the purposes of the 1988 and 1997 amendments: to address the effects of mass reproduction technology on creators. It represents over 11,500 creators and over 600 publishers in Canada, and administers their copyrights throughout the country outside of Quebec. Through an international network of collectives, Access Copyright also administers the reproduction rights in Canada of tens of thousands of creators and publishers residing abroad. It has millions of works in its repertoire.²⁷

54. From 1994 to the end of 2010, Access Copyright was able to negotiate licences with post-secondary educational institutions, including York, by negotiating a “model licence” with the

²⁶ *Copyright Act*, R.S.C. 1985, c. C-42, s. [70.17](#).

²⁷ Evidence of R. Levy, AR, Vol. III, Tab 21, p. 4 (line 16) – p. 9 (line 3).

Association of Universities and Colleges Canada (AUCC). The licences permitted the institutions (including faculty and staff) to make specified copies of works in Access Copyright's repertoire, in exchange for a licence fee.²⁸

55. By 2010, universities were migrating away from print copies. Institutions implemented digital "learning management systems" that enabled teachers to scan and post copied material on an online platform. This innovation required a fundamental change to the payment terms of the model licence. However, the AUCC and other post-secondary organizations failed to engage in good faith negotiations.²⁹

56. When a negotiated resolution became unlikely, Access Copyright filed a proposed tariff for the period 2011-2013. After further unsuccessful negotiations with AUCC, and aware that no agreement or approved tariff would be in place beginning in January 2011, Access Copyright also sought an interim tariff from the Copyright Board.³⁰ The Board concluded that without the interim tariff, institutions would be using Access Copyright's repertoire without authorization. It therefore granted an interim tariff whose terms closely resembled the AUCC's previous model licence, which contemplated a fee for each full-time equivalent student (or "FTE") to account for the untraceable copying and a fee per copied page assembled into paper coursepacks.

57. The AUCC brought an application to the Copyright Board, asking it to amend the interim tariff to be a transactional (per-copy) licence. However, the Board denied the application, holding that transactional licences are "ill-suited to digital uses in a post-secondary setting, where the use of protected works is widespread, dispersed and decentralized" and that there were considerable compliance problems associated with a transactional business model. However, the Board observed that "it will be open to the Board in its final decision to set royalties according to any reasonable formula it chooses, including one based on the number of copies made."³¹ The

²⁸ Evidence of R. Levy, AR, Vol. III, Tab 21, p. 15 (line 24) – p. 17 (line 19).

²⁹ [Interim Tariff Decision](#) at paras. 90-92.

³⁰ Evidence of R. Levy (Trial Exhibit P-1), AR, Vol. IV, Tab 23, pp. 120-134; Evidence of R. Levy, AR, Vol. III, Tab 21, p.33 (line 19) – p.35 (line 15).

³¹ [Reprographic Reproduction, 2011-2013, Re](#), 2011 CarswellNat 3708 at para. 33.

AUCC brought a judicial review to the Court of Appeal, which was dismissed on the basis that the matter was interlocutory, and therefore premature.³²

58. After the interim tariff was established, while the proceedings relating to the final tariff were ongoing before the Board, York (and numerous other institutions) advised Access Copyright that they would no longer comply with the interim tariff, as they claimed that the copies constituted fair dealing, and that, in any event, they had not agreed to abide by the licence terms in the tariff established by the Board. To be clear: they did not stop copying from the repertoire. They simply stopped paying royalties. The enforceability of the tariff is the issue in this appeal. Fair dealing is the issue in York's companion appeal.

59. The tariff proceeding continued. The post-secondary institutions and their representatives all withdrew their objections to the proposed tariff, and declined to participate any further in the tariff-setting proceedings before the Board. In other words, the organizations representing York and other schools decided to abandon their challenge to Access Copyright's proposed tariffs and did not lead any evidence about how it would affect them, such as whether or how to adjust the royalty rate for fair dealing, or payments made directly to publishers. They made no arguments about why a different tariff structure (such as a per-copy tariff) should be implemented. Instead, they let the tariff-setting process occur without them, because they argued that they were "opting out" of paying tariff royalties (while continuing to make unauthorized copies).

60. After all the post-secondary institutions withdrew from the tariff setting process and purported to opt out of the tariff, Access Copyright tried a more flexible approach, with different choices of licences, including a hybrid transactional (per page) approach. Few institutions took up these offers. Most simply continued to assert that they were opting out of the tariff, even though they had averaged 120 million copied pages per year of works from Access Copyright's repertoire, just for use in paper coursepacks.³³

³² [*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency \(Access Copyright\)*](#), 2012 FCA 96 at para. 2.

³³ Evidence of R. Levy, AR, Vol. III, Tab 22, p. 94 (line 13) – p. 96 (line 12); [*FC Decision*](#) at para. 301, AR, Vol. I, Tab 2, p.88.

The Post-Secondary Tariff

61. On December 7, 2019, the Copyright Board approved final tariffs for the years 2011-2017. The royalties under these tariffs were set at \$24.80 per full-time equivalent students (or “FTE”) from 2011 to 2014, and \$14.31 per FTE for 2015 to 2017 for universities. Apart from a brief period (January 1-August 31, 2011), York has not paid any of the tariff royalties, although the evidence at trial established that it was making millions of unauthorized copies of published works.

62. In its reasons accompanying the approved tariffs, the Board noted that York and many other universities filed post-hearing submissions requesting that the Board approve a tariff with a pay-per-use transactional licence or to calculate an arbitrary reduction in the royalty rate to address payments the universities had allegedly made to publishers for direct permission to copy and use their works. The universities filed no evidence to support these requests. The Board refused, noting the universities’ voluntary decision to not participate in the tariff process and the absence of any evidence that might support the universities’ requests. It concluded that “the lack of evidence is fatal to the universities’ comment that the Board should incorporate a transactional licence provision.”³⁴ The universities must therefore bear the consequences of their strategic decision to not participate in the Board’s tariff-setting process.³⁵

63. None of the post-secondary institutions, including York, sought to judicially review the Board’s decision.

The impact of copying on creators

64. The post-secondary sector’s refusal to pay royalties had a significant and adverse impact on the creators of published works used in the educational sector. Before post-secondary institutions stopped paying, post-secondary copying royalties made a significant contribution to the annual earnings of small and medium sized publishers, sometimes representing the difference between a profit and loss. The elimination of royalty income reduced the economic incentive to produce new works, and even threatened their viability. The result, as expected, was a reduction

³⁴ [Final Tariff Decision](#) at paras. 294-295.

³⁵ Ruling of Copyright Board Re: Access Copyright-Post-Secondary Educational Institutions Tariff (2011-2013) dated December 9, 2013 (“Copyright Board Ruling”) at page 6, ABOA, Tab 1.

in the number, diversity and quality of content produced for the post-secondary educational market.³⁶

65. The non-payment of tariff royalties has also had a material impact on the livelihood of professional writers who make a living authoring new works, particularly those with annual earnings of less than \$20,000. A majority of these authors considered the income they receive from Access Copyright to be very or extremely important to their livelihood, the elimination of which was expected to eliminate or reduce their incentives to create new works.³⁷

The Proceedings in the Courts Below

66. Access Copyright brought this action against York in the Federal Court in April 2013 under s. 68.2(1) and s. 70.15 of the *Copyright Act* to enforce the interim tariff. York argued that it was not obliged to pay the interim tariff because it was free to “opt out” of the tariff at any time. It also claimed that its copying was covered by fair dealing, or by direct permissions that York had obtained from copyright owners.

Trial Judge’s conclusion: York infringed copyright and the tariff is enforceable

67. The tariff enforcement action was heard by Justice Phelan of the Federal Court, in 2016. The evidence at trial was that York teaching staff made and distributed an enormous number of copies of published works for which York paid no licence fees or royalties.³⁸ In 2013 alone, York’s teaching staff copied an aggregate volume of 17.6 million pages of published works for use in print coursepacks and on digital learning management systems, without authorization.³⁹ While York initially argued that it had direct permission from copyright owners to make some of these copies, it conceded at trial that it lacked the evidence to prove these alleged permissions.⁴⁰

³⁶ [FC Decision](#) at paras. 108(f), 108(g), 351. Evidence of M. Dobner (Trial Exhibit P-97) at paras. 154-164, AR, Vol. IV, Tab 25, pp. 215-219.

³⁷ [FC Decision](#) at paras. 108(g), 351; Evidence of M. Dobner (Trial Exhibit P-97) at paras. 191-206, AR, Vol. IV, Tab 25, pp. 226-231.

³⁸ [FC Decision](#) at para. 94; rev’d, [York University v. Copyright Licensing Agency, 2020 FCA 77](#) at para. 1 [*FCA Decision*], AR, Vol. I, Tab 4, pp. 119-120.

³⁹ [FC Decision](#) at para. 303, AR, Vol. I, Tab 2, p. 88.

⁴⁰ [FC Decision](#) at para. 287, AR, Vol. I, Tab 2, p. 85.

68. The trial judge found that York's copying was not fair dealing, as it alleged. He also found that York's approach to copying of works by certain of its faculty members who were found to have made unauthorized copies was "consistent with its willfully blind approach to ensuring compliance with copyright obligations"; York had "no monitoring or enforcement mechanisms to address compliance with copyright laws or even its own policies"; and there was a "complete abrogation of any meaningful effort" to ensure compliance with its Fair Dealing Guidelines."⁴¹

69. The trial judge found that the interim tariff was enforceable. He first considered the legislative history of the *Act* in relation to collective societies and the tariff regime, and specifically, the 1988 and 1997 amendments to the *Act*. He found that "the enforcement of tariffs (both final and interim) are an integral part of the legislative scheme created by Parliament for the collective administration of copyright. Parliament recognized the difficulties copyright owners might face in enforcing their rights individually against those who copied copyright protected works."⁴²

70. Considering the legislative history and particularly the development of the modern enforcement provisions, the trial judge concluded that collective administration and the tariff-setting power of the Board provided "collectives with effective enforcement mechanisms against users who are not subject to an agreement and who reproduce, without authority from owners or without the benefit of an exception (*e.g.*, fair dealing), copyright protected works covered by the collectives, such as those works in Access's repertoire."⁴³

Court of Appeal provided a right with no meaningful remedy

71. The Court of Appeal affirmed the trial judge's finding that the copies made by York were not fair dealing, and York had engaged in unauthorized copying on an enormous scale. However, it reversed the trial judge's conclusion and held that York could "opt out" of tariffs. Its reasoning was deeply problematic, as explained below.

⁴¹ [FC Decision](#) at paras. 28, 58, 245, AR, Vol. I, Tab 2, pp. 21-22, 27, 75.

⁴² [FC Decision](#) at para. 195, AR, Vol. I, Tab 2, p. 65.

⁴³ [FC Decision](#) at para. 204, AR, Vol. I, Tab 2, pp. 66-67.

72. ***Wrong question: does the Act change the common law?*** The Court of Appeal started from the proposition that “at common law” neither a copyright owner nor a group of copyright owners can impose terms on users who have not agreed to be licensees, and stated “the question in this appeal is whether the interposition of the Copyright Board between the user and the rights owner changes the relationship between them.” This is the wrong question. No copyright exists at common law. Moreover, and as explained in paragraph 109 below, imposing financial terms on unauthorized users is a central feature of the Copyright Act.

73. ***Court concludes that 1988 amendments maintained 1936 intention.*** The Court of Appeal held that when collective administration was first introduced into the *Act* in the 1930s, its purpose was to curb the market power of collective societies. It acknowledged that the modern system of collective administration, introduced in 1988 and 1997, is entirely different than the “dealers in performing licences” whose conduct prompted the 1936 amendments. But it nevertheless relied heavily on the 1936 intention and the default common law position that licences cannot be involuntary, interpreting all subsequent amendments through this lens.

74. The Court of Appeal recognized that the 1988 amendments were made for an entirely different purpose, and in an entirely different context, far removed from the problems caused by performance rights societies in the 1930s. It also acknowledged that Parliament had removed a reference to “licences” in the enforcement provision that (the Federal Court had previously concluded) permit a user to opt out. But the Court of Appeal concluded that this change – although deliberate – was too “inconsequential” to affect its decision.

75. ***1997 amendments are “too modest.”*** With respect to the 1997 amendments, despite granting new powers to the newly created collective societies, including enforcement, the Court of Appeal found that these significant changes did not alter the 1930s goal of the tariff-setting process: to *limit* the market power of collective societies.

76. ***No right to remuneration.*** The Court of Appeal also looked at sections 19 and 81 of the *Act*, which provide a “right to remuneration” for public performance of sound recordings, and the use of blank media for private use. Even though s. 68.2(1) permits a collective society to recover unpaid tariffs, and in default, sue for them, the Court of Appeal concluded that the absence of equivalent language with respect to the reproduction right “weighs heavily against any argument

that the existence of the right [to collect royalties] can be inferred from the statutory grant of the remedy.”

77. **Why have section 68.2(1)?** The Court tried to address the question “why s. 68.2(1) is necessary at all if collective societies are entitled to rely upon their contractual rights in any event?” To answer this question, the court created an unrealistic hypothetical: a user that *offers* to pay royalties, but then does not *actually* pay them.

78. **Why have tariffs?** Finally, the Court of Appeal side-stepped what it described as Access Copyright’s “legitimate question” as to why collective societies would ever incur the costs and delay inherent in the tariff-setting process if users could simply opt out. It acknowledged that a system of purely voluntary tariffs would not be likely to be used, but that “the advantage of collective societies is that they allow rights holders to pool their resources to enable them to economically enforce their rights” and that “this advantage exists even in the absence of mandatory tariffs.” It therefore concluded that any tariff (including the interim tariff at issue) was only enforceable against users who had agreed to accept the offer to pay royalties for carrying out the acts of reproduction permitted in the tariff but had defaulted in that payment.⁴⁴

PART II – THE ISSUE

79. The issue in this case is whether York can “opt out” of royalties specified in a Copyright Board approved tariff that covers York’s copying. The appellant submits that if York is making unauthorized copies from Access Copyright’s repertoire, section 68.2(1) permits Access Copyright to recover the royalties in a court of competent jurisdiction.

PART III – LAW AND ARGUMENT

This appeal requires the Court to interpret sections 68.2(1) and 70.15

80. This case turns on a question of statutory interpretation. Section 68.2(1) permits a collective to collect or sue for royalties. Section 70.15 states that s. 68.2(1) applies to Access Copyright’s tariffs. So the issue is whether, notwithstanding the clear words of those sections,

⁴⁴ [FCA Decision](#) at paras. 102, 168-169, 202, AR, Vol. I, Tab 4, pp. 153, 177, 189.

York can both continue to make millions of copies from Access Copyright's repertoire, and refuse to pay the royalties specified in a tariff approved by the Copyright Board.

81. The Court of Appeal made numerous errors in answering this question of statutory interpretation. It ignored the plain meaning of the words. It rendered s. 68.2(1) superfluous. It misunderstood the overall scheme of the *Act*. It imagined a common law environment that does not actually exist, misunderstood the nature of a copyright licence, and therefore incorrectly presumed that extraordinary statutory language would be required to make tariffs enforceable. It undermined the Copyright Board as an independent tribunal that Parliament has charged with managing the terms and conditions of collective administration. Finally, it left creators with no effective remedy for mass infringement, thereby depriving rights-holders of the benefits of collective administration.

82. All of its errors have a common thread: the Court of Appeal fundamentally misconstrued Parliament's intention. It failed to appreciate that the purpose of the 1988 and 1997 amendments was to re-balance a scheme that the photocopier and other mass reproduction technologies had tilted dramatically in favour of users, depriving creators of both an incentive to create works, and the just reward that the *Act* is intended to ensure.

83. This Court has repeatedly stressed the importance of balance under the *Act*, particularly in the age of mass reproduction. As it stated in *SOCAN v. CAIP*, new technology should be "facilitated rather than discouraged," but this should "not be done unfairly at the expense of those who created the works of arts and intellect in the first place."⁴⁵

Error #1: Failure to apply the Plain Meaning of the Act

84. Statutory interpretation of the *Copyright Act* requires the Court to apply the "plain meaning" rule: it is to examine the words of the relevant sections in their grammatical and ordinary sense, in harmony with the *Act's* scheme and objects.⁴⁶ As a result, in answering any question of statutory interpretation, the first place to look is the text of the relevant sections of the *Act*. External considerations cannot be used to "distort the actual words of the statute, read

⁴⁵ [SOCAN v. CAIP](#) at para. 40.

⁴⁶ [Rogers Communications Inc. v. Voltage Pictures, LLC, 2018 SCC 38](#) at para. 20 [*Voltage*].

harmoniously with the scheme of the statute, its object, and the intention of the legislature, so as to make the provision say something it does not.”⁴⁷

85. The sections of the *Act* at issue are s. 68.2(1) and 70.15(2). Section 68.2(1) states that “without prejudice to any other remedies available to it, a collective society may, for the period specified in its approved tariff, collect the royalties specified in the tariff, and, in default of their payment, recover them in a court of competent jurisdiction.” Section 70.15(2) states that “where a [general regime] tariff is approved ... subsections 68(4) and 68.2(1) apply, with such modifications as the circumstances require.”

86. These words are unambiguous. They say that once a tariff is approved by the Board, the collective society may collect the royalties, and if they are not paid, sue for them. The statute does not carve out any exceptions for users who are copying but would prefer not to pay royalties. On the contrary, Parliament expressly deleted the reference to “licences” that the Federal Court in *Lion D’Or* had relied on to conclude that tariffs could not be enforced against unwilling users.

87. The Court of Appeal did not apply the “plain meaning” rule. Instead, it held that, considering the previous language and intention, the deletion of the word “licence” in the 1988 and 1997 amendments was a “modest omission” that cannot be taken to change the 1930s principle that tariffs are not mandatory. This was also an error. The Court should not have approached the language of the statute by asking what it used to mean, and gauged whether Parliament tried hard enough to change it. Rather, in assessing the text, it should have read the words of the relevant provision, which are unambiguous in their meaning: royalties can be collected and, in default of their payment, enforced in a court of competent jurisdiction.

88. As the majority stated in *Telus v. Wellman*, “it is not the role of this Court to rewrite the legislation.”⁴⁸ The Court of Appeal ignored the plain words of the *Act* in favour of external considerations.

⁴⁷ [TELUS Communications Inc. v. Wellman, 2019 SCC 19](#) at para. 79 [*Wellman*].

⁴⁸ [Wellman](#) at para. 79.

Error #2: If tariffs are not enforceable, section 68.2(1) is superfluous

89. It is well-established that “the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain.” Rather, “every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose...no legislative provision should be interpreted so as to render it mere surplusage.”⁴⁹ On the contrary, as the *Interpretation Act* states, every enactment should be given “such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”⁵⁰

90. If tariffs are not enforceable, there is no reason to have sections of the *Act* that provide for enforcement. The *Act* both permits a collective to “collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction” (in s. 68.2(1)) and makes this section apply to the general regime (in 70.15(2)). If tariffs are unenforceable against users of the repertoire, these sections are superfluous.

91. The Court of Appeal avoided this argument by applying an artificial distinction between a licence and a “statutory benefit.” It held that the purpose of s. 68.2(1) was to permit a collective society to enforce the tariff against a user who “offers to pay” but fails to actually pay, “since the benefit of using the material free of the threat of an infringement action is a statutory benefit and not consideration flowing from the rights holder.”

92. But this distinction is incorrect as a matter of contract law. A user who agrees (or “offers”) to pay a royalty in consideration of a benefit is bound in contract. The idea that the consideration must flow directly from the other party to the contract is an incorrect and outdated view of contract law.⁵¹ The legislative purpose of sections 68.2(1) and 70.15 must, as the text suggests, permit the collective society to enforce tariffs.

93. If tariffs are not enforceable, not only are sections 68.2(1) and 70.15 superfluous, but the entire general regime is “mere surplusage.” Tariff-setting is an extremely lengthy and expensive

⁴⁹ [Canada \(Canadian Human Rights Commission\) v. Canada \(Attorney General\), 2011 SCC 53](#) at para. 38.

⁵⁰ *Interpretation Act*, RSC 1985, c I-21, s. 12.

⁵¹ [Maritime Travel Inc. v. Boyle, 2012 NSSC 428](#) at para. 41, aff'd [Boyle v. Maritime Travel Inc.](#), 2014 NSCA 44. See also [Option Industries Inc \(Re\)](#), 2020 ABQB 535 at paras. 35-36.

process, requiring collectives to invest millions in lawyer and expert fees. A collective that invests the considerable time and money to obtain an unenforceable tariff may get nothing for its trouble except an effective cap on its own royalties, if users choose to pay them. Parliament could not have intended to impose such a one-sided bargain in the name of restoring the balance that had been upended by mass reproduction technology.

Error #3: Misunderstanding the Structure of the *Copyright Act*

94. The purpose of the *Copyright Act* is well-known and has been repeated by this Court on numerous occasions. The *Act* is intended to encourage the creation and dissemination of works, while ensuring for creators a just reward for their efforts.⁵² This purpose is the lens through which all of the provisions and amendments of the *Act* must be interpreted.⁵³

95. The Court has recently described the scheme of the *Act* as legislation that “states the rights of copyright owners, the conduct that infringes those rights, and the civil and criminal remedies that may be sought or enforced where those rights are infringed.”⁵⁴ **Copyright** is defined and granted in section 3 of the *Act*. One of its core rights is exclusivity over the “production and reproduction” of works. **Copyright infringement** is defined in s. 27, and consists of doing anything that interferes with that exclusivity, unless it falls either into a statutory exception, or is done with a licence. An infringer is liable for **statutory remedies**, including actual damages, disgorgement of profits, or statutory damages. A **licence** is a permission. It allows someone to produce or reproduce the work without infringing the copyright.

96. The Court of Appeal confused a number of these concepts and misunderstood the scheme of the *Act*. This led it into error.

The Act Creates Rights in a Manner Inconsistent with the Court of Appeal’s Decision

97. **No “common law” of copyright.** The Court has emphasized repeatedly that copyright law is “purely statutory law, which simply creates rights and obligations upon the terms and in

⁵² [Théberge v. Galerie d'Art du Petit Champlain inc.](#), 2002 SCC 34 at para. 30; [CCH Canadian Ltd. v. Law Society of Upper Canada](#), 2004 SCC 13 at para. 10; [SOCAN v. Bell](#) at paras. 8-10

⁵³ [Keatley Surveying Ltd. v. Teranet Inc.](#), 2019 SCC 43 at para. 47.

⁵⁴ [Voltage](#) at para. 21.

the circumstances set out in the statute.”⁵⁵ The *Act* creates all copyrights, determines who owns them, and provides that they may be licensed. Neither copyright nor copyright licences exist at common law. The Court of Appeal’s launching point – that a copyright holder cannot impose licence terms “at common law” – makes no sense if these rights are purely statutory.

98. **“Right to receive remuneration” not necessary for copyright.** The Court of Appeal relied on the presence of the language “entitled to be paid equitable remuneration” in s. 19(1) and “a right to receive remuneration” in s. 81(1) of the *Act* and the absence of equivalent language from s. 68.2(1) and 70.15 as distinguishing between different royalty regimes. However, this distinction misunderstands the scheme of the *Act*.

99. Different sections of the *Act* provide different rights. Section 3 defines copyright, which is a right to **exclusivity**. It is a right to **prevent others** from engaging in a number of activities, such as production or reproduction of the work. Section 27 says that this exclusive right is **infringed** when anyone other than the copyright owner engages in those activities, and is associated with certain civil and criminal penalties.

100. The public performance rights associated with sound recordings under s. 19(1), and the blank media levy under s. 81(1) are not copyrights and cannot be infringed. Rather, they are rights to “equitable remuneration.” The *Act* must therefore create specific sections that imposes an obligation to pay that equitable remuneration.

101. The Court of Appeal overlooked this crucial distinction. The right to remuneration under sections 19 and 81 requires express language because the only “right” is compensation. These rights cannot be infringed. The wording in s. 19(1) and 81(1) is necessary because, without it, these collectives have no rights to enforce. Corresponding language is not required for collectives operating under the general regime because (contrary to the Court of Appeal’s conclusion) the right and the liability for infringement is already imposed by sections 3 and 27 of the *Act*.

⁵⁵ [Bishop v. Stevens, \[1990\] 2 SCR 467](#) at page 477; [Compo Co. Ltd. v. Blue Crest Music et al. \(1979\), \[1980\] 1 SCR 357](#) at page 373.

A licence is not an agreement – it is a permission

102. The Court of Appeal mistakenly confused a “licence agreement” with a “licence.” In copyright, a licence is nothing more than a permission to copy or otherwise use the work. Legally, it is a defence against infringement. Users can obtain licences by entering into a contract that is called a “licence agreement.” But they are not the same thing.

103. The Court of Appeal confused these distinct legal concepts, and therefore fell into error. It relied on the word “licence” in s. 70.12 of the *Act*, which states:

70.12 A collective society may, for the purpose of setting out by **licence** the royalties and terms and conditions relating to classes of uses, (a) file a proposed tariff with the Board; or (b) enter into **agreements** with users.⁵⁶

104. This section was necessary to provide collective societies with the tools they require to carry out their core function – establishing the terms and conditions under which uses of their repertoire works will be permitted. Ideally, the parties will always be able to agree to mutually satisfactory terms, and enter into a licence agreement. But the tariff option exists because Parliament contemplated that collective societies and users will not always be able to agree. When that happens, the terms under which users can obtain a licence will have to be decided by the Board, who does so by certifying a tariff.

105. In other words, Parliament intended that collectives would effect these licences either through a consensual agreement *or* an approved tariff. The word “licence” in the context of section 70.12 applies to both licences obtained by tariffs (s. 70.12(a)) and licences obtained from agreements with users (s. 70.12(b)).

106. The Court of Appeal misinterpreted the word “licence” in section 70.12 as requiring a licence agreement, rather than its meaning in copyright, which is a “permitted use.”⁵⁷ Conflating “licence” with “agreement” led to the incorrect conclusion that approved tariffs were only enforceable against those users who had agreed to be bound by their terms. If it had appreciated

⁵⁶ *Copyright Act*, R.S.C. 1985, c. C-42, [s. 70.12](#).

⁵⁷ John S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed. (Toronto: Carswell, 2007) at page 19-26, ABOA, Tab 7; [Eli Lilly & Co. v. Novopharm Ltd.](#), [1998] 2 SCR 129 at para. 49.

that a licence does not require an agreement, it would have concluded that Parliament intended an approved tariff to be a statutory licence, enforceable under subsection 68.2(1).

107. The fact that tariffs are to be enforceable is particularly clear from section 70.191. It provides that “an approved tariff does not apply where there is an agreement between a collective society and a person authorized to do an act... if the agreement is in effect during the period covered by the approved tariff.” If tariffs are not enforceable, there would have been no need for this section, since a party could simply “opt out” of the tariff structure.

108. In short, the decision below ignores Parliament’s conscious use of the different words “tariff” and “agreement” and renders section 70.12(a) and section 70.191 redundant or unnecessary. These sections are necessary only if tariffs have binding effect. The Court of Appeal’s interpretation should be rejected in favour of one that is consistent with the *Act* as a whole.

109. The Court of Appeal also failed to appreciate that a “licence” and “infringement” are two sides of the same coin. A licence is nothing more than permission to use, which creates a defence to claims of infringement.⁵⁸ If the user infringes and is sued, the Court will impose damages under the *Act*, as compensation for failure to obtain a licence – *i.e.*, an “involuntary” licence fee. So the Court of Appeal erred in concluding extraordinary statutory language was required to impose this “pecuniary burden.” Imposing a pecuniary burden when a user engages in unauthorized reproduction is a central feature of the *Copyright Act*.

Tariffs provide benefits to users whether or not they “opt in”

110. Finally, other provisions of the *Act* support the conclusion that an approved tariff was intended to have binding effect. The mere existence of a tariff under 70.15 triggers certain statutory benefits for educational institutions. Section 30.3 excuses them from infringement for photocopies made on their premises so long as there is *either* an agreement with a collective society *or* a tariff or proposed tariff under Part VII. Section 38.2 limits the damages for infringement of reproduction rights to the royalty payable to a collective society administering

⁵⁸ [Robertson v. Thomson Corp., 2006 SCC 43](#) at para. 56.

those rights, either *under* an agreement *or* a certified tariff, even if the copied work is not within the collective society's repertoire.

111. Sections 30.3 and 38.2 were directed to ensuring the balance in the *Act*. Similarly, a subsequent amendment in 2012 enacted section 30.02⁵⁹ which excused educational institutions from actions for infringement and limited the damages recoverable by copyright owners when digital copies were made by an educational institution for an educational or training purpose, provided a fee was paid to a collective society under an agreement or approved tariff.

112. Parliament could not have intended that educational institutions would have all the benefits of these sections while opting out of the tariff and refusing to pay the royalties. This is not consistent with the "fair balance" principle at the heart of the *Copyright Act*.

Error #4: Undermining the Copyright Board of Canada and the Single Copy Fallacy

113. The Copyright Board is an independent tribunal that is chaired by a sitting or former Superior Court Judge, plus four other members. The chair and the members are appointed by the Governor-in-Council. Its powers and responsibilities are set out in Part VII of the *Act*, and include tariff-setting in the context of collective administration.

114. As Justice Abella wrote, the Board "sets policies that collectively determine the rights of copyright owners and users, and plays an important role in achieving the proper balance between those actors." It has "specialized knowledge about the media technologies used to create and disseminate copyrighted works, such as the Internet ... as well as related economic issues."⁶⁰

115. Respect for the functions of administrative decision-makers is a core feature of this Court's jurisprudence. It has insisted that lower courts "recognize the legitimacy and authority of administrative decision makers within its proper spheres" and "adopt an appropriate posture of respect" to their statutory mandate and function.⁶¹ A regime where this significant administrative

⁵⁹ *Copyright Modernization Act*, S.C. 2012, c. 20, [s. 27](#).

⁶⁰ [Rogers](#) at paras. 65-66 (Abella J., concurring).

⁶¹ [Canada \(Minister of Citizenship and Immigration\) v. Vavilov](#), 2019 SCC 65 at para. 14.

apparatus is relegated to issuing decisions that are merely advisory or optional is not consistent with that posture of respect.

116. Moreover, a central argument raised by certain interveners in the Court of Appeal – the hypothetical user who makes a single copy – dramatically undermines the function the Board as a statutory decision-maker. The argument centres on the idea that enforceable tariffs make users liable for all the royalties if they make a single copy of a repertoire work, which they submit is an unduly harsh result. This *in terrorem* argument is a collateral attack on the Copyright Board, and also purely theoretical. It is not a basis to allow users to opt out of tariffs.

117. ***Collateral Attack.*** This Court has repeatedly warned against collateral attack of administrative decisions. As it has stated “it is necessary to bear in mind the role and importance of administrative structures,” and the complexity of modern regulation. The “single-copy” theory is, in fact, a collateral attack on the Copyright Board’s tariff-setting authority.

118. The Copyright Board is mandated to set fair and equitable rates. There is no pre-set form of tariff royalty. The Board has enormous flexibility to set any tariff that it concludes is in the public interest. Royalties could be triggered on numerous bases: per copy, per work, per capita, a percentage of revenues, a flat fee or a “completely novel formula to that which a collective proposed”⁶². The Board decides what form of tariff would best serve the public interest after a full hearing, in which anyone affected by the tariff has a right to lead evidence and be heard. Its decisions are then subject to judicial review directly to the Federal Court of Appeal. No one – including York – judicially reviewed either the interim or the final tariff in this case.

119. The Copyright Board’s tariff proceeding is the appropriate venue to raise concerns about the theoretical “single copy.”⁶³ A party who could establish that it would be dramatically overpaying for its single copy would undoubtedly get relief from the Board, acting in the public interest, in the form of an exemption, or a “per-copy” tariff.

120. The “single copy” argument assumes that collectives will act unreasonably, the Copyright Board will not do its job in setting tariffs, and the Court of Appeal will fail to properly review the

⁶² [Reprographic Reproduction, 2011-2013, Re](#) at para. 33.

⁶³ *Copyright Board Ruling* at pages 4-5, ABOA, Tab 1.

Board's decisions. York and all the post-secondary institutions had an opportunity to argue their case about the form the tariff should take to the Copyright Board. Instead, they withdrew from the proceedings, and now resist enforcement of the tariffs they did not ultimately oppose. That is a collateral attack.

121. *Single Copy is a Myth.* Not only is this argument a collateral attack, it is purely hypothetical. No one has ever identified a "single copy" user. It is unlikely anyone ever will, since the tariff covers post-secondary institutions, not individual users.

122. The facts of this case show the real problem. The trial judge found that York made millions of unauthorized copies every year, for which the creators have not received any compensation. This mass copying without compensation – not the mythical "single copy" maker – is the true problem that Parliament sought to remedy in the 1988 and 1997 amendments. The "single-copy problem" is a myth propagated by users to avoid paying royalties on millions of copies.

Error #5: Unenforceable tariffs leave creators with no effective remedy

123. The Court of Appeal observed⁶⁴ that the absence of an enforceable tariff did not affect a copyright owner's recourse to proceedings for infringement. It found "the enforcement of mandatory tariffs against many individual infringers is no different than the prosecuting infringement actions against many individual infringers."⁶⁵ This is wrong, for many reasons.

124. The objective of the 1988 and 1997 amendments was not to double down on costly and resource-intensive separate court proceedings for infringement. Rather, it was to provide for an effective collective administration regime and to avoid the unmanageably complex, costly, and time-consuming individual management and enforcement of creators' rights. Providing for a Copyright Board before which both the collective society and the users of works could participate in the realization of an approved tariff served to regulate the balance between copyright owners and users.⁶⁶ This approach promoted both the use of works (including through

⁶⁴ [FCA Decision](#) at para. 53, AR, Vol. I, Tab 4, p. 136.

⁶⁵ [FCA Decision](#) at para. 203, AR, Vol. I, Tab 4, pp. 189-190.

⁶⁶ [Canadian Assn. of Broadcasters v. Society of Composers, Authors & Music Publishers of Canada \(1995\)](#), 58 C.P.R. (3d) 190 (Fed Ct App Div) at page 196.

new technologies) as well as a fair reward for creators – the recognized policy underlying the *Copyright Act*.

125. With no right to enforce an approved tariff, each copyright owner represented by Access Copyright will be faced with enormous obstacles in detecting and pursuing new unauthorized copying activities occurring daily in the thousands of discrete educational institutions in Canada. In most cases, the costs and complexity of those proceedings will exceed the modest recoverable damage award. This will strongly discourage copyright owners from pursuing remedies, and is contrary to the Court’s guidance that they obtain a just reward when their works are copied.

126. Statutory damages are, in the main, no answer to this concern. If educational institutions are found to be engaging in non-commercial uses,⁶⁷ only the first copyright owner to receive judgment will be permitted to collect statutory damages, and that may be capped at \$5000 for all works infringed in the proceeding. The remaining affected copyright owners will be stuck with whatever damages they can prove, which is notoriously difficult in copyright cases.

127. Moreover, educational institutions have a strong incentive to wait-and-see. They can simply wait to be sued and then pay or offer to pay the royalties in an approved tariff if they think they are likely to be unsuccessful. Under section 70.17 of the *Act*, such a payment or offer may stop the infringement proceeding in its tracks. Parliament’s intention could not have been to allow users to game the tariff regime, while making enforcement essentially impractical for copyright holders. The three-year limitation period for infringement suits, combined with the long delays in getting tariffs approved, may result in creators obtaining no reward at all.

128. In short, infringement proceedings do not provide a viable route to obtaining a fair reward for copyright holders. Absent an enforceable tariff, Parliament’s intended balance turns into a one-sided scale: educational institutions get special rights and exemptions, while copyright holders suffer the consequences of massive unauthorized and uncompensated copying, whether it is printed copies using a photocopier, or the even more elusive digital copies.

⁶⁷ Access Copyright does not agree that such uses are “non-commercial.” However, the question does not need to be answered in this appeal.

The issue was not decided in *CBC v. SODRAC*

129. York and certain interveners in the Court of Appeal argued that this Court's decision in *CBC v. SODRAC 2003*⁶⁸ stands for the proposition that tariffs are not binding on users. It does not. The decision in *CBC* was not concerned with tariffs, but rather dealt with the terms of a licence between one collective society and the CBC, conducted under different sections of the *Act*.

130. *CBC* was limited to the interpretation of the licensing sections 70.2 to 70.4 of the *Copyright Act*, which is a distinct procedure directed to resolving disputes between a collective and a single user. The Court did not interpret the text, context, purpose or legislative history of the tariff-fixing regime set out in sections 70.1 to 70.191 of the *Copyright Act*. It did not discuss the nature of a tariff, the tariff-fixing jurisdiction of the Board, the process prescribed by the *Act* for the approval of a tariff or the legal effect of a tariff once approved.⁶⁹ Indeed, the Court expressly noted that the tariff issued by the Board was *not* at issue.⁷⁰

131. The Court reached its conclusion from the introductory words of s. 70.4, which states that a user whose copying activities were the subject of a s. 70.2 proceeding *may* avail itself of the terms and conditions established by the Board. The Court concluded that the use of the word "may" means that a user cannot be bound to the terms and conditions of the Board-determined licence.

132. In contrast, subsection 68.2(1) of the *Act* does not provide the user with the same voluntary "opt in" language. Subsection 68.2(1) provides the option to the collective society, who *may* bring proceedings to collect the royalties specified in an approved tariff, when a user has failed to pay them.

133. The implications of the *CBC* decision were very different from this case. If the CBC declined to accept the terms of the Board-sanctioned licence, but engaged in unlawful reproduction, creators had a single known user to sue: the CBC. In this case, each of Access Copyright's thousands of affiliated copyright holders would have to address any unauthorized

⁶⁸ [Canadian Broadcasting Corp. v. SODRAC 2003 Inc., 2015 SCC 57](#) [*CBC*].

⁶⁹ *CBC* at paras. 104-108, 111-113, Appendix "A".

⁷⁰ *CBC* at para. 21.

copying by hundreds of users (universities and other educational institutions) through hundreds of copyright infringement proceedings. This is the precise result that Parliament sought to avoid through the 1988 and 1997 amendments to the *Copyright Act*.

PART IV – SUBMISSIONS ON COSTS

134. This appeal relates to Access Copyright’s action. York’s appeal relates to its independent counterclaim in that action. Access Copyright submits that the costs of each proceeding should follow the event.

PART V – ORDER SOUGHT

135. Access Copyright asks the Court to allowing the appeal and restore the decision of the trial judge, with costs throughout.

February 8, 2021

ALL OF WHICH IS RESPECTFULLY SUBMITTED



for:

Sheila R. Block



for:

Arthur Renaud



for:

Asma Faizi

PART VI – SUBMISSIONS ON CONFIDENTIAL INFORMATION

The Appellant, Access Copyright, confirms that there is no confidential information included within its Factum or its Appeal Record or any other restriction on public access to the contents of those documents.

PART VII – ITABLE OF AUTHORITIES & STATUTORY PROVISIONS

CASES	Cited in paras.
<i>Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)</i> , 2012 SCC 37, [2012] 2 SCR 345	47
<i>Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)</i> , 2012 FCA 96	57
<i>Bishop v. Stevens</i> , [1990] 2 SCR 467	97
<i>Canada (Canadian Human Rights Commission) v. Canada (Attorney General)</i> , 2011 SCC 53	89
<i>Canada (Minister of Citizenship and Immigration) v. Vavilov</i> , 2019 SCC 65	115
<i>Canadian Assn. of Broadcasters v. Society of Composers, Authors & Music Publishers of Canada</i> (1995), 58 C.P.R. (3d) 190 (Fed Ct App Div)	124
<i>Canadian Broadcasting Corp. v. SODRAC 2003 Inc.</i> , 2015 SCC 57	129, 130
<i>Canadian Copyright Licensing Agency v. York University</i> , 2017 FC 669	9, 60, 64, 65, 67, 68, 69, 70
<i>CCH Canadian Ltd. v. Law Society of Upper Canada</i> , 2004 SCC 13	94
<i>Compo Co. Ltd. v. Blue Crest Music et al.</i> (1979), [1980] 1 SCR 357	97
<i>Decision of the Copyright Board Re: Access Copyright Post-Secondary Educational Institutions Tariff, 2011-2014 and 2015-2017</i> , 2019 CarswellNat 9042	49, 62
<i>Decision of the Copyright Board Re: Reprographic Reproduction 2011-2013, Interim Statement of Royalties to be collected by Access Copyright (Post-Secondary Educational Institutions)</i> , 2011, 92 C.P.R. (4th) 434	45, 55
<i>Eli Lilly & Co. v. Novopharm Ltd.</i> , [1998] 2 SCR 129	106
<i>Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada</i> , 2012 SCC 34	47
<i>Keatley Surveying Ltd. v. Teranet Inc.</i> , 2019 SCC 43	94
<i>Maritime Travel Inc. v. Boyle</i> , 2012 NSSC 428, aff'd <i>Boyle v. Maritime Travel Inc.</i> , 2014 NSCA 44	92

<u>Neighbouring Rights Collective of Canada v. Society of Composers, Authors and Music Publishers of Canada</u> , 2003 FCA 302	40, 44, 45
<u>Option Industries Inc (Re)</u> , 2020 ABQB 535	92
<u>Public Performance of Musical Works, Re</u> , 61 CPR (4th) 353	47
<u>Reprographic Reproduction, 2011-2013, Re</u> , 2011 CarswellNat 3708	57, 118
<u>Re:Sound v. Motion Picture Theatre Associations of Canada</u> , 2012 SCC 38, [2012] 2 SCR 376	47
<u>Robertson v. Thomson Corp.</u> , 2006 SCC 43	109
<u>Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada</u> , 2012 SCC 35	47, 114
<u>Rogers Communications Inc. v. Voltage Pictures, LLC</u> , 2018 SCC 38	84, 95
<u>Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers</u> , 1 CPR (4th) 417	47
<u>Society of Composers, Authors and Music Publishers of Canada v. Bell Canada</u> , 2012 SCC 36	47, 94
<u>Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers</u> , 2004 SCC 45	47, 83
<u>TELUS Communications Inc. v. Wellman</u> , 2019 SCC 19	84, 88
<u>Théberge v. Galerie d'Art du Petit Champlain inc.</u> , 2002 SCC 34	94
<u>Vigneux v. Canadian Performing Right Society Ltd.</u> , [1943] SCR 348	25
<u>York University v. Copyright Licensing Agency</u> , 2020 FCA 77	67, 78, 123

SECONDARY SOURCES	Cited in paras.
Andrew A. Keyes and Claude Brunet, <i>Copyright in Canada: Proposals for a Revision of the Law</i> (Ottawa: Consumer and Corporate Affairs Canada, 1977)	32
Canada. Department of Communications and Department of Consumer and Corporate Affairs, <i>From Gutenberg to Telidon: A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act</i> , 1984	32
<u>Canada. House of Commons, Sub-Committee on the Revision of Copyright, A Charter of Rights for Creators: A Report of the Sub-committee on the Revision of Copyright, Standing Committee on Communications and Culture</u> (Ottawa: Queen's Printer, 1985)	32
Copyright and the Cultural Community, Minister of Supply and Services Canada, 1984	32
Hon. J. Parker, <u>Report of the Royal Commission Appointed to Investigate the Activities of the Canadian Performing Rights</u> (Ottawa, ON: JO Patenaude, 1935)	26
<u>House of Commons Debates, 18th Parl., 1st Sess. (February 28, 1936) at 644-645</u> (Hon. C.H. Cahan and Hon. H. Rinfret)	25
<i>House of Commons Debates</i> , 33 rd Parl., 2 nd Sess. (June 15, 1987) at 7109 (Hon. F. MacDonald)	33
House of Commons Debates, 33 rd Parl., 2 nd Sess. (May 17, 1988) at 15520 (Hon. F. MacDonald)	34
John S. McKeown, <i>Fox on Canadian Law of Copyright and Industrial Designs</i> , 4th ed. (Toronto: Carswell, 2007) at page 19-26	106
Report of the Committee to consider the Law on Copyright and Designs, (Her Majesty's Stationary Office, 1977)	31
Ruling of Copyright Board Re: Access Copyright-Post-Secondary Educational Institutions Tariff (2011-2013) dated December 9, 2013	62, 119
<u>Senate Debates, 34th Parl., 2nd Sess. (December 13, 1989)</u> at 840 (Hon. C. William Doody).	36

STATUTORY PROVISIONS	Cited in paras.
<i>An Act to Amend the Copyright Act</i> , S.C. 1997, c.24, s. 46 (HeinOnline)	38
<i>Copyright Act</i> , R.S.C. 1985, c. C-42, s. 68(4) and 70.15 Loi sur le droit d'auteur, LRC 1985, c C-42, s. 68(4) and 70.15	48
<i>Copyright Act</i> , R.S.C. 1985, c. C-42, s. 70.12 Loi sur le droit d'auteur, LRC 1985, c C-42, s. 70.12	103
<i>Copyright Act</i> , R.S.C. 1985, c. C-42, s. 70.17 Loi sur le droit d'auteur, LRC 1985, c C-42, s. 70.17	50
<i>Copyright Modernization Act</i> , S.C. 2012, c. 20, s.27 <i>Loi sur la modernisation du droit d'auteur</i> , SC 2012, c 20, s.27	111
<i>Interpretation Act</i> , RSC 1985, c I-21, s. 12 Loi d'interprétation, LRC 1985, c I-21, s. 12	89
<i>The Copyright Amendment Act, 1931</i> , Dom., 1931, c.8, s.10	26