File No. 39222

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

BETWEEN:

THE CANADIAN COPYRIGHT LICENSING AGENCY
("ACCESS COPYRIGHT")

Appellant
(Respondent)

- and -

YORK UNIVERSITY

Respondent
(Appellant)

Style of cause continued on inside cover page

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – CONCISE OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The issue on this appeal is whether, as Access Copyright claims, Parliament has given the Copyright Board the statutory power to issue so-called "mandatory tariffs" for Access Copyright; that is, to compel others, such as York, with whom Access Copyright has no contractual or other legal relationship, to pay royalties for the use of material for which Access Copyright has non-exclusive licensing rights. Parliament did no such thing.

2. Access Copyright starts from the undisputable proposition that tariffs under the *Copyright Act* were not mandatory for users for at least 50 years from 1936 to 1988. They were (and are) not mandatory because Parliament's purpose for regulating the licensing systems operated by collective societies was not to impose pecuniary burdens on users without their consent, but to restrict the predatory practices of collective societies that developed from the collective administration of copyright. Access Copyright's argument depends on a major legislative shift occurring when the *Copyright Act* was amended in 1988 to convert tariffs from voluntary to mandatory. But it points to nothing clear in the legislation, then or since, nor in *Hansard*, as there is nothing.

3. Parliament uses clear and unambiguous language when it empowers one party to impose involuntary pecuniary burdens on another. As this Court has affirmed, there must be "clear and distinct authority" in order to impose the "burdens of a licence … on a user who does not consent to be bound by its terms."[1] As the unanimous Federal Court of Appeal correctly found, there is no such "clear and distinct authority." Rather, when the statute is interpreted according to the modern principle of interpretation adopted by this Court, it does not have the extraordinary effect contended for by Access Copyright. Only by seizing on a snippet of statutory language, and reading it divorced from the statute's context and purpose, can Access Copyright attempt to support its position.

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[1] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, para. 107.

4. If Access Copyright's position were accepted, the consequences would be anti-competitive and unfair to users who wish to deal with Access Copyright's competitors, including publishers and vendors who provide licences to reproduce the exact same works. Requiring users to do business with Access Copyright would give it enormous market power and advantage over its competitors.

5. York chooses to deal with Access Copyright's competitors because they provide a more complete and valuable package—digital access to the contents of published works, plus usage rights (like copying). In contrast, Access Copyright provides only rights to ***copy*** from works, not access to the contents of works. The right to make copies is only useful if the user has access to the work to be copied (*e.g.*, from a purchased book). For York, dealing with Access Copyright's competitors for both content and copying rights offers more value.

6. On Access Copyright's theory, an educational institution like York has no choice but to pay large amounts for a licence from Access Copyright (*i.e.*, the tariff approved by the Copyright Board) the moment any student or faculty member makes an infringing copy of ***any*** work in its repertoire. Access Copyright says this makes York liable to pay for the copying rights to ***all*** works in its repertoire. The practical result is double payment for all the overlapping rights that York sources through Access Copyright's competitors.

7. This is not what the *Copyright Act* provides. Infringing copies are dealt with in the normal course with an action for damages for copyright infringement. Access Copyright's members chose, as they were free to do, not to grant rights to Access Copyright that would enable it to sue for infringement. This Court should not allow Access Copyright to assert more rights and become a monopolist based on a "mandatory tariff" theory unconnected to the text, context, or purpose of the *Copyright Act*.[2]

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[2] The statutory references in this factum use the section numbering from the version of the *Copyright Act* in force at the time of the trial and judgment. Parliament has since amended the tariff approval process and assigned new section numbers. Those amendments do not change the substance of York's position that approved tariffs are not

B. Position with Respect to Access Copyright's Statement of Facts

8. The statement of facts of the appellant, The Canadian Copyright Licensing Agency ("**Access Copyright**"), contains unsupported allegations regarding "mass reproduction" at York (paras. 17-22), and then it discusses the legislative history of the *Copyright Act* and the statutory context of collective administration (paras. 23-52). York addresses the unsupported allegations about "mass copying" below in this facts section. The legislative history and statutory arguments are addressed below in Part III together with York's legal submissions. These are legal points on which the parties disagree and which go to the heart of this appeal.

9. York also disputes Access Copyright's factual summary regarding the post-secondary sector (paras. 53-65). Although it is accurate that York and Access Copyright negotiated licences from 1994 to the end of 2010, York disputes Access Copyright's inflammatory characterization of the negotiation process in 2010 (including the allegation that "post-secondary organizations failed to engage in good faith negotiations").[3] Notably, Access Copyright does not support these allegations with findings of the trial judge, and only cites to the trial reasons sparingly in this entire section.[4] York's position on the facts is below.

C. York Operated Voluntarily Under the Interim Tariff

10. Access Copyright filed a proposed tariff with the Copyright Board of Canada ("**Board**") in March 2010 for the copying of works in its repertoire in the post-secondary educational sector for the years 2011-2013. Access Copyright sought a royalty of $45 per full-time equivalent student ("**FTE**") per year.[5]

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mandatory against unwilling users. Attached as **Schedule "A"** is a table of concordance showing how the section numbering below in this factum corresponds to the current *Act*.

3 Factum of the Appellant, the Canadian Copyright Licensing Agency ("Access Copyright") dated February 8, 2021 ("**Access Copyright's Factum**"), para. 55.

4 See only Access Copyright's Factum, para. 60.

5 *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669, [2018] 2 F.C.R. 43 ("**Trial Reasons**"), para. 163: Appellant's Record of Access Copyright ("**A.R.**"), Vol. I, Tab 2, p. 58.

11. From 1994 to the end of 2010, York and Access Copyright entered into voluntary licensing agreements allowing university staff to make copies of portions of published works in Access Copyright's repertoire. By 2010, the royalty was $3.38 per FTE plus 10¢ per page.[6]

12. Access Copyright filed its proposed tariff in March 2010 when it was uncertain if the licence renewal could be finalized before its expiry at the end of the year. At the time, Access Copyright was negotiating with the Association of Universities and Colleges of Canada ("**AUCC**", now Universities Canada) to establish a new model licence agreement. The AUCC filed an objection to Access Copyright's proposed tariff and was a party to the Board proceedings. York was not a party.[7]

13. On December 23, 2010, the Board issued an interim decision setting the terms of an interim tariff for 2011-2013 ("**Interim Tariff**"). The royalty structure under the Interim Tariff was based on Access Copyright's existing model licence agreement.[8] Entering into such an agreement with Access Copyright had always been voluntary.

14. Between January 1, 2011 and August 31, 2011, York voluntarily operated under the Interim Tariff. Thereafter, York declined to continue on as a licensee of Access Copyright.[9]

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6 Trial Reasons, para. 153: A.R., Vol. I, Tab 2, p. 57; *York University v. Copyright Licensing Agency*, 2020 FCA 77, 448 D.L.R. (4th) 456 ("**FCA Decision**"), para. 7: A.R., Vol. I, Tab 4, p. 121.

7 Trial Reasons, paras. 8, 165: A.R., Vol. I, Tab 2, pp. 16, 59; FCA Decision, para. 8: A.R., Vol. I, Tab 4, p. 121.

8 Trial Reasons, para. 168: A.R., Vol. I, Tab 2, p. 59; *Access Copyright Interim Post-Secondary Educational Institution Tariff, 2011-2013*, Copyright Board of Canada, dated December 23, 2010.

9 Trial Reasons, paras. 170-171: A.R., Vol. I, Tab 2, pp. 59-60; FCA Decision, para. 10: A.R., Vol. I, Tab 4, pp. 121-122.

D. Dealing with Access Copyright Is Not Mandatory

15. Access Copyright does not have exclusive rights to license the works in its repertoire. Access Copyright is authorized by its members on a ***non-exclusive basis*** to grant licences allowing users to make copies of published literary works.[10]

16. As Access Copyright's authority is not exclusive, it competes with other sources through which users can obtain rights to copy the same works. Users may exercise their fair dealing rights, or they may obtain licences and permissions directly from copyright owners (*e.g.*, creators/publishers), or from other organizations offering licences on behalf of owners.

17. For example, Access Copyright competes with vendors and publishers, from whom library consortia obtain licences on behalf of their member institutions (such as York). These library licences provide digital access to the contents of vast collections of materials, together with various usage rights (including copying).[11] In contrast, Access Copyright licences do not provide access to the content of works in its repertoire. Rather, its licences provide only limited usage rights (limited copying of the works in its repertoire). The contents of the works need to be obtained elsewhere (*e.g.*, by purchasing a physical book).[12]

18. Much of the digital material available through a library consortium are also works that Access Copyright treats as part of its repertoire.[13] If an educational institution obtains access and copying rights to a work through a library consortium licence, having an Access

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[10] Trial Reasons, para. 30: A.R., Vol. I, Tab 2, p. 22. See also Trial Transcript dated May 16, 2016, Cross-Examination of Roanie Levy at 132, lines 11-17; 136, lines 16-20: Respondent's Record of York University ("**R.R.**"), Vol. I, Tab 1, pp. 16, 20.

[11] Trial Transcript dated June 1, 2016, Evidence of Craig Olsvik at 1797, line 1 to 1814, line 18: R.R., Vol. I, Tab 5, pp. 157-174; Trial Transcript dated May 25, 2016, Evidence of Catherine Davidson at 919, lines 7-23: R.R. Vol. I, Tab 3, p. 105.

[12] Trial Reasons, paras. 30, 33, 35, 180-182: A.R., Vol. I, Tab 2, pp. 22-23, 61-62.

[13] Access Copyright operates on an "exclusion model," which means it treats all published works as part of its repertoire unless the owner expressly requests to be excluded:

Cross Examination of Roanie Levy at 146, line 16 to 147, line 10: R.R., Vol. I, Tab 1, pp. 30-31.

Copyright licence to obtain just the copying rights would be duplicative and involve double payment for the same thing.

19. At the time of the trial, the major library consortia in Canada were compensating copyright owners more than $100 million per year,[14] which eclipses Access Copyright's distributions of revenue to copyright owners.[15]

20. As the trial judge found, "much of the other material used for teaching is licensed to York's various libraries by authors, publishers, [performing rights societies], and other libraries."[16] Further, "[a]ccess to electronic resources by York is generally by way of licences from publishers and subscriptions to databases. The licences and subscriptions may be indirectly acquired through library consortia or directly acquired by York."[17]

21. As noted in York's appeal in respect of the fair dealing issues, York spends approximately $11 million per year on physical and electronic acquisitions, including over $8 million for access to electronic resources.[18]

E. Access Copyright's Factual Misstatements about "Mass Reproduction"

22. Access Copyright states that the "problem" is mass reproduction where York "copies millions of pages every year from an enormous selection of copyrighted works published by hundreds of different rights holders, without authorization."[19] This misstates the facts.

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[14] Trial Transcript dated June 1, 2016, Evidence of Craig Olsvik at 1797, lines 11-14: R.R. Vol. I, Tab 5, p. 157.

[15] See Trial Reasons, para. 112: A.R., Vol. I, Tab 2, pp. 44-45.

[16] Trial Reasons, para. 46: A.R., Vol. I, Tab 2, p. 25.

[17] Trial Reasons, para. 182: A.R., Vol. I, Tab 2, p. 62.

[18] Trial Transcript dated May 25, 2016, Evidence of Catherine Davidson at 942, line 1 to 943, line 21; 952, lines 9-20: R.R., Vol. I, Tab 3, pp. 110-111, 120; Trial Transcript dated May 31, 2016, Evidence of Louis Mirando at 1567, line 19 to 1574, line 11: R.R., Vol. I, Tab 4, pp. 142-149.

[19] Access Copyright Factum, para. 17.

23. First, Access Copyright is not correct that the "trial judge found that in 2013, York's faculty and staff copied 17.6 million unauthorized pages."[20] The trial judge found that: "In 2013, York copied an aggregate volume of 17.6 million exposures of materials relevant to [York's Fair Dealing Guidelines] in either coursepacks or [learning management systems]."[21] There is no reference in this finding to all of the copies being "unauthorized."

24. Second, overlooked by Access Copyright is the fact that this volume includes copying that is fair dealing or licensed in another manner (*e.g.*, through a library consortium licence). Although the evidence did not permit matching specific copying with particular licences, the trial judge did find that "much" of the material used at York for teaching is licensed to York's various libraries by authors, publishers, and other libraries.[22]

25. Third, Access Copyright's assertion is inconsistent with the evidence. The calculation of 17.6 million pages is found in the report of Benoît Gauthier (an expert put forward by Access Copyright). The report reflects that, in 2013, total copying at York was 17.6 million pages from three sources: coursepacks created in copy shops, sampled course packs created internally by York, and sampled copies on learning management systems.[23]

26. Fourth, Access Copyright ignores the fact—which was undisputed in the courts below—that Access Copyright was paid royalties for at least those coursepacks produced for York by copy shops licensed by Access Copyright.[24] As set out in York's factum on its fair dealing appeal, certain coursepacks at York were ordered from print shops that were

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20 Access Copyright Factum, para. 17. See also paras. 61, 67.

21 Trial Reasons, para. 303: A.R., Vol. I, Tab 2, p. 88.

22 Trial Reasons, paras. 46, 287: A.R., Vol. I, Tab 2, pp. 25, 85.

23 See Report of Benoît Gauthier dated April 3, 2016, Table 4.1 p. 43 (Exposures in 2013): R.R., Vol. II, Tab 6, p. 48.

24 Trial Reasons, paras. 52, 91, 98, 287: A.R., Vol. I, Tab 2, pp. 26, 35, 38, 85; Report of Benoît Gauthier, *ibid*., para. 22: R.R., Vol. II, Tab 6, p. 12.

licensed by Access Copyright, and those shops would pay the applicable royalties to Access Copyright.[25]

27. Access Copyright itself provided Mr. Gauthier with logs from copy shops that had produced coursepacks on behalf of York, and those are reflected in the 17.6 million figure.[26] Access Copyright is incorrect to label all of this volume as "unlawful copying."[27]

F. This Is Not an Action for Copyright Infringement

28. As Access Copyright's factum refers repeatedly to infringement,[28] it bears repeating that Access Copyright's action was ***not*** an action for copyright infringement. Rather, Access Copyright sued to enforce the Interim Tariff. Specifically, Access Copyright sued to force York to pay royalties under the Interim Tariff, transforming it into a mandatory tariff, thereby compelling York to deal with Access Copyright as opposed—or in addition—to Access Copyright's various competitors.[29]

29. Access Copyright cannot sue for infringement under its agreements with copyright owners.[30] This is a choice made by Access Copyright and its members. Had members granted to Access Copyright proprietary interests in their copyrights (either by assignment or exclusive licence), then Access Copyright could sue for copyright infringement.[31] By electing not to vest Access Copyright with these rights, copyright owners retain the power

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25 Trial Reasons, paras. 49, 52: A.R., Vol. I, Tab 2, pp. 25-26; Trial Transcript dated May 17, 2016, Evidence of Patricia Lynch at 318, line 25 to 320, line 25: R.R., Vol. I, Tab 2, pp. 87-89.

26 Report of Benoît Gauthier dated April 3, 2016, para. 22: R.R., Vol. II, Tab 6, p. 12.

27 Access Copyright's Factum, para. 18.

28 *E.g.*, Access Copyright's Factum, paras. 16, 81, 109.

29 Amended Statement of Claim filed April 5, 2016, paras. (a), (b): A.R., Tab 14, Vol. II, p. 100.

30 FCA Decision, para. 205: A.R., Vol. I, Tab 4, p. 190.

31 *Copyright Act*, R.S.C., 1985, c. C-42, s. 41.23(1); *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, [2007] 3 S.C.R. 20, paras. 27-28.

to grant licences directly to users or through Access Copyright's competitors, and to sue for copyright infringement themselves.[32]

G. The Federal Court Decision

30. The trial judge concluded that the Interim Tariff was mandatory and enforceable as against York. He reasoned that the Interim Tariff was an "approved tariff" under the *Copyright Act* and that "an approved tariff is a form of subordinate legislation which is mandatory and binding on any person to whom it pertains. There is no opting out."[33]

31. The trial judge recognized that "tariff" is not defined in the *Act*, but he relied on other unrelated statutory regimes to conclude that a "tariff" is inherently binding as "fees or charges which must be paid."[34] According to the trial judge, "tariffs and enforcement of tariffs (both final and interim) are an integral part of the legislative scheme created by Parliament for the collective administration of copyright" and effective enforcement mechanisms against users.[35]

H. The Federal Court of Appeal Decision

32. The Federal Court of Appeal held that Board-approved tariffs for copyright (both interim and final) are not "mandatory" in the sense of being "enforceable against anyone whose use of the protected works is an infringement of the copyright owner's exclusive rights."[36] The tariff becomes enforceable only once a user accepts a licence from the

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[32] Trial Transcript dated May 16, 2016, Cross-Examination of Roanie Levy at 132, lines 11-17; 136, lines 16-20: R.R., Vol. I, Tab 1, pp. 16, 20.

[33] Trial Reasons, para. 218: A.R., Vol. I, Tab 2, p. 70.

[34] Trial Reasons, paras. 190-193, 209: A.R., Vol. I, Tab 2, pp. 64, 68.

[35] Trial Reasons, paras. 195, 204: A.R., Vol. I, Tab 2, pp. 65, 66-67.

[36] FCA Decision, para. 4: A.R., Vol. I, Tab 4, p. 120.

collective society (Access Copyright).[37] Non-licensees (such as York) are not liable for paying royalties under the tariff.[38]

33. The Federal Court of Appeal reached this conclusion through a comprehensive review of the statutory scheme and legislative history since 1936, and by applying this Court's recent decision in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.* ("***SODRAC***").[39] As the Federal Court of Appeal held:

> The Supreme Court's decision in *SODRAC* confirms the view that collective societies operate licensing schemes so that, in every case, the question is whether the user has agreed to the terms of the licence. The fact that the Board has a role to play in setting those terms and conditions says nothing about a user's ability to accept, or not, a licence on those terms.[40]

34. This does not give non-licensees *carte blanche* to infringe copyright. As the Federal Court of Appeal held, "[i]nfringers are subject to an action for infringement and liability for damages but only at the instance of the copyright owner, its assignee or exclusive licensee."[41] As noted, this case was not an action for infringement. Access Copyright tried instead to enforce its tariff against York as a non-licensee, which the Federal Court of Appeal rejected.

PART II – POSITIONS ON QUESTIONS IN ISSUE

35. Contrary to Access Copyright's statement of issues, s. 68.2(1) of the *Copyright Act* does not permit Access Copyright to collect royalties under an approved tariff unless the user has accepted a licence. The context and scheme of the tariffing regime applicable to Access Copyright do not create tariffs that are binding on unwilling users who decline to accept a statutory licence. York has not been a licensee of Access Copyright since August 2011, and it is accordingly not liable for the royalties that Access Copyright sought at trial.

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37 FCA Decision, para. 190: A.R., Vol. I, Tab 4, p. 185.

38 FCA Decision, para. 205: A.R., Vol. I, Tab 4, p. 190.

39 2015 SCC 57, [2015] 3 S.C.R. 615, cited in the FCA Decision, paras. 112-114, 193: A.R., Vol. I, Tab 4, pp. 157-158, 186.

40 FCA Decision, para. 193: A.R., Vol. I, Tab 4, p. 186.

41 FCA Decision, para. 205: A.R., Vol. I, Tab 4, p. 190.

PART III – STATEMENT OF ARGUMENT

A. Section 68.2(1) Must Be Interpreted Purposively within the Statutory Scheme

36. Access Copyright's action against York depends on reading s. 68.2(1) of the *Act* in isolation to allow collective societies to enforce tariffs against unwilling users. At the relevant time, s. 68.2(1) provided 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."[42]

37. The Federal Court of Appeal correctly rejected Access Copyright's interpretation,[43] applying the modern approach of reading the words of s. 68.2(1) "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[44]

38. In contrast, Access Copyright argues as "Error #1" that the Federal Court of Appeal failed to apply a so-called "plain meaning" rule of statutory interpretation.[45] This overlooks three decades of guidance from this Court.[46] The modern principle requires purposive and contextual interpretation, ***not*** a "plain meaning rule."

39. It is particularly important to interpret s. 68.2(1) within its statutory scheme, as the *Copyright Act* creates various different types of rights which are treated differently within the collective administration system. Of the various tariffing regimes under the *Act*, two are

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42 *Copyright Act*, R.S.C., 1985, c. C-42, s. 68.2(1).

43 FCA Decision, paras. 166-167, 204: A.R., Vol. I, Tab 4, pp. 176-177, 190.

44 *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21; *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, para. 6; FCA Decision, paras. 47-48: A.R., Vol. I, Tab 4, p. 134.

45 Access Copyright's Factum, para. 84.

46 See *e.g.*, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21.

most pertinent to this appeal: the "Performing Rights Regime" and the "General Regime."[47] Access Copyright is subject to the General Regime. However, as the Performing Rights Regime was created first in the 1930s, it forms the basis for both regimes. These two regimes are discussed below, followed by what it means for a tariff to be "mandatory" in this context.

1. The Performing Rights Regime

40. The Performing Rights Regime (ss. 67 to 69), regulates the collective administration of performing and communication rights.[48] Parliament decided to regulate the collective administration of these specific rights in the 1930s to reign in the predatory practices of the early performing rights organizations (the predecessors to collective societies), which amassed these rights and charged users exorbitant prices for licences.[49]

41. Under the Performing Rights Regime, the collective society must file proposed tariffs with the Board (s. 67.1). The Board then fixes the royalties that the society may charge users (s. 68(3)).

42. Whether the user must pay those royalties depends on the nature of the right being administered. In respect of copyright in musical works, the Performing Rights Regime has always been voluntary for the user, in the sense that a user could choose whether to accept a licence from the collective society (which must not exceed the royalties approved by the Board). Access Copyright does not dispute that to have been the case for at least 50 years

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47 Since the trial in this case, Parliament has merged the Performing Rights Regime into the General Regime (now ss. 67-74). The amendments do not impact this appeal or the substantive result that Access Copyright tariffs are only enforceable against licensees.

48 *Copyright Act*, R.S.C., 1985, c. C-42, ss. 67 *et seq*.

49 *Vigneux v. Canadian Performing Right Society Ltd*., [1943] S.C.R. 348, pp. 352-354, aff'd [1945] A.C. 108 (J.C.P.C.).

until 1988, as had been held in the jurisprudence prior to the 1988 amendments to the *Act*.[50] As set out below, nothing in 1988 or thereafter changed this feature of the scheme.

43. The Performing Rights Regime also applies to "neighbouring rights" in published sound recordings, for which a right to remuneration was introduced in 1997 (see s. 19 of the *Act*).[51] Those statutory rights are different from copyright and, unlike with copyright, the *Act* provides that certain users are "liable to pay royalties" for the neighbouring rights in published sound recordings.[52] For tariffs of this type, the royalties (called "equitable remuneration") are mandatory on users, and a sole collective society is designated by the Board to collect the entirety of the royalties.[53] The *Act* is structured in this way because these rights holders have no other recourse under the *Act* (unlike with copyright, where copyright owners or their assignees or exclusive licensees may sue for infringement).

2. The General Regime

44. The General Regime (ss. 70.1 to 70.6) applies to the collective administration of copyrights under ss. 3, 15, 18, and 21, which includes the reproduction rights administered by Access Copyright.[54] This is a traditional copyright, and there is no provision making users liable to pay royalties. If these rights are infringed, the remedy is for a person with standing

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50 Access Copyright's Factum, paras. 29-30, 35-36; *Performing Rights Organization of Canada Ltd. v. Lion d'Or (1981) Ltée.* (1987), 16 F.T.R. 104, 17 C.P.R. (3d) 542 (F.C.) [Book of Authorities of the Respondent, York University ("**RBOA**"), Tab 3]. See also *Maple Leaf Broadcasting v. Composers, Authors and Publishers Association of Canada Ltd.*, [1954] S.C.R. 624, pp. 630-631.

51 *Copyright Act*, R.S.C., 1985, c. C-42, s. 19.

52 *Copyright Act*, *ibid.*, s. 19(2). See also *Re:Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [2012] 2 S.C.R. 376, para. 28.

53 *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, para. 106; codified under the current *Copyright Act*, R.S.C. 1985, c. C-42, s. 67.1.

54 *Copyright Act*, R.S.C., 1985, c. C-42, ss. 70.1 *et seq*.

(the owner, assignee, or an exclusive licensee) to sue for infringement (s. 35). The remedy for infringement is damages, which is different from royalties payable under a licence.[55]

45. As set out further below, the General Regime was introduced in stages between 1988 and 1997 and allows (but does not require) a collective society to file a proposed tariff with the Board setting out the terms and conditions of the licences that it proposes to offer to any prospective licensee (ss. 70.12 to 70.13). If the user accepts one of these licences, it cannot be sued for infringement (s. 70.17), and it instead must pay the royalties under the licence.

46. There are two elements to the General Regime: provisions which regulate the licences on offer to any prospective licensee under a tariff (ss. 70.1 to 70.191), and the provisions which allow the Board to set royalties and conditions in the case of individual licence negotiations between users and a collective society (ss. 70.2 to 70.4). This Court addressed the latter aspect in *SODRAC*, which confirmed that users may choose whether or not to accept the licence.[56] If the user does not accept the licence, it is not liable for royalties.

47. Under the version of the *Act* applicable in this appeal, s. 68.2(1) is within the Performing Rights Regime but applies to the General Regime "with such modifications as the circumstances require" under s. 70.15(2).[57] As set out below, the interpretation of s. 68.2(1) must reflect the scheme of the General Regime, which regulates the licensing systems operated by collective societies. The interpretation must also reflect the purpose for regulating these licensing systems, which is to protect users from anti-competitive conduct.

3. Meaning of "voluntary" or "mandatory" in interpreting these regimes

48. Before turning to the text, context, and purpose of the provisions at issue, it is first important to be clear on vocabulary. The statutory rights and collective administration

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55 *Composers, Authors & Publishers Assn. (Canada) v. Sandholm Holdings Ltd.*, [1955] Ex. C.R. 244, para. 22 [RBOA, Tab 2].

56 *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, para. 107.

57 *Copyright Act*, R.S.C., 1985, c. C-42, s. 70.15(2).

regimes under the *Act* have different characteristics that can be described as either "voluntary" or "mandatory," but this dichotomy has three meanings depending on context.

49. ***Whether the collective society must file a tariff:*** The *Act* contains tariffing regimes which are "voluntary" in the sense that the collective society may choose whether to file a tariff. The General Regime applicable to Access Copyright is "voluntary" in this sense, as Access Copyright could elect to negotiate licence agreements with educational institutions without needing a tariff (as they did from 1994 to 2010).[58] The Performing Rights Regime is "mandatory" in the sense that the collective societies "shall" file a tariff.[59]

50. ***Whether the tariff is binding on the collective society:*** Separately, there is the question of whether a tariff is "mandatory" on the collective society once the Board approves a tariff. The General Regime applicable to Access Copyright is "mandatory" in this sense only. Once the Board approves a tariff, Access Copyright cannot refuse to issue licences to prospective licensees who want a licence on the Board-approved terms and conditions.[60]

51. ***Whether the tariff is binding on the user:*** Central to this case is the question of whether a tariff is "mandatory" on users, in the sense of being enforceable against anyone who uses the works covered by the tariff. As the Federal Court of Appeal held in this case, Access Copyright tariffs are ***not*** "mandatory" in this sense.[61] It is voluntary for the user to choose whether or not to become a licensee. This is in contrast to certain other tariff systems under the *Act*, which are—by clear language—"mandatory" for the users to pay royalties.[62]

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58 *Copyright Act*, *ibid*., s. 70.12.

59 *E.g.*, *Copyright Act*, *ibid*., s. 67.1. See also s. 71.

60 *Copyright Act*, *ibid*., s. 70.17; FCA Decision, para. 86: A.R., Vol. I, Tab 4, p. 148; Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff – Part I" (2015) 27 I.P.J. 151, pp. 201-202, 206.

61 FCA Decision, paras. 4, 204: A.R., Vol. I, Tab 4, pp. 120, 190.

62 *Copyright Act*, R.S.C., 1985, c. C-42, ss. 19, 82(1)(a).

B. The Federal Court of Appeal Was Correct that an Approved Tariff Under the General Regime Is Not Binding on Users Who Do Not Take a Licence

52. The Federal Court of Appeal's conclusion that an approved tariff is always voluntary for the user under the General Regime (which applies to Access Copyright) is supported by:

(i) ***the text of s. 68.2(1)***, which must be read in light of *SODRAC* (which also addressed the General Regime), holding that the "burdens of a licence should not be imposed on a user who does not consent to be bound by its terms;"[63]

(ii) the ***statutory context***, where s. 68.2(1) is part of a non-exhaustive licensing scheme (not a closed system), which is unlike certain other regimes in the *Act* which impose mandatory tariffs on users with clear and distinct language imposing a liability to pay royalties or levies;

(iii) the ***statutory purpose***, which is to curb the market power of collective societies and thereby preserve user choice and competition; and

(iv) the ***legislative history***, in which tariffs under the *Act* have been voluntary for the users since the introduction of the Performing Rights Regime in 1936.

53. Through each of these elements of the modern approach, it is important to recognize that Access Copyright itself starts from the proposition that there is nothing about the word "tariff" that implies that it is mandatory on the user. Access Copyright concedes that tariffs were originally introduced to protect against anti-competitive conduct and that the jurisprudence prior to the 1988 amendments to the *Act* held that tariffs were voluntary for users.[64] Nothing about the text, context, or purpose of the provisions at issue suggest that this changed in 1988 or later in relation to Access Copyright's tariffs.

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[63] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, para. 107.

[64] Access Copyright's Factum, paras. 2, 29-30, 35-36, 86-87.

1. The text of Section 68.2(1) does not impose mandatory tariffs

54. Access Copyright's action against York depends entirely on the text of s. 68.2(1), which provides 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." On a pure textual reading, this provision does not specify from whom the collective society may collect royalties or who it may sue to recover them.

55. This Court interpreted a similar provision in *SODRAC*, specifically, s. 70.4 of the *Act*, which deals with individual licence negotiations within the same General Regime. The Court confirmed that a collective society could sue to recover royalties in default of payment ***if*** (and ***only if***) the user opts to become a licensee.[65] The statutory text is virtually identical:

70.4 Where any royalties are fixed for a period pursuant to subsection 70.2(2), the person concerned may, during the period, subject to the related terms and conditions fixed by the Board and to the terms and conditions set out in the scheme and on paying or offering to pay the royalties, do the act with respect to which the royalties and their related terms and conditions are fixed and ***the collective society may, without prejudice to any other remedies available to it, collect the royalties or, in default of their payment, recover them in a court of competent jurisdiction***.	**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 tariff and, in default of their payment, recover them in a court of competent jurisdiction***.

56. As this Court held in *SODRAC*, "[t]he language of s. 70.4 does not, of its own force, bind the user to the terms and conditions of the licence."[66] "In the absence of clear and distinct legal authority showing that this was Parliament's intent, the burdens of a licence should not be imposed on a user who does not consent to be bound by its terms."[67] This

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[65] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, paras. 105-108, 112.

[66] *SODRAC*, *ibid*., para. 106.

[67] *SODRAC*, *ibid*., para. 107.

reflects the general legal principle that "no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority."[68]

57. There is no material distinction between ss. 70.4 and 68.2(1) for purposes of this appeal.[69] Most importantly, neither contains "clear and distinct legal authority" imposing the terms of a licence on unwilling users.

2. The statutory context is the regulation of a licensing scheme

58. Section 68.2(1) forms part of the statutory licensing scheme of the General Regime. That licensing scheme—not s. 68.2(1) in isolation—determines from whom the collective society may recover royalties in default of payment. As the Federal Court of Appeal correctly held, only users who accept a licence from the collective society are liable to pay royalties.[70]

59. This follows from the scheme of the *Act*. Section 70.12 provides that a "collective society may, for the ***purpose of setting out by licence*** the royalties and terms and conditions relating to classes of uses […] file a proposed tariff with the Board."[71] The tariff identifies the "royalties to be collected by the collective society ***for issuing licences***" (s. 70.13).[72] That is, the "approved tariff" referred to in s. 68.2(1) is a statement of the royalties and terms and conditions of the licences available through the licensing scheme of the collective society.[73]

60. Once the Board approves a tariff (s. 70.15), the collective society must grant licences to potential licensees (users) on the terms and conditions approved by the Board, including

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68 *SODRAC*, *ibid*., para. 107.

69 Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff – Part I" (2015) 27 I.P.J. 151, pp. 203-207. See also Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff – Part II" (2015) 28 I.P.J. 39, pp. 53-55.

70 FCA Decision, para. 190: A.R., Vol. I, Tab 4, p. 185.

71 *Copyright Act*, R.S.C., 1985, c. C-42, s. 70.12 (emphasis added).

72 *Copyright Act*, *ibid*., s. 70.13 (emphasis added). See also Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff – Part I" (2015) 27 I.P.J. 151, p. 192.

73 FCA Decision, para. 109: A.R., Vol. I, Tab 4, p. 156.

the approved royalties.[74] But nothing in the *Act* permits collective societies to issue licences to—and extract royalties from—unwilling users.

61. The mechanism for a user to accept the licence flows from s. 70.17, which provides that the user may either pay or offer to pay the royalties specified in the approved tariff. Where a user accepts the licence in this manner, the user cannot be sued for copyright infringement (s. 70.17). At that point, once the user has decided to become a licensee, the collective society may enforce the terms of the licence against that licensee under s. 68.2(1).

62. Under Access Copyright's interpretation, in contrast, a user who does not accept the licence (by paying or offering to pay the royalties) could be sued by the owner for copyright infringement and still be liable to the collective society for royalties under the so-called "mandatory tariff." This violates the "elementary" principle that a user cannot simultaneously be an infringer liable to pay damages and a licensee liable to pay royalties.[75]

63. Contrary to Access Copyright's argument, requiring the consent of users does not conflate "licences" with "licence agreements" under s. 70.12 of the *Act.*[76] Section 70.12 provides two mechanisms for a collective society to set out royalties and conditions "by licence": (a) by filing a proposed tariff with the Board; or (b) by entering into agreements with users. These are two ways of setting out the terms of licences available from the collective society: either through a publicly-filed tariff which sets out the terms of a licence available to ***any*** prospective licensee who wants a licence, or by agreement with an individual user. These are different mechanisms, but neither is imposed on unwilling users.

64. Moreover, Parliament could not have intended s. 68.2(1) to allow recovery from literally anyone who uses works covered by a tariff (the strict textualist interpretation), as the General Regime applicable to Access Copyright is ***not a closed system*** where users must

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[74] Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff – Part I" (2015) 27 I.P.J. 151, p. 201.

[75] *Composers, Authors & Publishers Assn. (Canada) v. Sandholm Holdings Ltd.*, [1955] Ex. C.R. 244, para. 22 [RBOA, Tab 2].

[76] Access Copyright's Factum, para. 106.

deal with Access Copyright. Licences from Access Copyright are not the exclusive way for users to obtain rights to copy the works in Access Copyright's repertoire.[77] Users who are unwilling to accept a licence from Access Copyright may choose to obtain permissions or licences directly from the copyright owners or their agents (other than Access Copyright).

65. Access Copyright erroneously treats the *Act* as a closed system where users have "two options to avoid infringing copyright: they can reach an agreement with collective societies through negotiation, or pay the tariff-specified royalties."[78] This is incomplete. Users may accept—or forgo—the benefits and burdens of a licence from the collective society.[79] If the user foregoes, it has other options to avoid infringing copyright, including dealing with one of Access Copyright's various competitors offering the same permissions.[80]

66. Given this statutory context, it is incongruous that the *Act* would make licences from Access Copyright mandatory without "clear and distinct" language to that effect. Access Copyright is a licence-granter, but not an exclusive one, and any permissions obtainable through a licence from Access Copyright could be lawfully obtained through other means.

67. This is consistent with *SODRAC*, which addressed essentially the same statutory context and confirmed that "the burdens of a licence should not be imposed on a user who does not consent to be bound by its terms."[81] The provisions at issue in *SODRAC* (ss. 70.2 to 70.4) were also part of the General Regime. The difference—which is immaterial to whether the licences are mandatory—is how the matter comes to be presented to the Board:

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77 Trial Transcript dated May 16, 2016, Cross-Examination of Roanie Levy at 132, lines 11-17; 136, lines 16-20: R.R., Vol. I, Tab 1, pp. 16, 20.

78 Access Copyright's Factum, paras. 6, 105-106.

79 *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, para. 108.

80 Trial Reasons, paras. 46, 182: A.R., Vol. I, Tab 2, pp. 25, 62.

81 *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, para. 107.

(i) Section 70.4 deals with a licence where the terms are set by the Board on an application in an individual case.[82] Where the user and the collective society are unable to agree on the terms of a licence, either may apply to the Board to determine fair royalties and other terms. As this Court held in *SODRAC*, the Board's decision does not bind the user. The user retains the choice of whether to accept the licence and become a licensee, or not.[83]

(ii) Section 68.2(1) is similar but engaged in a different manner. Instead of seeking to set the terms of a licence with an individual user, the collective society may file a proposed tariff with the Board setting out the terms and conditions of licences that it proposes to offer to any prospective licensees.[84]

68. Either way it is presented to the Board, the potential licensee is given a choice. As explained in *SODRAC*, the power to fix royalties under a licence does "not contain within it the power to force these terms on a user who, having reviewed the terms, decided that engaging in licensed copying is not the way to proceed."[85] "[S]hould the user then engage in unauthorized copying regardless, it will remain liable for infringement. But it will not be liable as a licensee unless it affirmatively assumes the benefits and burdens of the licence."[86]

69. Interpreting the provisions at issue in this case differently from the individual licence regime in *SODRAC* would create anomalous results depending on who initiated the process: the user or the collective society. Where a user petitions the Board to fix royalties for a licence under s. 70.2 of the *Act*, *SODRAC* holds that the licence terms are not mandatory on

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82 *Copyright Act*, R.S.C., 1985, c. C-42, s. 70.2.

83 *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, para. 108.

84 Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff – Part I" (2015) 27 I.P.J. 151, pp. 204, 206.

85 *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, para. 108.

86 *SODRAC*, *ibid*., para. 108.

the user.[87] The same should apply where the collective society petitions the Board for an approved tariff: users should not be mandated to accept licences from the collective society.

70. Further, the licensing regime applicable in this case should be contrasted with other regimes under the *Act* that ***do*** create a mandatory liability for a user to pay. As noted, s. 19 of the *Act* specifically provides that users are "***liable to pay*** royalties" for neighbouring rights in relation to the public performance or communication of published sound recordings. Similarly, s. 82(1)(a) specifically provides that persons are "***liable … to pay*** a levy" for manufacturing or importing blank audio recording media. When the Board approves a tariff grounded in one of these mandatory provisions, the royalties will be mandatory for both the collective society and users. These are examples of "clear and distinct legal authority" in the *Act* imposing a "pecuniary burden" on the user.[88] There is no equivalent provision that could apply in the case of Access Copyright's tariffs.

3. The statutory purpose is to curb the market power of collective societies

71. The legal import of Access Copyright's approved tariffs must be interpreted in light of Parliament's purpose for regulating the licensing systems operated by collective societies. Access Copyright appropriately recognizes that the legislative regime was originally, and for at least 50 years, aimed at restricting the predatory practices that developed from the collective administration of copyright.[89] That is indisputable and confirmed by this Court.[90]

72. As the Federal Court of Appeal held, the amendments to the *Act* in 1988 and 1997 resulting in the General Regime did not change that.[91] In fact, the *Hansard* debates show that Parliament intended the amendments to continue protecting against the "potential for

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87 *SODRAC*, *ibid*., paras. 106-113.

88 *SODRAC*, *ibid*., para. 107.

89 *E.g.*, Access Copyright's Factum, para. 2.

90 *E.g.*, *Vigneux v. Canadian Performing Right Society Ltd*., [1943] S.C.R. 348, pp. 352-354, aff'd [1945] A.C. 108 (J.C.P.C.).

91 FCA Decision, paras. 95-96, 123, 191: A.R., Vol. I, Tab 4, pp. 151, 162, 185.

anti-competitive behaviour."[92] The Federal Court of Appeal correctly held that the "tariff-setting process exists to limit the market power of collective societies which, by reason of that power, are in a position to impose terms on users. This is not in the public interest."[93]

73. Requiring users to deal with Access Copyright would be anti-competitive and turn Parliament's purpose for regulating collective societies on its head. Treating tariffs as binding would compel educational institutions to deal with Access Copyright, which would favour Access Copyright over its competitors offering different value propositions to prospective licensees. For example, the library licences that York has in place with Access Copyright's competitors provide access to a vast collection of works and a variety of usage rights (including copying).[94] Access Copyright licences, in contrast, only authorize limited copying of the works within its repertoire, not access to the content of those works itself.[95]

74. If Access Copyright's product is no longer competitive against the alternatives, including the library consortia licences, educational institutions should not be forced to accept a licence from Access Copyright. The answer is not for Access Copyright to sue York to make their business mandatory based on an incorrect interpretation of the enabling statute.

75. Whether an educational institution would choose to accept an Access Copyright licence in a competitive environment depends on the needs of the institution and the structure of the particular licences that the collective society offers users (with the Board's approval).

76. For example, two common licence structures are blanket and transactional licences. Generally speaking, blanket licences grant the user rights in respect of all works within the

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92 See *e.g.*, *House of Commons Debates*, vol. VII, 1987, 2nd Sess., 33rd Parl., June 26, 1987, pp. 7667-7668 (Flora MacDonald, Minister of Communication).

93 FCA Decision, para. 191: A.R., Vol. I, Tab 4, p. 185.

94 Trial Transcript dated June 1, 2016, Evidence of Craig Olsvik at 1797, line 1 to 1814, line 18: R.R., Vol. I, Tab 5, pp. 157-174; Trial Transcript dated May 25, 2016, Evidence of Catherine Davidson at 919, lines 7-23: R.R., Vol. I, Tab 3, p. 105.

95 Trial Reasons, paras. 30, 33, 35, 180-182: A.R., Vol. I, Tab 2, pp. 22-23, 61-62.

collective's repertoire, whereas transactional licences relate to a particular work.[96] If the collective society proposes to offer blanket licences, users may decide that this is more than they need. The user may instead decide, for example, to seek transactional licences directly from copyright owners on an as-needed basis.[97] The difference is *prix fixe* versus *à la carte.*

77. That is precisely the circumstances of this case: Access Copyright filed a proposed tariff offering blanket licences to educational institutions to authorize limited copying of all works in its repertoire. York determined that the blanket licence offered by Access Copyright did not suit its purposes for the 2011-2012 academic year and beyond. York has other options to manage copyright, including transactional licences, library consortia licences, and reliance on the fair dealing rights of the ultimate users (students) where applicable.[98] Forcing York to do business with Access Copyright instead of—or in addition to—these available alternatives would undermine Parliament's rationale for regulating collective societies.[99]

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96 *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, para. 12.

97 See *SODRAC*, *ibid*., para. 12.

98 See Trial Reasons, paras. 46, 182: A.R., Vol. I, Tab 2, pp. 25, 62; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 29.

99 It is no answer that the Board could take into account the use of the available alternatives when setting the tariff royalty rate of an Access Copyright licence (*e.g.*, by lowering the rate to reflect that institutions obtain overlapping rights through library consortia). At best the Board could take into account the use of alternatives by the educational sector as a whole, *e.g*., to make a rough approximation for the average institution. This would not address the *actual* double payment of York (or any other institution) for copying rights covered by both an Access Copyright licence and alternative sources for the same rights. It is incongruous that the *Act* would give users the choice to select alternatives but then impose mandatory payments that fail to reflect the specific user's actual choices.

4. The history of the *Copyright Act* does not support mandatory tariffs

78. Access Copyright does not dispute that—for more than 50 years before 1988—Board-approved tariffs were only enforceable against users who chose to accept a licence.[100] If Parliament intended to momentously change the nature of tariffs in 1988, as Access Copyright argues, one would expect clear language to this effect in the *Act*, and at least some reference of this massive shift in *Hansard*. Access Copyright points to none as none exists.

79. The 1988 amendments introduced the concept of "licensing bodies" (the precursor to collective societies) to collectively administer certain copyrights that were not covered by the existing Performing Rights Regime, which had regulated the licensing systems operated by performing rights organizations for 50 years. The 1988 amendments introduced the beginnings of the General Regime, specifically, the mechanism addressed by this Court in *SODRAC* in respect of individual licences. The Board was empowered to determine royalties in individual cases if the licensing body and user could not agree on terms (ss. 70.1-70.4).[101]

80. Until 1997, licensing bodies outside the Performing Rights Regime could still not apply for a tariff. This changed in 1997 when Parliament expanded the General Regime to include a new mechanism (ss. 70.1-70.191) for the Board to consider proposed tariffs in respect of copyrights not covered by the Performing Rights Regime. "Licensing bodies" were renamed "collective societies," and those societies were given the option of applying to the Board to approve tariffs of "royalties to be collected by the collective society for issuing licences" (s. 70.13), or they could continue with individual licence negotiations.[102]

81. The first round of these amendments in 1988 removed the word "licence" from what is now s. 68.2(1), but this did not change the fact that the entire scheme was (and still is) built around regulating the licensing systems operated by those organizations engaged in

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[100] Access Copyright's Factum, paras. 29-30, 35-36. See also *Maple Leaf Broadcasting v. Composers, Authors and Publishers Association of Canada Ltd.*, [1954] S.C.R. 624, pp. 630-631.

[101] FCA Decision, para. 102: A.R., Vol. I, Tab 4, p. 153.

[102] FCA Decision, paras. 117-120: A.R., Vol. I, Tab 4, pp. 159-160.

collective administration. Had Parliament sought to make these licences mandatory on unwilling users, for the first time under the *Act*,[103] it would have said so clearly.

82. The Federal Court of Appeal addressed Access Copyright's argument that removing the word "licence" from the forebearer to s. 68.2(1) made tariffs mandatory.[104] Contrary to Access Copyright's argument, the Federal Court of Appeal did not "gaug[e]" whether Parliament had "tried hard enough" to change the law.[105] The Federal Court of Appeal correctly applied s. 45 of the *Interpretation Act*, which provides in part that the "amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was […] to have been different from the law as it is under the enactment as amended."[106] The Federal Court of Appeal also correctly relied on this Court's jurisprudence that Parliament uses clear words where it intends to change long-standing law.[107]

83. The Parliamentary debates do not suggest otherwise. Access Copyright relies on only very few excerpts from *Hansard* surrounding the 1988 amendments, none of which state (or even suggest) that unwilling users would be required to pay royalties under approved tariffs.

84. In terms of House of Commons debates, Access Copyright quotes the Minister of Communications, the Hon. Flora MacDonald, who referred to the Board: (1) being "the final arbiter in financial disputes between creator and user;" and (2) making "binding decisions whenever collectives and those who wish to use their members' works are unable to reach an agreement."[108] This is referring to the process addressed by this Court in *SODRAC* regarding individual licences,[109] which, as noted, was introduced by the 1988 amendments.

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[103] Mandatory neighbouring right and private copying levy tariffs were only added in 1997.

[104] FCA Decision, para. 163: A.R., Vol. I, Tab 4, p. 175.

[105] Access Copyright's Factum, para. 87.

[106] *Interpretation Act*, R.S.C., 1985, c. I-21, s. 45.

[107] *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, paras. 55-56; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, para. 21.

[108] Access Copyright's Factum, paras. 33-34.

[109] *House of Commons Debates*, Vol. XII, 1988, 2nd Sess., 33rd Parl., May 17, 1988, p. 15,520 (Flora MacDonald, Minister of Communication); *House of Commons Debates*,

85. Minister MacDonald's comments are accurate regarding the 1988 amendments. As noted, decisions of the Copyright Board ***are*** binding (mandatory) on the collective society, which is required to offer licences on the Board-approved terms, and on any user who voluntarily accepts a licence.[110] But these licences are not binding on unwilling users.[111]

86. Contrary to Access Copyright's selective and misplaced quotations (principally about the sections at issue in *SODRAC*), Minister MacDonald expressly stated that the 1988 amendments were not intended to profoundly change the nature of collective administration:

> ***This system has been in operation for about 50 years for musical performances and is working well.*** Under our present Bill, the practice which now pertains to those who provide musical performances ***would be expanded to other areas*** to be covered by copyright and would result in collectives of authors, visual artists and so forth.[112]

87. In terms of Senate debates, Access Copyright cites only the debate of a private member's bill after the 1988 amendments had already come into force.[113] Senator Doody referred to the prior 1988 amendments and noted "[t]he parties may ask [the Board] to determine what is a reasonable royalty, and that royalty rate will be binding on the parties before it."[114] Again, this is referring to the provisions addressed in *SODRAC*. Again, Board decisions are binding (mandatory) on collective societies and users who take out a licence.

88. It is ironic that Access Copyright relies on legislative history addressing the scheme at issue in *SODRAC*, given that Access Copyright argues that *SODRAC* is distinguishable

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vol. VII, 1987, 2nd Sess., 33rd Parl., June 26, 1987, p. 7668 (Flora MacDonald, Minister of Communication) (unattributed in Access Copyright's Factum).

[110] Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff – Part I" (2015) 27 I.P.J. 151, pp. 201-202, 206.

[111] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, para. 108.

[112] *House of Commons Debates*, vol. VI, 1987, 2nd Sess., 33rd Parl., June 15, 1987, p. 7109 (Flora MacDonald, Minister of Communication) (emphasis added).

[113] Access Copyright's Factum, para. 36.

[114] *Debates of the Senate*, Vol. I, 1989-90-91, 2nd Sess, 34th Parl., December 13, 1989, p. 840.

and relates to a different legislative regime (although it is actually part of the same General Regime at issue in this case).[115] The legislative history is consistent with this Court's decision in *SODRAC*,[116] and it confirms that *SODRAC* governs this appeal.

89. Access Copyright's approach to the history and interpretation of the *Act* is incorrect. The text, context, purpose, and history of the General Regime all support the conclusion of the Federal Court of Appeal that Access Copyright tariffs are not mandatory on unwilling users. None of the other alleged "errors" argued by Access Copyright suggest otherwise.

C. Section 68.2(1) Supports the Jurisdiction of the Federal Court

90. Access Copyright argues as "Error #2" that "[i]f tariffs are not enforceable, there is no reason to have sections of the Act that provide for enforcement" and s. 68.2(1) is "superfluous."[117] This is not correct. Section 68.2(1) addresses what the collective society may do in respect of a ***user who accepts a licence*** under federal law: to "collect the royalties" and "recover them in a court of competent jurisdiction," including the Federal Court.

91. Parliament has not spoken in vain by addressing this aspect of the statutory scheme. These are statutory licences under federal law, and Parliament has expressly empowered the Federal Court with concurrent jurisdiction to adjudicate an action for enforcement under s. 68.2(1). The reference to "court of competent jurisdiction" in that provision includes both the Federal Court and provincial superior courts (s. 41.24).[118] Empowering the Federal Court to adjudicate the enforcement of statutory licences under federal law is not "superfluous."

92. For the Federal Court to have jurisdiction, the following conditions must be satisfied:

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[115] Access Copyright's Factum, paras. 129-133.

[116] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, para. 112.

[117] Access Copyright's Factum, paras. 89-90.

[118] *Copyright Act*, R.S.C., 1985, c. C-42, s. 41.24.

1. There must be a statutory grant of jurisdiction by the federal Parliament.

2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.

3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.[119]

93. Section 68.2(1) grants jurisdiction to the Federal Court and confirms that the matter for adjudication depends on federal law (the enforcement of a statutory licence under an Act of Parliament), not provincial contract law over which the Federal Court lacks jurisdiction.[120]

94. Access Copyright argues that a "user who agrees (or 'offers') to pay a royalty in consideration of a benefit is bound in contract," apparently arguing that s. 68.2(1) would be "surplusage" if all it does is duplicate provincial contract law.[121] That is incorrect, as the Federal Court's jurisdiction to adjudicate enforcement issues is based on the federal statutory licence, not the provincial law of contract.

95. The Federal Court of Appeal addressed whether a user would be bound under provincial contract law if they offered to pay royalties under a tariff, and Access Copyright argues that this analysis of consideration was "outdated."[122] But nothing turns on this. Irrespective of provincial contract law, s. 68.2(1) provides that the accepting user is bound under federal law, and the Federal Court has concurrent jurisdiction. That is not surplusage.

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[119] *Windsor (City) v. Canadian Transit Co*., 2016 SCC 54, [2016] 2 S.C.R. 617, para. 34.

[120] See also *Composers, Authors & Publishers Assn. (Canada) v. Sandholm Holdings Ltd.*, [1955] Ex. C.R. 244, paras. 14-16 [RBOA, Tab 2]; *Composers, Authors & Publishers Assn. of Canada Ltd. v. Elmwood Hotel Ltd*., [1956] Ex. C.R. 65, paras. 9-18 [RBOA, Tab 1]; Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff – Part I" (2015) 27 I.P.J. 151, p. 205.

[121] Access Copyright's Factum, para. 93.

[122] FCA Decision, para. 169: A.R., Vol. I, Tab 4, p. 177; Access Copyright's Factum, para. 92.

D. Access Copyright's Arguments About the *Act*'s "Structure" Are Misplaced

96. Access Copyright argues as "Error #3" that the Federal Court of Appeal misunderstood the structure of the *Act*, including by: (1) confusing the statutory nature of copyright with the "common law"; (2) confusing copyright with equitable remuneration; (3) overlooking s. 70.191 of the *Act*; and (4) ignoring provisions of the *Act* which provide benefits to educational institutions.[123] None of these arguments is correct or even fair to the Federal Court of Appeal's reasons.

1. Copyright was not confused as "common law"

97. Access Copyright argues that the Federal Court of Appeal's "launching point" was the proposition "that a copyright holder cannot impose licence terms 'at common law,'" which Access Copyright says was an error because copyright is purely statutory.[124] This contorts what the Federal Court of Appeal actually held.

98. The Federal Court of Appeal referred to the "common law" only once. The passage reads: "If an individual copyright owner cannot impose terms on a person who has not agreed to become a licensee, it follows that, at common law, a group of copyright owners or persons who have acquired certain rights from copyright owners are legally in no better position to impose terms on those who have not agreed to become licensees."[125]

99. The words "at common law" do not suggest that the Federal Court of Appeal misunderstood copyright to be common law. In context, the court was referring to the legal principle reflected in the Latin maxim *nemo dat quod non habet*: a person cannot give what they do not possess. This maxim is part of the common law of property.[126]

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[123] Access Copyright's Factum, paras. 94-112.

[124] Access Copyright's Factum, para. 97. See also para. 72.

[125] FCA Decision, para. 54: A.R., Vol. I, Tab 4, p. 137.

[126] *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, [2010] 3 S.C.R. 3, para. 51.

100. In any event, whether it is labeled "common law" or a legal maxim applicable to statutory copyright, the concept is self-evident. As Professor Katz notes, "[p]resumably, *nemo dat quod non habet*, and when a copyright owner authorizes a [collective society] to act on her behalf she cannot authorize the [collective society] to do anything that she could not legally do on her own. Since her own copyright does not entitle her to impose on others a duty to pay she cannot confer such power on the [collective society], and the [collective society] cannot possess greater *legal* powers than its individual members could give it."[127]

2. Equitable remuneration was not confused with copyright

101. Access Copyright argues that the Federal Court of Appeal misunderstood the scheme of the *Act* by referring to the provisions which do create mandatory liabilities to pay royalties and levies (namely, equitable remuneration, which refers to the mandatory royalties payable for neighbouring rights, and private copying levies, both discussed above). According to Access Copyright, those regimes deal with rights which are non-exclusive and cannot be infringed (unlike copyright), so clear language is required to create the obligation to pay for those rights. That is in contrast with exclusive copyrights, Access Copyright argues, as "the right and the liability for infringement is already imposed by sections 3 and 27 of the *Act*."[128]

102. Access Copyright is itself confusing concepts. Liability for copyright infringement (which is actually created by s. 35 of the *Act*)[129] is not the same as liability for non-payment of royalties under an approved tariff or licence. The infringement provisions create liability for damages, which are neither royalties nor "involuntary licence fees."[130] They are damages.

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[127] Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff – Part I" (2015) 27 I.P.J. 151, p. 203 (emphasis in original).

[128] Access Copyright's Factum, paras. 98-101.

[129] Access Copyright cites s. 27 as creating the liability for infringement. Section 27 defines what infringement is, but the infringer's liability is actually created by s. 35 of the *Act*.

[130] Access Copyright's Factum, para. 109.

103. As the Federal Court of Appeal held, there "is an important distinction between liability for royalties and liability for damages for infringement."[131] The *Act* provides for damages for infringement—on an action by the copyright owner or its assignee or exclusive licensee (which Access Copyright is not)—to be assessed by a trial court and awarded through a judgment.[132] Royalties, in contrast, are fees payable under the terms of a licence.

104. Damages and royalties are mutually exclusive. As noted, it is an "elementary" principle that a user cannot simultaneously be an infringer liable to pay damages and a licensee liable to pay royalties.[133] If the user accepts a licence and becomes a licensee, that user can be liable for unpaid royalties (s. 68.2(1)) but not infringement (s. 70.17). In contrast, non-licensees can be sued for infringement (s. 35) but not unpaid royalties.[134]

105. For liability to be imposed on unwilling users to pay royalties (separately from damages), there must be clear and distinct authority imposing that pecuniary burden,[135] exactly like there is for neighbouring rights (s. 19) and private copying levies (s. 81(1)(a)).

3. Section 70.191 does not suggest that tariffs are mandatory

106. Access Copyright argues that, if tariffs are not enforceable, there would have been no need for s. 70.191, which 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."[136] They say that if a user could opt-out, this section is unnecessary, but that overlooks the purpose of s. 70.191.

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131 FCA Decision, para. 38: A.R., Vol. I, Tab 4, pp. 131-132.

132 *Copyright Act*, R.S.C., 1985, c. C-42, ss. 27, 34-35, 38.1, 41.23(1); *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, [2007] 3 S.C.R. 20, paras. 27-28.

133 *Composers, Authors & Publishers Assn. (Canada) v. Sandholm Holdings Ltd.*, [1955] Ex. C.R. 244, para. 22 [RBOA, Tab 2].

134 FCA Decision, para. 75: A.R., Vol. I, Tab 4, p. 144.

135 *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, para. 107.

136 Access Copyright's Factum, paras. 107-108.

107. Section 70.191 preserves agreements between the collective society and users. As the Federal Court of Appeal held: "sections 70.19 and 70.191 are intended to protect agreements concluded by collective societies from being overtaken by a tariff which the society may obtain for the same class of use. Section 70.191 applies when the collective society concludes an agreement with a user or class of user to which a subsequently approved tariff would otherwise apply."[137] In the less likely scenario where the user and collective society enter into a custom agreement after a tariff has already been approved, s. 70.191 also preserves that agreement. Either way, the section has utility without tariffs being mandatory.

4. Benefits to educational users do not suggest tariffs are mandatory

108. Access Copyright argues that the "mere existence of a tariff under 70.15 triggers certain statutory benefits for educational institutions" under ss. 38.2, 30.02 and 30.3, and "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."[138]

109. This argument does not supply the "clear and distinct legal authority" required by *SODRAC* to show that Parliament intended to impose the burdens of a licence on a user who does not consent to be bound by its terms.[139] Parliament's decision to create statutory exceptions to infringement and limitations on damages for educational institutions reflects that the mission of education mirrors the statutory objects of copyright law, including the dissemination of knowledge within society.[140]

110. The specific provisions Access Copyright cites do not support its position. Beginning with s. 38.2, all this provision does is establish a cap on the amount that a copyright owner

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[137] FCA Decision, para. 186: A.R., Vol. I, Tab 4, p. 184.

[138] Access Copyright's Factum, paras. 110-112.

[139] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, para. 107.

[140] *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, paras. 30-31; Jacob H. Rooksby, "Copyright in Higher Education: A Review of Modern Scholarship" (2016) Duq. L. Rev. 197, p. 198; *The York University Act, 1965*, 13-14 Eliz. II, 1965, s. 4.

can recover against an educational institution (or library, archive or museum) in respect of reprographic reproduction rights.[141] Where the owner has not authorized a collective society, the maximum recovery is "the amount of royalties that would have been payable to the society in respect of the reprographic reproduction, if it were authorized, either: (a) under any agreement entered into with the collective society; or (b) under a tariff certified by the Board pursuant to section 70.15." Nothing about this provision suggests that tariffs certified by the Board are mandatory. The section is premised on Board-approved royalties being fair and equitable, not royalties being mandatory.

111. Access Copyright also refers to s. 30.02,[142] which provides educational institutions with an exemption from infringement in respect of digital reproduction, provided that certain conditions are met. This provision does not suggest that tariffs are mandatory. Indeed, the exemption only applies to an "educational institution that has a reprographic reproduction licence." That is, this provision depends on the institution accepting a licence.

112. Finally, s. 30.3 provides a narrow exemption from infringement where an educational institution (or library, archive or museum) installs a self-service photocopier, provided that certain conditions are satisfied, including posting a warning to users about infringement. This was enacted in 1997 and was likely overtaken in 2004 by *CCH Canadian Ltd. v. Law Society of Upper Canada*, which held that a "person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright."[143]

113. Access Copyright's argument is premised on an assumption that an educational institution can avail itself of the exemption in s. 30.3 whenever a tariff has been proposed or approved,[144] which it says implies that the tariff is mandatory because the institution receives

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[141] *Copyright Act*, R.S.C., 1985, c. C-42, s. 38.2.

[142] *Copyright Act*, *ibid*., s. 30.02.

[143] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, para. 38.

[144] *Copyright Act*, R.S.C., 1985, c. C-42, s. 30.3.

a "benefit" whether or not it positively accepts a licence.[145] This argument ignores *SODRAC*. Among the ways for the institution to obtain the "benefit" under s. 30.3 is for the Board to fix royalties and related terms of a licence under s. 70.2 (s. 30.3(2)(b)). That is the situation addressed in *SODRAC*, which is clear that the institution is ***not*** bound to accept the licence. The same must apply to the paragraphs of s. 30.3 relating to proposed and approved tariffs (s. 30.3(2)(c)-(d)). The institution is equally not bound to accept a licence under the tariff.

114. The more coherent interpretation of s. 30.3 is that the institution can take advantage of the exemption where it has accepted any of the licences referred to in s. 30.3(2), that is, a licence by agreement with the collective society (s. 30.3(2)(a)), an individual Board-approved licence (s. 30.3(2)(b)), or a licence under a tariff (ss. 30.3(2)(c)-(d)). This is reflected in the legislative history, which confirms that the purpose for the conditions in s. 30.3(2) was "so that these institutions would be absolved from liability ***only if they obtained a licence***."[146] Section 30.3 does not suggest that any of these licence types are mandatory.

E. The Copyright Board's Mandate is Fulfilled with Voluntary Tariffs

115. As alleged "Error #4," Access Copyright cites this Court's administrative law jurisprudence and asserts that "relegat[ing]" the Board to "issuing decisions that are merely advisory or optional" is inconsistent with the posture of respect for administrative actors.[147] This argument overlooks that the Board undisputedly set voluntary tariffs prior to 1988, and it still sets royalties in individual cases that are not binding on the user (as per *SODRAC*).[148]

116. Respect for the administrative state does not depend on the decisions of the administrative actor being binding. That is the choice for Parliament. In any event, the

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[145] Access Copyright's Factum, paras. 110-112.

[146] See *Debates of the Senate*, Vol. 135, Issue 92, 2nd Sess, 35th Parl., April 1, 1997, Ninth Report of the Standing Senate Committee on Transport and Communications, p. 2020 (emphasis added).

[147] Access Copyright's Factum, paras. 113-116.

[148] *Copyright Act*, R.S.C., 1985, c. C-42, ss. 70.2 to 70.4; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, paras. 101-113.

Board's decisions are binding on the collective society (consistent with the objective of curbing monopoly power), and they are binding on any user who elects to accept a licence.[149]

117. Further, respect for the administrative state is not an argument for reading substantive entitlements or liabilities into the *Act*. This is particularly the case given that legislation to impose pecuniary burdens requires "clear and distinct" legal authority, which is not present.

118. Contrary to Access Copyright's argument, York's position is not a collateral attack on the Board's decision to issue the Interim Tariff (or the subsequent final approved tariff).[150] Collateral attack involves a party challenging the validity of a binding order in the wrong forum.[151] York does not challenge the validity of the Interim Tariff. Rather, York's position, as the Federal Court of Appeal found, is that the legal consequences of the Interim Tariff under the *Act* do not include binding unwilling users to become licensees.[152] The appropriate forum to address that argument is Access Copyright's action to enforce the terms of a licence against York as a non-licensee (*i.e.*, this case), not judicial review of the Interim Tariff itself.

119. In terms of the so-called "single copy fallacy," Access Copyright presents this as an error by the Federal Court of Appeal related to undermining the Board.[153] However, the Federal Court of Appeal did not actually address this so-called "fallacy." The only reference to this issue is found in the Federal Court of Appeal's summary of the parties' arguments.[154]

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[149] Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff – Part I" (2015) 27 I.P.J. 151, pp. 201-202, 206.

[150] Access Copyright's Factum, paras. 117-118.

[151] *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25, paras. 71-73; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, paras. 64-65.

[152] FCA Decision, para. 204: A.R., Vol. I, Tab 4, p. 190.

[153] Access Copyright's Factum, paras. 121-122.

[154] FCA Decision, para. 41: A.R., Vol. I, Tab 4, p. 132.

120. York had argued, as reflected in the Federal Court of Appeal's decision, that "given the form of the tariff in issue, a single infringing act could subject it to a significant liability for royalties for an entire year."[155] This is because the Interim Tariff was structured as a blanket licence with an annual licensing fee and a volume component. If the Interim Tariff was mandatory on all users (including non-licensees), then a single act to engage the tariff would require the user to pay for all available uses under the blanket licence, which in York's case is more than it needs.

121. This is not an attack on the Board's decision to approve a tariff that contemplates blanket licences. Rather, it demonstrates the incongruity of Access Copyright's position that the tariff is mandatory notwithstanding that users can obtain the same rights from other sources. Parliament gave users choice regarding where they acquire reproduction rights, *e.g.*, from the copyright owner or from a collective society like Access Copyright. Parliament could not have intended to force users to deal with one option (Access Copyright) any time a tariff is tripped with a single infringing copy. This would give Access Copyright enormous market power to subvert its competitors, which is inconsistent with the scheme of the *Act*.

F. Access Copyright's Enforcement Position Was the Choice of its Members

122. Finally, Access Copyright argues as "Error #5" that the Federal Court of Appeal left creators with "no effective remedy" because each copyright owner would face "enormous obstacles" if they were required to enforce their copyrights through infringement actions in the normal course.[156] However, if Access Copyright's members have a weak enforcement position through Access Copyright, that is of their own making.

123. As noted, Access Copyright's members do not grant exclusive rights to Access Copyright by assignment or exclusive licence.[157] This is why Access Copyright cannot sue

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[155] FCA Decision, para. 41: A.R., Vol. I, Tab 4, p. 132.

[156] Access Copyright's Factum, paras. 123-126.

[157] Trial Transcript dated May 16, 2016, Cross-Examination of Roanie Levy at 132, lines 11-17; 136, lines 16-20: R.R., Vol. I, Tab 1, pp. 16, 20.

for infringement.[158] If copyright owners granted exclusive rights to Access Copyright, then Access Copyright could sue alleged infringers for copyright infringement, on a collective basis, without a mandatory tariff. That is a choice for Access Copyright's members to make.

124. In any event, Access Copyright's commentary about the enforcement position of its members does not supply the "clear and distinct legal authority" required to impose an obligation to pay royalties on an unwilling user.[159] If Parliament had intended to impose mandatory tariffs to address Access Copyright's practicality concerns, it would have said so.

G. Conclusion

125. As this Court has held, in "the absence of clear and distinct legal authority showing that this was Parliament's intent, the burdens of a licence should not be imposed on a user who does not consent to be bound by its terms."[160] The Federal Court of Appeal correctly determined that there is no such "clear and distinct" authority in the *Act* to render Access Copyright tariffs mandatory.

126. Users have a choice about whether to deal with Access Copyright, or whether to deal with its members or competitors. Concluding otherwise would be anti-competitive and would favour Access Copyright over its competitors and available alternatives, which would be inconsistent with the purpose of the *Act* to curb the market power of collective societies.

PART IV – COSTS

127. York seeks costs in this Court and the courts below.

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158 *Copyright Act*, R.S.C., 1985, c. C-42, s. 41.23(1); *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, [2007] 3 S.C.R. 20, paras. 27-28.

159 *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, para. 107.

160 *SODRAC*, *ibid.*, para. 107.

PART V – ORDER SOUGHT

128. York respectfully requests an order dismissing Access Copyright's appeal in respect of the main action, with costs in this Court and the courts below.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

129. There is a Confidentiality and Protective Order made in the Federal Court on August 31, 2015 (attached to Form 23A). Confidential information in York's Appellant's Record is identified accordingly. However, nothing in this Factum is designated as confidential.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Toronto, April 6, 2021

per John C. Cotter / Barry Fong / W. David Rankin
OSLER, HOSKIN & HARCOURT LLP

per Guy J. Pratte / Nadia Effendi
BORDEN LADNER GERVAIS LLP

Counsel for the Respondent, York University

PART VII – TABLE OF AUTHORITIES

	Statutes	**Paragraph(s) referred to**
1.	*Copyright Act*, R.S.C., 1985, c. C-42, ss. 19, 27, 30.02, 30.3, 34-35, 38.1, 38.2, 41.23(1), 41.24, 67, 67.1, 68.2(1), 70.1, 70.12, 70.13, 70.15(2), 70.17, 70.2-70.4, 71, 82(1)(a) *Loi sur le droit d'auteur*, L.R.C. (1985), ch. C-42, art. 19, 27, 30.02, 30.3, 34-35, 38.1, 38.2, 41.23(1), 41.24, 67, 67.1, 68.2(1), 70.1, 70.12, 70.13, 70.15(2), 70.17, 70.2-70.4, 71, 82(1)(a)	2, 7, 8, 29, 30, 31, 35, 36, 39, 40, 42, 43, 44, 47, 48, 49, 50, 51, 52, 53, 55, 59, 60, 63, 65, 66, 67, 69, 70, 72, 77, 78, 81, 89, 90, 96, 91, 101, 102, 103, 110, 111, 113, 115, 117, 118, 121, 123, 125, 126
2.	*Interpretation Act*, R.S.C., 1985, c. I-21, s. 45 *Loi d'interprétation*, L.R.C. (1985), ch. I-21, art. 45	82
3.	*The York University Act, 1965*, 13-14 Eliz. II, 1965, s. 4	109

	Cases	**Paragraph(s) referred to**
4.	*1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22	37
5.	*Access Copyright Interim Post-Secondary Educational Institution Tariff, 2011-2013*, Copyright Board of Canada, dated December 23, 2010	13
6.	*Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, [2010] 3 S.C.R. 3	99

	Cases	Paragraph(s) referred to
7.	*Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585	118
8.	*Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615	3, 33, 46, 52, 55, 56, 65, 67, 68, 69, 70, 76, 79, 84, 85, 86, 87, 88, 105, 109, 113, 115, 124, 125
9.	*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339	112
10.	*Composers, Authors & Publishers Assn. of Canada Ltd. v. Elmwood Hotel Ltd.*, [1956] Ex. C.R. 65	93
11.	*Composers, Authors & Publishers Assn. (Canada) v. Sandholm Holdings Ltd.*, [1955] Ex. C.R. 244	43, 62, 93, 104
12.	*Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37, [2007] 3 S.C.R. 20	29, 103, 123
13.	*Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25	118
14.	*Maple Leaf Broadcasting v. Composers, Authors and Publishers Association of Canada Ltd.*, [1954] S.C.R. 624	42, 78
15.	*Performing Rights Organization of Canada Ltd. v. Lion d'Or (1981) Ltée.* (1987), 16 F.T.R. 104	42
16.	*R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402	82
17.	*R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575	82
18.	*Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48	43
19.	*Re:Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [2012] 2 S.C.R. 376	43

	Cases	**Paragraph(s) referred to**
20.	*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27	37, 38
21.	*Society of Composers, Authors and Music Publishers of Canada v. Bell Canada,* 2012 SCC 36, [2012] 2 S.C.R. 326	77
22.	*Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336	109
23.	*Vigneux v. Canadian Performing Right Society Ltd.*, [1943] S.C.R. 348, aff'd [1945] A.C. 108 (J.C.P.C.)	40, 71
24.	*Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617	92

	Doctrine	**Paragraph(s) referred to**
25.	Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff – Part I" (2015) 27 I.P.J. 151	50, 57, 59, 60, 67, 85, 93, 100, 116
26.	Ariel Katz, "Spectre: Canadian Copyright and the Mandatory Tariff – Part II" (2015) 28 I.P.J. 39	57
27.	Jacob H. Rooksby, "Copyright in Higher Education: A Review of Modern Scholarship" (2016) Duq. L. Rev. 197	109

	Hansard	**Paragraph(s) referred to**
28.	*Debates of the Senate*, Vol. I, 1989-90-91, 2nd Sess, 34th Parl., December 13, 1989, p. 840	87
29.	*Debates of the Senate*, Vol. 135, Issue 92, 2nd Sess, 35th Parl., April 1, 1997, Ninth Report of the Standing Senate Committee on Transport and Communications, p. 2020	114

	Hansard	**Paragraph(s) referred to**
30.	*House of Commons Debates*, vol. VII, 1987, 2nd Sess., 33rd Parl., June 26, 1987, pp. 7667-7668 (Flora MacDonald, Minister of Communication)	72, 84
31.	*House of Commons Debates*, Vol. XII, 1988, 2nd Sess., 33rd Parl., May 17, 1988, p. 15,520 (Flora MacDonald, Minister of Communication)	84
32.	*House of Commons Debates*, vol. VI, 1987, 2nd Sess., 33rd Parl., June 15, 1987, p. 7109 (Flora MacDonald, Minister of Communication)	86

SCHEDULE "A" – TABLE OF CONCORDANCE

Copyright Act, R.S.C., 1985, c. C-42 (Applicable to this Appeal)	*Copyright Act*, R.S.C., 1985, c. C-42 (Current Version)
19	19
27	27
30.02	30.02
30.3	30.3
34	34
35	35
38.1	38.1
38.2	38.2
41.23(1)	41.23(1)
41.24	41.24
67	67.2
67.1	68
68.2(1)	73
70.1	67
70.12	67(1), (3)
70.13	67(1)
70.15(2)	N/A
70.17	73.3
70.2	71
70.3	71.1
70.4	73.5
71	68.1
82(1)(a)	82(1)(a)