SCC No. 39222

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

B E T W E E N:

YORK UNIVERSITY

APPELLANT
(Appellant)

- and -

THE CANADIAN COPYRIGHT LICENSING AGENCY ("ACCESS COPYRIGHT")

RESPONDENT
(Respondent)

AND BETWEEN:

THE CANADIAN COPYRIGHT LICENSING AGENCY ("ACCESS COPYRIGHT")

APPELLANT
(Respondent)

- and -

YORK UNIVERSITY

RESPONDENT
(Appellant)

(Style of Cause continued on following page)

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(Style of Cause continued)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Following its analysis of the history and statutory scheme relevant to the tariff at issue in this proceeding ("Access Tariff Regime"), the Federal Court of Appeal stated generally that "tariffs are not mandatory which is to say that collective societies are not entitled to enforce the terms of their approved tariff against non-licencees".[1] In so doing, the Federal Court of Appeal did not expressly constrain its decision to the Access Tariff Regime.

2. The Retransmission Tariff (as described herein) and its particular statutory scheme was not considered by the Federal Court of Appeal when making its sweeping pronouncement.

3. As discussed below, however, the Retransmission Tariff arises out of and is governed by a statutory scheme that is fundamentally different from the Access Tariff Regime, including being rooted in Canada's obligations under the 1988 *Canada-U.S. Free Trade Agreement.*[2] As the Retransmission Tariff is not at issue in this proceeding, none of these considerations are before this Court. Nor were they before the Courts below.

4. The Copyright Collective of Canada ("CCC") does not take a position on the outcome of this appeal by Access Copyright ("Appeal"). Rather, CCC has intervened to urge this Court to confine its considerations and decision to the Access Tariff Regime, and to avoid unnecessarily broad pronouncements that would impact and potentially compromise different and distinct tariffs that are not at issue, in particular the Retransmission Tariff.

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[1] *York University v. The Canadian Copyright Licencing Agency* ("Access Copyright"), 2020 FCA 77 at para 202, with a limited carve out expressed elsewhere for "remuneration rights conferred by section 19 or 81" at para 124, 130, 166-167 [*FCA Decision*].

[2] Canada-United States Free Trade Agreement, 22 December 1987, Can TS 1989 No. 3 (entered into force 1 January 1989) *[FTA]*.

B. Statement of Facts

5. CCC takes no position in respect of the facts in this Appeal.

6. For context, CCC is a collective society that collects and distributes royalties paid by retransmitters (e.g. cable, IPTV, and satellite television companies) for the retransmission of television and film programming on "distant" television signals in Canada. The aforementioned royalties are certified by the Copyright Board of Canada through the Retransmission of Distant Television Signals Tariff (the "Retransmission Tariff"), established as part of the retransmission regime under the *Copyright Act*.[3]

7. As recently described by the Copyright Board of Canada, "[the retransmission regime] permits [retransmitters] to retransmit over-the-air (OTA) broadcast signals by capturing, packaging and selling them to their subscribers without the consent of the broadcaster or the owners of the broadcast programs. As a condition of this retransmission regime, where the retransmitted signals are "distant" signals, [retransmitters] must pay royalties set by the Board to various Collective Societies…"[4]

8. CCC is the single largest retransmission collective. Since 1990, CCC has administered the royalties payable to copyright owners, including producers and distributors of the U.S. independent film and television production industry for all drama and comedy programming (such as companies represented by the Motion Picture Association). During the last Retransmission Tariff period alone (2014-2018), over $600 million in royalties were collected by retransmission collectives to distribute to their members.[5]

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[3] Decision of the Copyright Board of Canada re: Retransmission of Distant Television Signals, dated August 2, 2019 [CB-CDA 2019-056] at para 1-5, 161, 162 [*2019 Copyright Board Decision*]; RSC 1985, c C-42 [*Act*]. Unless stated otherwise, the *Copyright Act* section numbers in this factum refer to the pre-2019 version of the *Copyright Act*.

[4] 2019 Copyright Board Decision at para 6.

[5] 2019 Copyright Board Decision at para 461, 462.

PART II – RESPONSE TO QUESTIONS IN ISSUE

9. The primary issue in this Appeal is whether the specific tariff at issue (related to the copying of certain works by post-secondary educational institutions) is "mandatory", or whether a party to that tariff can instead choose to "opt out". The parties have filed extensive material on the factual context of this Appeal, and the Courts below have considered those facts and the parties' submissions in making their determinations.

10. On this Appeal, the Court is called upon to consider the proper statutory interpretation of the *Copyright Act* as it applies to the Access Tariff Regime. In considering the applicable provisions of the *Copyright Act*, the Court must examine the specific legislation, along with the facts, including the overall scheme impacting the reproduction of copyrighted work in schools and other academic settings. These considerations are entirely different from the Retransmission Tariff and its distinct statutory scheme that arises out of Canada's obligations under the 1988 *Canada-U.S. Free Trade Agreement*, and which is intertwined with provisions of the *Broadcasting Act*[6] and broadcasting policy.

11. CCC urges this Court to adopt a restrained approach, and to limit its pronouncements to the Access Tariff Regime.

PART III – ARGUMENT

Restrained Approach to Statutory Interpretation of Copyright Act Required

12. Copyright in Canada is a creature of statute.[7] Consequently, resolution of the statutory interpretation issues raised in this Appeal requires application of the modern approach to statutory interpretation.

13. While under the modern approach "the words of an Act are to be read in their entire context

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[6] S.C. 1991, c. 11 [*Broadcasting Act*].

[7] See. e.g. *Compo Co. Ltd. v. Blue Crest Music et al.*, [1980] 1 S.C.R. 357 at p 373, *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 [*CCH*] at para 9, and *Keatley Surveying Ltd. v Teranet Inc.*, 2019 SCC 43 [*Keatley*] at para 40.

and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament"[8], that exercise must, nonetheless, be focused on the specific provisions at issue. Where the provisions under consideration are a component of a larger scheme, the interpretation of the words take their "colour" from that scheme and the interpretation of any provisions must be harmonious with statutes dealing with the same subject-matter.[9]

14. Although statutory interpretation may include comparing the wording of the provisions at issue with closely related provisions and inquiries into the broader context, such considerations should not stray into deciding or opining on issues of law that are not necessary to the resolution of an appeal.[10]

15. Unnecessary interpretive pronouncements on statutory provisions beyond the provisions at issue should be avoided because, among other things, implications of such pronouncements may not be foreseen and they may in turn prejudice future cases.[11]

16. Indeed, as recently observed by members of this Court in *Keatley*, unique and complicated questions of statutory interpretation related to provisions of the *Copyright Act* that are beyond the scope of the case before the Court should be left for "another day in which the Court has received full submissions in respect of those issues."[12]

17. The Retransmission Tariff and its distinct statutory scheme are different from the Access Tariff Regime, and are beyond the scope of the case before the Court in this Appeal.

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[8] *CCH* at para 9; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21, citing Elmer Driedger, Construction of Statutes, 2d ed. (Toronto: Butterworths, 1983) at p. 87.

[9] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para 27.

[10] *Marche v Halifax Insurance Co.*, 2005 SCC 6 at para 66; *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at para 6 [*Westray Mine*].

[11] *Westray Mine* at para 6-10.

[12] *Keatley* at para 142.

Retransmission Tariff's Distinct Treaty Origins and Statutory Scheme

18. The Retransmission Tariff was introduced as a result of significant reforms made to the *Copyright Act* in the late 1980s.

19. Prior to the Retransmission Tariff, the *Copyright Act* only conferred on copyright owners the exclusive right to communicate their works by "radio communication". This right had been interpreted narrowly to apply only to communications effected by means of electro-magnetic or Hertzian waves "over the air" and not to communications effected through other means such as co-axial cable.[13]

20. As such, retransmitters in Canada were free to retransmit broadcast programming to their paying subscribers without infringing copyright or having to pay royalties to the rightsholders whose programming they retransmitted.[14]

21. As cable television became more prevalent in Canada, the "free ride" enjoyed by retransmitters became a growing concern. This concern was particularly acute for U.S. copyright owners whose television programming was being appropriated by Canadian retransmitters who captured over-the-air television signals from U.S. border stations (e.g. U.S. network signals such as ABC, NBC, CBS and FOX) and then packaged and sold them to paying subscribers in Canada.[15]

22. In 1985, a Parliamentary Committee recommended the establishment of copyright royalties for television retransmission to address this lacuna in the law.[16] The commitment to create

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[13] *Canadian Admiral Corporation, Ltd. v Rediffusion Inc.*, [1954] Ex. C.R. 382 at para 76-78.

[14] *FWS Joint Sports Claimants v Canada (Copyright Board)*, [1992] 1 F.C. 487 (FCA) *[FWS]* at para 1.

[15] Library of Parliament - Parliamentary Research Branch, Legislative Summary, Bill C-48: An Act to Amend the *Copyright Act*, LS-420E, dated January 22, 2002, revised August 7, 2002 [Bill C-48 Legislative Summary] at p. 2.

[16] Canada. Parliament. House of Commons. Sub-Committee on the Revision of Copyright. A Charter of Rights for Creators: Report of the Sub-Committee on the Revision of Copyright. Ottawa: The Sub-Committee, 1985, p. 78, 80-81; Bill C-48 Legislative Summary at p 2; FWS at para 1.

a distant signal retransmission tariff resulted from bi-lateral negotiations with the United States flowing from the so-called "Shamrock Summit", culminating with the 1988 *FTA*.

23. The specific commitment to create a distant signal retransmission tariff is found at Article 2006 of the *FTA*, which required that:[17]

> Each Party's copyright law shall provide a copyright holder of the other Party with **a right of equitable and non-discriminatory remunerations** for any retransmission to the public of the copyright holder's program where the original transmission of the program is carried in distant signals intended for free, over-the-air reception by the general public…[emphasis added].

24. In 1988, amendments to the *Copyright Act*, which enacted the *FTA* in Canada[18], established the statutory basis for the retransmission right and statutory framework for the Retransmission Tariff.[19] These amendments led to the inclusion of the following provisions in the *Act*, all of which specifically relate to the retransmission right and Retransmission Tariff.[20] None of these specific provisions (either in their prior or current form) are at issue in this Appeal, nor were they considered by the Courts below.

(a) **Section 31(2) of the *Act* (currently s. 31(2)):** provides a retransmission right for retransmitters, subject to compliance with the conditions set out in that section, which include that:

(i) the retransmission is lawful under the *Broadcasting Act* [s. 31(2)(b)];

(ii) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada [s. 31(2)(c)]; and

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[17] *FTA*, Article 2006.

[18] *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988 c 65.

[19] *FWS* at para 1.

[20] *Copyright Act*, s. 31(2), 71(1), 73(1) and (2), 74(1), 76(1) and (3); *Copyright Act*, RSC 1985, c C-42 (in-force since Jul 1, 2020), s. 31(2), 67(2), 70(1) and (6), 70(4), 75(1) and (3).

(iii) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act [s. 31(2)(d)].

(b) **Section 71(1) of the *Act* (currently s. 67(2)):** provides that (unlike other collective societies falling under the "General Regime" as defined by the FCA [21]) retransmission collectives **must** file a proposed tariff with the Copyright Board in order for a "fair and equitable" rate to be set by the Board in accordance with paragraph 31(2)(d). Further, unlike provisions applicable to collective societies falling under the "General Regime,"[22] retransmission collectives did not have the ability to enter into agreements for the purposes of establishing royalties with respect to rights they administer under paragraph 31(2)(d). It is of note that section 67(3) of the current *Copyright Act* explicitly **prohibits** retransmission collectives from entering into such agreements.

(c) **Section 73(1) and (2) of the *Act* (currently s. 70(1) and (6))**: provides that the Copyright Board must establish a tariff, including setting royalties referred to in paragraph 31(2)(d), and in so doing must not discriminate between owners of copyright on the ground of their nationality or residence.

(d) **Section 74(1) of *Act* (currently s. 70(4))**: provides that the Copyright Board shall fix a preferred royalty rate for small retransmission systems.

(e) **Section 76(1) of the *Act* (currently s. 75(1))**: provides that "[a]n owner of copyright who does not authorize a collective society to collect, for that person's benefit, royalties referred to in paragraph 31(2)(d) is, if the work is communicated to the public by telecommunication during a period when an approved tariff that is applicable to that kind of work is effective, entitled to be paid those royalties by the

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[21] *FCA Decision* at para 119, 178, 192; "Each collective society referred to in section 70.1 ***may***…file with the Board a proposed tariff…." [emphasis added], *Act*, s. 70.13(1).

[22] *FCA Decision* at para 119, 178, 192; *Act*, s. 70.12.

collective society that is designated by the Board, of its own motion or on application, subject to the same conditions as those to which a person who has so authorized that collective society is subject".

(f) **Section 76(3) of the *Act* (currently s. 75(3)):** provides that "[t]he entitlement referred to in subsections (1) and (2) is the only remedy of the owner of the copyright for the payment of royalties for the communication, making of the copy or sound recording or performance in public, as the case may be."

25. As described by the Copyright Board in its decision related to the inaugural Retransmission Tariff, the *FTA* (and the enacting amendments made to the *Copyright Act*) imposed copyright liability for the retransmission of distant television signals, introduced a compulsory licencing scheme for that right, and charged the Copyright Board with establishing the amounts of royalties to be paid.[23] Indeed, the retransmission right and Retransmission Tariff has been succinctly described by this Court as a "form of compulsory licencing regime" [24]:

> [58] It bears underlining that, in the case of works carried in both local and distant signals, the copyright owner has *no right to prohibit* the simultaneous retransmission of the work; recourse is limited to receiving through a collective society the prescribed royalty, but only for the simultaneous retransmission of works carried in distant signals (ss. 76(1) and 76(3) of the *Copyright Act*). On the one hand, the copyright owner is granted a general right to retransmit the work. This retransmission right is part of the right, under s. (3)(1)(f), to communicate the work by telecommunication to the public. On the other hand, the owner's general right to retransmit is restricted by a carve-out in s. 31(2) of the *Copyright Act*, which effectively grants to a specific class of retransmitters two retransmission rights. The first right lets these users simultaneously retransmit without a royalty payment, works carried in a local signal. The second right lets them simultaneously retransmit works carried in distant signals, but only subject to the payment of royalties under a form of

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[23] Decision of the Copyright Board of Canada re: Retransmission of Distant Television Signals, dated October 2, 1990 [CB-CDA 1989-1] at p. 3, 4.

[24] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at para 58.

> compulsory licence regime (*Copyright Act*, s. 31(2)(a) and (d)). Both user rights are, subject to s. 31(2), beyond the owner's control.

26. In short, the origins and objectives of the Retransmission Tariff, and its particular statutory scheme, are different from the Access Tariff Regime.[25] It was created in response to specific and unique circumstances, including Canada's international treaty obligations, and is interrelated with Canadian broadcasting policy, and the *Broadcasting Act*.

27. As has been held by this Court, "[i]t is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law."[26] Further, "[w]here possible, statutes should be interpreted in a way which makes their provisions consistent with Canada's international treaty obligations and principles of international law."[27]

28. Similarly, the interpretation of the Retransmission Tariff also implicates the *Broadcasting Act* and broader issues of Canadian broadcasting policy that would need to be considered in interpreting the applicable provisions of the *Act*.

29. As a result, any interpretation of the specific statutory scheme applicable to the Retransmission Tariff would require, at the least, that the Court have careful regard to the specific statutory scheme of the *Act* associated with the Retransmission Tariff, relevant *FTA* treaty obligations, as well as the *Broadcasting Act* and relevant Canadian broadcasting policy.

30. However, such an analysis is neither necessary nor possible in this Appeal. Nor was it necessary or possible in the Courts below. The Retransmission Tariff and its particular statutory scheme, including as it relates to Canada's *FTA* obligations, the *Broadcasting Act* and Canadian broadcasting policy, are not at issue in this Appeal. Facts and submissions,

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[25] *FCA Decision* at para 58.

[26] *R.v. Hape*, 2007 SCC 26 at para 53.

[27] *Németh v. Canada (Justice)*, 2010 SCC 56 at para 34.

let alone full submissions, with respect to those issues are not before the Court, and do not form part of the evidentiary record in the case.

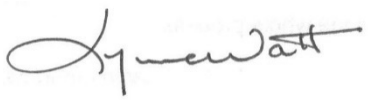
Conclusion

31. It is respectfully submitted that in the circumstances it is neither necessary nor appropriate when pronouncing on whether the Access Tariff Regime is "mandatory" or "not mandatory" to generalize or expand that determination in a way that implicates other tariffs not at issue in this Appeal.

PART IV – COSTS

32. CCC does not seek costs and submits that the ordinary rule that costs are not to be awarded against an intervener should apply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of April, 2021.



for:

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Counsel for the Intervener,
Copyright Collective of Canada

PART VII – TABLE OF AUTHORITIES & LEGISLATION

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Copyright Act, RSC 1985, c C-42 [pre-2019 version], s. 31(2), 70.12, 71(1), 73(2), 74(1), 76(1), 76(3) *Loi sur le droit d'auteur*, LRC 1985, c C-42, art. 31(2), 70.12, 71(1), 73(2), 74(1), 76(1), 76(3)	6, 24
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Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27	13
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