

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

B E T W E E N:

THE CANADIAN COPYRIGHT LICENSING AGENCY  
("ACCESS COPYRIGHT")

Applicant  
(Respondent)

- and -

YORK UNIVERSITY

Respondent  
(Appellant)

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**MEMORANDUM OF ARGUMENT**  
(THE CANADIAN COPYRIGHT LICENSING AGENCY  
"ACCESS COPYRIGHT", APPLICANT)

(Pursuant to Rule 25(1)(c) of the *Rules of The Supreme Court of Canada, S.O.R./2002-156*)

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### Overview

1. Post-secondary educational institutions do not respect the copyrights of authors and publishers of textbooks, journals, periodicals and newspapers. The post-secondary sector engages in mass print copying of works for inclusion in “coursepacks” and engages in mass digital copying of works for posting on paperless electronic course management systems. This provides students with the benefit of these works at little or no cost. But it accomplishes this by depriving the copyright holders of the “just reward” that the *Copyright Act* is intended to provide them.
2. The scale and scope of the copying, and the fact that much of it is done behind literal or digital “closed doors,” makes these copyright infringements difficult to detect. The enormous number of rights holders affected and the cost of an infringement proceeding makes these infringements difficult to enforce. Part VII of the *Act* provides an effective and convenient solution to this problem: the collective administration of copyright.
3. Collective administration addresses mass copying in an entirely different way than enforcing them through infringement lawsuits. Instead of thousands of plaintiffs suing each defendant, Part VII allows for rights holders to create licensing and enforcement bodies, or “collective societies.” The collectives then apply to the Copyright Board to set a tariff that addresses the entire scope of copying, often across an entire industry. The Board’s tariff-setting process is an extensive and robust administrative procedure, permitting full participation rights for any party affected by the tariff. The Board’s objectives are the same as the *Copyright Act*’s generally: to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect with obtaining a just reward for the creator.
4. The decision of the Court below strikes an enormous blow to collective administration of copyright, by making the Board’s tariffs optional for infringers. The Federal Court of Appeal held that an infringer who does not want to pay a tariff approved by the Board can simply “opt out” of it. This forces creators to engage in monitoring and enforcement on their own, trying to find particulars of the infringements that they know are occurring, and then sue.

5. This application asks this Court to consider a question of national and public importance relating to the collective administration of copyright: are the Copyright Board's tariffs mandatory, or can infringers opt out of them? This requires the Court to interpret provisions of the *Act* that Parliament passed specifically for the purpose of strengthening copyright owners' reproduction rights. The first set of amendments were passed in 1988, to address the threat that the photocopier posed to creators of printed works. The second set were passed in 1997, with the recognition that digital technology posed an even greater threat than the analog copy machine could ever have. Together, they were intended to provide authors and publishers effective collective administration of their reproduction right, including the right to enforce the terms of a Copyright Board tariff against those who reproduce works covered by the tariff without lawful authority.

6. The Federal Court of Appeal misread the history and purpose of the collective administration and enforcement provisions in the *Copyright Act*. It held that the purpose of the tariff-setting process was solely to limit the market power of collective societies. It therefore concluded that tariffs can only be enforced against infringers – such as post-secondary institutions – who agree to their terms. If they do not, it concluded that creators' only remedy is infringement proceedings, even though the inability to monitor and the inefficiency of enforcement were key reasons for Parliament enacting the relevant provisions of the *Act*.

7. The decision below poses a near-fatal blow to collective administration of copyright. Access Copyright asks this Court to grant leave and decide whether Parliament intended to permit creators to collectively address mass copying, or whether it intended to leave them on their own to deal with rapidly advancing technologies through thousands of individual infringement lawsuits.

### **Collective Administration under the *Copyright Act***

8. The central question in this case is the interpretation of sections 70.1 through 70.191 of the *Copyright Act*. These sections authorize collective societies to file a proposed tariff with the Copyright Board (s. 70.12(a)) and authorize the Board to certify a tariff (s. 70.15) after giving notice and hearing from all affected parties (s. 70.14, incorporating ss. 67.1(5) and 68(1)). They also incorporate by reference subsection 68.2(1), which permits a collective society to collect royalties and, on default of payment, to collect them in a court of competent jurisdiction.

9. The Court of Appeal interpreted these provisions as attempting to curtail the market power of collective societies. While this might have been the original objective of earlier amendments to the *Act*, relating to the performance of musical works, it is clear from the legislative history that it was not the objective of sections 70.1 through 70.191. A legislative history of the relevant provisions of the *Act* is set out below.

***1931 Amendments: Limiting the Performance Rights Societies***

10. Prior to 1931, societies, associations and companies had become active in acquiring the public performance right in the vast majority of music commonly performed in public. These “performance rights societies” (“PRSs”) charged users (e.g. theatres, radio broadcasting stations and gramophone manufacturers) fees for the right to perform these works in public<sup>1</sup>.

11. To ensure that PRSs could not impose oppressive fees, Parliament made remedial amendments to the *Copyright Act*<sup>2</sup> to impose regulatory oversight over these fees. These amendments were intended to limit the market power of the PRSs in order to restore the desired balance between the users of music and the copyright holders in musical works.

***1970s: Technology creates a copyright crisis***

12. Before the 1980s, authors and publishers of printed works were not afforded clear legal authority to authorize the collective administration of their copyrights. However, the invention and wide dissemination of the photocopier in the 1970s had a profound impact on the creators of these works. While previously copying required a printing press, these works could now be copied inexpensively by users at the push of a button. Copyright owners faced insurmountable problems in controlling their copyrights and obtaining compensation when their works were copied.

13. The *Copyright Act* in force at that time was ill-equipped to deal with the problem. It became clear that technology had upset the balance between creators and users, and amendments would be necessary to restore it. Several studies were undertaken, in both Canada

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<sup>1</sup> *Vigneux v. Canadian Performing Right Society Ltd.*, [1943] SCR 348, pages 353-354

<sup>2</sup> *The Copyright Amendment Act, 1931* (Dom., 1931, c.8, s.10)

and abroad, to assess the breadth of the problem and to recommend legislative solutions. These included:

- (a) *The Whitford Report* from the U.K., which<sup>3</sup> recognized the “sheer impossibility of policing infringements and the probability that the detection of any individual instance of infringement and the institution of proceedings for such infringement would cost far more than any sum which might be recouped by way of damages.” One of its recommendations to resolve this problem was collective administration of copyright, including both collective societies to administer reproduction rights, and an independent tribunal to set licence terms when the parties could not agree.
- (b) *Keyes and Brunet* in Canada<sup>4</sup> identified the photocopier as both enormously decreasing the user’s difficulty in accessing information but increasing creators’ difficulties in controlling unauthorized reproduction. The report concluded that “it is obvious that an individual author cannot possibly control all the uses to which his works are put,” and recognized that “it would be impossible for him individually to exercise his [enforcement] rights.”<sup>5</sup> It proposed collective administration to clear up the problems associated with infringement and enforcement, and empowering the collective to enforce copyrights without involving the holder of the copyright.<sup>6</sup> It proposed a Copyright Board to “hear disputes that occur between those who seek to license and those who are being licensed.”<sup>7</sup>

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<sup>3</sup> Report of the Committee to consider the Law on Copyright and Designs, March 1977 (“the Whitford Report”), paras. 268, 285, Tab 5G

<sup>4</sup> Andrew A. Keyes and Claude Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Ottawa: Consumer and Corporate Affairs Canada, 1977), pages 162-165, 209-223 (“*Keyes & Brunet*”), Tab 5B

<sup>5</sup> *Keyes & Brunet*, note 4 at pages 214-215, Tab 5B

<sup>6</sup> *Keyes & Brunet*, note 4 at page 165, Tab 5B

<sup>7</sup> *Keyes & Brunet*, note 4 at page 221, Tab 5B

- (c) *Canada's White Paper*<sup>8</sup> expressed the concern that technology was making it ever easier to appropriate the works of creators. It therefore suggested a tariff system. In an accompanying companion guide,<sup>9</sup> the Minister of Communications recognized that “effective control by an individual copyright owner has been rendered virtually impossible.”
- (d) In 1985, the *Charter of Rights for Creators*<sup>10</sup> accepted copyright owners’ concerns that they could not control the unauthorized use of their works. It concluded “that the formation of collective societies of copyright owners is the best solution to the problems created by modern reproduction technology such as photocopiers” and the “only practical way” to administer creator’s rights. It foresaw “the demise of the collective exercise of copyright if users are permitted to circumvent the tariff system and bargain with the essentially weaker individual creator, rather than pay an approved tariff.”

14. Parliament acted upon these recommendations. It recognized that creators’ copyright interests and the public interest had become unbalanced by the invention and widespread use of the photocopier. While the remedial rebalancing efforts undertaken by Parliament in 1931 were to limit the market power of PRSs, a new rebalancing was required to ensure creators could control their reproduction right and obtain fair compensation when their works were copied.

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

15. After years of study and consideration, the Federal government began to respond to the difficulties the photocopier created for creators. It introduced Bill C-60, *An Act to Amend the Copyright Act*, in 1987. During the House of Commons debates, the Minister of Communications, Flora MacDonald, discussed the challenges created by copying technology.

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<sup>8</sup> Canada. Department of Communications and Department of Consumer and Corporate Affairs, *From Gutenberg to Telidon: A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act*, 1984, pages 1-6, Tab 5C

<sup>9</sup> *Copyright and the Cultural Community*, Minister of Supply and Services Canada, 1984, page 4, Tab 5D

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

She stated that the motivation for the bill was that it has become “almost impossible” for creators to monitor potential infringements, which “is why Bill C-60 explicitly encourages the creation of new collective societies of copyright owners.”<sup>11</sup>

16. The Minister indicated that under the new regime, the Copyright Board will “continue to set and regulate royalty rates” and “be able to make **binding decisions** whenever collectives and those who wish to use their members’ works are unable to reach an agreement.” She also stated that “in response to a **request for arbitration from either party**, the Board may set what it feels to be a fair royalty rate.”<sup>12</sup> She described the new Board as “a fully independent agency” with “**quasi-judicial authority**,” who would act as the “**final arbiter in financial disputes between creator and user**.”<sup>13</sup>

17. Bill C-60 received Royal Assent in 1988. In the contemporaneous “Backgrounder”, Consumer and Corporate Affairs Canada explained that Parliament was enabling the collective exercise of copyright in areas such as photocopying, since “[i]n circumstances where users and collectives are unable to reach agreements, either party may apply to the Board to fix the rates and related terms and conditions.”<sup>14</sup>

18. As part of the 1988 amendments, Parliament repealed subsection 50(9) of the *Copyright Act*. This subsection limited the PRSs’ enforcement remedy to users “in respect of the issue or grant by [the collective] of **licences** for the performance of all or any of its works.”<sup>15,16</sup> This amendment was in direct response to a Federal Court decision holding that if an infringer

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<sup>11</sup> *House of Commons Debates*, 33<sup>rd</sup> Parl., 2<sup>nd</sup> Sess. (June 15, 1987) at 7109 (Hon. F. MacDonald), Tab 5E

<sup>12</sup> *House of Commons Debates*, 33<sup>rd</sup> Parl., 2<sup>nd</sup> Sess. (June 26, 1987) at 7668 (Hon. F. MacDonald) [emphasis added], Tab 5E

<sup>13</sup> *House of Commons Debates*, 33<sup>rd</sup> Parl., 2<sup>nd</sup> Sess. (May 17, 1988) at 15520 (Hon. F. MacDonald) [emphasis added], Tab 5F

<sup>14</sup> *Canada’s Copyright Act as Amended by Bill C-60*, Consumer and Corporate Affairs, 1988, pages 8-9, Tab 5A

<sup>15</sup> *Copyright Act*, 1970, c. C-30, s.50(9), repealed S.C. 1988, c.15, s.13(3) [emphasis added]

<sup>16</sup> *Performing Rights Organization of Canada Ltd v Lion D’or* (1981) Ltee (“*Lion D’or*”) (1987), 17 CPR (3d) 542, page 546

refused to take out a licence, the tariff could not be enforced. Parliament decided that it did not want this limiting language to apply to the new enforcement remedy.<sup>17</sup>

***Further amendments in 1997 strengthen collective administration***

19. The powers given to “licensing bodies” in 1988 were strengthened in another series of amendments, passed in 1997. They were redefined as “collective societies,” and given new powers. In particular, new section 70.12(a) gave collective societies the right to file a proposed tariff with the Copyright Board setting out the terms and conditions under which reproduction of the collective’s members’ works would be permitted. Crucially, after the Copyright Board heard any objections and approved a tariff, the collective would be afforded the same right as PRSs to collect the royalties specified in the approved tariff and, in default of their payment, recover them in a court of competent jurisdiction.<sup>18</sup>

20. Parliament also enacted other provisions in 1997<sup>19</sup> that provided educational institutions certain exceptions to infringement and a limitation on their liability for damages if there was, among other triggering conditions, an approved tariff.

21. In sum, the 1988 and 1997 amendments were enacted to deal with the precise problem facing creators, both then and now: advancement in technology that make copyright infringement easy and cheap, but also difficult to monitor or enforce. After careful study, Parliament crafted a solution to this problem: collective administration and a Copyright Board with powers to set tariffs that balance creators’ and users’ rights, without the difficulties and inefficiencies associated with infringement lawsuits.

22. The Federal Court of Appeal’s decision significantly undermines this solution. This is apparent from the facts of the underlying proceeding: users like York can engage in mass infringement with relative impunity, since all they need do to undermine collective administration is to purport to “opt out” of the tariff.

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<sup>17</sup> S.C. 1988, c. 15, s. 12, enacting subsection 49.2(2); renumbered by S.C. 1997, c.24, s.45 as subsection 68.2(1)

<sup>18</sup> S.C. 1997, c.24, s. 46, enacting ss. 70.1-70.191

<sup>19</sup> S.C. 1997, c.24, ss. 18 and 20, enacting subsections 30.3(2) and 38.2(1)

## **Access Copyright**

23. Access Copyright was formed in 1988 as a not-for-profit corporation to collectively administer the reproduction right owned by authors and publishers of printed materials. At present, Access Copyright represents over 12,600 creators and over 670 publishers of books, journals, periodicals and newspapers and administers their copyrights in the nine common-law provinces and territories. Through an international network of collective societies, Access Copyright has also been authorized to administer the copyright interests of tens of thousands of authors and publishers residing in Quebec and abroad. As a result, the number of works in Access Copyright's repertoire is in the tens of millions.<sup>20</sup>

24. For the first 16 years of its existence, Access Copyright was able to enter into agreements with Ministries of Education, school boards and post-secondary educational institutions that permitted their teaching faculty and staff to make limited copies of works in Access Copyright's repertoire, in exchange for a fee. After covering its administration costs, the fees paid by users have been distributed to tens of thousands of authors and publishers around the world. Since 1988, Access Copyright has distributed over \$440 million.<sup>21</sup>

25. Beginning in 2005 in the elementary and secondary ("K-12") sector, and beginning in 2011 in the post-secondary sector, a disturbing pattern emerged. First, educational institutions stopped agreeing to licence terms, requiring Access Copyright to engage in the lengthy and expensive process of obtaining tariffs from the Copyright Board. Later, the institutions decided that they were not even going to pay the approved tariff amounts, purporting to "opt out" of the tariffs. How this played out in the post-secondary sector, and ultimately led to this case, is explained below.

## **The Post-Secondary Tariff**

26. Between 1994 and 2010, Access Copyright reached agreements with post-secondary institutions, permitting them to make limited copies of works in its repertoire for a prescribed fee. However, after extensive negotiations, Access Copyright failed to reach an agreement for 2011-2013. As a result, Access Copyright filed a proposed tariff with the Copyright Board in

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<sup>20</sup> Affidavit of R. Levy affirmed June 18, 2020 ("RL affidavit"), paras. 9, 11-14, Tab 4B

<sup>21</sup> RL affidavit, paras. 14-17, 36-39, Tab 4B

March 2010 that proposed the terms of permitted copying in post-secondary institutions for those years.<sup>22</sup>

27. Because the Copyright Board's process is lengthy, decisions often come out after the tariff years have passed. As a result, Access Copyright applied for, and the Copyright Board issued, an interim tariff for the period 2011-2013. The interim tariff permitted teachers in post-secondary institutions to copy from works in Access Copyright's repertoire. Several institutions, including York University, initially complied with the interim tariff but later purported to "opt out" of its terms.<sup>23</sup>

28. On December 7, 2019, the Copyright Board approved final tariffs for the years 2011-2017. However, apart from two post-secondary institutions, all others who do not have a consensual agreement with Access Copyright have refused to pay the approved tariffs. They refuse even though they continue to copy substantial portions from published works in Access Copyright's repertoire.

29. In the period 2005 to 2010, the fees paid to Access Copyright by the post-secondary sector under consensual licences averaged approximately \$ 15 million per year. Since 2016, that average has declined precipitously to approximately \$ 1.5 million per year. As a result of the Federal Court of Appeal's decision, Access Copyright expects other users to "opt out" of the approved tariffs. Authors and publishers have not received fair compensation for the copying of their works in most post-secondary institutions since 2011 and face receiving very little at all moving forward.<sup>24</sup>

30. The same dynamic is playing out in the public K-12 education sector. Apart from the British Columbia Ministry of Education, all other ministries and school boards in the nine common law provinces and territories purported to "opt out" of the approved tariffs and stopped paying any fees to Access Copyright effective January 1, 2013. In the period 2010-2012, the

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<sup>22</sup> RL affidavit, paras. 36, 40-42, Tab 4B

<sup>23</sup> RL affidavit, paras. 43-44, Tab 4B

<sup>24</sup> RL affidavit, paras. 39, 68-69, Tab 4B

three years just prior to “opting out”, the public K-12 sector’s payments to Access Copyright averaged approximately \$ 8 million per year.<sup>25</sup>

### **York University’s Infringing Copies**

31. York complied with the interim tariff until August 31, 2011. Like many other post-secondary institutions, York then purported to “opt out” of the tariff for the 2011-2012 and subsequent academic years.<sup>26</sup> But it did not stop copying works, including works in Access Copyright’s repertoire. Like many other post-secondary institutions, York continued to take all the benefits of the licence it once agreed to. It just opted not to pay the fee.

#### ***Proceedings Below***

32. Access Copyright brought an action in the Federal Court in April 2013 under subsection 68.2(1) of the *Copyright Act* to enforce the interim tariff. York argued that it was not obliged to pay the interim tariff because it had not agreed to be bound by its terms. It also claimed that it had direct permission from the owners of copyright to copy their works. In respect to the remaining copies made by its teaching faculty, York claimed that this copying constituted fair dealing. Therefore, according to York, it did not infringe Access Copyright’s Affiliates’ copyrights even once during the tariff period. York claimed that if there were instances of infringement, the only remedy available to rights holders was an infringement lawsuit.

33. The tariff enforcement action was heard by the Federal Court in 2016. The evidence at trial was that York teaching staff made and distributed an enormous number of copies for which York paid no licence fees or royalties.<sup>27</sup> In 2013 alone, York’s teaching staff copied an aggregate volume of 17.6 million pages for use in print coursepacks and for digitally posting on learning management systems.<sup>28</sup> In respect to York’s claim that it had direct permission from copyright owners to make these copies, the trial judge confirmed York’s concession at trial that

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<sup>25</sup> RL affidavit, para. 33, Tab 4B

<sup>26</sup> RL affidavit, para. 44, Tab 4B

<sup>27</sup> *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669, [FC Decision], para. 94; rev’d, 2020 FCA 77, para. 1 [FCA Decision], Tabs 2A & 2B

<sup>28</sup> FC Decision, para. 303, Tab 2A

its evidence on alleged direct permission to copy these works was inaccurate and could not be relied upon.<sup>29</sup>

34. The trial judge also found that: York’s approach to copying of works by certain of its faculty members who were found to have copied works without lawful authority was “consistent with its willfully blind approach to ensuring compliance with copyright obligations”; York had “no monitoring or enforcement mechanisms to address compliance with copyright laws or even its own policies”; and there was a “complete abrogation of any meaningful effort to ensure compliance with [York’s Fair Dealing] Guidelines.”<sup>30</sup>

35. ***Trial Judge’s conclusion: York infringed copyright and the tariff is enforceable.*** The trial judge found that York had infringed copyright. It was clear that the scale of this infringement, in just this one university, was enormous. For this and other reasons, the trial judge therefore rejected the fair dealing defence. He also found that the interim tariff was both enforceable and breached by York. He concluded that collective administration and the tariff-setting power of the Board provided “collectives with effective enforcement mechanisms against users who are not subject to an agreement and who reproduce, without authority from owners or without the benefit of an exception (e.g. fair dealing), copyright protected works covered by the collectives, such as the works in Access’s repertoire.”<sup>31</sup>

36. The trial judge also found that “the enforcement of tariffs (both final and interim) are an integral part of the legislative scheme created by Parliament for the collective administration of copyright. Parliament recognized the difficulties copyright owners might face in enforcing their rights individually against those who copied copyright protected works.”<sup>32</sup>

37. ***Federal Court of Appeal’s conclusion: right without a remedy.*** The Court of Appeal affirmed the trial judge’s finding that the copies made by York were not fair dealing, leaving his conclusion that York had infringed copyright on an enormous scale. However, it reversed the trial judge’s conclusion on the enforceability of the interim tariff. Contrary to the legislative

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<sup>29</sup> FC Decision, para. 287, Tab 2A

<sup>30</sup> FC Decision, paras. 245, 58, 28, Tab 2A

<sup>31</sup> FC Decision, para. 204, Tab 2A

<sup>32</sup> FC Decision, para. 195, Tab 2A

history, the Court of Appeal held that the sole purpose of the tariff-fixing process was to limit the market power of copyright collectives. It held that an approved tariff amounted only to an “offer to license.” As a result, it concluded that it was only enforceable against users who had agreed to accept the offer to pay royalties for carrying out the acts of reproduction permitted in the tariff but had defaulted in that payment.<sup>33</sup>

## **PART II – STATEMENT OF THE QUESTION IN ISSUE**

38. Access Copyright asks the Court to grant leave to appeal so it can answer the following question of national or public concern: are tariffs approved by the Copyright Board under Part VII of the *Copyright Act* merely voluntary licence terms that users can “opt into,” or are they enforceable by a collective society against all users who copy works without lawful authority?

39. Access Copyright submits that the Court of Appeal was incorrect to find that Board-approved tariffs are strictly voluntary. Access Copyright asks this Court to grant leave so it can provide a final word on this crucial issue for creators and users of numerous types of copyrighted works.

## **PART III – STATEMENT OF ARGUMENT**

40. The operation of collective administration of copyright is a question of national and public importance that merits this Court’s attention. The Court of Appeal’s decision deprives creators of works of the statutory mechanisms that Parliament intended to provide them to deal with technological advances that severely diminished their copyrights. Since these provisions were enacted in the 80s and 90s, technology has advanced, copying has become easier, and creators’ rights are more threatened than ever.

41. Educational institutions are still engaging in mass copying of copyrighted works. But they have stopped paying fees for that copying. The parties cannot reach an agreement on the essential terms of a licence. Creators have not been paid for the exploitation of their rights. The market has failed.

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<sup>33</sup> FCA Decision, paras. 102, 168-169, 202, Tab 2B

42. The 1988 and 1997 amendments were supposed to cure this market failure by giving creators recourse to the Copyright Board when the parties cannot agree. The decision below does the opposite: it restores the pre-1988 market failure and ensures that it will continue indefinitely.

### **Proper interpretation of sections 70.1 through 70.191**

43. The Court of Appeal failed to properly interpret sections 70.1 through 70.191, as well as the sections that they incorporate by reference. The Court of Appeal was required to read the words of the *Copyright Act* “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.”<sup>34</sup> The decision below ignores the purpose, history and structure of the relevant provisions, and instead relies on an outdated Parliamentary intention, as well as an irrelevant phrase (“is liable to pay”).

#### ***Decision disregards legislative history of the collective’s enforcement remedy***

44. The purpose of the *Copyright Act* is well-known and has been repeated by this Court on numerous occasions: to encourage the creation and dissemination of works, while ensuring for creators a just reward for their efforts.<sup>35</sup> It is clear from the legislative history that Parliament intended sections 70.1 through 70.191 to further that purpose, by permitting collective administration and negotiations, and recourse to the Copyright Board if negotiations did not succeed.

45. The Federal Court of Appeal took a highly outdated view of collective administration. It concluded that sections 70.1 to 70.191 of the *Copyright Act* exist to *limit* the market power of collective societies.<sup>36</sup> This is wrong. The object of these provisions was to restore the balance between creators and users that had been upset by new technologies and their capacity to facilitate easy, cheap and nearly-undetectable infringement.

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<sup>34</sup> *Canada Trustco v. Canada*, 2005 SCC 54, para. 10

<sup>35</sup> *Théberge v. Galerie D’art Du Petit Champlain Inc.* 2002 SCC 34, para. 30; *CCH v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, para. 10; *SOCAN v. Bell Canada*, [2012] 2 S.C.R. 326, paras. 8-10

<sup>36</sup> FCA Decision, paras. 34, 173, 191, Tab 2B

46. Indeed, the Court of Appeal's view of Parliament's intention cannot withstand what Parliament actually did. In particular, the 1988 amendments specifically repealed the provision that had been interpreted to render PRSs statements of fees as enforceable only if the user agreed to accept a licence.<sup>37</sup> This amendment was specifically intended to provide PRSs (and, after the 1997 amendments, to other collective societies) an effective mechanism to enforce a tariff approved by the Copyright Board.

***Decision gives no effect to the words of the relevant sections in their entire context***

47. Section 70.12 of the *Act* was intended to provide collective societies with the tools it requires to carry out its core function – establishing the terms and conditions under which reproduction of its repertoire works will be permitted. Under section 70.12, a collective society may, for the purpose of setting out by licence the royalties and terms and conditions relating to classes of uses, either file a proposed tariff (s. 70.12(a)) or enter into agreements with users (s. 70.12(b)). The tariff option was provided precisely because collective societies and users cannot always come to an agreement.

48. Parliament's use of the word "licence" in the context of section 70.12 applies to both tariffs (s. 70.12(a)) and agreements with users (s. 70.12(b)). Parliament intended that both tariffs and agreements would "licence" copyrighted works, either through a consensual agreement (a voluntary licence) or an approved tariff (a statutory licence).

49. The Court of Appeal misinterpreted the word "licence" in section 70.12 as requiring a licence agreement as opposed to its ordinary meaning of a "permitted use." Conflating "licence" with "agreement" led to the incorrect conclusion that approved tariffs were only enforceable against those users who had agreed to be bound by their terms. The correct interpretation that best accords with Parliament's intention is that an approved tariff is a statutory licence, enforceable under subsection 68.2(1).

50. The fact that tariffs are intended to be mandatory not voluntary is particularly clear in light of section 70.191. It provides that "an approved tariff does not apply where there is an agreement between a collective society and a person authorized to do an act... if the agreement

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<sup>37</sup> See paragraph 18 above

is in effect during the period covered by the approved tariff.” If tariffs were intended to be voluntary, there would have been no need for this section since a party could simply “opt out” of the tariff structure.

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

52. Other provisions of the *Act* support the conclusion that an approved tariff was intended to have binding effect. When Parliament enacted sections 30.3 and 38.2 in 1997 and section 30.02 in 2012,<sup>38</sup> it provided educational institutions the benefit of certain exceptions to infringement (s. 30.02 and s. 30.3) and a limitation on liability for infringement (s. 38.2) if certain conditions are met. Among the conditions that trigger the benefit of these provisions is a tariff certified or approved under section 70.15. It is nonsensical to conclude that Parliament intended that educational institutions could benefit from these provisions in an infringement action brought by a copyright owner because there is an approved or certified tariff that the institution has not paid.

***Decision renders tariff alternative pointless or futile***

53. The Court of Appeal’s interpretation of the relevant provisions renders the copyright collectives’ right to file a proposed tariff under section 70.12(a) a completely sterile option with no practical effect if a user must consent to be bound to its terms.

54. Parliament did not enact the tariff regime of sections 70.1 to 70.191 of the *Act* to be pointless or futile. It can only be an effective, practical scheme if the terms and conditions of an approved tariff are enforceable under subsection 68.2(1) against infringers, such as York, when they are unable to agree to a licence.

55. The procedural rights afforded to users are another statutory indication that tariffs are mandatory. Users are afforded full participation rights in the tariff proceedings. When a

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<sup>38</sup> S.C. 2012, c. 20, s. 27

proposed tariff is filed, users are given the right to formally object to its terms, engage in a written discovery process, furnish factual and expert evidence, test the collective society's evidence through cross-examination, and advance any relevant arguments, all before the Copyright Board in a public hearing. There is no reason to give users all those rights if they can then opt out of the process.

56. Indeed, if tariffs are only enforceable under subsection 68.2(1) of the *Act* against users who agree to be bound, it becomes pointless for a collective society to invest time and resources to prepare and file a proposed tariff, and engage in an expensive and lengthy prosecution of the proposed tariff, only to obtain an approved tariff that has no enforceable effect upon users with whom the collective has been unable to reach an agreement under section 70.12(b).

***The absence of the phrase “liable to pay”***

57. The Federal Court of Appeal gave mandatory effect to subsection 68.2(1) of the *Act* in respect to tariffs issued by the Copyright Board to collective societies which administer the neighbouring rights of performers and sound recording makers (section 19); and who administer the collection of levies on the manufacture of blank audio recording media (sections 81- 82).

58. The Court of Appeal relied upon the language “is liable to pay royalties” in subsection 19(2) and the language “is liable...to pay a levy” in section 82(a) of the *Act*, and its absence from the provisions related to copyright collectives, to support its finding that subsection 68.2(1) has mandatory effect only at the suit of these neighbouring rights collectives. In contrast, according to the Court of Appeal's reasoning, copyright collectives cannot enforce approved tariffs against users who have refused to be bound.

59. However, the Court of Appeal overlooked the fact that the right to remuneration under sections 19 and 81 requires express language that imposes an obligation to pay because these remuneration rights exist independently of the underlying copyright. In the absence of the phrase “is liable to pay”, these collectives have no enforceable right. Corresponding language is not required for copyright collectives because the liability to pay for acts of reproduction is already imposed by sections 3 and 27 of the *Act*.

60. The language of subsection 68.2(1) does not discriminate between collective societies. All entities who fall within the definition of “collective society” and who have obtained an approved tariff have standing to enforce a tariff. That standing is not dependent upon the collective society owning copyright.<sup>39</sup> The Court of Appeal’s interpretation effectively results in the exclusion of all copyright collectives who do not hold a copyright interest from the definition of “collective society”. In addition, by giving subsection 68.2(1) mandatory effect for neighbouring rights collectives but only voluntary effect for copyright collectives – who must all resort to the same enforcement mechanism – the Decision results in the remuneration right being protected more directly and more efficiently than the underlying copyright. That result could not have been Parliament’s intent.

### **The Effect on Collective Administration of the Decision Below**

61. The absence of an effective regime for the collective administration of copyright will make Canada an outlier in the international community that has also embraced the collective administration of copyright as the solution to ensure authors and publishers are fairly rewarded when their works are copied.<sup>40</sup>

62. The Decision leaves each copyright owner represented by Access Copyright with the right to control its own reproduction right and attempt to bargain with, or initiate litigation against, each institution in which its works are copied. Requiring thousands of discrete copyright owners to investigate acts of unauthorized copying and initiate proceedings for copyright infringement is the very mischief that Parliament intended to avoid by its remedial amendments to the *Copyright Act* in 1988 and 1997.

63. Beyond the copyright interests of the authors and publishers represented by Access Copyright, the Decision undermines the stability of the entire collective system and introduces a number of inequities and economically inefficient impacts. For those collectives (*e.g.* CONNECT, CMRRA) that have the option to file a proposed tariff, there is no longer any benefit to investing in a lengthy and costly tariff process if the resulting approved tariff is not enforceable against unwilling users. For those collectives who are (*e.g.* CRC) or were (*e.g.*

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<sup>39</sup> Vaver, D. *Copyright Law*, 2000, Irwin Law Inc., pages 244-245, Tab 5H

<sup>40</sup> Affidavit of Caroline Elizabeth Morgan sworn June 18, 2020, para. 26, Tab 4F

SOCAN) required to obtain an approved tariff, the potential effects of a user being able to opt out of an approved tariff many years after it is proposed are profound.<sup>41</sup>

64. The Decision therefore impacts innumerable creators of dramatic, literary, artistic and musical works whose copyrights have been historically administered under different tariff regimes by various collective societies. The ability of users to disregard approved tariffs will deprive them of fair compensation when their works are reproduced, performed, broadcast, and used.

***Proceedings for infringement provide no effective remedy***

65. The Federal Court of Appeal observed<sup>42</sup> that the absence of an enforceable tariff did not affect a copyright owner's recourse to proceedings for infringement. It found "the enforcement of mandatory tariffs against many individual infringers is no different than the prosecuting infringement actions against many individual infringers"<sup>43</sup>. This observation was, with respect, ill-founded.

66. The objective of the 1988 and 1997 amendments was not to double down on separate court proceedings for infringement. The objective was to provide for an effective collective administration regime so as to avoid the unmanageably complex, costly, and time-consuming individual management and enforcement of creators' reproduction rights. Providing for a Copyright Board before which both the collective society and the users of works could participate in the realization of an approved tariff served to regulate the balance of market power between copyright owners and users.<sup>44</sup> This approach promoted both the usage of works as well as a fair reward for creators- the recognized key policy of the *Copyright Act*.

67. With no right to enforce an approved tariff, each copyright owner represented by Access Copyright, some of whom are domiciled abroad, will be faced with insurmountable obstacles in

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<sup>41</sup> Affidavit of Catherine Jones of CONNECT sworn June 18, 2020 ("CJ affidavit"), Tab 4D; Affidavit of Kit Wheeler (SOCAN) sworn June 17, 2020 ("KW affidavit"), Tab 4A; Affidavit of Veronica Syrtash (CMRRA) sworn June 17, 2020 ("VS affidavit"), Tab 4G; Affidavit of Carol Cooper (CRC) sworn June 18, 2020 ("CC affidavit"), Tab 4E

<sup>42</sup> FCA Decision, para. 53, Tab 2B

<sup>43</sup> FCA Decision, para. 203, Tab 2B

<sup>44</sup> *Canadian Association of Broadcasters v. SOCAN et al.* (1995), 58 C.P.R. 190 at 196

detecting and pursuing new unauthorized copying activities occurring daily in the thousands of discrete educational institutions in Canada. In most cases, the costs and complexity of those proceedings will exceed the modest recoverable damage award and discourage copyright owners from pursuing that remedy.<sup>45</sup> Copyright owners who have authorized other collective societies to administer their copyrights face the same insurmountable problems.<sup>46</sup>

68. The devastating loss<sup>47</sup> of revenue suffered by creators from the education sectors' abandonment of the collective administration of copyrights goes beyond simply denying creators fair compensation. Publishers have been forced to dismiss several highly creative authors from their workforces and scale back their creation of new "made in Canada" resources for the Canadian educational markets, to the lasting detriment of Canadian students. Three major Canadian publishers have withdrawn altogether from the production of Canadian content for the K-12 education sector.<sup>48</sup>

69. Despite making and distributing millions of pages copied from published works, most educational institutions continue to refuse to negotiate with Access Copyright and are now permitted to "opt out" of the approved tariffs. While the institutions risk proceedings for infringement, that risk is substantially minimized by the fact that acts of unauthorized copying are now conducted almost exclusively behind password protected firewalls, minimizing the risk of detection.

70. Moreover, educational institution can simply wait to be sued and then pay or offer to pay the royalties in an approved tariff. Under section 70.17 of the *Act*, such a payment or offer would appear to stop the infringement proceeding in its tracks. Parliament's intention could not have been to allow users to game the tariff regime in this way to the disadvantage of copyright owners who have authorized a collective society to administer their copyrights.

71. Therefore, contrary to the Court of Appeal's observation, infringement proceedings and the remedies available for infringement, provide copyright owners no reasonable path to

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<sup>45</sup> Affidavit of John Degen sworn June 16, 2020, ("JD affidavit"), paras. 22- 23, Tab 4C

<sup>46</sup> KW affidavit, paras. 18-26, Tab 4A; CC affidavit, para. 46, Tab 4E; CJ affidavit, paras. 12-17, Tab 4D; VS affidavit, paras. 11-14, Tab 4G

<sup>47</sup> JD affidavit, para. 21, Tab 4C

<sup>48</sup> JD affidavit, paras. 8, 22-23, Tab 4C; RL affidavit, para. 76, Tab 4B

obtaining a fair reward for the copying of their works. The absence of an enforceable tariff negates Parliament's legislated solution to address the serious problem of massive unauthorized and uncompensated copying enabled by the invention of the photocopier. The more recent invention of paperless digital reproduction technology has simply amplified the seriousness of that problem.

**PART IV – SUBMISSIONS WITH RESPECT TO COSTS**

72. Access Copyright submits that the costs of this application should follow the event.

**PART V – ORDER SOUGHT**

73. Access Copyright seeks an order granting leave to appeal the judgment of the Federal Court of Appeal dated April 22, 2020 in Court File No. A-259-17, with costs.

June 19, 2020

ALL OF WHICH IS RESPECTFULLY SUBMITTED

A handwritten signature in blue ink, appearing to be "Asma Faizi", written over a horizontal line.A handwritten signature in blue ink, clearly legible as "Asma Faizi", written over a horizontal line.

Counsel for the Applicant

**PART VI – TABLE OF AUTHORITIES**

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