SCC File No. 39222 (SECOND APPLICATION)

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)

REPLY MEMORANDUM OF ARGUMENT

(THE CANADIAN COPYRIGHT LICENSING AGENCY "ACCESS COPYRIGHT", APPLICANT)

(Pursuant to Rule 28(2) of the *Rules of The Supreme Court of Canada*, S.O.R./2002-156)

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TABLE OF CONTENTS

APPLICANT'S REPLY MEMORANDUM OF ARGUMENT

Affidavits in support of Access Copyright's application for leave are appropriate

1. The Respondent, York University, argues that the affidavits filed by Access Copyright in support of its application for leave are unnecessary, inappropriate and of no assistance to the Court.

2. To the contrary, the affidavits submitted by several other copyright collectives in support of Access Copyright's application for leave[1] appropriately serve to demonstrate that the decision sought to be appealed establishes "a precedent that is unworkable in practice, or otherwise is likely to have a problematic impact or jurisprudential importance not apparent on its face"[2] and provides "the Court with background material relevant to the general importance of the case."[3]

CBC v. SODRAC 2003 is not dispositive

3. York argues that this Court in *CBC v. SODRAC 2003*[4] "effectively answers" the questions in issue identified by Access Copyright in its application for leave and that this 2015 decision stands for the proposition that tariffs approved by the Copyright Board under sections 70.1 to 70.191 of the *Copyright Act* are not enforceable by any collective society against users, such as York, who copy copyright-protected works without lawful authority.[5]

4. To the contrary, the issues before the Court in *CBC* did not relate to a tariff approved by the Board under the tariff regime that would apply to an entire sector. Rather, the issues related to the terms of a licence fixed by the Board in an individual case under the provisions of section 70.2(2). This process was initiated by the collective society under section 70.2(1) to set the

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[1] Access Copyright Application Record ("AR"), Tabs 4-A to 4-G

[2] *Aecon Buildings v. Stephenson Engineering Ltd*., 2011 SCC 33, [2011] 2 S.C.R. 560, para. 4

[3] *Brine v. Industrial Alliance Insurance and Financial Services Inc.*, 2016 SCC 9, [2016] 1 S.C.R. 72, para. 8

[4] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc*. ("*CBC*"), 2015 SCC 57, [2015] 3 S.C.R. 615

[5] York Memorandum of Argument, para. 19; Access Copyright Memorandum of Argument, AR, Tab 3, p. 247, paras. 38-39

terms of a licence between the parties regarding the reproduction by the CBC of works in the collective's repertoire.

5. The Court's review of the Copyright Board's decision in *CBC* was limited to the interpretation of sections 70.2 to 70.4 of the *Copyright Act*. The Court did not interpret the text, context, purpose or legislative history of the tariff-fixing regime set out in sections 70.1 to 70.191 of the *Copyright Act*. Nowhere in the *CBC* decision did the Court discuss the nature of a tariff, the tariff-fixing jurisdiction of the Board, the process prescribed by the *Act* for the approval of a tariff or the legal effect of a tariff once approved.[6] Indeed, the Court expressly noted that the tariff approved by the Board relating to the distribution of cinematographic works was *not* at issue before the Court.[7]

6. Moreover, the Court in *CBC* was not furnished with the complete legislative history underlying the amendments to the copyright collective regime enacted in 1988 and 1997 that were directly relevant to its interpretation of sections 70.2 to 70.4 of the *Act*. This history does not support the Court's conclusion that Copyright Board decisions under section 70.4 of the *Act* are not binding upon the parties who bring their dispute before the Board under section 70.2 of the *Act*.[8]

7. The Court's finding that decisions made pursuant to the Board's licence-setting proceedings under s. 70.2 do not have binding effect against users was arrived at by interpreting the introductory words of section 70.4. The Court found that these words made clear that a user whose copying activities were the subject of a s. 70.2 proceeding *may* avail itself of the terms and conditions established by the Board to gain authorization to engage the activity contemplated in the Board proceeding. As found by the Court, the language of section 70.4 does not, of its own force, bind a user to the terms and conditions of the licence.

8. In contrast to the language of section 70.4, subsection 68.2(1) of the *Act* does not provide the user with the same voluntary "opt in" language. The only permissive language in

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[6] *CBC*, paras. 104-108, 111-113, Appendix "A"

[7] *CBC*, para. 21

[8] Access Copyright's Memorandum of Argument, paras. 13-22, AR, Tab 3, pp. 238-242

subsection 68.2(1) provides the collective society with the option to bring proceedings to collect the royalties specified in an approved tariff when a user to whom it applies has failed to pay the approved tariff for copying activities falling within its terms.

9. The Court in *CBC* could find no clear and distinct authority in the wording of sections 70.2 to 70.4 of the *Act* that would impose a pecuniary burden on a user who did not agree to be bound by the terms of a licence fixed by the Copyright Board.

10. The unified textual, contextual and purposive interpretation of the tariff regime (sections 70.1-70.191 and subsection 68.2(1)), not considered by the Court in *CBC*, provide the clear and distinct authority that is absent from the text of sections 70.2 to 70.4. A tariff approved by the Board, whether interim or final, imposes a pecuniary burden on a user to pay the collective society when the user unfairly reproduces a work in the collective society's repertoire without proper authority.

11. The Court in *CBC* supported its conclusion by noting that its findings did not give rise to any prejudice to the collective society in question because the society had the right to initiate a proceeding for infringement in the event of the CBC's unauthorized reproduction of works in the collective society's repertoire. In the factual circumstances before the Court, the availability of the remedy for copyright infringement was non-prejudicial because the collective society would only be required to pursue a single user, the CBC, for any copyright infringement.

12. That factual situation is markedly different from the consequences arising from the decision below which require each of Access Copyright's thousands of affiliated copyright holders to address any unauthorized copying by multiple users (universities and other educational institutions) through multiple copyright infringement proceedings, the result sought to be avoided by the 1988 and 1997 amendments to the *Copyright Act.*[9]

13. Parliament crafted two separate schemes: a tariff-fixing scheme (ss. 70.1-70.191) initiated by a copyright collective society when consensual agreements are unattainable, and a licence-fixing scheme (ss. 70.2-70.4) that could be initiated by either a collective society or an

[9] Access Copyright Memorandum of Argument, paras. 61-71, AR, Tab 3, pp. 252-255

individual user. The textual and contextual differences between the two schemes which York labels "virtually identical" are different for a reason: to ensure that tariffs are an effective and mandatory enforcement mechanism for collective societies to employ in appropriate circumstances. To find otherwise would undo the entire rationale for Parliament's 1988 and 1997 amendments to the *Copyright Act*.

14. It is therefore *un*remarkable that Access Copyright did not cite *CBC* in its leave application as that decision simply does not begin to answer the questions in issue arising from the Federal Court of Appeal decision below.

York faculty: Extensive unauthorized copying with impunity

15. York criticizes Access Copyright for advancing "inflammatory allegations that were not proven at trial" to the effect that York is a serial infringer of copyright.[10] The evidence before the Federal Court and the findings of both Courts below confirmed that York's teaching faculty copied extensive portions of copyrighted works for which York had no permission and paid no licence fees or royalties.[11]

16. In particular, in respect to every relevant copy made from a copyrighted work that was captured in a jointly commissioned sample survey of copying events at York during the period September 2011 to December 2013[12], "York's reliance on permissions was misplaced and of no assistance."[13] Ultimately, York conceded at trial that it could not prove that *any* of these copies were made with appropriate permission from copyright holders.[14]

17. Both courts below otherwise found that York's self-proclaimed "Fair Dealing Guidelines" were not a policy of fair dealing. Copying up to the limits of the guidelines thus

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[10] York Memorandum of Argument, para. 6

[11] *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2020 FCA 77 ("Federal Court of Appeal Decision"), para. 1, AR, Tab 1-C; *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2017 FC 669 ("Federal Court Decision"), paras. 18, 78, 94, 97, 157-160, 237, 261, 296, 303, AR, Tab 2-A

[12] Federal Court Decision, paras. 88-89, AR, Tab 2-A

[13] Federal Court Decision, paras. 91, 93, 299, AR, Tab 2-A

[14] Federal Court Decision, para. 287, AR, Tab 2-A

resulted in numerous additional acts of copyright infringement. Moreover, faculty often exceeded those limits and were never held accountable, an example of York's "complete abrogation of any meaningful effort to ensure compliance with the guidelines" and "consistent with its wilfully blind approach to ensuring compliance with copyright obligations."[15]

The parties' respective applications for leave raise discrete issues

18. York argues that the only justification for granting Access Copyright's application for leave is the fact that York has filed its own application for leave to appeal. York argues that all issues arising from the decision below are "at large" and thus may be addressed by the Court.

19. York's application for leave to appeal does not raise any issue of public or national importance. Fair dealing has been considered by this Court on no fewer than three separate occasions. Based upon an extensive evidentiary record, both courts below found that York failed to establish that its self-proclaimed guidelines constituted a policy of fair dealing. Fair dealing was a discrete issue raised by York by way of counterclaim to Access Copyright's action seeking to enforce an approved Copyright Board tariff. The factually-suffused issue of fair dealing does not warrant this Court's attention.

20. In contrast, the legal issue raised by Access Copyright in its application for leave has never been considered by this Court. The Federal Court of Appeal and the Federal Court disagreed on the proper interpretation of the relevant provisions of the tariff regime (ss. 70.1 to 70.191 of the *Copyright Act*) and the tariff enforcement remedy (subsection 68.2(1) of the *Act*). That the issues raised by the parties in their respective applications for leave stand separate and apart is underscored by the separate awards of costs made by the Federal Court of Appeal in adjudging the issues raised by York in its appeal of the Federal Court decision.

September 4, 2020

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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[15] Federal Court Decision, paras. 28, 48, 58, 76, 79, 116-117, 244-245, AR, Tab 2-A

TABLE OF AUTHORITIES

CASES	Cited in paras.
Aecon Buildings v. Stephenson Engineering Ltd., 2011 SCC 33, [2011] 2 S.C.R. 560	2
Brine v. Industrial Alliance Insurance and Financial Services Inc., 2016 SCC 9, [2016] 1 S.C.R. 72	2
Canadian Broadcasting Corp. v. SODRAC 2003 Inc., 2015 SCC 57, [2015] 3 S.C.R. 615	3, 5
Canadian Copyright Licensing Agency (Access Copyright) v. York University, 2017 FC 669	15, 16, 17
York University v. Canadian Copyright Licensing Agency (Access Copyright), 2020 FCA 77	15