Date: 20080109

Docket: A-391-06

Citation: 2008 FCA 6

CORAM: **SEXTON J.A.**
SHARLOW J.A.
RYER J.A.

BETWEEN:

CANADIAN WIRELESS TELECOMMUNICATIONS ASSOCIATION,
BELL MOBILITY INC. AND
TELUS COMMUNICATIONS COMPANY

Applicants

and

SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA

Respondent

Heard at Toronto, Ontario, on October 22, 2007.

Judgment delivered at Ottawa, Ontario, on January 9, 2008.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: SEXTON J.A.
RYER J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] On August 18, 2006, the Copyright Board of Canada certified a Statement of Royalties entitled "SOCAN Tariff No. 24 – Ringtones (2003-2005)", [2006] C.B.D. No. 5 (QL). Tariff 24 authorizes the Society of Composers, Authors and Music Publishers of Canada ("SOCAN") to collect royalties on the wireless transmission of ringtones from wireless carriers to cellphones at the request of cellphone owners. Canadian Wireless Telecommunications Association and two of its members, Bell Mobility Inc. and Telus Communications Company, seek judicial review of that decision on the basis that Tariff 24 is not authorized by the *Copyright Act*, R.S.C. 1985, c. C-42.

Decision of the Copyright Board

[2] In certifying Tariff 24, the Copyright Board relied on paragraph 3(1)(*f*) of the *Copyright Act*, which reads in relevant part as follows (my emphasis):

3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right	3. (1) Le droit d'auteur sur l'œuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'œuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'œuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :
[…]	[…]
(*f*) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,	*f*) de communiquer au public, par télécommunication, une œuvre littéraire, dramatique, musicale ou artistique;
[…]	[…]
and to authorize any such acts.	Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

[3] The terms "musical work" and "telecommunication" are defined as follows:

"musical work" means any work of music or musical composition, with or without words, and includes any compilation thereof.	«œuvre musicale » Toute œuvre ou toute composition musicale — avec ou sans paroles — et toute compilation de celles-ci.
"telecommunication" means any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system.	«télécommunication » Vise toute transmission de signes, signaux, écrits, images, sons ou renseignements de toute nature par fil, radio, procédé visuel ou optique, ou autre système électromagnétique.

[4] The Copyright Board held that the transmission of a musical ringtone to a cellphone in the circumstances stated in Tariff 24 is a communication falling within paragraph 3(1)(*f*) of the *Copyright Act*.

Standard of Review

[5] The issue in this application is the interpretation of paragraph 3(1)(*f*) of the *Copyright Act*. The parties agree that the standard of review is correctness. I agree as well; see *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45, at paragraphs 48 to 50.

Facts

[6] The facts are undisputed. They are well and fully stated in the Board's decision. For the purposes of this application, only a summary is necessary.

[7] A ringtone is a digital audio file that may be stored in the memory of a cellphone and programmed to signal an incoming call. A ringtone may be any kind of sound, including music. A musical ringtone may be synthesized music, either monophonic (one note at a time) or polyphonic (up to sixteen notes at a time). A ringtone may also be an excerpt or clip taken from an original sound recording of a musical work.

[8] A cellphone is normally sold with one or more ringtones loaded in the cellphone memory. The customer may purchase additional ringtones and add them to the cellphone memory. By means of various promotional devices, wireless carriers invite their customers to purchase ringtones by ordering them from the wireless carrier's website.

[9] There are two methods by which ringtones are sold and distributed to customers from the website of a wireless carrier. One is by means of a "wireless application protocol" or "WAP". The

customer uses the cellphone to access and browse a digital catalogue maintained by the wireless carrier containing descriptions of ringtones. The customer sends a message to the wireless carrier identifying the chosen ringtone. For a fee, the wireless carrier transmits the chosen ringtone to the customer's cellphone, where it is immediately stored in the cellphone memory. Approximately 80% of ringtones are purchased this way.

[10] The other method uses a "short messaging service" or "SMS". A customer uses a computer to access and browse the ringtone catalogue on the website of the wireless carrier. The customer either reads a description of the ringtone or has the ringtone played. The subscriber then sends a message to the wireless carrier identifying the chosen ringtone. For a fee, the wireless carrier transmits a message to the customer's cellphone with the copy of the chosen ringtone file as an attachment, which is then saved in the cellphone memory.

[11] Either method of acquiring a ringtone for a cellphone involves a transmission of the digital audio file from the wireless carrier to the customer's cellphone, upon payment of a fee. Once the file is stored in the cellphone memory, the customer can access the file to play the ringtone or to use the ringtone as a signal for incoming calls. Neither of the transmission methods described permits the ringtone to be played or heard simultaneously with the transmission.

[12] Wireless carriers could use other ways of delivering ringtones to customers. For example, more ringtones could be loaded at the point of purchase, or ringtones could be sold as compact disc recordings which would then be copied to the cellphone memory. Neither method would be caught

by Tariff 24. However, neither of those alternatives would be as efficient from the point of view of the wireless carriers.

The suggestion of double compensation

[13] Through contracts with reproduction rights societies (Canadian Musical Reproduction Rights Agency Limited (CMRRA) and Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC)), the authors, composers and music publishers of musical ringtones are being compensated for the reproduction of musical works associated with ringtones.

[14] The applicants say that the authors, composers and music publishers of musical works should not be allowed to "split" the enforcement of their rights between different collectives and collect a second time for the same use of the musical works for which they are already being compensated. However, the applicants do not argue that the transmission of musical works by the methods described above is expressly or implicitly authorized by the contracts referred to above. Nor do the applicants argue that the existence of the agreements is sufficient, as a matter of law, to support the conclusion that Tariff 24 is invalid.

[15] It has long been established that under the *Copyright Act*, the right to reproduce a musical work and the right to communicate it to the public by telecommunication are separate statutory rights (*Bishop v. Stevens*, [1990] 2 S.C.R. 467). If the Copyright Board was correct to conclude that the transmission of a musical ringtone is the final step in a communication to the public by telecommunication, then Tariff 24 stipulates compensation for a right that is not covered by the

reproduction rights agreements. If the Copyright Board was wrong on that point, then Tariff 24 is not authorized by the *Copyright Act* and the decision of the Copyright Board to certify Tariff 24 cannot stand.

Royalty structures in other countries

[16] The parties have referred for various reasons to the royalty arrangements in other countries involving ringtone transmissions. Those arrangements illustrate that there are many statutory schemes and administrative techniques by which authors, composers and music publishers might be compensated for the various rights associated with the copyright in musical works. None of the foreign arrangements involve legislation that is sufficiently like the *Copyright Act* to assist in resolving the legal issues in this application.

Discussion

[17] The applicants' challenge to the legality of Tariff 24 is based on two alternative arguments. The first argument is that the transmission of a ringtone to a cellphone by one of the methods described above is not a "communication". The alternative argument is that it is not a "communication to the public".

(1) First argument: "Communication"

[18] The applicants argue, based on a contextual analysis of the *Copyright Act*, that a transmission is not the same thing as a communication, and therefore the use of the word "communication" must be understood to include only a transmission that is intended to be heard or perceived by the recipient simultaneously with or immediately upon the transmission.

[19] In my view, the applicants are proposing a meaning of the word “communication” that is too narrow. The word “communication” connotes the passing of information from one person to another. A musical ringtone is information in the form of a digital audio file that is capable of being communicated. The normal mode of communicating a digital audio file is to transmit it. The wireless transmission of a musical ringtone to a cellphone is a communication, whether the owner of the cellphone accesses it immediately in order to hear the music, or at some later time. The fact that the technology used for the transmission does not permit the cellphone owner to listen to the music during the transmission does not mean that there is no communication. In my view, in the context of a wireless transmission, it is the receipt of the transmission that completes the communication.

[20] This conclusion accords with the SOCAN case (cited above). In that case Justice Binnie, writing for the majority, said that the transmission of information over the internet is a communication once the information is received (see paragraph 45). It is not clear whether that point was in issue in that case, or the subject of argument. It may be *obiter dicta*. Even so, it is undoubtedly a true statement. In relation to the meaning of the word “communication”, I see no relevant distinction between the transmissions in issue in the SOCAN case and the transmissions in issue in this case. I conclude that the transmissions are communications.

[21] In support of its argument on the meaning of “communication”, the applicants rely heavily on the decision of the Exchequer Court in *Composers, Authors and Publishers Association of*

Canada Ltd. v. CTV Television Network Ltd., [1968] S.C.R. 676, affirming [1966] Ex. C.R. 872 (the "1968 CAPAC" case) and two later cases (discussed below) that follow the same reasoning.

[22] The 1968 CAPAC case involved CAPAC (a predecessor of SOCAN), which owned the copyright in certain musical works and authorized the broadcast of the musical works by television stations affiliated with CTV. To facilitate the broadcast, the musical works were videotaped. Rather than send copies of the videotape to the stations, CTV transmitted the contents of the videotape to its affiliates using the microwave facilities of Bell Telephone Co. CAPAC claimed that this was a breach of the previous version of paragraph 3(1)(*f*) of the *Copyright Act*, which read as follows:

(*f*) in case of any literary, dramatic, musical or artistic work, to communicate such work by radiocommunication; ...	*f*) s'il s'agit d'une œuvre littéraire, dramatique, musicale ou artistique, de transmettre cette œuvre au moyen de la radiophonie…

[23] At that time, the term "musical work" was defined as "any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced". Justice Pigeon, writing for the Supreme Court of Canada, concluded that paragraph 3(1)(*f*), as it then read, did not apply.

[24] In reaching that conclusion, Justice Pigeon did not say that there had been no communication. Rather, he found that what had been communicated was not a "musical work" (a graphic representation of the melody and harmony), but a "performance" of the work, which was not an act within the scope of paragraph 3(1)(*f*). At that time, the word "performance" was defined as "any acoustic representation of a work or any visual representation of any dramatic action in a

work, including a representation made by means of any mechanical instrument or by radio communication.”

[25] Justice Pigeon did not stop at his literal interpretation of paragraph 3(1)(*f*), but went on to consider its legislative and historical context. He found nothing in that context to derogate from the literal interpretation. Paragraph 3(1)(*f*), as originally enacted in 1931, was intended to give effect to section 1 of Article 11*bis* of the *Berne Convention* (Rome Copyright Convention, 1928), which read as follows:

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by radiocommunication.	(1) Les auteurs d'œuvres littéraires et artistiques jouissent du droit exclusif d'autoriser la communication de leurs œuvres au public par la radiodiffusion.

[26] Justice Pigeon concluded that this provision of the *Berne Convention* contemplates public performances by radio broadcasting. That is consistent with the general definition of "copyright" in section 3 of the *Copyright Act*, which includes all rights of reproduction, and also includes all rights to perform the work, but only if the performance is “in public”. The microwave transmissions facilitated broadcasts to the public by the CTV affiliate stations, as authorized by CAPAC, but they were not themselves communications to the public.

[27] In 1988, the *Copyright Act* was amended, primarily to give effect to the *Free Trade Agreement* (*Canada-United States Free Trade Implementation Act*, S.C. 1988, c. 65). At that time, the definition of “telecommunication” (quoted above) was added to the *Copyright Act*, and other provisions were added to deal with broadcasting issues that are not relevant to this application. At

the same time paragraph 3(1)(*f*) was amended to become the version that is applicable to this case. The 1988 version of paragraph 3(1)(*f*) is quoted above but is repeated here for ease of reference (my emphasis):

(*f*) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication.	*f*) de communiquer au public, par télécommunication, une œuvre littéraire, dramatique, musicale ou artistique.

[28] The 1988 version of paragraph 3(1)(*f*) was considered by this Court in two cases heard at the same time in 1993. The first case, *CTV Television Network Ltd. v. Canada (Copyright Board) (F.C.A.)*, [1993] 2 F.C. 115, involved facts that were similar to the facts in the 1968 CAPAC case, except that the transmission of musical works from CTV to its affiliate stations was by satellite rather than microwave. The Court followed the reasoning in the 1968 CAPAC case to reach the same result, namely that the transmissions were not within the scope of paragraph 3(1)(*f*). The Court also concluded that the transmissions did not constitute performances of the musical works in public.

[29] In the second case, *Canadian Cable Television Assn. v. Canada (Copyright Board) (F.C.A.)*, [1993] 2 F.C. 138, the Court again followed the reasoning in the 1968 CAPAC case to conclude that the transmission of a musical work to cable subscribers is not a communication of the work to the public within the meaning of paragraph 3(1)(*f*). However, the transmission was held to be a performance of the musical work in public, because the result of the transmission was a visual and acoustic representation of the musical work to a broad segment of the public.

[30] In my view, the 1968 CAPAC case and the two subsequent cases from this Court in 1993 cast no doubt on the conclusion that the transmissions in issue in this case are communications.

(2) Alternative argument: Communication "to the public"

[31] The only remaining question is whether the transmission of ringtones from a wireless carrier's website to a customer's cellphone is, as the Copyright Board found, the last step in the communication of the ringtone "to the public".

[32] The group consisting of all of the customers of a wireless carrier is a group that is sufficiently large and diverse that it may fairly be characterized as "the public". The applicants do not argue the contrary. The essence of their argument is that when a wireless carrier offers to all of its customers an opportunity to purchase ringtones, the fact that the customers respond to the offer one by one, and receive copies of the ringtones by wireless transmission one by one, necessarily means that each transmission is a private communication, and therefore there is no communication of to the public. Put another way, the applicants' proposition is that a series of identical communications, no matter how numerous, cannot be a communication to the public if each communication is initiated by the recipient's request.

[33] The only case of any assistance on this point is the decision of the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 (the "CCH case"). That case involved a request-based photocopy service operated by the Law Society of Upper Canada to members, judges and other legal researchers. The photocopied material consisted of

excerpts from works held in the Great Library in Toronto. One of the means by which the requested material was delivered was by fax, which is a method of telecommunication.

[34] Among the many issues in the CCH case was whether the transmission of copies by fax on request in accordance with the Great Library's photocopy service was a communication to the public by telecommunication within the meaning of paragraph 3(1)(*f*) of the *Copyright Act*. The Court held that it was not. As the reason for that conclusion is very short, I reproduce it in its entirety (paragraphs 77 to 79, per Chief Justice McLachlin, writing for the Court):

> [77] At trial, the publishers argued that the Law Society's fax transmissions of copies of their works to lawyers in Ontario were communications "to the public by telecommunication" and hence infringed s. 3(1)(*f*) of the *Copyright Act*. The trial judge found that the fax transmissions were not telecommunications to the public because they "emanated from a single point and were each intended to be received at a single point" (para. 167). The Court of Appeal agreed, although it allowed that a series of sequential transmissions might constitute an infringement of an owner's right to communicate to the public.
>
> [78] I agree with these conclusions. The fax transmission of a single copy to a single individual is not a communication to the public. This said, a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright. However, there was no evidence of this type of transmission having occurred in this case.
>
> [79] On the evidence in this case, the fax transmissions were not communications to the public. I would dismiss this ground of cross-appeal.

[35] Based on this reasoning, it seems to me that in determining whether paragraph 3(1)(*f*) applies to the transmission of a musical work in the form of a digital audio file, it is not enough to ask whether there is a one-to-one communication, or a one-to-one communication requested by the recipient. The answer to either of those questions would not necessarily be determinative because a series of transmissions of the same musical work to numerous different recipients may be a

communication to the public if the recipients comprise the public, or a significant segment of the public.

[36] The Copyright Board concluded that the present case involves a series of transmissions of the same works to different recipients, and thus to the public. That conclusion is explained as follows at paragraph 68 of its reasons:

> Wireless carriers are trying to sell as many copies of every single musical ringtone as possible to maximize sales and profit. They intend, indeed they wish for, a series of repeated transactions of the same work to numerous recipients. This, in our opinion, amounts to a communication to the public.

[37] The Copyright Board's description of the relevant facts is an apt one, and it is well supported by evidence in the record.

[38] The applicants argue that the Copyright Board erred in its appreciation of the reference to a series of transmissions. They rely on the decision of this Court in the CCH case ([2002] 4 F.C. 213), and in particular the following comments of Justice Linden at paragraph 100:

> [100] The Trial Judge held (at paragraph 167) that a single telecommunication emanating from a single point and intended to be received at a single point is typically not a communication to the public. I agree. In my view, the ordinary meaning of the phrase "to the public" indicates that a communication must be aimed or targeted toward "people in general" or "the community" (see the *New Oxford Dictionary of English*, s.v. "public" (Oxford: Clarendon Press, 1998). Article 1721(2) of NAFTA, *supra*, which is not binding on this Court but is nevertheless helpful since "public" is not otherwise defined, states that the public includes "any aggregation of individuals intended to be the object of, and capable of perceiving communications". A communication that is targeted only at a segment of the public, may however, also be a communication to the public. Paragraph 2.4(1)(a) (as enacted by S.C. 1997, c. 24, s. 2) […] clarifies that a communication may be to the public if it is "intended to be received by" a "part of the public", specifically persons who occupy apartments, hotel rooms, or dwelling units in the same building. Thus, to be "to the public" a communication must be targeted at an aggregation of individuals, which is more than a single person but not

> necessarily the whole public at large.

[39] In my view, these comments are not intended to be a comprehensive description of the meaning of “communication to the public”. There is no reason to believe that in making these comments, Justice Linden was contemplating a series of one-to-one transmissions to individuals who together comprise a group that may fairly be described as the public, as in this case.

[40] The applicants also point out that the transmissions in this case are not made “openly and without concealment” and therefore lack an essential characteristic of being “public”. This is a reference to *Canadian Cable Television Assn. v. Canada (Copyright Board) (F.C.A.)*, cited above, in which this Court held that the transmission of a musical work by cable television was a performance of the work “in public”. Justice Létourneau, writing for the Court, explained that conclusion as follows:

> The appellant also contends that, should this Court find that its transmission amounts to a performance, such performance is not a public performance as 97% of all cable television subscribers in Canada are residential subscribers and the transmission is to the private homes of the various subscribers.
>
> I would have thought on a mere common sense basis that when the Prime Minister of Canada addresses the nation, either from his home or his private office, and reaches the citizens in their homes by means of radio and television, he appears in public and performs in public. I would have been content to leave it at that had it not been for early conflicting decisions on this issue.
>
> In the case of *Canadian Admiral Corporation Ltd. v. Rediffusion, Inc.* [(1954) Ex.C.R. 382], the Court held that radio or television broadcasts do not amount to performances in public when received in private homes. […]
>
> With respect, I prefer and adopt the contrary views expressed by English, Indian and Australian authorities. They are consistent with our Act. They take a realistic view of the impact and effect of technological developments and they are consistent with the plain and usual meaning of the words "in public", that is to say openly, without concealment and to the knowledge of all.

[41] The question in that case was whether a performance was in public, not whether a communication had been made to the public. The words “openly and without concealment” were used to describe the nature of the intended and potential audience for a performance transmitted by television, as distinguished from a private performance in a home.

[42] In the present case, no one except the wireless carrier and the recipient normally would be aware of a particular transmission of a ringtone to a cellphone, and in that sense the transmission is not made “openly”. However, it does not necessarily follow that paragraph 3(1)(*f*) does not apply. The transmission of a television program is a performance in public, even if no one is watching it or everyone who is watching it is doing so in private, because it is made available to a sufficiently large and diverse group of people. Similarly, in this case all of the customers of a wireless carrier (that is, all members of the relevant segment of the public) have access to all of the ringtones offered by that wireless carrier. The fact that the ringtones are offered to the public, or to a significant segment of the public, supplies the requisite degree of “openness”.

[43] In my view, the conclusion of the Copyright Board that the transmissions in issue in this case are within the scope of paragraph 3(1)(*f*) of the *Copyright Act* is consistent with the language of that provision and its context. It also accords with common sense. If a wireless carrier were to transmit a particular ringtone simultaneously to all customers who have requested it, that transmission would be a communication to the public. It would be illogical to reach a different result simply because the transmissions are done one by one, and thus at different times.

Conclusion

[44] In my view, the Copyright Board was correct in law to conclude that the transmission of ringtones by wireless carriers to their customers on request is a communication to the public by telecommunication within the meaning of paragraph 3(1)(*f*) of the *Copyright Act*. I would dismiss this application with costs.

"K. Sharlow"
J.A.

"I agree.
J. Edgar Sexton J.A."

"I agree.
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-391-06
STYLE OF CAUSE:	Canadian Wireless Telecommunications Association, Bell Mobility Inc. and Telus Communications Company v. Society of Composers, Authors and Music Publishers of Canada
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 22, 2007
REASONS FOR JUDGMENT:	SHARLOW J.A.
CONCURRED IN BY:	SEXTON J.A. RYER J.A.
DATE:	January 9, 2008

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