Federal Court of Appeal  Cour d'appel fédérale

Date: 20130403

Docket: A-119-12

Citation: 2013 FCA 91

CORAM: **SHARLOW J.A.**
GAUTHIER J.A.
MAINVILLE J.A.

BETWEEN:

THE GOVERNMENTS OF THE PROVINCES OF MANITOBA, NEW BRUNSWICK, NOVA SCOTIA, PRINCE EDWARD ISLAND, AND SASKATCHEWAN

Applicants

and

THE CANADIAN COPYRIGHT LICENSING AGENCY
Operating as "ACCESS COPYRIGHT"

Respondent

Heard at Ottawa, Ontario, on February 12, 2013.

Judgment delivered at Ottawa, Ontario, on April 3, 2013.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: SHARLOW J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] The governments of the Provinces of Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan (the Applicants) seek judicial review of the decision of Copyright Board of Canada (the Board) dismissing their objection that the Board has no jurisdiction to establish a tariff that would apply to them in respect of the reprographic reproduction of copyrighted works in the repertoire of the Canadian Copyright Licensing Agency, operating as "Access Copyright" (Access).

[2] Before the Board, the Applicants and a number of other provinces and territories who are not parties to this application argued that by virtue of section 17 of *the Interpretation Act*, R.S.C. 1985, c. I-21, they are entirely immune from the *Copyright Act*, R.S.C. 1985, c. C-42 (the *Act*) and therefore would not be subject to the proposed tariffs for the years 2005-2009 and 2010-2014 filed by Access for certification by the Board pursuant to section 70.15(1) of the *Act*. Section 17 of the *Interpretation Act* reads as follows:

17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.	**17.** Sauf indication contraire y figurant, nul texte ne lie Sa Majesté ni n'a d'effet sur ses droits et prérogatives.

[3] The Board concluded that the *Act*, construed contextually, is intended to bind the Crown, and on that basis rejected the Applicants' claim of Crown immunity.

[4] The Applicants challenge this finding. For the reasons that follow, I have concluded that their application should be dismissed.

BACKGROUND

[5] On March 31, 2004 and March 31, 2009 Access filed with the Board proposed tariffs relating to the reproduction of published works in its repertoire by employees of all provincial and territorial governments (with the exception of Quebec). All these provinces and territories filed timely written objections with the Board.

[6] Further to a joint request by all those concerned, the Board agreed to hear a preliminary challenge to its statutory power under the *Act* to consider the proposed tariffs. In the course of this challenge, the Applicants argued that the presumption of Crown immunity applies and the *Act* does not bind them.

[7] The Board released its decision dismissing this challenge on January 5, 2012, with accompanying reasons on March 15, 2012 (Reasons). Since then, the Board has proceeded to hear the parties' representations on the merits, and the Applicants have participated in the said hearing on a without prejudice basis.

[8] As mentioned, some of the original objectors before the Board have decided not to challenge the decision under review. Also, Access did not seek the Board's approval for a tariff in respect of the federal government or the provinces of Ontario, British Columbia, and Quebec. Ontario, British Columbia and the federal government have each made an agreement with Access. The province of Quebec has done the same with the parallel collective societies in Quebec.

[9] The factual underpinning of the Applicants' claim for Crown immunity is set out in a jointly filed Statement of Agreed Facts.

[10] At this stage, it is worth noting that the Applicants have long standing policies and practices whereby they abide by the provisions of the *Act* by seeking authorization and paying royalties to copyright holders. They emphasize that they intend to continue these practices, which they consider to be voluntary.

The Board's decision

[11] First, the Board rejected the argument of Access that the Applicants' claim for Crown immunity conflicts with the common law principle that there can be no expropriation without just compensation. It held that the common law cannot overcome the clear statutory language of section 17 of the *Interpretation Act*. In its view, the fact that the Applicants would be prejudiced if the proposed tariffs were approved and imposed on them is sufficient to entitle them to assert their claim to Crown immunity.

[12] Relying in part on *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551 (*Eldorado*), the Board noted at paragraph 23 of the Reasons that section 17 of the *Interpretation Act* creates a presumption that the Crown is not bound by any statute, but that presumption is rebutted where it can be demonstrated that there exists a contrary intention to bind the Crown.

[13] After agreeing with the parties that "there are no expressly binding words which establish that the Crown is bound by the *Act*" (paragraph 28 of the Reasons), the Board proceeded with a contextual analysis of the *Act*, as required by the modern rule of statutory interpretation, to determine whether there are other provisions from which it might be inferred that the Crown is intended to be bound by the *Act*.

[14] The Applicants relied on section 12 of the *Act*, which reads as follows:

12. Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the	**12.** Sous réserve de tous les droits ou privilèges de la Couronne, le droit d'auteur sur les œuvres préparées ou publiées par l'entremise, sous la direction ou la surveillance de Sa Majesté ou d'un ministère du gouvernement, appartient, sauf stipulation conclue avec l'auteur, à Sa

author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.	Majesté et, dans ce cas, il subsiste jusqu'à la fin de la cinquantième année suivant celle de la première publication de l'œuvre.

[15] Section 12 appears in Part I of the *Act*, which defines the rights of copyright holders. After carefully and thoroughly considering the legislative history and evolution of section 12, the Board rejected the Applicants' argument that section 12 should be read as expressly providing for Crown immunity from the *Act*. The Board's analysis began with a recognition of the history of Crown copyright under the Crown prerogative particularly its right to print and publish**.** This right goes back hundreds of years, and includes the right to print and publish statutes, court decisions, and authorized versions of the Bible, among other things. The Board expressed the view that, "Crown copyright under the Crown prerogative is wider in scope and duration than what section 12 provides" (see paragraph 50 of the Reasons). It then reasoned that section 12 must be read in context with section 89, which provides in part that "[n]o person is entitled to copyrights otherwise than under and in accordance with this *Act*". In the absence of the opening phrase of section 12, section 89 would operate to eliminate all remaining common law copyright held by the Crown. The Board concluded that the words "without prejudice to any right or privilege of the Crown" in section 12 of the *Act* are necessary to maintain that common law Crown prerogative, and the scope of section 12 should be limited accordingly.

[16] The Board noted that Parliament introduced an exception targeting an emanation of the federal Crown in 1987, and added a large number of very specific exceptions for both the federal and provincial Crowns in 1997 (see paragraph 66 of the Reasons). Thus, apart from section 12, the

Act contains a score or more of exceptions that expressly benefit the Crown such as those that benefit the Crown at large (for example, paragraph 45.1(b) and subsection 32.1(1); see paragraph 60 of the Reasons), those that benefit educational institutions (for example, subsection 29.4(2) and section 30.3; see paragraphs 61-63 of the Reasons) and those that concern Library and Archives Canada (for example, section 30.3; see paragraphs 64-65 of the Reasons).

[17] The Board then held at paragraph 66 of its Reasons:

> The number and the detailed nature of these exceptions seem to indicate a purposeful, explicit intention on the part of Parliament to identify and circumscribe activities that do not infringe copyright. If the Crown benefited from an overall immunity from the *Act*, why would Parliament spend so much time and effort in crafting these exceptions?

[18] The Board rejected the Applicants' argument that these exceptions were adopted out of an abundance of caution or as historical incidents, as in *Alberta Government Telephones v. Canadian Radio-Television & Telecommunications Commission*, [1989] 2 S.C.R. 225 (*AGT*). The Board distinguished *AGT*, where a single, somewhat unclear reference to "government railways" could be explained away in this manner.

[19] The Board then drew upon *R. v. Ouellette*, [1980] 1 S.C.R. 568 (*Ouellette*), and concluded at paragraph 68 of the Reasons:

> […] when analysing the whole of the *Act* contextually, we are irresistibly drawn to a logical conclusion that the Act generally binds the Crown.

[20] The Board went on to consider the implications of a finding that the Crown is immune from the *Act*. In its view, this would mean that the Board would have to reject on its own motion any tariff filed in respect of any emanation of the Crown, unless immunity had been waived. This would

also mean that Crown corporations such as Telefilm, the National Film Board, and the CBC could use copyrighted works without regard to the rights of their authors or copyright holders. This would leave a significant gap in the enforcement of copyright by rights holders which, in the Board's view, supports the logical implication that the Crown must be bound (paragraph 73 of the Reasons).

[21] The Board added at paragraph 75 of the Reasons that the *Act* would make no sense unless it bound the Crown, given the reach of government action in the copyright market and the extent to which governments must rely on the *Act* to enforce their own copyrights. That said, the Board noted that excluding the Crown and its agents from the reach of the *Act* would not totally frustrate the *Act* (See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (*Oldman River*)). This finding should, however, be considered together with the Board's statement at paragraph 28 of the Reasons that "it will not be necessary to decide whether there would be a resulting absurdity were the Crown not so bound", given that Parliament's intention is revealed when the provisions are read in the context of other provisions.

[22] Having so concluded, the Board stated that no further analysis would be required to dismiss the preliminary objection. Nevertheless, given the importance of the legal issues involved, the Board explained that it would be useful to comment on whether in any event the Applicants had waived their immunity either in relation to the totality of the provisions contained in the *Act*, or alternatively, in relation to certain of its provisions.

[23] The Board considered the applicable legal principles set out in *Sparling v. Québec (Caisse de dépôt & placement)*, [1988] 2 S.C.R. 1015 (*Sparling*), and then noted that the conduct of the

Applicants since the first adoption of the *Act* spoke volumes. The Applicants' behaviour, coupled with the fact that they have enjoyed benefits under sections 3, 15, 18 and 21 of the *Act* and exercised their rights in relation to a number of related provisions, showed that they had waived Crown immunity (see paragraph 82 of the Reasons). This did not mean that, in the future, the Applicants could not reclaim their immunity if any, but that simply, at this stage, they could not do so.

THE ISSUES

[24] The Applicants submit that the Board erred in law when it concluded that the *Act* binds them by necessary implication. In that respect, they advance four main points:

a. the Board misapplied *AGT* by failing to abide by the Supreme Court of Canada's direction that the necessary implication exception should be narrowly confined (*AGT* at page 277);

b. the Board erred by finding that the presence of exceptions that benefit the Crown necessarily imply that the Crown is bound by the *Act*;

c. the Board erred by reading words into section 12 of the *Act* in order to restrict the introductory words of that section to a Crown prerogative relating to the printing and publishing of works; and

d. the Board erred by considering the possible consequences of a finding that the Crown is immune to the *Act*.

[25] With respect to the Board's *obiter* that the Applicants had waived their immunity, if indeed they were immune from the *Act*, the Applicants claim that the Board misunderstood the test to be applied. They argue that the Board failed to appreciate that there must be a sufficient nexus between the benefits and the burdens involved to apply this doctrine. They advance that the Board misapplied the said test to the facts of this matter, failing to appreciate that the Applicants' practice of voluntarily respecting the rights of copyright holders was simply the result of the Crown trying to act as a good citizen, as was found by the Ontario Court of Appeal in *Collège d'arts appliqués & de technologie La Cité collégiale v. Ottawa (City)* (1998), 37 O.R. (3d) 737 (OCA) at paragraph 19. Given the conclusion I have reached on the other grounds of appeal, I do not consider it necessary to consider this issue, and I have not done so.

ANALYSIS

[26] As this application for judicial review concerns a question of law of general application in respect of the *Act*, the standard of review is correctness (*Rogers v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at paragraphs 10 and 20).

[27] Before considering the issues, it is worth noting that, at the hearing, the Applicants confirmed that they are not relying on any constitutional argument in this case. They also confirmed that despite what appears in paragraph 69 of the Board's Reasons, they were and still are seeking a declaration that they are immune from the *Act* as a whole, not only in respect of the proposed tariffs in the current proceeding before the Board.

[28] The principles to be applied in determining whether the Crown is immune from a particular statute on the basis of section 17 of the *Interpretation Act* are now well established. In *Oldman River*, the most recent pronouncement of the Supreme Court on this issue, Laforest J. summarized the situation as follows, at pages 52-53:

> However, any uncertainty in the law on these points was put to rest by this Court's recent decision in *Alberta Government Telephones, supra*. After reviewing the authorities, Dickson C.J. concluded, at p. 281:
>
> > In my view, in light of *PWA* [*Her Majesty in right of the Province of Alberta v. Canadian Transportation Commission*, [1978] 1 S.C.R. 61] and *Eldorado* [*supra*], the scope of the words "mentioned or referred to" must be given an interpretation independent of the supplanted common law. However, the qualifications in *Bombay* [*Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58] are based on sound principles of interpretation which have not entirely disappeared over time. It seems to me that the words "mentioned or referred to" in s. 16 [now s. 17 of the *Interpretation Act*] are capable of encompassing: (1) expressly binding words ("Her Majesty is bound"); (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette, supra*; and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a guideline for when a statute has clearly conveyed an intention to bind the Crown.
>
> In my view, this passage makes it abundantly clear that a contextual analysis of a statute may reveal an intention to bind the Crown if one is irresistibly drawn to that conclusion through logical inference.

[29] Thus, once the Board acknowledged in its analysis that there is no section stating clearly that "this *Act* shall bind her Majesty" (first prong of the exception), it had to consider, through a purposive and contextual statutory analysis, whether it could discern a clear parliamentary intention to bind the Crown (second prong of the exception). Only if it were unable to find such a clear intention would it have to proceed to the next step of determining whether the third prong of the exception provided for in relation to section 17 applies (frustration or absurdity).

[30] To rebut the presumption in section 17 of the *Interpretation Act*, there must be a clear parliamentary intention to bind the Crown, or, to use the words of La Forest J. in *Oldman River*, one must be irresistibly drawn, through logical inference, to the conclusion that there is an intention to bind the Crown. The search for parliamentary intention must be undertaken though a contextual interpretation of the statute. In my view, the Board understood this and applied the proper approach when it undertook its task.

[31] As always, context matters. *AGT* did not change the law in *Ouellette*. On the contrary, it confirmed it (see *AGT* at pages 279-280). Different results occur when the courts interpret different statutes within their different contexts. I do not agree with the applicants that the Board gave too much weight to the exceptions targeting the Crown or its agents in this case.

[32] I turn now to a detailed consideration of the provisions of the *Act* which are relevant to the issues in this case. I begin with the objectives of the *Act* which were described in *Reference re Broadcasting Act, S.C. 1991 (Canada),* 2012 SCC 68 at paragraph 36 as follows:

> **36** The *Copyright Act* is concerned both with encouraging creativity and providing reasonable access to the fruits of creative endeavour. These objectives are furthered by a carefully balanced scheme that creates exclusive economic rights for different categories of copyright owners in works or other protected subject matter, typically in the nature of a statutory monopoly to prevent anyone from exploiting the work in specified ways without the copyright owner's consent. It also provides user rights such as fair dealing and specific exemptions that enable the general public or specific classes of users to access protected material under certain conditions. (See, e.g., *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at paras. 11-12 and 30; *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772, at para. 21; D. Vaver, *Intellectual Property Law*: *Copyright, Patents, Trade-marks* (2nd ed. 2011), at pp. 34 and 56). …

[33] Section 12 of the *Act* is an important part of the contextual analysis. As mentioned above, it is found in Part I of the *Act*. Part I is entitled "Copyright and Moral Rights in Works". It deals with the rights attached to copyrighted works, the owners, and the duration of said copyright. Part III of the *Act* is entitled "Infringement of Copyright and Moral Rights and Exceptions to Infringement", and it is where one finds a score or more of exceptions that quite explicitly relate or apply to the Crown (federal and provincial).

[34] Having carefully examined the wording of section 12 in its overall context, including the structure of the *Act*, its legislative history and evolution, and other provisions, such as section 89, I agree with the Board that the words "[w]ithout prejudice to any right or privilege of the Crown" set out in section 12 are intended to refer to and preserve the Crown's rights and privileges of the same general nature as copyright that may not fall within the meaning of the rest of this provision. These rights and privileges could otherwise be excluded by the general principle set out in section 89 which provides that no person is entitled to copyright otherwise than under and in accordance with the *Act* or any other Act of Parliament.

[35] I turn now to the various exceptions or user rights set out in Part III in favour of the Crown and its agents. However, a few preliminary comments are appropriate.

[36] First, the Applicants appear to say that these exceptions should all be disregarded as the Court should deduce the legislator's intention from the first version of the *Act*, adopted in 1921.

[37] Like the Board, I believe that section 17 must be applied to construe the *Act* as it now stands. In fact, the Applicants included in Volume IV of their record the most recent amendments to the *Act*, which came into force in June of 2012. These include a number of additional exceptions dealing with new technologies, among other things, as well as detailed provisions in respect of available remedies that, in my view, confirm Parliament's intention as expressed by the Board when construing the *Act* before them.

[38] Second, the Board noted that the parties felt that the parliamentary debates shed little light on the meaning of section 12 or on the immunity issue *per se*. However, I observe that the debates indicate that there was a strong opposition to the large number of exceptions targeting the Crown or its agents included in Bill C-32 which was adopted in 1997. These exceptions were seen to be an unwarranted limitation of rights of copyright holders under the *Act* in favour of governmental organizations (*House of Commons Debates*, (4 June 1997) at 3442-3443 (Mr. Louis Plamondon (Richelieu, BQ)), at 3460 (Mrs. Suzanne Tremblay (Rimouski-Témiscouata, BQ), and at 3461-3462 (Mrs. Christiane Gagnon (Québec, BQ)). There is no reference anywhere to the fact that these exceptions did not really constitute a restriction on the rights of copyright holders given that, in any event, the federal and provincial Crowns and their agents were immune, and these provisions were included out of an abundance of caution. This would certainly have quelled all protest. Instead, the Parliamentary Secretary to the Deputy Prime Minister and the Minister of Canadian Heritage responsible for the Bill stated early on that the exceptions were proposed for reasons of public interest and that they responded to real concerns (*House of Commons Debate*s, (13 March 1997) at 9031 (Mr. Guy H. Arseneault (Parliamentary Secretary to Deputy Prime Minister and Minister of Canadian Heritage, Lib.)).

[39] That said, aside from the high number of exceptions noted by the Board, many are very detailed. They are also subject to conditions which would be illogical in the absence of a clear intent to otherwise bind the Crown. A few illustrations will suffice to clarify what I mean here.

[40] For my first illustration I will use one of the exceptions dealing with educational institutions. The definition of "educational institution" (at section 2 of the *Act*) is particularly clear. It includes:

"educational institution" means	« établissement d'enseignement » :
…	[…]
(*c*) a department or agency of any order of government, or any non-profit body, that controls or supervises education or training referred to in paragraph (*a*) or (*b*), or	*c*) ministère ou organisme, quel que soit l'ordre de gouvernement, ou entité sans but lucratif qui exerce une autorité sur l'enseignement et la formation visés aux alinéas *a*) et *b*);

[41] The exception set out in subsection 29.7 provides:

29.7 (1) Subject to subsection (2) and section 29.9, it is not an infringement of copyright for an educational institution or a person acting under its authority to	**29.7** (1) Sous réserve du paragraphe (2) et de l'article 29.9, les actes ci-après ne constituent pas des violations du droit d'auteur s'ils sont accomplis par un établissement d'enseignement ou une personne agissant sous l'autorité de celui-ci :
(*a*) make a single copy of a work or other subject-matter at the time that it is communicated to the public by telecommunication; and	*a*) la reproduction à des fins pédagogiques, en un seul exemplaire, d'une œuvre ou de tout autre objet du droit d'auteur lors de leur communication au public par télécommunication;
(*b*) keep the copy for up to thirty days to decide whether to perform the copy for educational or	*b*) la conservation de l'exemplaire pour une période maximale de trente jours afin d'en déterminer la

training purposes.	valeur du point de vue pédagogique.
(2) An educational institution that has not destroyed the copy by the expiration of the thirty days infringes copyright in the work or other subject-matter unless it pays any royalties, and complies with any terms and conditions, fixed under this Act for the making of the copy.	(2) L'établissement d'enseignement qui n'a pas détruit l'exemplaire à l'expiration des trente jours viole le droit d'auteur s'il n'acquitte pas les redevances ni ne respecte les modalités fixées sous le régime de la présente loi pour la reproduction.
(3) It is not an infringement of copyright for the educational institution or a person acting under its authority to perform the copy in public for educational or training purposes on the premises of the educational institution before an audience consisting primarily of students of the educational institution if the educational institution pays the royalties and complies with any terms and conditions fixed under this Act for the performance in public.	(3) L'exécution en public, devant un auditoire formé principalement d'élèves de l'établissement, de l'exemplaire dans les locaux de l'établissement et à des fins pédagogiques, par l'établissement ou une personne agissant sous l'autorité de celui-ci, ne constitue pas une violation du droit d'auteur si l'établissement acquitte les redevances et respecte les modalités fixées sous le régime de la présente loi pour l'exécution en public.
[Emphasis added]	[mon souligné]

[42] Further on, the legislator provides that the institution will not have the right to the exception set out in subsection 29.7(1) where the communication to the public by telecommunication was obtained by illegal means (section 29.8 of the *Act*).

[43] This is only one of many similar exceptions targeting emanations of the Crown, but it is sufficient to show how far we are from the scenario described by Dickson C.J.C. in *AGT* at pages 281-282. In our case, the exceptions cannot be explained away.

[44] A further illustration is found in the additional provisions added to the *Act* in 2012. The legislator provides at subsection 41.1(1) that no person shall attempt to circumvent technological protection measures relating to copyrighted works. Further, subsection 41.2 provides that:

41.2 If a court finds that a defendant that is a library, archive or museum or an educational institution has contravened subsection 41.1(1) and the defendant satisfies the court that it was not aware, and had no reasonable grounds to believe, that its actions constituted a contravention of that subsection, the plaintiff is not entitled to any remedy other than an injunction.	**41.2** Dans le cas où le défendeur est une bibliothèque, un musée, un service d'archives ou un établissement d'enseignement et où le tribunal est d'avis qu'il a contrevenu au paragraphe 41.1(1), le demandeur ne peut obtenir qu'une injonction à l'égard du défendeur si celui-ci convainc le tribunal qu'il ne savait pas et n'avait aucun motif raisonnable de croire qu'il avait contrevenu à ce paragraphe.
[Emphasis added]	[Mon souligné]

[45] Then, in a totally different context, paragraph 45(1)(b) of the *Act* provides that it is lawful for a person to do the following:

45. (1) Notwithstanding anything in this Act, it is lawful for a person	**45.** (1) Malgré les autres dispositions de la présente loi, il est loisible à toute personne :
…	[…]
(*b*) to import for use by a department of the Government of Canada or a province copies of a work or other subject-matter made with the consent of the owner of the copyright in the country where it was made;	*b*) d'importer, pour l'usage d'un ministère du gouvernement du Canada ou de l'une des provinces, des exemplaires — produits avec le consentement du titulaire du droit d'auteur dans le pays de production — d'une œuvre ou d'un autre objet du droit d'auteur;
…	[…]
[Emphasis added]	[Mon souligné]

[46] Turning back to the 1997 additions to the *Act*, subsection 30.3(1) sets out another scenario where an educational institution, library, archive or museum's actions will not constitute infringement. However, this scenario is subject to strict conditions set out in subsection 30.3(2):

30.3 (1) An educational institution or a library, archive or museum does not infringe copyright where	**30.3** (1) Un établissement d'enseignement, une bibliothèque, un musée ou un service d'archives ne viole pas le droit d'auteur dans le cas où :
…	[…]
(2) Subsection (1) only applies if, in respect of a reprographic reproduction,	(2) Le paragraphe (1) ne s'applique que si, selon le cas, en ce qui touche la reprographie :
(*a*) the educational institution, library, archive or museum has entered into an agreement with a collective society that is authorized by copyright owners to grant licences on their behalf;	*a*) ils ont conclu une entente avec une société de gestion habilitée par le titulaire du droit d'auteur à octroyer des licences;
(*b*) the Board has, in accordance with section 70.2, fixed the royalties and related terms and conditions in respect of a licence;	*b*) la Commission a fixé, conformément à l'article 70.2, les redevances et les modalités afférentes à une licence;
(*c*) a tariff has been approved in accordance with section 70.15; or	*c*) il existe déjà un tarif pertinent homologué en vertu de l'article 70.15;
(*d*) a collective society has filed a proposed tariff in accordance with section 70.13.	*d*) une société de gestion a déposé, conformément à l'article 70.13, un projet de tarif.
[Emphasis added]	[Mon souligné]

[47] In my view, the references in the *Act* to very strict conditions, to tariffs fixed by the Board, to the consent of the copyright owners, and to the power of the court when the defendant is an

"educational institution", including a federal or provincial government department, all point to only one logical and plausible conclusion as to the intent of Parliament: the Crown is bound.

[48] I have considered that the *Act*, unlike other statutes such as the *Patent Act*, R.S.C., 1985, c. P-4, s.2.1, does not contain an "expressly binding" clause at the beginning, as was recommended in the 1985 report entitled *A Charter of Rights for Creators*. I am still irresistibly drawn to the conclusion that Parliament clearly intended to bind the federal and provincial Crowns by the express language of the *Act* and through logical inference.

[49] It is not necessary in my view to consider the argument advanced by Access regarding whether any other interpretation of the *Act* would result in a breach of Canada's international obligations under NAFTA, TRIPS or any other international convention ratified and implemented in Canada. This is especially so when one considers that this argument was not fully developed before us.

[50] In the circumstances, there is also no need to consider whether granting immunity would result in a frustration of the *Act* as a whole or in an absurdity.

[51] Access had argued that Crown immunity should not even be in play, as immunity from the *Act* and the tariffs would constitute expropriation without compensation. As noted earlier, the Board rejected this argument. Given that I have found that the Crown is bound by the *Act*, I express no opinion on this point.

[52] In light of the foregoing, I propose that this application be dismissed with costs.

"Johanne Gauthier"

J.A.

"I agree
K. Sharlow J.A."

"I agree
Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	April 3, 2013

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