

Federal Court



Cour fédérale

**Date: 20240222**

**Docket: T-326-18**

**Citation: 2024 FC 292**

**Ottawa, Ontario, February 22, 2024**

**PRESENT: The Honourable Madam Justice Aylen**

**BETWEEN:**

**THE PROVINCE OF ALBERTA and all  
entities named in Schedule “A” to the  
Statement of Claim**

**Plaintiffs**

**and**

**THE CANADIAN COPYRIGHT  
LICENSING AGENCY (c.o.b. ACCESS  
COPYRIGHT)**

**Defendant**

**ORDER AND REASONS**

[1] The Plaintiffs are the Ministries of Education of 10 Canadian provinces and territories (excluding British Columbia, Ontario and Québec) and each of the school boards in Ontario. During the years 2010, 2011 and 2012, the Plaintiffs paid royalties in the amount of \$4.81 per full time equivalent [FTE] student to Access Copyright (a collective society under the *Copyright Act*,

RSC 1985, c C-42 [*Copyright Act*])<sup>1</sup> under an interim tariff. When the Copyright Board certified the final tariff for 2010 to 2015 at \$2.46 per FTE, the Plaintiffs brought this action seeking a refund for the amount they claim they overpaid from 2010 to 2012. The Plaintiffs maintain that they opted out of purchasing licences effective January 1, 2013 and as such, did not pay for a licence from 2013 to 2015.

[2] Access Copyright does not dispute the amount of the overpayment, but instead counterclaims that it should be permitted to keep the Plaintiffs' refund because the Plaintiffs continued to hold a statutory licence from 2013 to 2015 for which no licence fees were paid. As a result, Access Copyright claims it is entitled to recover default licence fees from the Plaintiffs under section 68.2(1) of the *Copyright Act* because the Plaintiffs paid or offered to pay royalties under the tariff for those years. In the alternative, if it is not entitled to recover default licence fees from the Plaintiffs for 2013 to 2015, Access Copyright argues that it is entitled to various equitable and common law remedies that would extinguish any amount owing to the Plaintiffs, including unjust enrichment, estoppel by representation, common law and equitable election, issue estoppel, abuse of process and collateral attack. In the further alternative, Access Copyright argues it is entitled to equitable set-off against any refund of the overpayment otherwise owing to the Plaintiffs.

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<sup>1</sup> For the purposes of this Order and Reasons, all references to the *Copyright Act* are to the version of the *Copyright Act* that was in force from November 7, 2012 to December 12, 2018, prior to the amendments to the *Copyright Act* via the *Budget Implementation Act, 2018, No. 2*, SC 2018, c 27.

[3] The parties have brought a motion for summary trial in which they have jointly asked the Court to answer the following three questions:

1. Have the Plaintiffs been licensees from 2013 onward?
2. If the Plaintiffs have not been licensees from 2013 onward, are the Plaintiffs nevertheless liable in equity to pay Access Copyright?
3. If the Plaintiffs are not liable in equity to pay Access Copyright, is Access Copyright entitled to retain the 2010-2012 overpayment in any event?

[4] When the motion was originally brought and the aforementioned questions were framed by the parties, Access Copyright was seeking compensation from 2013 onward. However, in their closing submissions, Access Copyright advised that it was limiting its case to compensation owed for the period 2013 to 2015 only and as such, I have not considered any of Access Copyright's claims and arguments related to 2016 onward. The issues as framed by the parties have been modified accordingly (as set out below).

[5] For the reasons that follow, I find that: (a) the Plaintiffs were not statutory licensees from 2013 to 2015; (b) the Plaintiffs are not liable in equity, or otherwise, to pay Access Copyright an amount equivalent to the royalties under the Approved 2010-2015 Tariff (as defined below) for the years 2013 through 2015; and (c) Access Copyright is not entitled to retain the 2010 to 2012 royalty overpayment.

## I. Background

### A. The parties

[6] The Plaintiffs are the Ministries of Education of ten Canadian provinces and territories (excluding British Columbia, Ontario and Québec) and each of the school boards in Ontario, as listed in Schedule “A” to the Statement of Claim.

[7] The Council of Ministers of Education, Canada [CMEC] is an intergovernmental body that is comprised of the Ministers of Education in all 13 provinces and territories in Canada, including Québec. The CMEC’s Copyright Consortium is composed of the Ministers of Education of all provinces and territories of Canada, with the exception of Québec. The CMEC Copyright Consortium works to advance the views of its members on national copyright issues related to education. The CMEC Copyright Consortium also represents the interests of students and teachers before the Copyright Board of Canada [Board] and was an objector in the Board proceedings to certify Access Copyright’s proposed tariffs for elementary and secondary schools for the years 2005-2009, 2010-2012 and 2013-2015. Further, the CMEC’s Copyright Consortium has a mandate to provide information on the use of copyright-protected materials and educate teachers, school staff and school board administrators about their rights and obligations under the *Copyright Act* (including publishing and distributing *Copyright Matters!*). While CMEC is not a party to this proceeding, CMEC played an active role before the Board, on behalf of many of the Plaintiffs, in relation to the tariffs at issue in this proceeding.

[8] Access Copyright is a not-for-profit corporation operating as a collective society within the meaning of section 70.1(a) of the *Copyright Act*. Access Copyright acts as an agent and collects royalties for hundreds of thousands of domestic and international publishers, authors and artists [collectively, Affiliates] for the reproduction of published literary, dramatic and artistic works in Canada (except Québec). The Affiliates enter into representation agreements with Access Copyright in respect of their copyright works.

[9] Access Copyright is not an assignee or an exclusive licensee. As such, it does not have the right to sue for copyright infringement of its Affiliates' work, and the Affiliates are free to licence their rights to users directly or through intermediaries besides Access Copyright [see *York University v Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32 at para 2 [*York University*]].

[10] The Affiliates are not, and have never been, parties to this proceeding.

## **B. Collective societies and the tariff regime**

[11] Access Copyright is a collective society within the meaning of section 2 of the *Copyright Act*. As a collective society that administers a licensing scheme in respect of reproduction rights applicable to its repertoire of published works, Access Copyright operates within the *Copyright Act*'s regime for "Collective Administration in Relation to Rights under Sections 3, 15, 18 and 21", known as the "general regime" (sections 70.1 to 70.6) [see *York University, supra* at para 21].

[12] Pursuant to section 70.12, a collective society operating in the general regime may, “for the purpose of setting out by licence the royalties and terms and conditions relating to classes of uses”, either (a) file a proposed tariff with the Board; or (b) enter into agreements with users. A collective society that chooses to file a proposed tariff does so under section 70.13, which permits it to “file with the Board a proposed tariff ... of royalties to be collected by the collective society for issuing licences” [see *York University, supra* at para 22].

[13] When a collective society files a proposed tariff with the Board, subsection 70.15(1) requires the Board to “certify the tariffs as approved, with such alterations to the royalties and to the terms and conditions related thereto as the Board considers necessary, having regard to any objections to the tariffs” [see *York University, supra* at para 23].

[14] After a collective society files a proposed tariff under section 70.13, section 70.14 stipulates that subsections 67.1(3) and (5) and subsection 68(1) apply, “with such modifications as the circumstances require.” These provisions state as follows:

**67.1 (3)** A proposed tariff must provide that the royalties are to be effective for periods of one or more calendar years.

[...]

**(5)** As soon as practicable after the receipt of a proposed tariff filed pursuant to subsection (1), the Board shall publish it in the *Canada Gazette* and shall give notice that, within sixty days after the publication of the tariff, prospective users or their representatives may file written objections to the tariff with the Board.

[...]

**68 (1)** The Board shall, as soon as practicable, consider a proposed tariff and any objections thereto referred to in subsection 67.1(5) or raised by the Board, and

(a) send to the collective society concerned a copy of the objections so as to permit it to reply; and

(b) send to the persons who filed the objections a copy of any reply thereto.

[15] Accordingly, prospective users are entitled, pursuant to subsection 67.1(5), to object to any tariff proposed by Access Copyright and to participate in the proceedings before the Board.

[16] The Board's power to modify and approve a collective society's proposed tariff is one of three sources of the Board's supervisory and price-setting authority over a collective society's royalties in the general regime. The Board may also fix royalties when a collective society and individual user are unable to agree on terms and one party applies to the Board (sections 70.2 to 70.4), or alter royalties if the parties make an agreement without Board intervention that is then filed with the Board (sections 70.5 to 70.6) [see *York University, supra* at para 24].

[17] Once a tariff is approved under subsection 70.15(1), the resulting legal consequences are established by subsection 70.15(2) and section 70.17 [see *York University, supra* at para 25].

[18] Subsection 70.15(2) states that subsection 68.2(1) applies "with such modifications as the circumstances require." Subsection 68.2(1), which is found in the *Copyright Act's* separate regime for the collective administration of performing rights and communication rights, provides:

**68.2 (1)** Without prejudice to any other remedies available to it, a collective society may, for the period specified in its approved tariff, collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction.

[19] Section 70.17 provides:

**70.17** Subject to section 70.19, no proceedings may be brought for the infringement of a right referred to in section 3, 15, 18 or 21 against a person who has paid or offered to pay the royalties specified in an approved tariff.

[20] Section 70.18 gives collective societies the right to continue collecting royalties under the terms of the previous tariff where it has filed a proposed tariff in accordance with section 70.13, but that proposed tariff has not yet been approved (referred to as an “interim tariff” or a “continuation tariff”):

**70.18** Subject to section 70.19, where a collective society files a proposed tariff in accordance with section 70.13,

(a) any person authorized by the collective society to do an act referred to in section 3, 15, 18 or 21, as the case may be, pursuant to the previous tariff may do so, even though the royalties set out therein have ceased to be in effect, and

(b) the collective society may collect the royalties in accordance with the previous tariff,

until the proposed tariff is approved.

[21] Under section 66.52, the Board also has the power to vary the tariff terms and conditions if, in its opinion, there has been a material change in circumstances since the decision was made:

**66.52** A decision of the Board respecting royalties or their related terms and conditions that is made under subsection 68(3), sections 68.1 or 70.15 or [sic] subsections 70.2(2), 70.6(1), 73(1) or 83(8) may, on application, be varied by the Board if, in its opinion, there has been a material change in circumstances since the decision was made.



### C. Supreme Court of Canada's decision in York University

[22] When this proceeding was commenced in 2018, the Supreme Court of Canada had not yet rendered its decision in *York University*. The Supreme Court's decision in *York University*, ultimately rendered on July 30, 2021, impacted the framing of Access Copyright's claims in this proceeding (discussed more fully below). It also impacted the dealings between the Plaintiffs and Access Copyright, as, most notably, the Supreme Court concluded that interim and final tariffs certified by the Board (which would include the tariffs at issue in this proceeding) are not mandatory.

[23] By way of context, from 1994 to 2010, a licence agreement permitted professors at York University to make copies of published works in Access Copyright's repertoire and set the applicable royalties. The relationship between Access Copyright and York University deteriorated in the course of negotiations to renew the licence and Access Copyright eventually filed a proposed tariff with the Board for post-secondary educational institutions. Access Copyright's position was that a tariff certified by the Board would create a mandatory legal relationship between Access Copyright and universities (including York University) and that the full amount of the approved royalties under the tariff would be payable by a university as soon as it made a single infringing use of a work within Access Copyright's repertoire, regardless of whether the university agreed to be bound by a licence on the approved terms of the tariff.

[24] Access Copyright applied to the Board for certification of a tariff on an interim basis because it was unsure that it would be able to reach an agreement with York University before the

licence expired. The terms generally matched the pre-existing licence agreement and would operate until the Board certified the final tariff. The Board granted Access Copyright's request for an interim tariff and it took effect on January 1, 2011. York University initially paid the approved royalties, but in July 2011, York University informed Access Copyright that it would not continue as a licensee. York University took the position that its copying activities involving works within Access Copyright's repertoire constituted fair dealing and, in any event, the interim tariff was not enforceable against it.

[25] The Board ultimately certified the final tariff for the period 2011 to 2017, but made no comment as to whether the tariff created a mandatory legal relationship between Access Copyright and universities who did not sign a licensing agreement.

[26] Access Copyright sought to enforce the interim tariff in this Court, asserting that professors at York University had made copies that went beyond fair dealing and for which no licence was obtained. Access Copyright asserted that York University was liable to pay, in full, the royalties set out in the interim tariff. York University counterclaimed for a declaration that any copying conducted within its fair dealing guidelines was protected by fair dealing rights under the *Copyright Act* and asserted that the interim tariff was not enforceable against it as it had not agreed to be bound by its terms.

[27] This Court found that the interim tariff was enforceable against York University and that neither its fair dealing guidelines nor its actual practices constituted fair dealing. The Federal Court of Appeal allowed the appeal on the tariff enforcement action, holding that Board-approved tariffs

are voluntary for users, but dismissed its appeal on the fair dealing counterclaim. Access Copyright appealed the tariff enforcement issue to the Supreme Court, and York University appealed from the dismissal of its fair dealing counterclaim.

[28] The issue, as framed by the Supreme Court, was whether subsection 68.2(1) of the *Copyright Act* empowers Access Copyright to enforce royalty payments set out in a Board-approved tariff against a user who chooses not to be bound by a licence on the approved terms.

[29] The Supreme Court held that the tariff was not enforceable against York University as the tariff was not mandatory. The Supreme Court found that subsection 68.2(1) of the *Copyright Act* does not empower Access Copyright to enforce the royalty payments set out in tariffs certified by the Board pursuant to section 70.15 against a user who chooses not to be bound by a licence on the approved terms. Moreover, subsection 68.2(1) also does not provide a collective infringement remedy. Although a collective society is required to provide licences pursuant to the terms of a certified tariff, the licence cannot be forced on a user. Users are entitled to obtain their rights by other means, if they choose to, and if the user makes an unauthorized use of works in the collective society's repertoire, the appropriate remedy is an action for infringement.

[30] The Supreme Court began its analysis by considering the text of subsection 68.2(1), noting that the provision is silent on who the collective society may collect royalties from and on what conditions. The Supreme Court stated at paragraph 32 that “where Parliament sees fit to create a mandatory duty to pay, it does so with ‘clear and distinct legal authority showing that this was

Parliament's intent” and noted that there is no such language creating a duty to pay approved royalties to a collective society that operates a licencing scheme anywhere in the *Copyright Act*.

[31] With respect to the legislative context, the Supreme Court held that the combined effect of subsection 68.2(1) and section 70.17 creates a dichotomy between users who choose to be licensed pursuant to the terms of a Board-approved tariff, and those who choose not to acquire a licence but may be liable for infringement. The Supreme Court went on to state:

[34] Copyright infringement constitutes an unauthorized exercise of the owner's exclusive right (s. 27), and a licence constitutes an authorization to make a particular use that would otherwise be infringing (Elizabeth F. Judge and Daniel J. Gervais, *Intellectual Property: The Law in Canada* (2nd ed. 2011), at p. 146; *Eli Lilly & Co. v. Novopharm Ltd.*, 1998 CanLII 791 (SCC), [1998] 2 S.C.R. 129, at para. 49, per Iacobucci J.). It is therefore “elementary” that a person cannot simultaneously be an infringer and a licensee (*Composers, Authors and Publishers Association of Canada, Ltd. v. Sandholm Holdings Ltd.*, 1955 CanLII 799 (CA EXC), [1955] Ex. C.R. 244, at p. 254). In the context of the provisions at issue in this case, a person who has paid or offered to pay the royalties under s. 70.17 has become a licensee and may be liable for defaulted payments under s. 68.2(1). A person who has not paid or offered to pay is not licensed and may be liable for infringement.

[35] Section 68.2(1) ensures that a collective society has a remedy for defaulted payments from voluntary licensees and that actions for recovery can be brought in Federal Court (see *Sandholm Holdings Ltd.*, at pp. 249-50).

[Emphasis added.]

[32] The Supreme Court cited its decision in *Canadian Broadcasting Corp v SODRAC 2003 Inc*, [2015] 3 SCR 615 [*SODRAC*], noting that the *SODRAC* decision was consistent with its interpretation of subsection 68.2(1). In *SODRAC*, Rothstein J. held that royalties fixed by the Board pursuant to section 70.2 (a provision permitting a tariff application when a collective society

and a specific user are unable to agree on licencing royalties) are not binding on the user and the Board did not have the “power to force these terms on a user who, having reviewed the terms, decided that engaging in licensed copying is not the way to proceed.” In *SODRAC*, the Supreme Court stated that a user who does not accept a licence but engages in a protected use “will remain liable for infringement” [see *SODRAC*, *supra* at para 108].

[33] The Supreme Court in *York University* went on to state:

[38] In reaching this conclusion, Rothstein J. observed that the text of s. 70.4 is permissive, showing 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 as a way to gain authorization to engage in the activity contemplated in the Board proceeding” (para. 106 (emphasis in original)). Section 68.2(1) does not itself specify that a user “may” avail itself of the tariff terms. But read alongside s. 70.17, the combined effect creates the same voluntary trigger for acquiring a licence. Under s. 70.17 a user can acquire a licence and immunize themselves from infringement proceedings if they have “paid or offered to pay the royalties”. This is identical to s. 70.4, where a user “may ... subject to the related terms and conditions fixed by the Board and to the terms and conditions set out in the scheme *and on paying or offering to pay the royalties*, do the act”. Paying or offering to pay is a permissive act triggering licence acquisition in both cases.

[Underlining added.]

[34] The Supreme Court also considered the legislative purpose and held that the object of the statutory scheme governing collective administration is the protection of users, and this purpose has persisted through various amendments to the *Copyright Act*. The first regime regulating collective societies in Canada was created in response to the emergence of early performing rights societies who had acquired control of the vast majority of popular musical compositions and were therefore able to exercise monopolistic power. Regulating collective societies was deemed

necessary by Parliament and was done by vesting the Board with price-setting powers to protect users from the potentially unfair exertion of the new societies' market power. Though an approved statement of royalties put a cap on what the societies could charge for a licence, it did not bind an unwilling user to the terms of a licence. Empowering a society to foist a licence on an unwilling user would be discordant with the protective purpose of the regime.

[35] Before concluding, the Supreme Court noted:

[74] The source of Access Copyright's grievance, it seems to me, stems not so much from the voluntary nature of an approved tariff, but from the fact that Access Copyright cannot initiate infringement actions on behalf of its members. To the extent that this is a problem, it has nothing to do with s. 68.2(1) and is largely outside the scope of this appeal. But it is important to recall that Access Copyright chooses to operate on the terms of a non-exclusive licence that does not give it the right to sue for infringement in respect of the rights it administers. Nothing compels Access Copyright and its members to operate this way.

#### **D. The underlying action/counterclaim and history of the proceeding**

[36] On February 16, 2018, prior to the Supreme Court's decision in *York University*, the Plaintiffs commenced this action against Access Copyright seeking, among other relief: (a) a declaration that Access Copyright's tariffs as certified by the Board are not mandatory; (b) a declaration that the Plaintiffs overpaid Access Copyright for the years 2010, 2011 and 2012 by an amount equal to \$2.35 per FTE student; and (c) payment by Access Copyright of a refund or monetary damages to the Plaintiffs in the amount of the overpayment, namely \$25,493,109.36, together with pre-judgment and post-judgment interest.

[37] On July 11, 2018, Access Copyright served and filed its Statement of Defence and Counterclaim. As explained below, Access Copyright's counterclaim and defences changed significantly over the course of the proceeding. As originally pleaded, Access Copyright alleged that the Board's tariffs were mandatory and based their defences and counterclaim on both the 2013-2015 Interim Tariff (as defined below) and the Approved 2010-2015 Tariff (as defined below), as well as tariffs post-2015, which are no longer at issue. Access Copyright asserted that the Plaintiffs' claims must be set-off from the amounts owing to Access Copyright for non-payment of royalties under the Approved 2010-2015 Tariff. In the alternative, Access Copyright pleaded that, by their conduct (including participating in Board and judicial review proceedings), the Plaintiffs are estopped or otherwise precluded from claiming that the Approved 2010-2015 Tariff is not binding or otherwise attacking the Board's decisions certifying the 2013-2015 Interim Tariff and the Approved 2010-2015 Tariff. Access Copyright asserted that such claims are also an impermissible collateral attack and an abuse of process, and that the Plaintiffs are bound by findings of fact and law in the 2013-2015 Interim Tariff and the Approved 2010-2015 Tariff decisions by the doctrines of *res judicata*, issue estoppel and collateral attack.

[38] By way of its counterclaim, Access Copyright sought, among other relief: (a) a declaration that the Plaintiffs, from January 1, 2013 to December 31, 2015, reproduced works in Access Copyright's repertoire, which obliges them to pay royalties under the Approved 2010-2015 Tariff; (b) a declaration that the Approved 2010-2015 Tariff and the 2013-2015 Interim Tariff are mandatory for the Plaintiffs as a result of their reproduction of works in Access Copyright's repertoire; and (c) payment by the Plaintiffs of the royalties owing under the relevant tariffs.

[39] Amendments were made by Access Copyright to its pleading on January 10, 2020 and September 13, 2021, the latter amendments being made post-*York University*. The September 13, 2021 version of its pleading is the one presently before the Court on this motion. Access Copyright now pleads, in addition to the allegations detailed above, that the Plaintiffs had no right to opt out of the tariffs because they voluntarily engaged in the tariff process beginning in 2010, including after January 1, 2013, and made use of works in Access Copyright's repertoire. Having made their election to engage in the tariff process, and having paid royalties from 2010 to 2012, Access Copyright asserts that the Plaintiffs were voluntary licensees.

[40] Access Copyright further pleads, in the alternative and under the heading of set-off that:

[55]...by engaging in the reproduction, making available and authorization of making available and reproduction of copyright works in the Repertoire without authorization, the Plaintiffs are engaging in mass infringement of works in the Repertoire and have generated damages in a quantum far in excess of the amounts claimed by the Plaintiffs in their Statement of Claim.

[...]

[57] The payments still owing to Access Copyright pursuant to the *Tariffs* since and including 2013 are so clearly connected with the Plaintiffs' claims that it would be manifestly unjust to allow the Plaintiffs to enforce payment without taking into consideration those amounts still owing to Access Copyright by the Plaintiffs or, alternatively, recoverable as damages for infringement.

[Underlining in original.]

[41] In early 2022, the Plaintiffs brought a motion to strike Access Copyright's pleading pursuant to Rule 221(1)(a) of the *Federal Courts Rules*, SOR/98-106 [*Rules*], in which they asserted that the Supreme Court's decision in *York University* provides a complete answer to Access Copyright's position in this litigation, such that Access Copyright has no defence to the



action and no claim to assert by way of counterclaim. It was in the context of this motion that the full extent of Access Copyright's assertions became known, including Access Copyright's assertion that the Plaintiffs "offered to pay" for a licence under the Approved 2010-2015 Tariff by virtue of their various forms of asserted conduct (as particularized below), as well as the various forms of equitable relief sought by Access Copyright and the basis therefor.

[42] By Order dated March 16, 2022, I dismissed the Plaintiffs' motion to strike, finding that the Plaintiffs had not demonstrated that it was plain and obvious that Access Copyright's pleading disclosed no reasonable cause of action.

[43] The parties have engaged in an extensive documentary discovery process. Given the number of Plaintiffs and the time period involved, the documentary production process quickly became unwieldy and the parties required the extensive assistance of the Case Management Judge (a position which I held at the relevant time). By Order dated January 2, 2019, I determined that documentary production would proceed by way of a representative set of productions from an agreed upon number of Plaintiff schools, school boards and Ministries of Education, without prejudice to the right of any party to seek leave of the Court to obtain further documentary productions. The parties were required to meet and confer to agree on the specific representative group, as well as the nature of documents to be produced.

[44] However, the parties encountered issues in determining the representative group and the nature of documents to be produced, with both the Plaintiffs and Access Copyright engaging experts to assist them with documentary discovery. I ultimately ordered the parties and their

experts to confer regarding: (a) the nature and scope of document production expected from Access Copyright and the representative Ministries, school boards and schools (as ultimately selected); (b) the manner by which the specific representative Ministries, school boards and schools would be selected; and (c) the methodologies used by the experts in opining on the appropriate representative Ministries, school boards and schools and the areas of agreement and disagreement between the experts. The parties were unable to reach an agreement and ultimately, the Plaintiffs brought a motion before the Court to determine the issues.

[45] By Order dated May 29, 2019, I ordered that, for the purpose of the representative documentary discovery of the Plaintiffs (as ordered on January 2, 2019):

1. Affidavits of documents were required from: (a) each Ministry of Education from all provinces and territories, excluding Québec and British Columbia, and in relation to Ontario, the school boards shall make inquiries of the Ministry for relevant documents; (b) 65 school boards (excluding Québec and British Columbia), randomly selected with sufficient representation of smaller and larger school boards (in proportions equivalent to their share of FTEs) and to be distributed across Canada in a manner proportional to FTE counts while ensuring a minimum of three school boards per province and three for the three territories in aggregate; and (c) eight schools randomly selected from each of the 65 school boards, with sufficient representation of smaller and larger schools as well as elementary and secondary schools. The selection of school boards and schools was to be a joint exercise undertaken by the parties and their experts.

2. The affidavits of documents to be delivered from the representative Plaintiffs had to contain the following records, for the period 2013 onward, in the power, possession or control of the representative Plaintiffs that were relevant to the implementation, administration and enforcement of fair dealing, to the extent such records exist: (a) each fair dealing guideline implemented by each province, district, school board and school, including implementation memoranda, correspondence, training materials and logs, teacher and administrator certifications, guidelines for agents or external providers, documents relating to the monitoring of compliance with fair dealing guidelines, including by the CMEC, feedback from users within the school system, incident reports or disciplinary records relating to non-compliance or failure to train, including any records of any violation or suspected or claimed violations of any fair dealing guidelines, and excluding any student incident reports or student disciplinary records; and (b) such other relevant documentation relating to the implementation, administration and enforcement of fair dealing guidelines, including of Ministry or Department of Education Copyright Officers.
  
3. The affidavits of documents to be delivered from the representative Plaintiffs had to contain the following records, for the period 2013 onward, in the power, possession or control of the representative Plaintiffs that were relevant to the copying activities of the representative Plaintiffs, to the extent such records exist: (a) physical copies of works, including both “master copies” of works intended to be used for teaching as well as resulting copies of works disseminated to students; (b) lesson plans, course syllabi, course outlines, source materials, curriculums and similar records associated with the

teaching of subjects in the Plaintiffs' schools (i.e. teachers' course binders); (c) all internal and external records pertaining to choice of educational materials, maintenance of class sets, and use of workbooks; all internal and external records pertaining to Access Copyright or its tariffs; (d) all internal and external records pertaining to the schools, school boards and provinces electing to "no longer operate" under Access Copyright's K-12 tariff; (e) archives from electronic learning management systems; (f) budgets for each school for the 2013 to 2018 years (in the form that they currently exist), including for purchasing all products and services including materials used for educational instruction, copying expenses (i.e. paper, ink, copying equipment, etc.) and acquiring new physical works (i.e. for textbooks, novels, etc.); and (h) amounts spent by each school on purchasing or licensing materials for educational instruction, broken down by type, including on each textbook and consumable, as they relate to the works at issue in the counterclaim including publisher licence agreements, amounts spent on licences of materials used for educational instruction by work licensed, records from copying shops or internal copying services relating to any copying of the works at issue in the counterclaim, records of any savings of each school board resulting from copying of the works at issue in the counterclaim, and all FTE numbers on a per class basis, for all schools and school boards between 2013 and 2018.

4. A limited affidavit of documents was also to be delivered by 300 school boards (excluding Québec and British Columbia) containing the following records, for the period 2013 onward, in the power, possession or control of each school board, to the extent such records exist: (a) copyright management and enforcement guidelines,

including all guidelines, instructions and training materials issued by the school board to teachers and principals; (b) any copying audits, audit committee reports or studies with regard to compliance; (c) all copying budget numbers; and (d) all FTE numbers.

5. Access Copyright was also entitled to identify a maximum of 10 additional school boards for targeted discovery, which school boards were to produce an affidavit of documents containing the same categories of documents as set out above.

[46] Further disputes arose regarding the production of certain file types and whether the Plaintiffs had complied with my production order, which also required the ongoing assistance of the Court throughout 2020 and 2021.

[47] Following my Order dismissing the Plaintiffs' motion to strike, the parties participated in a Court-assisted mediation. When it was unsuccessful, the parties then agreed to bring the within motion for summary trial.

#### **E. Evidence before the Court on this motion**

[48] Notwithstanding that the parties were unable to reach an agreement on an agreed statement of facts for use on this motion, I find that most of the facts that are relevant to the issues raised on this motion are not in dispute. Rather, it is the parties' respective interpretation of events that is disputed.

**(1) Licences prior to 2005**

[49] In 1991, the province of Ontario became the first jurisdiction in Canada to enter into a licence agreement with Access Copyright for elementary and secondary publicly funded schools. The royalty rate was \$1.00 for each FTE. By 1997, all other provinces and territories (excluding Québec) had entered into similar licence agreements with Access Copyright.

[50] In 1998, CMEC concluded a licence agreement with Access Copyright for all Ministries of Education in all jurisdictions (excluding Ontario and Québec) and for school boards in Ontario. This licensing agreement, referred to by the parties as the Pan-Canadian Licence Agreement, took effect on September 1, 1999. The royalty rate was \$2.10 per FTE, with an annual increase of the lesser of the rate of change of the Consumer Price Index or 3 per cent.

**(2) 2005-2009 tariff**

[51] In March 2004, following the expiry of the Pan-Canadian Licence Agreement and unsuccessful negotiations with CMEC to enter into a new licensing agreement, Access Copyright filed a proposed tariff for the reproduction in Canada (excluding Québec) of works in Access Copyright's repertoire by kindergarten to grade twelve [K-12] schools for the period of 2005 to 2009.

[52] In April 2005, during the Board proceedings for the certification of Access Copyright's proposed tariff, Access Copyright and the objectors agreed on the methodology that would be used in conducting a study to measure a sample of the volume and nature of photocopying that occurred

in elementary and secondary educational institutions, school boards, and Ministries of Education throughout Canada, save Québec [Volume Study]. The Volume Study was carried out during the 2005 to 2006 school year in 894 schools, 31 school boards, and 17 offices of Ministries of Education.

[53] On June 26, 2009, the Board issued its decision in relation to Access Copyright’s proposed tariff for 2005 to 2009 [Initial 2005-2009 Tariff]. Relying on the data from the Volume Study, the Board concluded that approximately 270 million pages of published works that would be covered by the tariff were copied per year by K-12 schools, Ministries of Education and school boards. The Board identified 18.5 million pages as having been made for a purpose permitted by the fair-dealing provisions in sections 29 or 29.1 of the *Copyright Act*. Of these, the Board found 1.6 million pages to have been made by fair dealing. The Board concluded that the royalty rate for the tariff would be \$5.16 per FTE. On June 27, 2009, the Initial 2005-2009 Tariff, as certified by the Board, was published in the *Canada Gazette*.

[54] The Plaintiffs sought judicial review of the Board’s finding of non-fair dealing with respect to approximately 16.9 million pages [the “category 4” copies]. On July 23, 2010, the Federal Court of Appeal found that the Board’s conclusion that the “category 4” copies were not fair dealing was reasonable [see *Alberta (Education) v Access Copyright*, 2010 FCA 198]. The Plaintiffs were granted leave to appeal the fair dealing issue to the Supreme Court.

[55] On July 12, 2012, the Supreme Court rendered its decision in *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 and found that the

Board's decision certifying the Initial 2005-2009 Tariff was unreasonable. The Supreme Court held that the Board's finding misapplied the factors enunciated in *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13. The Supreme Court restricted their decision to the 16.9 million "category 4" copies in dispute and remitted the matter to the Board for redetermination.

[56] On January 18, 2013, the Board issued its redetermination decision and the following day published the final certified tariff for 2005 to 2009 [Approved 2005-2009 Tariff] at \$4.81 per FTE student [see *Access Copyright - Tariff for Educational Institutions, 2005-2009 [Redetermination]*, 2013 CanLII 148720 (CA CB)]. This tariff replaced the Initial 2005-2009 Tariff (set at \$5.16 per FTE).

[57] For the years 2005 to 2009, the Plaintiffs chose to license the reproduction of published literary works in elementary and secondary schools by paying to Access Copyright the royalties prescribed by the Initial 2005-2009 Tariff. Access Copyright refunded the difference between the Initial 2005-2009 Tariff (\$5.16 per FTE) and the Approved 2005-2009 Tariff (\$4.18 per FTE) to the Plaintiffs.

### **(3) Amalgamated 2010-2012 and 2013-2015 tariffs**

[58] On May 9, 2009, the Board published a tariff proposed by Access Copyright for the years 2010 to 2012 with respect to elementary and secondary schools in the *Canada Gazette* (effective January 1, 2010). Access Copyright proposed a tariff of \$15.00 per FTE. The Board invited "prospective users or their representatives who wish to object to the statements" to file written objections with the Board and on July 8, 2009, the Plaintiffs filed an objection.



[59] On June 16, 2012, Access Copyright filed a second proposed tariff with the Board applicable to elementary and secondary schools in Canada, this one for the years 2013 to 2015 (effective January 1, 2013). The total tariff fee proposed by Access Copyright was \$9.50 per FTE student. The Board gave notice to “prospective users or their representatives who wish to object to the statement” that they may file written objections with the Board and on August 9, 2012, the Plaintiffs filed an objection.

[60] Access Copyright and the Plaintiffs agreed to have both tariff proceedings (covering the 2010-2012 and 2013-2015 proposed tariffs) move forward simultaneously and be heard together by the Board.

[61] The Plaintiffs actively participated throughout the 2010 to 2015 tariff proceedings before the Board, including by filing objections, responding to interrogatories, filing a statement of case, filing expert evidence on the valuation of the tariff and participating in a nine-day hearing.

[62] The Plaintiffs and Access Copyright agreed that, for the purpose of the 2010 to 2015 tariff proceedings, the parties would accept that the value of the photocopied pages made after January 1, 2010 had remained the same as that reflected in the Volume Study used for the purpose of the 2005 to 2009 tariff proceeding.

[63] In submissions before the Board dated August 8, 2014, the Plaintiffs proposed a rate of \$0.49 per FTE student for 2010 to 2012 and \$0.46 per FTE student for 2013 to 2015. The Plaintiffs later revised their proposed rate to \$0.53 per FTE for the years 2010 to 2012 and \$0.51 per FTE

for the years 2013 to 2015. These amounts represented the Plaintiffs' determination of the value of copies that would go beyond their fair dealing and other user rights.

[64] On February 19, 2016, the Board released its decision certifying the 2010 to 2015 tariff [Approved 2010-2015 Tariff]. The Board set the royalties at \$2.46 per FTE student for 2010 to 2012 and \$2.41 per FTE student for 2013 to 2015. The Approved 2010-2015 Tariff contained a number of transitional provisions that were not included in earlier tariffs and appear to be intended to address the fact that, by the time it was approved, the Approved 2010-2015 Tariff was entirely retroactive in application.

[65] Specifically, section 15(4) of the Approved 2010-2015 Tariff provided:

(4) In relation to each of the years from 2010 to 2015, Access Copyright shall, in lieu of subsection 8(5), invoice the licensee within 180 days of publication of this tariff.

Subsection 8(5) provided for the payment of royalty instalments before the end of April and October of each year, or within 60 days of receiving an invoice.

[66] Section 15(5) of the Approved 2010-2015 Tariff provided:

(5) Amounts due or overpaid as a result of the certification of this tariff shall be paid in two equal installments on October 31, 2016, and April 30, 2017. These amounts shall be increased by using the multiplying interest factors (based on the Bank Rate as published by the Bank of Canada) set out in the following table with respect to each period: [...]

[67] On or about March 21, 2016, Access Copyright sought judicial review of the Board's decision with respect to the Approved 2010-2015 Tariff, alleging several errors of fact and law.

The Plaintiffs participated in the judicial review proceedings and asserted that the Board's decision was "entirely correct" and reasonable and should therefore be left untouched.

[68] On January 27, 2017, the Federal Court of Appeal granted Access Copyright's application in part. The Federal Court of Appeal held that the Board erroneously stated that Access Copyright had provided no evidence to support a claim that the volume of copying was underestimated in the prior study due to coding errors, whereas Access Copyright had provided said evidence in the form of an expert report. As a result, the Federal Court of Appeal held it was unreasonable for the Board to refuse to consider whether the Access Copyright repertoire had been underestimated. In all other respects, the Board's decision was found to be reasonable. The Federal Court of Appeal remitted the matter pertaining to the impact of the coding errors on Access Copyright's repertoire back to the Board for reconsideration [see *Canadian Copyright Licensing Agency (Access Copyright) v British Columbia (Education)*, 2017 FCA 16 at para 105].

[69] On January 19, 2018, the Board issued its reconsideration decision and held that despite the presence of errors in the dataset, the initial data remained the best available source from which to estimate the total volume of copying from works in Access Copyright's repertoire. Therefore, the Board made no adjustments to the royalty rates previously fixed on February 19, 2016.

**(4) Dealings between the Plaintiffs and Access Copyright from 2012 through 2016 and other relevant events**

[70] The Plaintiffs paid the Initial 2005-2009 Tariff as a continuation tariff in 2010, 2011 and 2012 as the Board reviewed Access Copyright's proposed tariffs for the 2010 to 2015 period.

[71] On June 29, 2012, Parliament passed the *Copyright Modernization Act*, SC 2012, c 20, which implemented new user rights for education. In particular, it introduced education as an allowable fair dealing purpose. These amendments to the *Copyright Act* came into force on November 7, 2012.

[72] In December of 2012, CMEC, in collaboration with several other parties, published an updated version of the booklet entitled “*Copyright Matters!*” [Guidelines]. The Guidelines permitted copying “short excerpts” which included:

- up to 10% of a copyright-protected work (including a literary work, musical score, sound recording, and an audiovisual work);
- one chapter from a book;
- a single article from a periodical;
- an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and a plan) from a copyright-protected work containing other artistic works;
- an entire newspaper article or page;
- an entire single poem or musical score from a copyright-protected work containing other poems or musical scores; and
- an entire entry from an encyclopedia, annotated bibliography, dictionary, or similar reference work.

[73] On December 5, 2012, the Plaintiffs advised Access Copyright, by way of letter from their legal counsel [2012 Letter], as follows:

This letter is to advise Access Copyright that the provincial and territorial Ministries of Education comprising the Council of Ministers of Education, Canada (CMEC) Copyright Consortium, together with the school boards in Ontario, **will not be operating under the Access Copyright Elementary and Secondary School Tariff, 2005-2009 as of January 1, 2013.**

[Emphasis added in **bold**.]

[74] After January 1, 2013, the Plaintiffs made no further royalty payments under any tariff instrument to Access Copyright, nor did they report any FTE numbers to Access Copyright.

[75] On April 8, 2013, Access Copyright brought an application to the Board to approve an interim tariff effective January 1, 2013, until the proposed 2013-2015 tariff was certified. The Plaintiffs opposed this application, arguing, in part, that the basis for the application was speculative.

[76] In a letter dated April 19, 2013 from Access Copyright's counsel to the Board regarding Access Copyright's application for an interim approved tariff in respect of 2013 to 2015, Access Copyright stated:

The context of Access Copyright's application is that the Objectors have unequivocally decided to reduce the royalties to be paid to Access Copyright from January 1, 2013 forward from \$4.81 per FTE to nil. The basis for this decision is the Objectors' representation that none of its teachers are "operating under the tariff". The Objectors have refused to take advantage of section 70.18(a) and the immunity from suit afforded to them under section 70.17 of the Act.

The Objectors' decision is tantamount to an application by them to relieve them from any obligation fixed by the previous tariff.

[Emphasis added.]

[77] In that same letter, Access Copyright also specifically stated that in spite of the Plaintiffs' submission that the application was premature, it believed that the Plaintiffs had not resiled from the position set out in the 2012 Letter:

The Objectors also submit [...] that as [*sic*] April 30, 2013 (the due date for payment of royalties) has not arrived yet, Access Copyright's application is *premature*. **The Objectors told Access Copyright that no further royalties would be paid for any copying activities after January 1, 2013.** Access Copyright need not await the due date to come and go **given the Objectors' unresiled from position.** This is clearly an anticipatory breach of the Objectors' obligation to pay royalties for non-exempt copying of published works in Access Copyright's repertoire.

[Emphasis added in **bold**.]

[78] On May 29, 2013, the Board issued a decision certifying the *Access Copyright Elementary and Secondary School Interim Tariff, 2013-2015* as of January 1, 2013, subject to certain modifications [2013-2015 Interim Tariff] [see *Access Copyright - Interim Tariff for Elementary and Secondary Schools, 2010-2015*, 2013 CanLII 148714 (CACB)]. The decision provided, in part, as follows:

[7] Access claims that it requires interim relief to counteract the Objectors' decision to stop paying royalties. Access expects the decision will reduce its revenues by approximately 45 per cent and will significantly impair its ability to carry out its mandate. Since hearings on the proposed tariffs are scheduled to begin on April 29, 2014, Access does not expect to receive a final certified tariff until the third quarter of 2014 at the earliest. In the interim, Access will suffer the deleterious effects arising from the Objectors' decision to cease paying any royalties.

[Emphasis added.]

[79] Following the Board's approval of the 2013-2015 Interim Tariff, Access Copyright advised the Plaintiffs by way of various letters to the individual Plaintiffs that it was entitled to enforcement payment of the tariff.

[80] Access Copyright sent invoices to a number of the Plaintiffs in 2013, which the Plaintiffs acknowledged by letter. Several of the Plaintiffs' letters responded with the following message to acknowledge receipt of Access Copyright's invoice and refuse payment:

We are in receipt of an invoice from Access Copyright with a due date for payment of July 31, 2013. On December 5, 2012 [sic] Access Copyright was advised by our legal counsel that the provincial and territorial Ministries of Education comprising the Council of Ministers of Education, Canada (CMEC) Copyright Consortium, together with the school boards in Ontario, would no longer be operating under the *Access Copyright Elementary and Secondary School Tariff, 2005-2009* as of January 1, 2013. The provinces and territories comprising the CMEC Copyright Consortium and the school boards in Ontario were listed in an appendix to that letter [...]

[81] All of the letters requested that all future communications be directed to Plaintiffs' counsel and some added that they would not be issuing payment. One school board (the James Bay Lowlands Secondary School Board) advised Access Copyright that they had mistakenly paid the invoice and requested reimbursement.

[82] Notwithstanding Access Copyright's efforts to obtain the 2013-2015 Interim Tariff and its threats of enforcement proceedings, no steps were taken by Access Copyright to enforce the 2013-2015 Interim Tariff before this Court (including in this proceeding) as against the Plaintiffs.

[83] In a letter dated May 4, 2016 [2016 Letter], the Plaintiffs requested a refund from Access Copyright of the difference between the per FTE student rate of \$4.81 that was paid in 2010 through 2012 under the continuation tariff and the \$2.46 per FTE student rate that was ultimately certified, in accordance with section 15(5) of the Approved 2010-2015 Tariff. The total amount sought by the Plaintiffs was \$25,493,109.36.

[84] Access Copyright refused the Plaintiffs' request for a refund. Instead, in a letter dated August 14, 2016, Access Copyright explained that it disagreed with the Plaintiffs' interpretation of the Approved 2010-2015 Tariff and enclosed invoices for royalties from 2010 to 2015.

[85] In a letter dated September 7, 2016, the Plaintiffs responded to Access Copyright and rejected the calculations included in the invoices attached to their August 14, 2016 letter on the basis that they ignore the fact that the Plaintiffs did not operate under the tariff regime after January 1, 2013. This letter also advised that the Plaintiffs intended "to consider their legal options to recoup the overpaid royalties owed to them in respect of 2010, 2011 and 2012 in the event Access Copyright fails to refund these monies in accordance with section 15(5) of the Copyright Board's tariff".

[86] In a letter dated October 25, 2016, Access Copyright enclosed invoices for a second time and refund cheques for 2010 to 2012 that subtracted the set-off payments it claimed the Plaintiffs owed for 2013 to 2015. By letter dated November 3, 2016, the Plaintiffs informed Access Copyright that their counsel had been instructed to retain the cheques, but not cash them, as the calculations were incorrect because Access Copyright ignored the fact that the Plaintiffs had not



operated under the tariff as of January 1, 2013. The letter also advised, for the third time, that the Plaintiffs were considering their legal options to secure the refund.

**(5) The Plaintiffs' copying of works in Access Copyright's repertoire from 2013 through 2015**

[87] On this motion, Access Copyright provided evidence of copying of works within Access Copyright's repertoire based on the documents produced by the Plaintiffs during the documentary discovery phase of this proceeding. Appended as Exhibit 29 to the affidavit of Michael William Andrews (addressed more fully below) was a list of examples of substantial copies made by the Plaintiffs of works within Access Copyright's repertoire. The list included: (a) three books that had been copied in their entirety (ranging in length from 272 pages to 569 pages); (b) two workbooks that had been copied in their entirety; (c) eleven examples of entire book chapters or lengthy book excerpts that had been copied; and (d) two examples of compound copying, where multiple excerpts were made from the same book. The Plaintiffs did not directly refute this evidence.

[88] I note that at paragraph 10(g) of their Reply written representations, Access Copyright suggests that this copying was done post-2015 and therefore after the period in dispute:

(g) the "representative samples" showed *whole book* and *whole chapter* copying. The chart filed as "Schedule A" to Access Copyright's written representation in advance of the hearing demonstrates a continued failure to supervise teachers and monitor compliance even with the CMEC Guidelines. The Schedule A chart *supports* the evidence of compensable copying without licensing in 2016 and beyond; it isn't proffered as the evidence for the 2013 to 2015 period.

[Underlining added.]

[89] Having reviewed the record and in particular, Mr. Andrews' affidavit (addressed below), I note that there is no evidence before me as to the date that these documents were actually copied. Beyond this evidence, I have no direct evidence of copying undertaken by the Plaintiffs in the 2013 to 2015 period of specific works within Access Copyright's repertoire. Instead, Access Copyright relies primarily on the Volume Study and the Plaintiffs' alleged admissions of compensable copying as evidence of the Plaintiffs' actual compensable copying in 2013 through 2015.

[90] That said, I am satisfied that the evidence before the Court established that the Plaintiffs did not monitor the extent of the copying that was being done of works in Access Copyright's repertoire in 2013 to 2015 and as such, the Plaintiffs are not in a position to know what specific licences or other permissions would be required to "clear" any copying that went beyond the copying that the Plaintiffs were permitted to do under the *Copyright Act*.

[91] There was also no evidence before the Court of any licences otherwise obtained by the Plaintiffs (i.e. obtained directly from the Affiliates) or other steps taken to "clear" any compensable copying of works within Access Copyright's repertoire made by the Plaintiffs from 2013 through 2015.

[92] Notwithstanding the factual findings above, for the reasons below, this case does not turn on Access Copyright's evidence of compensable copying (either in the form of actual copies or the Volume Study), but rather on Access Copyright's ability to advance its counterclaim and defences on behalf of its Affiliates with respect to issues two and three.

**(6) Witnesses at trial**

[93] Each of Access Copyright and the Plaintiffs called a number of witnesses at trial, all of whom filed affidavits and gave oral evidence both by way of brief examinations-in-chief and cross-examination. The evidentiary record on this motion is extensive and the cross-examinations spanned four days. It is not my intention in these Reasons to provide an extensive summary of the evidence of each witness, but rather to give a high-level overview of the nature of their evidence. However, I have considered the entirety of the evidence of each witness.

[94] Moreover, as will become apparent below, my determination of the issues raised on this motion did not turn on the contested evidence of these witnesses.

**(a) *Access Copyright's witnesses***

**(i) **Duncan Lane****

[95] Access Copyright submitted the affidavit of Duncan Lane affirmed August 21, 2023. Mr. Lane is a former teacher, has worked in educational publishing for over 30 years and is currently the Vice-President of Scholastic Canada's Education and Magazines Division.

[96] In his affidavit and his testimony before this Court, Mr. Lane provided an overview of the K-12 publishing industry, which he stated is "not healthy" as a result of declining sales and unlicensed copying. In particular, Mr. Lane explained that the Plaintiffs' refusal to pay royalties to Access Copyright for their copying has had a negative impact on educational publishers,

particularly with respect to Canadian-developed content, and a number of publishers have withdrawn from the market. Despite refusing to pay royalties under the tariff from 2013 onwards, Mr. Lane stated that the Plaintiffs continued to copy works, or large excerpts of works, and provided several examples thereof. Mr. Lane explained that monitoring copying across the education sector is a major challenge for educational publishers.

**(ii) Eric Walters**

[97] Access Copyright submitted the affidavit of Eric Walters affirmed August 21, 2023 [Walters Affidavit]. Mr. Walters is a teacher, a social worker and a Canadian author of young adult fiction and picture books. The Walters Affidavit referred to the More Canada Report (published in 2018) and cited industry statistics showing that the sales of Canadian books had drastically declined in the previous decade. Mr. Walters also gave evidence about the widespread unlicensed copying of his work in schools, for which royalties have not been paid.

[98] Mr. Walters' evidence was that the collective licensing regime provides a solution to the “impossibility of authors directly licensing copies made by every teacher [...] across the country,” and authors (like him) depend on royalties collected by Access Copyright for their livelihood. Mr. Walters stated that when the Plaintiffs ceased paying the tariff in 2013, there was a “drastic reduction” in royalties paid to authors, which is both unfair to those authors and creates financial barriers for new and diverse writers.

**(iii) Glenn Rollans**

[99] Access Copyright submitted the affidavit of Glenn Rollans affirmed August 21, 2023 [Rollans Affidavit]. Mr. Rollans is the president, publisher and owner of an independent education-resources publisher and has been involved in K-12 publishing in varying capacities since 1999.

[100] In his affidavit and his testimony before this Court, Mr. Rollans provided an overview of the K-12 publishing industry, including an explanation that the provincial and territorial governments are the main customers in K-12 publishing and that publishers expend significant resources developing K-12 materials, which makes uncompensated copying disruptive to the industry. Mr. Rollans also explained that the K-12 publishing industry is facing “declining health,” in part due to increased demands for digital resources in K-12 education, which required further investment and decreased sales. The Rollans Affidavit noted that the photocopying of K-12 educational resources creates “downward pressure on sales,” but that Canadian publishers have no way of monitoring copying levels in schools.

[101] Mr. Rollans stated that he and other publishers relied on the Plaintiffs’ conduct before the Board, the Federal Court of Appeal and in the reconsideration proceeding, and “believed they would pay the rate they fought for”.

[102] As a result of the Plaintiffs’ decision not to pay the K-12 tariff, Mr. Rollans stated that “Canadian operations tailored to the unique curriculum needs of different Canadian K-12 populations mostly no longer exist,” and provided a list of examples of publishers that have ceased

publishing in K-12. Mr. Rollans explained that copyrighted works are still being copied in schools, without compensation, and points to the Guidelines as evidence that teachers are encouraged to make unlicensed copies of certain works (e.g. “up to 10 per cent of a copyright-protected work” or “an entire single poem or musical score”).

**(iv) John Degen**

[103] Access Copyright submitted the affidavit of John Degen affirmed August 21, 2023. Mr. Degen has served as the Executive Director or Chief Executive Officer of the Writers’ Union of Canada since 2012 and was previously involved in the publishing industry in other capacities.

[104] Mr. Degen stated that the Guidelines suggest to educators that no payments are needed for copies of certain works, or portions thereof, and that educators continue to copy works even though the Plaintiffs no longer pay Access Copyright for a licence. Mr. Degen also described the hardship faced by writers who struggle to make a living as a result of the Plaintiffs’ decision to not pay Access Copyright for licences as well as the benefits of collective licensing in ensuring that writers are fairly compensated for their work. Mr. Degen stated that writers (like himself) believed the Plaintiffs would pay the lower royalty rate they were advocating for once certified by the Board. Mr. Degen asserted that the CMEC was “sending the message that they wanted a *lower* rate as opposed to *no* rate,” because the CMEC participated in the tariff process, defended the Board’s decision and made comments to that effect.

(v) **Michael William Andrews**

[105] Access Copyright submitted the affidavit of Michael William Andrews affirmed August 21, 2023 [Andrews Affidavit]. Since 2017, Mr. Andrews has been the Chief Operating Officer at Access Copyright and has worked in the Canadian publishing industry since 2008. However, Mr. Andrews was not employed with Access Copyright during the time period at issue in this litigation.

[106] Mr. Andrews provided an overview of Access Copyright's activities, a history of the K-12 licensing regime, background regarding the 2005-2009 and 2010-2012 tariffs and details regarding the Plaintiffs' participation in the tariff setting process before the Board and the courts. Mr. Andrews stated that the Plaintiffs have copied many millions of pages each year of works within Access Copyright's repertoire, but have refused to pay royalties since January of 2013. He also explained the history of the disputes Access Copyright has had with the Plaintiffs over the determinations on compensable copying and cited examples to that effect.

[107] Mr. Andrews stated that the Plaintiffs refused to pay any royalties owed from 2013 to 2015 under the Approved 2010-2015 Tariff, contrary to their representations before the Supreme Court. Mr. Andrews explained that it was clear to Access Copyright that the Plaintiffs' 2012 Letter was not about "opting out" but rather paying less, as the Plaintiffs continued to participate in the proceedings. Mr. Andrews stated that after the 2012 Letter, Access Copyright believed that the Plaintiffs would not pay the interim tariff because the Plaintiffs thought that the soon-to-be certified rate for the 2010-2015 tariff would be lower than the interim rate.

[108] Mr. Andrews also described how the Plaintiffs' failure to pay royalties has led to a sharp decline in Access Copyright's revenues and distributions. He stated that the Plaintiffs' conduct has had a negative effect on Access Copyright, its Affiliates and the health of the Canadian publishing industry as a whole.

**(b) *The Plaintiffs' witnesses***

**(i) **John Finch****

[109] The Plaintiffs submitted two affidavits from John Finch, one of which was sworn on April 28, 2023 [Finch Affidavit] and the second of which was sworn on September 14, 2023. From 2012 until his retirement in 2021, Mr. Finch was the Coordinator of the Learning Support and Technology Unit of the Department of Education and Training of Manitoba. As part of this role, Mr. Finch was the Manitoba member on the CMEC's Copyright Consortium Committee. Further, from 2015 to 2019, Mr. Finch was also the Chair of the Tariff Proceedings Subcommittee, which is a committee that manages the copyright work of the Ministers of Education that make up the CMEC Copyright Consortium.

[110] The Finch Affidavit provided an overview of the CMEC's role in Canadian copyright matters, which include advocacy around amendments to the *Copyright Act*. The Finch Affidavit also described the judicial review and subsequent appeal of the Initial 2005-2009 Tariff, the development of the Guidelines and the Plaintiffs' decision, based on legal developments, to opt out of the tariff regime. Mr. Finch explained that the Plaintiffs did not report FTE numbers or make payments to Access Copyright from 2013 onwards. Mr. Finch provided a chronological overview



of the relevant events from 2013 to 2021 leading up to this action. He then explained the Plaintiffs' perceived relevance of the *York University* decision to the claims in this action.

**(ii) Shannon Delbridge**

[111] The Plaintiffs submitted the affidavit of Shannon Delbridge sworn April 27, 2023. Ms. Delbridge was the Executive Director of Corporate Policy for the Department of Education and Early Childhood Development at the Government of Nova Scotia from 2003 to 2012 and 2013 to 2014. In this capacity, Ms. Delbridge was also a witness for the Plaintiffs in the Board's 2014 tariff proceedings as related to the Approved 2010-2015 Tariff.

[112] Ms. Delbridge provided an overview of the historic licensing relationship between the Plaintiffs and Access Copyright, the structure of the Canadian K-12 education system, the CMEC Copyright Consortium's role in Canadian copyright matters and the K-12 education system, the Guidelines, the Plaintiffs' choice to opt out of the tariff regime effective January 1, 2013 (as well as the timeline leading up to this choice) and the chronology of events leading up to this litigation (including the legislative changes to the *Copyright Act* as well as the Supreme Court's ruling in 2012).

**(iii) Charlotte Strong**

[113] The Plaintiffs submitted the affidavit of Charlotte Strong sworn April 30, 2023. Ms. Strong was the legislation and research policy consultant in the Department of Education of

Newfoundland and Labrador and in that role, she was the Province's member of the CMEC's Copyright Consortium Committee.

[114] Ms. Strong explained that one reason materials are copied in K-12 education is to facilitate access by students with perceptual disabilities, and she provided some background regarding the services that provide alternate format materials. Aside from these reasons, Ms. Strong stated that, in her experience, teachers do not need to copy curriculum resources, except to provide supplementary material in particular circumstances.

**(iv) Cynthia Andrew**

[115] The Plaintiffs submitted the affidavit of Cynthia Andrew sworn May 12, 2023 [Andrew Affidavit]. Ms. Andrew has participated in the CMEC's activities on behalf of public school boards in Ontario since the late 1990s and is currently the Chair of the Tariff Proceedings Sub-Committee of the CMEC's Copyright Consortium Committee.

[116] Ms. Andrew provided background information about the Plaintiffs' historical licensing arrangements with Access Copyright, the CMEC, the CMEC Copyright Consortium and its Tariff Proceedings Sub-Committee. Ms. Andrew also explained that the CMEC Copyright Consortium, in collaboration with other parties, developed and published *Copyright Matters!*, which acts as a copyright resource for teachers to help them understand their rights and responsibilities regarding the use of copyright-protected materials in educational settings.

[117] Ms. Andrew also explained the basis for the CMEC Copyright Consortium's decision to actively represent the interests of school boards and educators before the Board in the proceedings leading up to the certification of both the Approved 2005-2009 Tariff and the Approved 2010-2015 Tariff.

[118] In her affidavit, Ms. Andrew provided a history of how negotiations with Access Copyright historically functioned in the education sector, leading up to the breakdown of the negotiations to renew the Pan-Canadian Licence Agreement. Ms. Andrew provided background on both the 2005-2009 and the 2010-2015 tariff proceedings and the Plaintiffs' motivations for participating in the Board's proceedings relating to the 2010-2012 and 2013-2015 proposed tariffs.

[119] The Andrew Affidavit also stated that the CMEC Copyright Consortium viewed the Supreme Court of Canada's decision in *Alberta (Education) et al v Canadian Copyright Licensing Agency (Access Copyright)*, *supra*, as a significant change in the application of copyright law in Canada, which was followed by the amendment to the *Copyright Act* in November 2012. Following these amendments, the CMEC Copyright Consortium, along with other federal education agencies, created the *Fair Dealing Guidelines* to update educators on their rights and responsibilities following these changes to the copyright regime.

[120] Ms. Andrew also stated that Ontario school boards obtained licences and paid the applicable tariff fees up to and including 2012 and explained the annual licence purchasing process.

[121] The Andrew Affidavit stated that Access Copyright was advised in the 2012 Letter that the provincial Ministries and the Ontario school boards would no longer be operating under the Access Copyright tariff, and from January 1, 2013 onwards, the Ontario school boards ceased reporting their FTE numbers and making payments to Access Copyright.

**F. The Plaintiffs' criticisms of Access Copyright's witnesses**

[122] In their amended written representations, the Plaintiffs asserted that all of Access Copyright's witnesses lacked credibility.

[123] In relation to Mr. Andrews, the Plaintiffs' critique focused on his lack of knowledge. While Mr. Andrews testified that his knowledge came from the relevant documents that he had been provided for review (given that he was not at Access Copyright at the relevant time), the Plaintiffs assert that he appeared to only know the facts from those documents that supported Access Copyright's case. The Plaintiffs pointed to 61 instances where Mr. Andrews was asked a question on cross-examination and his response was that he did not know the answers, could not recall a relevant fact or was not at Access Copyright at the relevant time.

[124] In relation to the remaining three Access Copyright witnesses (Mr. Degen, Mr. Walters and Mr. Lane), the Plaintiffs assert that their evidence was intended by Access Copyright to establish that rights owners (i.e. Affiliates) had believed and relied on the Plaintiffs' asserted promises to pay Access Copyright. However, in the case of Mr. Degen, the Plaintiffs note that he admitted on cross-examination to having made many public and private statements from 2012 to 2015 to the effect that the Plaintiffs had opted out of the tariff regime and were no longer licensees.

The Plaintiffs argue that his attempt to distance himself from these statements by drawing a distinction between what was said in public and what is said in private undermined his credibility, particularly given that he had also made statements in private to Access Copyright's then-CEO that undermined his purported distinction.

[125] In the case of Mr. Walters and Mr. Lane, the Plaintiffs assert that they both lacked credibility because they admitted that they chose not to bring infringement actions after witnessing K-12 schools infringing their copyright on a regular basis, not because they believed that the schools were licensees through Access Copyright but for business reasons.

[126] I have considered the assertions made by the Plaintiffs regarding Access Copyright's witnesses. However, as detailed below, none of my determinations on the issues raised in this proceeding turn on the disputed evidence of these witnesses. That said, I will nonetheless address the allegations made by the Plaintiffs.

[127] I am satisfied that Mr. Andrews lacked knowledge of many aspects of the subject matter on which he was questioned. However, this is not surprising given that he was not at Access Copyright at the relevant time. Whether his inability to answer questions was "strategic" (i.e. based on a deliberate familiarization with only certain historical facts) or a function of what I agree was unclear questioning by counsel for the Plaintiffs, I am not satisfied that an adverse credibility finding is justified. Mr. Andrews' evidence was limited by what he was able to speak to and to the extent that he was unable to speak to certain issues, I simply do not have any evidence from him on those issues.

[128] With respect to Mr. Degen, I have reviewed his responses to questions asked on cross-examination when presented with his private correspondence. When reviewed in context, I find that he does not directly contradict himself, but rather attempts to provide an explanation as to why he wrote what he did and why what he wrote did not contradict his belief that the Plaintiffs were liable for licence fees. Any weaknesses in Mr. Degen's responses go to weight, rather than to the issue of credibility.

[129] With respect to Mr. Walters and Mr. Lane, Access Copyright correctly notes that the Plaintiffs cite Mr. Rollans' testimony to support their argument regarding Mr. Lane and Mr. Walters' credibility. I find that their credibility was not put into question by their own explanations as to why they did not independently pursue copyright infringement actions.

### **G. Parliamentary privilege dispute**

[130] On October 6, 2023, on the eve of the summary trial, I received a joint letter from the Law Clerk and Parliamentary Counsel for the Senate of Canada, as well as for the House of Commons of Canada [jointly, the Clerks]. The Clerks wrote on behalf of the Speakers of the Senate and the House of Commons, respectively, in their roles as custodians of parliamentary privileges of their respective Houses. The Clerks expressed concern with Access Copyright's use of committee transcripts, which they asserted are protected by parliamentary privilege. Specifically, Access Copyright sought to adduce evidence of statements made by witnesses that appeared before the Standing Senate Committee on Banking, Trade and Commerce, the House of Commons Legislative Committee on Bill-C-32 and the House of Commons Legislative Committee on Bill

C-11. The Clerks were concerned that this Court would be asked to rely on these statements to make findings of fact and a determination of liability.

[131] The Clerks submitted that this Court must judicially take notice of, apply and defend parliamentary privilege [see *Parliament of Canada Act*, RSC, 1985, c. P-1, s 5]. Although it is well-established that Courts may rely on parliamentary debates to establish uncontroversial facts, to ascertain the purpose of an enactment or to assess an enactment's constitutionality, the Clerks submitted that the anticipated use of the committee transcripts ran contrary to the protections afforded to witnesses under parliamentary privilege. As the Clerks stated in their letter, this protection of freedom of speech for individuals appearing before the Senate, the House or their committees exists to encourage truthful and complete disclosure without fear of reprisal or other adverse actions because of the individuals' testimony, as supported by the case law [see *Gagliano v Canada (Attorney General)*, 2005 FC 576, aff'd 2006 FCA 86; *Canada (Deputy Commissioner, Royal Canadian Mounted Police) v Canada (Commissioner, Royal Canadian Mounted Police)*, 2007 FC 564; *Ontario v Rothmans et al*, 2014 ONSC 3382; *CMT et al v Government of PEI et al*, 2019 PESC 40, rev'd in part on other grounds in 2020 PECA 12; *Duffy v Canada (Senate)*, 2020 ONCA 536; *Guergis v Novak et al*, 2022 ONSC 3829].

[132] At my request, on October 8, 2023, Access Copyright, the Plaintiffs and the Clerks filed written submissions with the Court in support of their respective positions. In their written submissions, the Clerks challenged:

- a. the possible use and reliance, by the parties, of transcripts of parliamentary proceedings for a purpose that is contrary to the parliamentary privilege of freedom of speech, including for the

purpose of making findings of fact and determination of liability and cross-examinations; and

- b. the admissibility, as evidence, of transcripts of other court or administrative tribunal proceedings in which parliamentary proceedings were used for a purpose that is contrary to the parliamentary privilege of freedom of speech.

[133] The Plaintiffs agreed with the Clerks and supported their position. Access Copyright took the position that the evidence of parliamentary proceedings should remain in the record, as it was clearly relevant and admissible, particularly with respect to the interpretation of the 2012 amendments to the *Copyright Act*. Access Copyright asserted that if a party seeks to rely on this evidence for other purposes, then the Court should receive submissions at that juncture or in final argument and the Court should not rule pre-emptively on objections that have not been made to questions that have not yet been asked.

[134] On October 9, 2023, Access Copyright, the Plaintiffs and the Clerks informed this Court that they had resolved the issue related to parliamentary privilege by agreeing to the following:

Questions having arisen respecting the application of parliamentary privilege of freedom of speech and concerns having been raised by parliamentary counsel, the parties agree:

1. Parliamentary transcripts - and sections of other transcripts reproducing parliamentary transcripts - cannot be used in building a liability case by either side except as permitted under paragraph 3;
2. Parliamentary transcripts cannot be used in cross-examination; and
3. Parliamentary transcripts can be used to determine Parliament's intention as an aid to statutory interpretation and can stay on the record for these purposes.



[135] On October 10, 2023, I issued a direction confirming that the parties and the Clerks had reached the above agreement and that for the purposes of the summary trial, the Court would treat as struck any evidence and written representations that contravened this agreement.

[136] As such, for the purpose of this summary trial, any evidence protected by parliamentary privilege could only be used for the limited purpose of determining Parliament's intention as an aid to statutory interpretation.

[137] As will be addressed more fully below, the only statutory interpretation required for the purpose of determining the three issues presented by the parties is the meaning of the phrase "offer to pay".

[138] In their closing submissions, Access Copyright summarized the Plaintiffs' conduct, which it argues "sent a clear message that the Plaintiffs were not prepared to continue to 'overpay' the 2005-2009 tariff rate but were offering to pay the \$2.41 per FTE rate they were defending in the courts and before the Board on redetermination" and therefore "clearly and directly contradicts any claim that they had opted out of the *Approved 2010-2015 Tariff*". Specifically, at subparagraph 49(a) of Access Copyright's closing submissions, Access Copyright lists the following as "conduct" establishing this argument:

Beginning in 2011, the Plaintiffs represented in multiple public fora that Access Copyright had a continued entitlement to payment, that the Board's tariff processes "will be in place", and that there would be "no loss of income" for authors and publishers.

[139] Access Copyright cites no evidence to identify the “public fora” in which these statements were made, but as rightly pointed out by the Plaintiffs, these statements align with statements made by the Plaintiffs in the parliamentary committee transcripts.

[140] When I addressed Access Copyright’s use of evidence subject to parliamentary privilege during their closing arguments, Access Copyright asserted that the statements made by the Plaintiffs before the parliamentary committees are relevant to the Plaintiffs’ assertion that the *Copyright Modernization Act* constituted a “significant” change in copyright law and impacted the Plaintiffs’ conduct, which conduct underpins Access Copyright’s “offer to pay” analysis. However, the nature of the amendments to the *Copyright Act* occasioned by the *Copyright Modernization Act* (i.e. whether they were minor or significant changes) is not an issue that I need to decide on this motion, regardless of whether those amendments influenced the decision of the Plaintiffs to obtain a licence. I find that there is no issue of statutory interpretation before me that would require me to consider the representations made by the Plaintiffs before the parliamentary committees.

[141] As such, I will not consider any of the evidence protected by parliamentary privilege in determining the issues raised on this motion.

## **II. Issues**

[142] The first issue to be determined is whether the parties have established that this matter is suitable to be determined by way of summary trial.

[143] Assuming that I find that summary trial is appropriate, the parties agree that the following issues are to be determined on this motion and that the consequences of the determination of each issue are as stated in the brackets:

1. Have the Plaintiffs been licensees from 2013 onward? (If yes, the Plaintiffs shall pay the tariff in respect of the years in which they were licensees. If not, issue (ii) must be decided).
2. If the Plaintiffs have not been licensees from 2013 onward, are the Plaintiffs nevertheless liable in equity to pay Access Copyright? (If yes, the Plaintiffs shall pay the tariff in respect of the years in which they were licensees. If not, issue (iii) must be decided).
3. If the Plaintiffs are not liable in equity to pay Access Copyright, is Access Copyright entitled to retain the 2010-2012 overpayment in any event? (If not, the Plaintiffs are entitled to a refund of overpaid royalties for 2010 to 2012).

[144] Given Access Copyright's decision to limit its claims to the years 2013 through 2015, I would reframe the issues as follows, with the same resulting consequences as agreed to by the parties:

1. Were the Plaintiffs licensees in 2013, 2014 and 2015?

2. If the Plaintiffs were not licensees from 2013 to 2015, are the Plaintiffs nevertheless liable in equity, or otherwise, to pay Access Copyright an amount equivalent to the tariff royalties for 2013 to 2015?
3. If the Plaintiffs are not liable in equity, or otherwise, to pay Access Copyright an amount equivalent to the tariff royalties for 2013 to 2015, is Access Copyright entitled to retain the 2010 to 2012 overpayment in any event?

### **III. Analysis**

#### **A. This matter is suitable to be determined by way of summary trial**

[145] When a motion for summary trial is brought, there are three basic operative principles that the Court must consider: (i) the practice and procedure of the Court, as established by the *Rules* as well as its plenary powers; (ii) that the *Rules* generally permit the parties to prosecute and defend their cases as they see fit, which reflects the Court’s default position that the litigation is party-run; and (iii) that the *Rules* must be interpreted in light of Rule 3, which provides that the *Rules* shall be interpreted and applied so that “‘every proceeding’ is determined ‘on its merits’ in ‘the just, most expeditious and least expensive’ way” [see *ViiV Healthcare Company v. Gilead Sciences Canada, Inc*, 2021 FCA 122 at paras 16-18].

[146] The rules applicable to summary trials are found in Part 4 of the *Rules*. Rule 213(1) allows a party to bring a motion for summary trial on all or some of the issues raised in the pleadings at

any time after the defendant has filed a defence, but before the time and place for trial have been fixed.

[147] Rule 216 of the *Rules* governs the Court's discretion as to whether to hold a summary trial. Pursuant to Rule 216(5), the Court may decline to do so if "the issues raised are not suitable for summary trial" or "a summary trial would not assist in the efficient resolution of the action". Pursuant to Rule 216(6), if the Court is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexities of the issues and the existence of conflicting evidence, the Court may grant judgment, unless it would be unjust to do so.

[148] Mindful of the wording of Rules 3, 213 and 216, this Court has recognized several useful factors relevant to whether the prerequisites for summary trial have been met. In deciding whether to proceed by way of summary trial, the Court is entitled to consider, among other things:

- The amount involved;
- The complexity of the matter;
- The urgency of the matter;
- Any prejudice likely to arise by reason of delay;
- The cost of taking the case forward to a conventional trial in relation to the amount involved;
- The course of the proceedings;
- Whether the litigation is extensive and the summary trial will take considerable time;
- Whether credibility is a critical factor in determining the dispute;

- Whether the summary trial may create an unnecessary complexity in resolving the dispute;
- Whether the application would result in litigating in slices; and
- Any other matters which arise for consideration.

[see *Wenzel Downhole Tools Ltd v National-Oilwell Canada Ltd*, 2010 FC 966 at paras 36-37; *ViiV Healthcare Company v Gilead Sciences Canada, Inc.*, 2020 FC 486 at para 11, aff'd 2021 FCA 122].

[149] Ultimately, “the Court must be satisfied that the prerequisites in the Rules for summary judgment or summary trial, understood in light of rule 3, are met and that it is able to grant summary judgment, fairly and justly, on the evidence adduced and the law” [see *ViiV Healthcare Company v. Gilead Sciences Canada, Inc.*, *supra* at para 42].

[150] In this case, both parties have agreed to proceed by way of summary trial. While consent of the parties to the summary trial process is not determinative, it is an important factor in assessing whether it is “suitable” and “just” to proceed by summary trial [see *Ark Innovation Technology Inc v Matidor Technologies Inc*, 2021 FC 1336 at para 18, citing *Tremblay v Orio Canada Inc*, 2013 FC 109 at para 26 and *Vachon Bakery Inc v Racioppo*, 2021 FC 308 at paras 8, 12]. As Justice McHaffie stated in *Ark Innovation* at paragraph 18:

If all parties are prepared to proceed through the simplified and typically less expensive summary trial process, this suggests it is just to proceed in this manner. I believe the Court should be reluctant in such circumstances to require the parties to incur the further cost and delay of proceeding to a full trial.

[151] I would note that as the original Case Management Judge of this proceeding, I suggested to the parties, at the time that I dismissed the motion to strike, that this matter appeared amenable to a motion for summary trial. Having now reviewed the materials filed by the parties and conducted the summary trial, I am satisfied that this matter is suitable for summary trial, that it would assist in the efficient resolution of the action and that it would not be unjust to decide the issues in this case by summary trial as: (a) there is sufficient evidence for adjudication of the issues, as each party filed significant affidavit and documentary evidence; (b) while there are a number of detailed issues, the facts are clear and the dispute between the parties is limited to the legal effects of those facts; (c) credibility is not a determinative factor, but in any event, the witnesses appeared before the Court for direct and cross-examination; (d) the summary trial will fully dispose of the action and counterclaim, such that there will be no risk of “litigating in slices”; and (e) summary trial will permit a judgment on the merits to be reached more quickly and less expensively.

**B. Burden of proof**

[152] The parties agree and I concur that as a Plaintiff by Counterclaim and a party raising affirmative defences, Access Copyright bears the legal burden of proof on this motion.

**C. Issue No. 1: the Plaintiffs were not licensees in 2013, 2014 or 2015**

[153] As noted above, pursuant to section 70.12 of the *Copyright Act*, a collective society (such as Access Copyright) operating in the general regime may, “for the purpose of setting out by licence the royalties and terms and conditions relating to classes of uses”, either (a) file a proposed tariff with the Board; or (b) enter into agreements with users. This case does not concern a private

licensing agreement entered into between the Plaintiffs and Access Copyright. Rather, this case concerns licensing pursuant to a Board-approved tariff.

[154] The parties are in agreement that licences under the tariff regime are voluntary and that, pursuant to section 70.17 of the *Copyright Act*, a person becomes a voluntary licensee by paying or offering to pay the royalties specified in an approved tariff. Access Copyright asserts that the Plaintiffs were voluntary licensees under the Approved 2010-2015 Tariff as a result of: (a) their payments of royalties for the years 2010 through 2012; and (b) their conduct, which Access Copyright asserts constituted an “offer to pay”.

**(1) The Plaintiffs did not “pay” for a licence under the Approved 2010-2015 Tariff**

[155] Access Copyright’s position is that the Plaintiffs became voluntary licensees bound to a six-year licence under the Approved 2010-2015 Tariff based on the Plaintiffs’ payments in 2010, 2011 and 2012 of the Initial 2005-2009 Tariff as a continuation tariff. In other words, by paying royalties from 2010 to 2012, Access Copyright asserts that the Plaintiffs received the benefit of being immunized against infringement actions for the full period from 2010 to 2015, and accordingly, assumed the burden of paying royalties for the remainder of the tariff period (from 2013 to 2015).

[156] The Supreme Court’s decisions in *SODRAC* and *York University* make it clear that the Plaintiffs were entitled to know the terms and conditions of the Approved 2010-2015 Tariff before agreeing to be bound thereto. That is part and parcel of what it means to be a “voluntary” licensee.



[157] There is a dispute between the parties as to when the terms and conditions of the Approved 2010-2015 Tariff were known to the Plaintiffs (with Access Copyright asserting it was in February 2016 and the Plaintiffs asserting it was in January 2018), which dispute I will address more fully below. Regardless of which party is correct, it is undisputed that the terms and conditions of the Approved 2010-2015 Tariff could not have been known when the Plaintiffs paid the continuation tariff royalties in 2010 through 2012. As such, I find that the Plaintiffs' act of paying a continuation tariff while they awaited the terms of a certified tariff does not constitute payment for a six-year licence under the Approved 2010-2015 Tariff. It would be contrary to the Supreme Court's decisions in *SODRAC* and *York University* to find that the Plaintiffs could voluntarily "pay" for a statutory licence under a tariff that had not yet been approved, let alone filed. Access Copyright did not file the proposed 2013-2015 tariff until June of 2012.

[158] Moreover, while Access Copyright has not advanced a claim against the Plaintiffs based on the Initial 2005-2009 Tariff or the Approved 2005-2009 Tariff, I would note that there are no terms or conditions of these tariffs that would bind the Plaintiffs to a licence under the Approved 2010-2015 Tariff by virtue of paying thereunder as a continuation tariff. Access Copyright has also not pointed the Court to any section of the *Copyright Act* to support its assertion that paying a continuation tariff binds a user to a licence once the tariff is finalized.

[159] While Access Copyright makes much of the fact that the Plaintiffs are seeking a refund of their overpayment under the Approved 2010-2015 Tariff, seeking a refund of the overpayment does not somehow transform the payments made under the Initial 2005-2009 Tariff in 2010 through 2012 into payments for a licence under the Approved 2010-2015 Tariff. Moreover, it is

important to note that section 15(5) of the Approved 2010-2015 Tariff permits the Plaintiffs to obtain a refund for their overpayment of the continuation tariff, without having to be licensees under the Approved 2010-2015 Tariff. Unlike section 15(4), section 15(5) makes no reference to licensees. Rather, it simply provides that “amounts due or overpaid as a result of the certification of this tariff shall be paid in two equal installments on October 31, 2016, and April 30, 2017”.

[160] While the parties raised a number of arguments about whether the Approved 2010-2015 Tariff contained all of the terms and conditions of a licence assumed thereunder, the term of any licence under the Approved 2010-2015 Tariff (annual, three years or six years) and the ability of the parties to terminate a licence under the Approved 2010-2015 Tariff, I need not address these issues in light of my finding above.

[161] Accordingly, I do not find that the Plaintiffs paid for a licence under the Approved 2010-2015 Tariff.

**(2) The Plaintiffs did not “offer to pay” for a licence under the Approved 2010-2015 Tariff**

[162] Access Copyright asserts that the Plaintiffs became voluntary licensees through their conduct, which conduct constituted an “offer to pay” within the meaning of section 70.17 of the *Copyright Act*. Access Copyright submits that the Plaintiffs’ conduct “sent a clear message” that the Plaintiffs were not prepared to continue to “overpay” the 2005-2009 tariff rate (as a continuation tariff) but were instead offering to pay the \$2.41 per FTE rate that the Plaintiffs were defending in the courts and before the Board on redetermination.

[163] Access Copyright relies on *Rogers Communications Canada Inc v Society of Composers, Authors and Music Publishers of Canada*, 2021 FC 207 at paragraphs 141-146, in support of its assertion that a party's conduct in relation to tariff obligations can constitute acceptance of a tariff that might otherwise not have applied.

[164] According to Access Copyright, the Court should determine, on an objective basis and from the perspective of a reasonable person, whether the Plaintiffs' conduct constituted an implicit offer to pay for a licence under the Approved 2010-2015 Tariff. Access Copyright urges the Court to determine that such an implicit offer was made, based on the following conduct:

1. Beginning in 2011, the Plaintiffs represented in multiple public fora that Access Copyright had a continued entitlement to payment, that the Board's tariff processes "will be in place" and that there would be "no loss of income" for authors and publishers.
2. The Plaintiffs did not withdraw from, reject or disengage with the Board's ongoing review of the proposed 2010-2015 tariff. After January 1, 2013, the Plaintiffs continued to actively participate in the process and adduced expert evidence justifying the low proposed blanket rate for their activities between 2010 and 2015. Based on their admitted compensable copying activities, the Plaintiffs proposed a tariff rate of \$0.51 per FTE.
3. In April 2013, the Plaintiffs opposed Access Copyright's interim tariff application. The Plaintiffs did not tell the Board that they had opted out of the tariff system. To the contrary, the Plaintiffs described Access Copyright's application as "completely

unnecessary” and dismissed Access Copyright’s concerns over not receiving interim payments as “speculative”. The Plaintiffs also submitted that the final tariff would soon be certified, relieving Access Copyright’s concerns about non-payment: “Access Copyright will not suffer any undue negative consequences caused by the length of proceedings as this tariff item is scheduled to be heard by the Board in a relatively accelerated manner on April 29, 2014”. Access Copyright asserts that such statements are incompatible with the suggestion that the Plaintiffs had opted out of the process and are in fact consistent with the Plaintiffs’ views, at the time, that they wanted to stand down payments until a new lower tariff was finally certified.

4. After being presented with the Board-approved rate and terms and conditions (described by Access Copyright as “the moment of truth described in *York*”), the Plaintiffs continued to make copies and defended the rates certified by the Board via a judicial review and a redetermination hearing before the Board in 2016-2018. This included describing the Board’s rate decision as “entirely correct”, and asking for it to be “left untouched”, phraseology that Access Copyright asserts goes many steps beyond a mere standard of review argument.
5. The Plaintiffs never examined (let alone executed) an alternative mechanism to lawfully clear their admittedly compensable copying beyond the tariff route. They made no effort to assess what copies they would need to license or to license those copies. Instead, they said they would absolutely pay and confirmed, by their conduct, that they would clear

their copying through the tariff to which they said Access Copyright was rightfully entitled.

6. In 2016, the Plaintiffs held onto adjustment cheques sent by Access Copyright rather than returning or destroying them.
7. The Plaintiffs continue to rely on the Approved 2010-2015 Tariff to ground their request for a refund from Access Copyright.

[165] Furthermore, Access Copyright draws on the common law related to unilateral contracts to argue that engaging in the performance of the invited act (here, compensable copying) constitutes “sufficient acceptance without notification”, relying on *Carlil v Carbolic Smoke Ball Co*, [1893] 1 QB 256 (CA) and *Union Steamships Ltd v Barnes*, [1956] SCR 842 at 846.

[166] Access Copyright maintains that neither the 2012 Letter nor the 2016 Letter displaced the Plaintiffs’ clear, objective intention to remain licensed. With respect to the 2012 Letter, Access Copyright asserts that: (a) the 2012 Letter spoke only of the Plaintiffs’ intention not to operate under an expired tariff, not the Approved 2010-2015 Tariff; (b) during the interim tariff application proceedings, the Plaintiffs stated that Access Copyright’s concerns that they would not pay royalties was “speculative” and that harm to Access Copyright would be only temporary as a final tariff would be set in the near future, which supports Access Copyright’s position that the Plaintiffs had not “opted out” of the tariff regime as now suggested; and (c) the Plaintiffs continued to engage

in the Board’s proceedings following the 2012 Letter—investing in experts quantifying their compensable copying and defending the Board-approved rates for 2010 to 2015.

[167] With respect to the 2016 Letter, Access Copyright asserts that the 2016 Letter did not change anything, as it was sent three months after the Board’s decision certifying the Approved 2010-2015 Tariff and “purported to advise, *retroactively and for the first time*, that they wished to ‘maintain their status as not having operated under’ the *new*” Approved 2010-2015 Tariff as of January 1, 2013. Access Copyright further asserts that the 2016 Letter was replete with obscurities, insofar as the 2012 Letter had referenced a different tariff and it was unclear how the Plaintiffs could operate under the Approved 2010-2015 Tariff for the purpose of valuing their refund, while not “operating under” it for valuing their compensable copying. Rather, Access Copyright claims that the 2016 Letter was a “ploy to buy time” and an attempt by the Plaintiffs to “hedge their bets” by avoiding the continuation payments for 2016 forward as the judicial review continued. Further, Access Copyright asserts that the Plaintiffs did not act as if they were “not ‘operating under’” the Approved 2010-2015 Tariff, as they did not drop out of the judicial review process but rather forcefully defended the Board’s decision.

[168] Access Copyright claims that the Plaintiffs now offer hindsight justification to explain their conduct in participating in the Board proceedings and subsequent judicial review and appeal of the Approved 2010-2015 Tariff—such as it being a strategy to negotiate or hedge against a higher rate—but argues that none of these strategies were memorialized in any document. Rather, Access Copyright asserts that the Plaintiffs never “opted out” of the statutory tariff regime.

[169] The Plaintiffs assert that no conduct, other than an offer to pay, could have made the Plaintiffs licensees under section 70.17 of the *Copyright Act* and that the conduct relied upon by Access Copyright cannot constitute an offer to pay. The Plaintiffs instead take the position that they had the right to review the final tariff terms in 2018 and no conduct before that date could have been an offer to pay.

[170] “Offer to pay” is a statutory term found in section 70.17 of the *Copyright Act* and thus the words must be interpreted in accordance with the modern principle of statutory interpretation, “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” [see *Canada v Bezan Cattle Corporation*, 2023 FCA 95 at paras 49-51].

[171] As noted by the Supreme Court in *York University*, “[i]n the context of the provisions at issue in this case, a person who has paid or offered to pay the royalties under s. 70.17 has become a licensee and may be liable for defaulted payments under s. 68.2(1). A person who has not paid or offered to pay is not licensed and may be liable for infringement” [see *York University, supra* at para 34]. The *Copyright Act* therefore vests a collective society such as Access Copyright with a right to bring an enforcement proceeding for payment of royalties against a person who has offered to pay for a statutory licence, but failed to follow through with payment.

[172] The Supreme Court has also acknowledged that “[p]aying or offering to pay is a permissive act triggering licence acquisition in both cases” [see *York University, supra* at para 38]. As such,

this Court must interpret the meaning of “offer to pay” in light of the voluntary nature of the licensing regime.

[173] “Offer to pay” must also be interpreted in accordance with the Supreme Court’s finding that a licensee must be able to review the terms and conditions of a tariff before agreeing to its terms, which (as noted above) is a critical component of what it means to be a voluntary licensee [see *York University, supra* at paras 27, 37; *SODRAC, supra* at para 108]. The timing of the conduct is therefore a relevant consideration.

[174] I accept that, theoretically, an “offer to pay” could be made by way of conduct. However, it must be recalled that the Supreme Court has held that “[w]here Parliament sees fit to create a mandatory duty to pay, it does so with ‘clear and distinct legal authority showing that this was Parliament’s intent’” [see *York University, supra* at para 32, citing *SODRAC, supra* at para 107]. The financial burden of a statutory licence is significant. As such, I find that any “offer to pay” by conduct would have to be clear and unequivocal so as not to bind a party to a statutory licence involuntarily and foist an obligation to pay on an unwilling user.

[175] Access Copyright urges the Court to consider various individual acts of the Plaintiffs, not all of which were directed at Access Copyright and none of which on their own could constitute a clear and unequivocal offer to pay, to find that, when pieced together like a jigsaw puzzle, the conduct demonstrates an objective intention to be bound by a statutory licence. I cannot accept that proceeding in this manner is consistent with the scheme of the *Copyright Act*, the object of the *Copyright Act* or the intention of Parliament. If Parliament intended that a user could be bound to



a voluntary statutory licence and its associated financial burden by an objective review of the person's collective course of conduct, Parliament would have clearly said so, which it has not done.

[176] I would expect that an “offer to pay” for a statutory licence under the *Copyright Act* would typically be made in writing by the party and addressed directly to the collective society concerned. I anticipate that it will be extremely rare that a court need consider a party's conduct to determine whether an offer to pay had in fact been made. However, the issue is now before me and, as such, I will turn to consider whether the Plaintiffs' conduct constituted an “offer to pay” for a statutory licence.

[177] I will begin by considering what conduct is relevant when considering whether the Plaintiffs made an “offer to pay”. As noted above, a licensee must be able to review the terms and conditions of a tariff before agreeing to its terms. There is a dispute between the parties as to when the terms and conditions of the Approved 2010-2015 Tariff were available to the Plaintiffs for review. In their written representations, Access Copyright asserts that the relevant date is February 19, 2016, when the Board certified the Approved 2010-2015 Tariff, whereas the Plaintiffs assert that the relevant date is January 19, 2018.

[178] While the Board released its decision certifying the Approved 2010-2015 Tariff on February 19, 2016, Access Copyright sought judicial review of the Board's decision, alleging several errors of fact and law. If successful on the judicial review, the royalty amount could have changed significantly. This left the terms and conditions of the Approved 2010-2015 Tariff

uncertain. As noted above, the Federal Court of Appeal ultimately granted the application for judicial review in part and remitted the matter for redetermination by the Board, with the Board ultimately finding on January 19, 2018 that the royalty rate should not be adjusted. Therefore, I find that it was only as of January 2018 (and then technically 30 days thereafter when the window to bring an application for judicial review closed) that the Plaintiffs knew the terms and conditions of the Approved 2010-2015 Tariff and could then make an informed decision as to whether to assume a voluntary licence thereunder.

[179] However, Access Copyright asserts that a reasonable observer assessing the Plaintiffs' conduct should nonetheless consider statements made by the Plaintiffs as far back as 2011, as it "does not lie in the Plaintiffs' mouths to disavow those many statements now". I reject this assertion. An offer to pay for a statutory licence cannot be made before the terms and conditions of the tariff are known. As that did not occur until January of 2018, there was no licence to offer to pay for prior to 2018. As such, I find that only conduct after January 19, 2018 could amount to an offer to pay for a statutory licence.

[180] The only conduct Access Copyright points to after January 19, 2018 that may have continued after the Approved 2010-2015 Tariff was certified is the following: (a) the Plaintiffs' failure to execute "an alternative mechanism to lawfully clear their admittedly compensable copying beyond the tariff route"; (b) the fact that the Plaintiffs held on to Access Copyright's adjustment cheques rather than returning or destroying them; and (c) the Plaintiffs continued to rely on the Approved 2010-2015 Tariff to ground their request for a refund.

[181] I do not find that any of this conduct, on its own or viewed collectively, constitutes a clear and unequivocal offer to pay for a statutory licence.

[182] The Plaintiffs' failure to execute "an alternative mechanism to lawfully clear their admittedly compensable copying beyond the tariff route" does not constitute an offer to pay for a statutory licence. Access Copyright appears to be asserting that compensable copying triggers obligations under the tariff, which is incorrect. The only way to obtain a licence under the tariff is for a party to pay or offer to pay. Any "compensable copies" that were made, which infringe the intellectual property rights of copyright owners, are properly the subject of a copyright infringement action brought by the copyright owner or its exclusive licensee or assignee under section 34(1) of the *Copyright Act*. Put differently, acts of infringement do not turn infringers into licensees so as to make them liable for the payment of royalties. To interpret the Plaintiffs' conduct as Access Copyright asks this Court to do would render the tariff *de facto* mandatory, contrary to the Supreme Court's decision in *York University*. Thus, any compensable copying the Plaintiffs have engaged in would properly be subject to an action in copyright infringement by the copyright owners, or their exclusive licensees or assignees, not by way of pursuing remuneration for default licence fees.

[183] Access Copyright's suggestion that the Plaintiffs' retention of Access Copyright's adjustment cheques (rather than returning or destroying them) constitutes an offer to pay is entirely without merit and Access Copyright has not even attempted to explain how this act, obviously designed to preserve a litigation position, could be construed as an offer to pay.

[184] Finally, I find that the Plaintiffs' request for a refund under section 15(5) of the Approved 2010-2015 Tariff did not amount to an offer to pay for a six-year licence under section 15(4) of that same instrument. These subsections contain distinct terms. Subsection 15(4) permits Access Copyright to invoice a licensee for the years 2010 to 2015, whereas subsection 15(5) provides the terms for refunding overpayments, without a requirement that the person seeking a refund be a licensee under that tariff. Based on the wording of the provisions, I find that a request for a refund under subsection 15(5) of the Approved 2010-2015 Tariff does not trigger an obligation to pay for a six-year licence under subsection 15(4).

[185] Even if I am wrong and the entirety of the Plaintiffs' conduct from 2011 onwards should be considered in determining whether the Plaintiffs offered to pay for a statutory licence, I nonetheless would have found that Access Copyright failed to establish that the Plaintiffs' conduct from 2011 onwards constituted an offer to pay for a statutory licence.

[186] Access Copyright pointed to statements made by the Plaintiffs in their written and oral submissions in the appeal heard by the Supreme Court of Canada in December 2011 in relation to the Initial 2005-2009 Tariff. The Plaintiffs stated, among other things, that:

- **“The tariff that the Copyright Board certified was calculated on the basis of the Board’s finding that the educational institutions across Canada copied, in total, 246 million pages per year of works within Access Copyright’s repertoire—*copies for which Access Copyright is entitled to payment.* Of those 246 million copies, only 16.8 million are in dispute in this proceeding. Considering that there were approximately 3.8 million full-time students in the Board’s tariff calculation, the number of copies in dispute in this case is therefore four and a half pages, per student, per year”.**

[Emphasis added in **bold**, underlining in original.]

- “Where I would like you to put the facts on the legal grid is to say that **one quarter of a billion pages, minus 17 million pages should be compensated or the Respondents are entitled to compensation for**”.

[Emphasis added in **bold**.]

[187] I am not satisfied that remarks made by the Plaintiffs to the Supreme Court (not Access Copyright) in relation to an entirely different tariff (the Initial 2005-2009 Tariff), in the context of a different issue (the copying of short excerpts) and before Access Copyright had even filed its proposed tariff for 2013 to 2015 could constitute an offer to Access Copyright to pay for the Approved 2010-2015 Tariff. Moreover, as Ms. Delbridge stated during her cross-examination during the Board proceeding in 2014, the Plaintiffs had not yet decided to opt out of the tariff regime at the time these submissions were made to the Supreme Court.

[188] It is unclear what other comments made in “public fora” Access Copyright relies on, given that the CMEC’s statements before the parliamentary committees are privileged and do not shed light on the statutory interpretation of “offer to pay”. As such, I find that Access Copyright has not established that any public statements made by the Plaintiffs constitute an “offer to pay” for a statutory licence.

[189] I also do not accept Access Copyright’s argument that the Plaintiffs’ participation in the tariff-setting process bound them as statutory licensees. It is clear from the words of the *Copyright Act* and the directions from the Board that prospective users or their representatives are entitled to file objections to proposed tariffs. In particular, the statutory language in section 67.1(5) of the *Copyright Act* requires the Board to publish proposed tariffs in the *Canada Gazette* to provide

“prospective users or their representatives” notice that they may file written objections to the tariff with the Board.

[190] Objectors play an important role in making sure that the Board sets rates that are fair and provide equitable remuneration to creators. They are provided opportunities to present evidence and challenge the terms and conditions of proposed tariffs. Had Parliament intended that objectors who participate in Board proceedings would be bound by the outcome of Board decisions, they would have explicitly said so. Access Copyright’s assertion that objectors could become bound to the tariff by virtue of their participation in Board proceedings would require the Court to read-out the term “prospective” or to otherwise render the term meaningless, which is improper. Moreover, were I to accept Access Copyright’s assertion that participating in the Board’s proceeding could constitute an offer to pay, it could have the perverse effect of making the tariff *de facto* mandatory for those who participate and voluntary for those who do not.

[191] Access Copyright’s further assertion that the Plaintiffs’ participation in the judicial review of the Board’s approval of the Initial 2010-2015 Tariff could amount to an offer to pay also lacks merit. If participating in proceedings before the Board cannot constitute an offer to pay, it follows that participating in the related judicial review proceeding similarly cannot constitute an offer to pay. To suggest, as Access Copyright does, that the language used by the Plaintiffs in their legal submissions (i.e. that the Board’s rate decision was “entirely correct” and that it should be “left untouched”) somehow transforms their conduct into an offer to pay is nonsensical. It is obvious that the language chosen by the Plaintiffs in their legal submissions related to the standard of review and the requested relief.

[192] While this is sufficient to dispose of Access Copyright's meritless assertion that participating in the tariff-setting process at all levels (before the Board, this Court, and the Federal Court of Appeal) constituted an offer to pay, the rationale for why the Plaintiffs would have participated sheds further light on the absurdity of Access Copyright's assertion. At the relevant time, the Supreme Court had not yet decided *York University*, so it was possible that the Plaintiffs would be bound to a statutory licence. If that were ultimately the case, it is obvious that it was in the Plaintiffs' interests to participate and advocate for a tariff lower than the one being proposed by Access Copyright (\$15.00 for 2010 to 2012 and \$9.50 for 2013 to 2015), which was an increase of \$10.19 and \$4.69 per FTE over and above the royalty under the Approved 2005-2009 Tariff.

[193] Access Copyright makes a related argument that, in response to the interim tariff application before the Board, the Plaintiffs never told the Board that they had opted out of the tariff regime and stated that Access Copyright's concerns that the Plaintiffs would not make interim payments were speculative. Access Copyright asserts that this conduct is incompatible with the suggestion that the Plaintiffs had opted out of the tariff regime and consistent with the Plaintiffs' "views that they wanted to stand down payments until a new lower tariff was finally certified". The flaw with this argument is that the issue is not whether the Plaintiffs "opted out". There was no obligation on the Plaintiffs' part to advise anyone, including Access Copyright, that they were "opting out" of the tariff regime. The issue is whether they "opted in" and that could only be done by way of an offer to pay for a statutory licence (given that I have already found that there was no payment for a statutory licence).

[194] During their closing arguments, Access Copyright stressed that it was not necessarily any one act of the Plaintiffs', on its own, that constituted an offer to pay but rather the totality of their conduct that must be considered. As I noted earlier, having found that no single act referred to by Access Copyright constitutes a clear and unequivocal offer to pay, it is illogical to suggest that this Court should now find that, when assembled together like a jigsaw puzzle, or when viewed holistically rather than individually, my determination should change. It does not. One key reason for this determination is that if the Court is being asked to consider the totality of the Plaintiffs' conduct, it must include other aspects of the Plaintiffs' conduct that would mitigate against a finding of a clear and unequivocal offer to pay—most notably, the Plaintiffs' 2012 Letter.

[195] Access Copyright argues that the 2012 Letter specified that the Plaintiffs will not be operating under the Approved 2005-2009 Tariff, which was an entirely different tariff, and said nothing about their intention to opt out of the Approved 2010-2015 Tariff, somehow suggesting that the 2012 Letter is not evidence of an intention to cease operating under the statutory licensing regime as of January 1, 2013. There is no merit to this argument. At the time that the 2012 Letter was sent, the Approved 2010-2015 Tariff had not yet been certified and the only existing certified tariff to make reference to in the letter was the Approved 2005-2009 Tariff. While Access Copyright attempts to obfuscate the meaning of the 2012 Letter, I find that the 2012 Letter provided clear notice to Access Copyright of the Plaintiffs' intention to cease operating under a statutory licence effective January 1, 2013. This letter, on its own, contradicts any assertion that the Plaintiffs' conduct constituted a clear and unequivocal offer to pay for a statutory licence.



[196] But there is additional conduct that further contradicts this assertion. Specifically: (a) after January 1, 2013, the Plaintiffs reported no FTE numbers to Access Copyright as they would have been required to do under the tariff regime; (b) the Plaintiffs refused to pay the invoices sent by Access Copyright for royalties purportedly owing in 2013; and (c) the Plaintiffs' 2016 Letter reiterates the sentiment expressed in their 2012 Letter, stating that the Plaintiffs "maintain their status as not having operated under the *Access Copyright Elementary and Secondary School Tariff, 2010-2015* as of January 1, 2013."

[197] Having considered the totality of the Plaintiffs' conduct, I am not satisfied that Access Copyright has established that the Plaintiffs made an offer to pay for a statutory licence under the Approved 2010-2015 Tariff.

[198] Accordingly, I find that the Plaintiffs did not pay or offer to pay for a statutory licence under the Approved 2010-2015 Tariff. As such, I must now go on to consider issue number two.

[199] Before doing so, I would note that at the hearing of the motion, the parties made submissions as to whether Access Copyright's claim under issue number one was limitation barred. Having found that the Approved 2010-2015 Tariff only became final in January of 2018, the three-year limitation period prescribed by subsection 43.1(1) of the *Copyright Act* only began to run as of February 2018 (when the 30-day judicial review period ran out from the Board's redetermination decision) and the Plaintiffs did not pay or offer to pay. As the counterclaim was commenced in July 2018, there was no limitation bar to this claim.

**D. Issue No. 2: the Plaintiffs are not liable in equity, or otherwise, to pay Access Copyright an amount equivalent to the tariff for 2013 to 2015**

[200] Having determined that the Plaintiffs did not pay or offer to pay for a statutory license under the Approved 2010-2015 Tariff, issue number two requires the Court to consider whether equity should nonetheless “step in” and require the Plaintiffs to compensate Access Copyright in an amount equivalent to the royalties payable under a statutory licence.

[201] Access Copyright argued at the hearing that the facts of this matter “cry out” for justice, such that equity should bind the Plaintiffs to the tariff. Put another way, equity should force the Plaintiffs to compensate the Affiliates for the 2013 to 2015 period (by way of payment to Access Copyright acting as agent) and the Approved 2010-2015 Tariff is the best evidence of the volume and value of copying.

[202] Access Copyright asserts that “equity cares about the factual backdrop”, which includes the conduct and understanding of the parties, and is not concerned with whether the Plaintiffs knew the terms and conditions of the approved tariff when they made their admissions, broke promises and engaged in the other conduct at issue. Access Copyright relies on all of the conduct noted above (the same conduct that it asserted amounts to an offer to pay) and in addition, highlights the following:

1. The Plaintiffs made copies of works in Access Copyright’s repertoire that went beyond their fair dealing rights. In the 2010-2015 tariff proceedings, the Board concluded that, after taking into account fair dealing and other copyright exceptions, the Plaintiffs made

more than 150 million compensable copies per year from 2010 to 2015. While this finding was premised on data from the 2005-2006 Volume Study, the Plaintiffs willingly agreed to use this data as representative of the amount of their compensable copying in 2010 through 2015.

2. The Plaintiffs conceded in the 2010-2015 tariff proceedings that their schools made compensable copies, that “these transactions also appear to be subject to a rightful compensation claim by Access Copyright” and that the Plaintiffs would “absolutely pay”. The Plaintiffs’ witnesses confirmed that evidence before the Court on this motion as well.
  
3. In their evidence and submissions to the Board, the Plaintiffs placed a value on their compensable copying from 2013 to 2015 of \$0.51 per FTE (although it was ultimately valued by the Board at \$2.41 per FTE). Notwithstanding this admission, the Plaintiffs have never provided any compensation to Access Copyright or the Affiliates for those copies. In fact, there is no evidence at all before this Court that the Plaintiffs explored any options to clear the copying that they admitted to. The Plaintiffs’ witnesses admitted that no licences were in place to cover the full range of their compensable copying activities nor did the Plaintiffs monitor the copying so that they would know what to license.
  
4. Access Copyright asserts that from 2010 to 2015, the Plaintiffs promoted increased copying through the Guidelines, which misinterpreted the bounds of fair dealing.

However, more importantly, the Plaintiffs knew that the Guidelines did not cover all of their copying and starkly conflicted with their own public positions on fair dealing.

5. Access Copyright asserts that it should be inferred from the evidence of compensable copying in the representative discovery sample (Exhibit 29 to the Andrews Affidavit) that the Plaintiffs' level of compensable copying remains in the many millions annually without any payment to the Affiliates.
6. Access Copyright asserts that this claim is the Affiliates' only chance to be paid for copies that the Plaintiffs concede went beyond their user rights.
7. Access Copyright asserts that it and the Affiliates reasonably relied on the various representations made by the Plaintiffs and believed that the Plaintiffs would pay the tariff once certified, particularly as the Plaintiffs remained fully engaged in the Board process, admitted to compensable copying, failed to explore any other avenue beyond the tariff for licensing their compensable copying and, after a long and expensive fight aimed at keeping the rate as low as possible, defended the terms and the rate for the entire 2010 to 2015 period as entirely correct.
8. Access Copyright asserts that the Plaintiffs' conduct has brought the Canadian K-12 publishers and authors "to the brink". The Plaintiffs have been and continue to withhold approximately \$20 million per year for compensable copying, which has caused writers'

incomes to plummet, book sales to crater, investments in new homegrown titles to diminish and additional publishers to shut down their educational divisions.

[203] Access Copyright asserts that it is entitled to equitable relief based on unjust enrichment, estoppel by representation, common law and equitable election, issue estoppel, abuse of process and/or collateral attack.

[204] It is not disputed that, pursuant to section 4 of the *Federal Courts Act*, RSC, 1985, c F-7, this Court is a court of equity and thus has the ability to grant equitable relief. Access Copyright also points to section 20(2) of the *Federal Courts Act* to note that such equitable jurisdiction also exists in relation to copyright matters. Section 20(2) provides:

<p><u>The Federal Court has concurrent jurisdiction in all cases, other than those mentioned in subsection (1), in which a remedy is sought</u> under the authority of an Act of Parliament or at law or <u>in equity respecting any patent of invention, certificate of supplementary protection issued under the Patent Act, copyright, trademark, industrial design or topography referred to in paragraph (1)(a).</u></p>	<p><u>Elle a compétence concurrente dans tous les autres cas de recours</u> sous le régime d'une loi fédérale ou de toute autre règle de droit non visés par le paragraphe (1) <u>relativement à un brevet d'invention, à un certificat de protection supplémentaire délivré sous le régime de la Loi sur les brevets, à un droit d'auteur, à une marque de commerce, à un dessin industriel ou à une topographie au sens de la Loi sur les topographies de circuits intégrés.</u></p>
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[Emphasis added.]

[Je souligne.]

[205] However, the Court's ability to grant equitable relief is not without limitation and this is where the parties differ. The Plaintiffs' general position is that copyright in Canada is a creature of statute and the rights and remedies it provides are exhaustive, citing *Théberge v Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at paragraph 5. As the *Copyright Act* does not make

equitable remedies available to a collective society (unless an exclusive licensee or assignee), the Plaintiffs assert that this Court has no ability to grant the equitable relief sought by Access Copyright.

[206] Access Copyright argues that the Supreme Court made it clear in *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 at 585-586, that “the maxims of equity can be flexibly adapted to serve the ends of justice as perceived in our days” and “are not rules that must be rigorously applied but malleable principles intended to serve the ends of fairness and justice”. As such, Access Copyright asserts that neither the law nor equity has primacy over the other, and the question is really which solution best meets the requirements of fairness and justice.

[207] Access Copyright argues that there is no need to ground its equitable claims in the text of the *Copyright Act*. In support of this assertion, Access Copyright pointed to several cases that consider equity in connection to copyright disputes, including *Rogers Communications Canada Inc v Society of Composers, Authors and Music Publishers of Canada*, 2021 FC 207, *Century 21 Canada Limited Partnership v Rogers Communications Inc*, 2011 BCSC 1196, *Columbia Pictures Industries Inc v Wang*, 2006 SKQB 307, *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 [*CCH*], *Research in Motion Limited v Atari Inc*, 2007 CanLII 33987 (ONSC) and *Urban Mechanical Contracting Ltd v Zurich*, 2022 ONCA 589.

[208] Access Copyright asserts that, contrary to the Plaintiffs’ assertion, the Federal Court of Appeal’s decision in *Teksavvy Solutions Inc v Bell Media Inc*, 2021 FCA 100, does not stand for the proposition that Access Copyright must ground its equitable remedies in the wording of the

*Copyright Act*. Access Copyright cites paragraph 31 of *Teksavvy*, where the Federal Court of Appeal refers to the punitive damages awarded in *Cinar Corporation v Robinson*, 2013 SCC 73 and the declaratory judgment in *CCH* as examples of “other remedies related to copyright infringement that are not specifically mentioned in the *Copyright Act*”.

[209] Instead, Access Copyright asserts that if Parliament had intended to preclude this Court from awarding equitable remedies in cases such as this one, it needed to do so expressly in the *Copyright Act*. Put differently, there is a presumption that the *Copyright Act* does not oust equity unless it is “irresistibly clear” [citing *Moore v Sweet*, 2018 SCC 52 at para 70; *Mercantile Bank of Canada v Leon’s Furniture Ltd*, 1992 CanLII 7473, 11 OR (3d) 713 (ONCA)]. Moreover, Access Copyright argues that the principle in *Théberge* (that copyright in this country is a creature of statute and the rights and remedies it provides are exhaustive) must be read together with the principle that the legislature does not intend to change existing law unless there is a clear provision to the contrary, relying on the following statement in *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42:

[39] To begin with, I think it useful to stress the presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, 1956 CanLII 2 (SCC), [1956] S.C.R. 610, at p. 614, for example, Fauteux J. (as he then was) wrote that “a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed”. In *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, at p. 1077, Lamer J. (as he then was) wrote that “in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law”.

[210] In the alternative, if this Court requires a provision to authorize it to award the equitable remedy Access Copyright seeks, Access Copyright submitted that authorization is to be found at the beginning of section 68.2(1) of the *Copyright Act*:

**68.2 (1)** Without prejudice to any other remedies available to it, a collective society may, for the period specified in its approved tariff, collect the royalties specified in the tariff and, in default of their payment, recover them in a court of competent jurisdiction.

[Emphasis added.]

[211] The core question raised in issue number two is whether it is open to this Court to award the equitable remedies Access Copyright seeks in the circumstances of this case and, if so, whether I should exercise my discretion to grant such remedies. For the reasons below, I find that this Court cannot award the equitable remedies sought by Access Copyright.

[212] While section 4 of the *Federal Courts Act* (previously section 3) clearly grants this Court jurisdiction to grant equitable remedies, such jurisdiction must be viewed through the lens of *Copyright Act* and any limitations it imposes thereon. Both this Court and the Federal Court of Appeal have considered the impact of statutory limitations on this Court's equitable jurisdiction.

[213] In *Garford Pty Ltd v Dywidag Systems International, Canada, Ltd*, 2010 FC 997 at paragraphs 8-11, Justice Russel stated that:

[8] This Court does have some equitable jurisdiction by virtue of section 3 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. This statutory grant allows the Court to apply the rules of equity in cases in which it otherwise has jurisdiction (as for example, in admiralty matters), but it does not give the Court a general jurisdiction in a civil action to consider equitable claims and remedies where the action is based on a statutory cause of action. See *Bédard v. Kellogg*, 2007 FC 516, [2007] F.C.J. No. 714.



[9] Careful attention must therefore be paid to the specific law under which jurisdiction is claimed. Where the statute relied upon provides a particular civil cause of action that does not include a claim for unjust enrichment, a substantive claim in unjust enrichment lies outside the federal law relied upon and the Court lacks jurisdiction over it.

[...]

[11] Section 36 provides a civil remedy by which a person who has suffered loss as a result of certain offences under the *Competition Act* may be compensated, exclusively, for actual loss or damage. The Plaintiff's failure to show actual loss and damage is fatal to the claim. Section 36 does not provide a vehicle for the recovery of any enrichment of the wrongdoer, and it cannot provide the basis for an equitable or restitutionary remedy, i.e., a claim in unjust enrichment. The remedies available for a breach of the *Competition Act* are limited to the recovery of the Plaintiff's actual loss and damage. See *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2008 NSSC 163 and 947101 *Ontario Ltd. (c.o.b. Throop Drug Mart) v. Barrhaven Town Centre Inc.* (1995), 1995 CanLII 7391 (ON SC), 121 D.L.R. (4th) 748 (Ont. Gen. Div.).

[214] In *Apotex Inc. v. Eli Lilly Canada Inc.*, 2011 FCA 358 [*Apotex*], the Federal Court of Appeal considered whether paragraphs claiming disgorgement of profits in Apotex's statement of claim, pled in conjunction with other paragraphs seeking damages pursuant to section 8 of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 [*PM(NOC) Regulations*], were properly struck by the Prothonotary (as Associate Judges were then known) and as thereafter confirmed by Justice Heneghan of this Court. The Federal Court of Appeal upheld the Prothonotary's order striking Apotex's unjust enrichment claim. Justice Heneghan's decision found that section 8 of the *PM(NOC) Regulations* made it plain and obvious that section 8 did not include a claim for unjust enrichment, or provide this Court with the jurisdiction to grant the equitable remedy of disgorgement as a remedy on section 8 claims. The Federal Court of Appeal agreed:

[17] It follows that as found by Prothonotary Milczynski in the above quoted passage (para. 7 above), while Apotex relies on the Federal Court's jurisdiction to provide equitable relief under subsection 20(2) of the *Federal Courts Act* for its claim for disgorgement of profits, this claim is tied to the *PM(NOC) Regulations* since entitlement is said to flow from the fact that the prohibition proceedings initiated by the respondents were ultimately dismissed, as contemplated by section 8, and nothing more. Given this, the question which arises is whether Apotex can have any hope of successfully invoking subsection 20(2) of the *Federal Courts Act* to obtain the additional remedy which it seeks.

[18] **In my respectful view, the answer to this question is no. Parliament, through the delegated authority of the Governor-in-Council, has considered the question [*sic*] whether a remedy should be available to second persons in the circumstances alleged by the statements of claim and the extent of that remedy. It did so in an attempt to strike a balance between the need for patent protection on the one hand and the timely entry of lower priced drugs on the market, on the other. Section 8 fits within this compromise** (see *Merck F.C.A.* at paras. 45 to 61; *Bristol Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533 at paras. 6 to 12, 45, 46 and 50; *AstraZeneca Canada Inc. v. Canada (Minister of Health)*, 2006 SCC 49, [2006] 2 S.C.R. 560 at paras. 12 to 23).

[19] Compromises by their nature fall short of fully responding to the competing interests at stake with the result that no one was happy with section 8. Innovative companies did not believe that they ought to be visited with damages for simply availing themselves of the procedure devised by Parliament to ensure patent protection (*Merck F.C.A.* at para. 51). Generic companies argued, as Apotex does here, that the balance struck did not provide a sufficient disincentive to first persons when regard is had to the negative impact which the “automatic stay” has on the access to cheaper drugs.

[20] Prior to the 2006 amendment, section 8 was ambiguous as it provided for an entitlement to “damages or profits”. However, the reference to “profits” was eventually determined to refer to a second person's lost profits rather than to profits earned by the first person during the regulatory stay period (see *Merck F.C.* at para. 97 as confirmed by *Merck F.C.A.* on this point at paras. 88 to 91).

[21] Any doubt in this regard was removed by the 2006 amendment which deleted the reference to the word “profits” in section 8. The Regulatory Impact Analysis Statement (RIAS) which accompanied this amendment explained the change as follows:

The Government is aware of a number of ongoing section 8 cases in which it is argued that in order for this provision to operate as a disincentive to improper use of the *PM(NOC) Regulations* by innovative companies, the term “profits” in this context must be understood to mean an accounting of the innovator’s profits ...

After referring to the introduction of related measures, the RIAS concluded:

[...] The Government believes that this line of argument should no longer be open to generic companies that invoke section 8.

[My emphasis]

[22] When regard is had to this amendment, and the decision of this Court in *Merck F.C.A.*, the matter could not be any clearer. Parliament, through the auspices of the Governor-in-Council, has considered whether generic companies should be entitled to the disgorgement of first persons’ profits in the circumstances contemplated by section 8, and has excluded this remedy. It did so in the context of the above-noted balance which is sought to be achieved by the *PM(NOC) Regulations*. This is a legislative policy issue with respect to which the will of Parliament is paramount.

[23] **It follows that whatever jurisdiction the Federal Court has under subsection 20(2) of the *Federal Courts Act* to provide equitable relief, it cannot be used to grant a remedy which section 8 was intended to exclude** (compare *Radio Corp. of America v. Philco Corp. (Delaware)* (1966), 1966 CanLII 85 (SCC), 48 C.P.R. 128 at 136 (SCC); see also *Zaidan Group Ltd. v. London (City)* (1990), 1990 CanLII 2624 (ON CA), 71 O.R. (2d) 65 at 69 (C.A.), aff’d 1991 CanLII 53 (SCC), [1991] 3 S.C.R. 593), unless a cause of action independent of the operation of section 8 is alleged. Here, no such cause of action has been pled. The result is that Apotex’ claim for disgorgement of profits cannot possibly succeed.

[Emphasis added in **bold.**]

[215] As evidenced by the Federal Court of Appeal’s decision above in *Apotex*, the mere grant of equitable jurisdiction under section 20(2) of the *Federal Courts Act* does not establish that this Court has the jurisdiction under the *Copyright Act* to award the remedies sought by Access

Copyright. Rather, this Court must interpret the *Copyright Act* to determine whether the equitable remedy sought by Access Copyright is available in the circumstances of this case.

[216] Further, in *Neles Controls Ltd v Canada*, 2002 FCA 107 [*Neles*], the Federal Court of Appeal considered Neles' request to set aside the order of the motion judge. The issues on appeal related to the operation of the List of Tariff-Free Machinery and Equipment promulgated by the Minister of National Revenue, pursuant to section 75 of the *Customs Tariff Act*, RSC 1985, c 41 (3rd Supp.) as it read in July 1990. One of the issues of law on appeal was whether Neles' claim was barred in whole or in part by its failure to avail itself of the other remedies available to it. Neles argued that equitable relief, absent an express exclusion by Parliament, may coexist with any statutory relief and that the statutory scheme does not "oust" the Court's equitable jurisdiction to grant relief from unjust enrichment. In so doing, Neles enumerated features of the statute that it claimed indicated Parliament's intent. These included a lengthy limitation period, the program's retroactive effect, the absence of a privative clause, and the alleged creation of a trust-like obligation for refunds imposed upon the Crown. However, the Federal Court of Appeal agreed with the motion judge for the following reasons:

[15] In my view, **Dawson J. correctly concluded that recourse to common law or equitable relief is precluded by a comprehensive statutory scheme for relief** (see *Glaxo Wellcome PLC v. MNR*, 1998 CanLII 9071 (FCA), [1998] 4 F.C. 439 at 467 (FCA); *Zaidan Group Ltd. v. London (City)* (1990), 1990 CanLII 2624 (ON CA), 71 O.R. (2d) 65 (Ont. C.A.), aff'd 1991 CanLII 53 (SCC), [1991] 3 S.C.R. 593). It is evident in reading sections 75 to 79 and 100 of the *Customs Tariff* that, as regards relief from customs duties, **Parliament has enacted a comprehensive and exhaustive code**. The scheme of the *Customs Tariff* demonstrates that the importer has an exhaustive list of remedies including remission of duties under section 76, inclusion of goods on the Minister's List, and refunds under section 100. **In light of this scheme, resort to equitable principles of unjust enrichment or restitution is duplicative, especially given that judicial review**

would lie from a denial of any of these three forms of relief. Accordingly, in my analysis, this is a clear indication of Parliament's intention that sections 75 to 79 and 100 of the *Customs Tariff* occupy the whole field in terms of the relief available to an importer whose goods are subject to customs duties. A different conclusion may be warranted in situations where the legislation is silent, where its terms cannot apply, or where a gap in relief is apparent, but that is not the case here.

[16] For these reasons, I am of the view that Dawson J. was correct in answering this question as she did.

[Emphasis added.]

[217] The Federal Court of Appeal in *Neles* rejected the same argument now being put forward by Access Copyright—namely that absent an express exclusion by Parliament, an equitable claim may coexist with any statutory relief and that the statutory scheme does not “oust” the Court’s equitable jurisdiction to grant relief from unjust enrichment.

[218] Moreover, as noted by the Plaintiffs, it is well-established that copyright in Canada is a creature of statute and that the rights and remedies it provides are exhaustive [see *Théberge, supra* at para 5]. Under the *Copyright Act*, collective societies have the right, pursuant to subsection 68.2(1), to bring proceedings in this Court to recover default royalties. In order to be entitled to default royalties for 2013 to 2015 under the *Copyright Act*, the Plaintiffs must have been licensees for that period either by paying or offering to pay the royalties. Access Copyright has failed to establish that the Plaintiffs were licensees. As in *Neles*, Access Copyright’s claims for equitable relief effectively duplicate the remedy provided in section 68.2(1) of the *Copyright Act* and would, if granted, permit Access Copyright to obtain a purely statutory remedy that the Court has found it is not entitled to.

[219] As explained by the Supreme Court in *York University*, the *Copyright Act* also specifically provides a remedy for unlawful copying where a user is not a licensee under the tariff and the collective society is not an exclusive licensee of the works of its Affiliates. That remedy lies in the hands of copyright owners under section 34(1) of the *Copyright Act* in the form of an infringement action. This is not a case where, as *Neles* notes, the legislation is silent, where its terms cannot apply or where a gap in relief is apparent. It may not be a convenient remedy for Access Copyright and their Affiliates given the manner in which they have structured their contractual relationship (which precludes Access Copyright from bringing an infringement proceeding), but that does not change the fact that there is a remedy for infringement available to the Affiliates under section 34(1) of the *Copyright Act*.

[220] While Access Copyright asserts that this claim is the Affiliates' only chance to be paid, I make no finding as to whether any copyright infringement claim for compensable copying by the Plaintiffs in 2013 to 2015 would be limitation-barred, given the potential application of the discoverability principle. That issue is not properly before this Court. However, to the extent that the Affiliates have not brought an infringement proceeding to date, that is as a result of their own strategic choices and/or understanding of the Plaintiffs' conduct, and not because the *Copyright Act* otherwise deprives them of a remedy.

[221] In that regard, I note that, to the extent that Access Copyright argued that the Court must exercise its equitable jurisdiction to address a gap in the statutory scheme that would result in unfairness to its Affiliates, Access Copyright specifically raised this concern before the Supreme Court at paragraphs 123-128 of its factum in *York University*, stating:

**Error #5: Unenforceable tariffs leave creators with no effective remedy**

123. The Court of Appeal observed 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 [*sic*]. This is wrong, for many reasons.

124. The objective of the 1988 and 1997 amendments was not to double down on costly and resource-intensive separate court proceedings for infringement. Rather, it was to provide for an effective collective administration regime and to avoid the unmanageably complex, costly, and time-consuming individual management and enforcement of creators' 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 between copyright owners and users. This approach promoted both the use of works (including through new technologies) as well as a fair reward for creators – the recognized policy underlying the Copyright Act.

125. With no right to enforce an approved tariff, each copyright owner represented by Access Copyright will be faced with enormous obstacles in 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. This will strongly discourage copyright owners from pursuing remedies, and is contrary to the Court's guidance that they obtain a just reward when their works are copied.

126. Statutory damages are, in the main, no answer to this concern. If educational institutions are found to be engaging in non-commercial uses, only the first copyright owner to receive judgment will be permitted to collect statutory damages, and that may be capped at \$5000 for all works infringed in the proceeding. The remaining affected copyright owners will be stuck with whatever damages they can prove, which is notoriously difficult in copyright cases.

127. Moreover, educational institutions have a strong incentive to wait-and-see. They can simply wait to be sued and then pay or offer to pay the royalties in an approved tariff if they think they are likely to be unsuccessful. Under section 70.17 of the Act, such a payment or offer may stop the infringement proceeding in its tracks. Parliament's intention could not have been to allow users to game the tariff regime, while making enforcement essentially impractical for copyright

holders. The three-year limitation period for infringement suits, combined with the long delays in getting tariffs approved, may result in creators obtaining no reward at all.

128. In short, infringement proceedings do not provide a viable route to obtaining a fair reward for copyright holders. Absent an enforceable tariff, Parliament's intended balance turns into a one-sided scale: educational institutions get special rights and exemptions, while copyright holders suffer the consequences of massive unauthorized and uncompensated copying, whether it is printed copies using a photocopier, or the even more elusive digital copies.

[222] The Supreme Court rejected Access Copyright's arguments and instead held:

[34] Copyright infringement constitutes an unauthorized exercise of the owner's exclusive right (s. 27), and a licence constitutes an authorization to make a particular use that would otherwise be infringing (Elizabeth F. Judge and Daniel J. Gervais, *Intellectual Property: The Law in Canada* (2nd ed. 2011), at p. 146; *Eli Lilly & Co. v. Novopharm Ltd.*, 1998 CanLII 791 (SCC), [1998] 2 S.C.R. 129, at para. 49, per Iacobucci J.). It is therefore "elementary" that a person cannot simultaneously be an infringer and a licensee (*Composers, Authors and Publishers Association of Canada, Ltd. v. Sandholm Holdings Ltd.*, 1955 CanLII 799 (CA EXC), [1955] Ex. C.R. 244, at p. 254). In the context of the provisions at issue in this case, a person who has paid or offered to pay the royalties under s. 70.17 has become a licensee and may be liable for defaulted payments under s. 68.2(1). A person who has not paid or offered to pay is not licensed and may be liable for infringement.

[...]

[74] The source of Access Copyright's grievance, it seems to me, stems not so much from the voluntary nature of an approved tariff, but from the fact that Access Copyright cannot initiate infringement actions on behalf of its members. To the extent that this is a problem, it has nothing to do with s. 68.2(1) and is largely outside the scope of this appeal. But it is important to recall that Access Copyright chooses to operate on the terms of a non-exclusive licence that does not give it the right to sue for infringement in respect of the rights it administers. Nothing compels Access Copyright and its members to operate this way.

[Emphasis added.]



[223] In *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC) at paragraph 27, the Supreme Court stated:

[...] It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes, supra*, at p. 88).

[Emphasis added.]

[224] To interpret the *Copyright Act* as allowing equitable remedies that permit recovery of a remedy provided for under subsection 68.2(1), but not otherwise available to Access Copyright under the *Copyright Act* (because the Plaintiffs were not licensees), would be incompatible with the object of the *Copyright Act* and result in absurdity. Parliament has struck a careful balance between users' and creators' rights, as well as with respect to the risk of collective societies developing monopolistic powers. In striking that balance, Parliament chose to make statutory licenses voluntary. To permit Access Copyright to obtain through equity what it cannot obtain under the *Copyright Act* would turn the copyright regime on its head, by effectively making voluntary statutory licences mandatory through the use of equitable remedies. Under the circumstances, it is "irresistibly clear" that the statutory scheme precludes Access Copyright from seeking the equitable remedies it claims in the circumstances of this proceeding [see *Moore, supra* at para 70].

[225] Moreover, there are a number of potential inequities that could also arise from granting the equitable relief sought by Access Copyright. For example, if Access Copyright were to be awarded the full value of royalties under the Approved 2010-2015 Tariff for the years 2013 to 2015, without the Plaintiffs actually being licensees, the Plaintiffs could still be liable to the copyright owners for infringement, as the Plaintiffs would not be shielded from infringement actions under a licence for those years. While that could be addressed by issuing an order precluding copyright owners from bringing an infringement action against the Plaintiffs for any compensable copying from 2013 to 2015, such an order would improperly bind the copyright owners' rights without them having participated in the proceeding.

[226] Moreover, I do not have any definitive evidence of actual compensable copying by the Plaintiffs of works in the Access Copyright repertoire during the 2013 to 2015 period. As noted above, I do have evidence that whole books or whole works were copied (Exhibit 29 to the Andrews Affidavit), but Access Copyright suggests that this evidence was intended to demonstrate compensable copying without a licence in 2016 and is not "proffered as the evidence from the 2013 to 2015 period". Even if I accepted that such copying occurred in 2013 to 2015, such copies were made by only a handful of the Plaintiffs and at a much lower volume than contemplated under the tariff. This calls into question whether it would be equitable to require all of the Plaintiffs to effectively pay the full amount of royalties applicable in those years. Consequently, Access Copyright's request that I make inferences based on the Volume Study and the evidence at Exhibit 29 to the Andrews Affidavit risks further inequity.

[227] This concern lays bare one of the problems with Access Copyright's equitable claims. While Access Copyright has gone to great lengths to assert in its submissions that it is not making an infringement claim (notwithstanding the language used in its pleading), Access Copyright grounds its equitable claims in the Plaintiffs' acts of compensable copying. But compensable copying in the absence of a licence is merely an act of infringement—an unauthorized exercise of the owner's exclusive right. As stated by the Supreme Court in *York University*, a person who has not paid or offered to pay is not licensed and may be liable for infringement. To permit Access Copyright to obtain an equitable remedy for compensable copying would have the effect of using equity to make the tariff *de facto* mandatory or permitting Access Copyright (a non-exclusive licensee) to recover for infringement, either of which would turn the copyright regime on its head.

[228] Through its equitable claims, considered *collectively*, Access Copyright ultimately seeks payment by the Plaintiffs of an amount equivalent to the royalties the Plaintiffs would have owed had they been licensees, which would result in the inequities and absurdities addressed above. However, I would also note that each of Access Copyright's equitable claims considered *individually* also conflict with the object and scheme of the statute and cannot succeed:

1. **Unjust enrichment:** as explained above, if this Court were to grant Access Copyright restitution in the amount sought, it would duplicate the remedy available under subsection 68.2(1) of the *Copyright Act* and allow Access Copyright to recover a statutory remedy to which it is not entitled. To do so would render a voluntary licence *de facto* mandatory. Further, inequities would result from this Court either improperly binding the rights of Affiliates to recover for copyright infringement under section 34(1)

of the *Copyright Act* (when they are not parties to this action) or (in the alternative) opening the door to double recovery as against the Plaintiffs.

2. **Estoppel by representation:** Access Copyright is effectively asking this Court to find that even though the Plaintiffs' conduct did not amount to an "offer to pay" under the statute—as I held under issue number one, above—the Plaintiffs should nevertheless be estopped from asserting they did not offer to pay because of their conduct. Given my interpretation of "offer to pay" under issue number one, Access Copyright's argument with respect to estoppel by representation, if accepted, would result in absurdity.
  
3. **Equitable election:** applying the doctrine of equitable election in this case would directly contradict the terms of the Approved 2010-2015 Tariff (a statutory instrument under the *Copyright Act*). Under issue number one, I found that section 15(5) of the Approved 2010-2015 Tariff allows the Plaintiffs to recover a refund for their overpayments without becoming a licensee for the full six-year term of the tariff, as permitted (but not required) under section 15(4). Applying the doctrine of equitable election in the manner Access Copyright requests would, in effect, render a voluntary licence *de facto* mandatory, contrary to the scheme and object of the *Copyright Act*.

[229] For these reasons, I conclude that, in the circumstances, it is not open to this Court to award the equitable remedies sought by Access Copyright as to do so would turn the copyright regime on its head. As such, I will not go on to consider the merits of Access Copyright's arguments with

respect to each ground of equitable relief sought by Access Copyright or whether the equitable relief sought is limitation-barred.

[230] However, as I pointed out to Access Copyright at the hearing, collateral attack, abuse of process and issue estoppel are not equitable remedies but rather common law doctrines [see *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 18]. The same holds true for common law election. Leaving aside the question of whether the *Copyright Act* ousts the application of these common law doctrines (which neither party addressed), I will consider the applicability of these doctrines as a potential bar to the Plaintiffs' recovery of the overpayment.

#### **(1) Issue estoppel**

[231] Issue estoppel is one manifestation of the doctrine of *res judicata*, the doctrine that precludes parties from re-litigating an issue in respect of which a final determination has been made as between them [see *Eli Lilly Canada Inc v Teva Canada Limited*, 2018 FCA 53 at para 50 [*Eli Lilly*]; *Régie des rentes du Québec v Canada Bread Company Ltd*, 2013 SCC 46 at para 24]. *Res judicata* is a fundamental doctrine in the Canadian justice system that is grounded on two considerations of public policy: that it is in the public interest that there be finality in litigation and that no one should be “twice vexed in the same cause” [see *Eli Lilly, supra* at para 50]. As the Supreme Court stated it, “[t]he stability and finality of judgments are fundamental objectives and are requisite conditions for ensuring that judicial action is effective and that effect is given to the rights of interested parties” [see *Boucher v Stelco Inc*, 2005 SCC 64 at para 35].

[232] Issue estoppel may apply where three conditions are met: (i) the same question has been decided; (ii) the judicial decision which is said to create the estoppel was final; and (iii) the parties to the judicial decision or those who stand in their place were the same as those in the proceedings in which the estoppel is raised [see *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 25 [*Danyluk*]; *Eli Lilly, supra* at para 51; *Janssen Inc v Apotex Inc*, 2023 FC 912 at para 52].

[233] The question out of which the estoppel is said to arise must be “fundamental to the decision arrived at” in the earlier proceeding. In other words, the estoppel extends to the material facts and conclusions of law or mixed fact and law that were necessarily (even if not explicitly) determined in the earlier proceedings [see *Danyluk, supra* at para 24].

[234] Even when the three above-noted conditions are met, the Court nonetheless retains a discretion not to apply the doctrine. As the Supreme Court stated in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at paragraph 30 [*Penner*], “[t]he principle underpinning this discretion is that ‘[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice’ [...]”. While the discretion has been said to be limited to “special circumstances,” there is no definitive list of factors for determining whether special circumstances are made out [see *Penner, supra* at para 38]. The Supreme Court has stated that “[a]s a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice” [see *Danyluk, supra* at para 80; *Eli Lilly, supra* at para 53].

[235] Access Copyright argues that issue estoppel should preclude the Plaintiffs from raising issues in this proceeding that were before the Board—namely, the duration, rate and applicability of the Approved 2010-2015 Tariff, as well as their admissions of compensable copying and Access Copyright’s entitlement to royalties. Access Copyright argues that the Plaintiffs’ conduct demonstrated they clearly understood that the Board had finally determined the term and rate of the Approved 2010-2015 Tariff and made that tariff final and binding on both parties for the Plaintiffs’ acts of compensable copying by certifying it. Access Copyright also asserts that all parties believed the Board’s decision was binding on them, as demonstrated by the Plaintiffs’ conduct, including proposing a rate of \$0.51 per FTE for 2013 to 2015 and defending the Board’s certified rate of \$2.41. Furthermore, Access Copyright argues that the Board has already determined the value of compensable copying based on evidence and the Plaintiffs’ admissions. Having put the issue of the valuation of their compensable copying from 2010 to 2015 before the Board and the Federal Court of Appeal, Access Copyright asserts that the Plaintiffs cannot “resile from the consequences of their victory” and assert that they did not make compensable copies from 2010 to 2015.

[236] The Plaintiffs assert that they do not contest the terms of the Approved 2010-2015 Tariff, but rather disagree with Access Copyright on the duration of a licence obtained under the tariff. The Plaintiffs submit that they are not estopped by the Board’s decision from seeking their refund because the Approved 2010-2015 Tariff specifically provides for a refund.

[237] I am not satisfied that Access Copyright has demonstrated that the Plaintiffs should be prevented from obtaining a return of the overpayment on the basis of issue estoppel. The issues of

the duration of the tariff (as opposed to the licence), the rate of the tariff and the binding effect of the tariff are not at issue in this proceeding. The Plaintiffs agree that the tariff is a binding instrument and that it sets the royalty rate for a particular term. Rather, the live issues in dispute in this proceeding are whether the Plaintiffs, in fact, paid or offered to pay for a statutory licence under the Approved 2010-2015 Tariff and if so, the duration of said licence. None of these issues have been decided by the Board, which is not surprising given that the Board lacks jurisdiction to deal with tariff enforcement issues [see *Re: Sound and SOCAN – Stingray Pay Audio and Ancillary Services Tariff (2007–2016)*, 2021 CB 5 at para 91; *Re: Sound - Tariff 6.A (Use of Recorded Music to Accompany Dance), 2008-2012 (Application to vary)*, 2012 CanLII 151205 (CACB) at para 5].

[238] With respect to the question of the Plaintiffs' admissions of compensable copying, the Board's consideration of the Plaintiffs' compensable copying and the Plaintiffs' submissions to that effect were made for the sole purpose of setting a fair and equitable royalty rate under the tariff. The Board in its February 19, 2016 decision explicitly stated that the data collected for the purpose of the Volume Study is not evidence of actual copying events [see *Access Copyright – Tariff for Elementary and Secondary Schools, 2010-2015*, 2016 CanLII 156139 (CACB) at paras 113-114].

[239] The question of Access Copyright's entitlement to royalties was not decided by the Board, as that falls outside of the Board's jurisdiction. The Board is only empowered with broad jurisdiction to establish a fee, rate or royalty—it does not have the power to order someone to comply with payment obligations under an approved tariff [see e.g. *Copying for Private Use, Re*, [2004] CBD No 1, 32 CPR (4th) 271 (CACB) at para 3].



[240] Furthermore, Access Copyright’s argument that the Plaintiffs’ conduct (e.g. participating in the Board proceedings and proposing a royalty rate) demonstrated they “clearly understood” that the Board had finally determined the duration and rate of the Approved 2010-2015 Tariff and had made that tariff final and binding is not relevant to issue estoppel. The Plaintiffs’ conduct and subjective (or objective) understanding have no bearing on whether the Board had previously decided any of the questions before this Court, or whether the Board’s decision was final or not.

[241] Lastly, Access Copyright seeks to rely on *Rogers Communications Partnership v. Society of Composers, Authors and Music Publishers of Canada (SOCAN)*, 2016 FCA 28 to argue that the Plaintiffs’ “victory” in defending the Board’s certified rate in the Approved 2010-2015 Tariff binds them to the decision. I disagree. As explained above, the live issues in this proceeding were not before the Board (or the Court on judicial review). Indeed, the terms and conditions of the tariff are final, but the questions as to whether the Plaintiffs had become licensees and whether Access Copyright had an entitlement to default licence fees were not decided by the Board or any court of competent jurisdiction.

[242] For these reasons, Access Copyright’s arguments with respect to issue estoppel must fail.

**(2) Abuse of process**

[243] The Supreme Court has held that judges have an inherent and residual discretion to prevent an abuse of the court’s process [see *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 33; *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 39; *CUPE*, *supra* at para 35].

[244] The doctrine of abuse of process is a broad concept that applies in various contexts and is characterized by its flexibility. It is not encumbered by specific requirements, unlike the concepts of *res judicata* and issue estoppel [see *Abrametz, supra* at paras 34-35; *Behn, supra* at paras 39-40]; *CUPE, supra* at paras 36-38].

[245] Justice McLachlin (as she then was) expressed the doctrine of abuse of process as follows in *R v Scott*, 1990 CanLII 27 (SCC), [1990] 3 SCR 979 at 1007:

[...] abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. [...]

[246] The primary focus is the integrity of the courts' adjudicative functions, and less the interests of parties [see *Abrametz, supra* at para 36; *CUPE, supra* at para 43]. The proper administration of justice and ensuring fairness are central to the doctrine [see *Abrametz, supra* at para 36, citing *Behn, supra* at para 41 and *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at paras 24-25, 31]. It aims to prevent unfairness by precluding "abuse of the decision-making process" [see *Abrametz, supra* at para 36; *Figliola, supra* at para 34].

[247] Access Copyright argues that when the Approved 2010-2015 Tariff became final in January 2018, the Plaintiffs expected that it would bind both parties from 2010 to 2015. Furthermore, it alleges that the Plaintiffs' claim that they can rely on the rates in the Approved 2010-2015 Tariff for their refund, but are otherwise not bound by that tariff, impeaches the Board's adjudicative function, especially after fighting a "rate battle through an eight-year process". Access

Copyright therefore argues that the Plaintiffs' reliance on the Board's certified rate to demand a refund for overpayment for 2010 to 2012, while taking the position they do not need to pay the rate the Board set, is an abuse of process. Access Copyright argues that by commencing this litigation to request a refund that relies on the Board's decision, while denying the binding effect of the Board decision, runs contrary to the principles that there should be finality in litigation and that nobody should be "twice vexed by litigation".

[248] I find that Access Copyright's abuse of process assertions are without merit. Access Copyright's arguments conflate the tariff with a licence and seek to have this Court enforce the Approved 2010-2015 Tariff against the Plaintiffs, despite the fact that they did not pay or offer to pay royalties under the tariff for 2013 to 2015 and therefore were not licensees. The Plaintiffs' claim that they can rely on the certified rates under the Approved 2010-2015 Tariff to obtain a refund, while not obtaining licences for 2013-2015, does not impeach the Board's adjudicative function. As I explained above, the Approved 2010-2015 Tariff expressly permits licensees to obtain a refund for any overpayments resulting from the Board's certification of the new rate under the tariff. The Board performed its adjudicative function in setting the tariff, but did not—and cannot—address issues of enforcement.

### **(3) Collateral attack**

[249] A collateral attack is an attack "made in proceedings other than those whose specific object is the reversal, variation or nullification of the order or judgment" [see *R v Wilson*, 1983 CanLII 35 (SCC), [1983] 2 SCR 594 at 599; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 at

para 60]. As such, the rule against collateral attack bars actions to reverse, vary or nullify judgments when those actions take place in the wrong forum [see *CUPE*, *supra* at para 33].

[250] The rule is a judicial creation (which must therefore yield to contrary legislative enactment) based on general considerations related to the administration of justice, as explained in *Garland v Consumers' Gas Co*, 2004 SCC 25 at paragraph 72:

The fundamental policy behind the rule against collateral attack is to “maintain the rule of law and to preserve the repute of the administration of justice” (*R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.

[Emphasis added.]

[251] In *R v Bird*, 2019 SCC 7 [*Bird*], the Supreme Court recently revisited its decision in *R v Consolidated Maybrun Mines Ltd*, [1998] 1 SCR 706, 1998 CanLII 820 (SCC) at para 4 [*Maybrun*]. The Supreme Court explained that a different framework applies to collateral attacks on administrative orders, given the difference in legal nature between court orders and administrative orders:

[25] In *Maybrun*, the Court held that a different framework was warranted for collateral attacks on administrative orders, given the major differences that exist between court orders and administrative orders in relation to their legal nature and the institutions that issue them (para. 4). *Maybrun* clarified that the question of whether a person charged with breaching an administrative order can collaterally attack the validity of the order is determined by focussing on the legislature’s intention. The court must inquire into whether the legislature intended to permit collateral attacks on the order, or intended instead that a person should challenge the order by way of other review mechanisms.

[26] In focussing on the legislature's intention, the *Maybrun* framework balances two principles: (1) ensuring that the legislature's decision to assign decision-making powers to administrative bodies is not undermined and (2) ensuring that individuals have an effective means available to them to challenge administrative orders (*Maybrun* at para. 44; see also B. Bilson, "Lying in Wait for Justice: Collateral Attacks on Administrative and Regulatory Orders" (1998), 12 C.J.A.L.P. 289, at pp. 291-94).

[27] Focussed as it is on the legislature's intention as to the appropriate forum for challenging an administrative order, the *Maybrun* framework respects the legislature's choice to assign decision-making powers to administrative bodies. The Court in *Maybrun* emphasized that administrative structures play an important role in the organization of a wide range of activities in modern society (paras. 26 and 43). To maintain the authority of these administrative bodies, the legislature may establish internal mechanisms with the intention that people will challenge administrative orders by way of these mechanisms or other appropriate forums, rather than by mounting a collateral attack on them (*Maybrun*, at para. 27). *Maybrun* recognized that if a person were entirely free to ignore these established procedures for challenging the order and could breach the order and wait for criminal charges to be laid before challenging it, this would risk discrediting the authority of administrative bodies that issue such orders and undermine the effectiveness of administrative regimes (para. 42).

[28] [...] Furthermore, allowing collateral attacks on administrative orders could undermine the legislature's intention to draw on the expertise and experience of certain decision-makers. As the Court noted in *Maybrun*, permitting individuals to circumvent administrative tribunals or other appropriate forums and transfer the debate to the judicial arena could lead the courts to rule on matters they are not best suited to decide (para. 43).

[252] Access Copyright submits that the Plaintiffs' claim for a refund for overpaying from 2010 to 2012, without paying the Approved 2010-2015 Tariff from 2013 to 2015, is in effect an appeal of the finality of the Board's decision and the judicial review process, which bound both parties, and therefore constitutes a collateral attack. Further, Access Copyright argues that the Plaintiffs cannot claim a refund under the tariff without making payments pursuant to it. Access Copyright asserts that the Plaintiffs cannot participate in the Board and judicial review process and refuse to

abide by the Board-approved terms, while also not otherwise compensating Access Copyright's Affiliates, because the entire tariff system would collapse.

[253] For the reasons provided above related to both issue estoppel and abuse of process, I reject Access Copyright's arguments. The Board's decision to certify the Approved 2010-2015 Tariff is different from an action—like this—seeking to enforce the terms of the tariff. As noted previously, the Board itself has recognized that it does not have the power to enforce the tariff—that is properly a matter to be decided by a court of competent jurisdiction. In this case, the Plaintiffs seek to enforce the Approved 2010-2015 Tariff to secure a refund. The Plaintiffs' action to secure a refund for their overpayment therefore does not undermine the finality of the Board's decision to certify the tariff.

**(4) Common law election**

[254] The essence of the doctrine of election is that a person is precluded from exercising a right that is inconsistent with another right if they have consciously and unequivocally exercised the latter [see *Charter Building Company v 1540957 Ontario Inc (Mademoiselle Women's Fitness & Day Spa)*, 2011 ONCA 487 at para 15].

[255] The doctrine of common law election requires that Access Copyright prove that: (i) there were two alternative and mutually exclusive courses of action; (ii) the Plaintiffs knew the facts giving rise to a right to elect between them; and (iii) Access Copyright relied on the election to its detriment, in that it adopted or persevered in conduct that it otherwise would have abandoned or

modified [see *Allnorth Consultants Limited v Tercon Construction Ltd*, 2010 BCCA 570 at para 23].

[256] Access Copyright submits that the doctrine of common law election applies in this case.

They argued that:

The Plaintiffs engaged in an irrevocable election to obtain a statutory licence, especially once they were aware of its terms and chose to defend them unequivocally. Their Conduct demonstrates the Plaintiffs understood their participation in the tariff process and dropping out of the tariff process were mutually exclusive choices. Access Copyright and its creators were harmed by expending resources in pursuing, and in forgoing alternatives to, the tariff proceedings in reliance on the Plaintiffs' Conduct.

[257] Given my findings in relation to issue number one, I find that there is no merit to Access Copyright's assertion that the doctrine of common law election applies so as to deprive the Plaintiffs of their ability to obtain a refund of their overpayment. I have already determined in issue number one that the Plaintiffs did not, by their conduct, obtain a statutory licence, which conduct included their participation in the Board proceedings. Participating in the Board proceedings does not make someone a statutory licensee. As such, Access Copyright has not established that there were two alternative and mutually exclusive courses of action between which the Plaintiffs could have chosen. This is sufficient to dispose of Access Copyright's common law election assertion.

[258] That said, I also do not accept that Access Copyright's choice to expend resources in the tariff proceedings and subsequent judicial reviews amounts to detrimental reliance, as Access Copyright would have expended at least some resources in pursuit of its tariff regardless of whether

the Plaintiffs participated as they would have to justify their proposed tariff to the Board. As for the “alternatives” that Access Copyright and the Affiliates forewent, Access Copyright has not detailed what those specific alternatives were, they have not demonstrated that they would have actually pursued these alternatives but for the Plaintiffs’ election to participate in the Board proceedings and they have not demonstrated that any detriment arising from forgoing such alternatives was as a result of the Plaintiffs’ election to participate in the Board proceedings.

[259] Accordingly, I find that none of Access Copyright’s asserted common law doctrines apply so as to prevent the Plaintiffs from seeking a return of their royalty overpayments.

**E. Issue No. 3: Access Copyright is not entitled to retain the 2010-2012 overpayment**

[260] Access Copyright submits that equitable set-off is a full defence to the Plaintiffs’ claim for a refund of the overpayment and that equitable set-off applies even if this Court rules against Access Copyright with respect to issue number two, as a different legal test applies. Access Copyright asserts that if the Plaintiffs were not bound by the Approved 2010-2015 Tariff (which is my finding under issue number one), then the Plaintiffs admittedly engaged in compensable copying without compensating Access Copyright’s Affiliates directly or through Access Copyright by way of royalties under a statutory licence, despite the Plaintiffs having said that they would “absolutely pay”. Access Copyright argues that its defence and counterclaim are so closely related to the Plaintiffs’ claim for a refund of the overpayment that it would be “manifestly unjust to enforce the payment of one without taking into account the amounts owing”. Specifically, Access Copyright asserts that both claims are made under the same instrument (the Approved 2010-2015 Tariff) and are therefore clearly connected.



[261] Moreover, Access Copyright asserts that it does not need to have a freestanding claim against the Plaintiffs for the defence of equitable set-off to apply, as a true claim of equitable set-off will be responsive to, and therefore contingent on, the Plaintiffs bringing their action [see *Cam Net Communications et al v Vancouver Telephone Company Limited*, 1999 BCCA 751 at para 49].

[262] Access Copyright claims its Affiliates have suffered significant losses of revenue due to the Plaintiffs' decision to defend then repudiate the Approved 2010-2015 Tariff and that if the Plaintiffs are successful, the Affiliates will have no remedy for the compensable copies.

[263] Generally speaking, set-off is the process whereby two mutual claims for money are set-off against each other to produce a balance before any party is called upon to execute its obligation. The essence of a set-off is the existence of cross-demands—that is, the existence or assertion of a mutual claim for money [see *Apotex Inc v Sanofi-Aventis Canada Inc*, 2010 FC 182 at para 34 [*Sanofi-Aventis*]].

[264] The requirements for proving equitable set-off in Canada were set out by the Supreme Court in *Holt v Telford*, [1987] 2 SCR 193, 1987 CanLII 18 (SCC) [*Telford*] at paragraph 34:

1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: *Rawson v. Samuel*, [1841] Cr. & Ph. 161, 41 E.R. 451 (L.C.).
2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: [*Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt (U.K.) Ltd.*, [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: ... [*Fed. Commerce and Navigation Co. v. Molena Alpha*

*Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].

4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani*.

5. Unliquidated claims are on the same footing as liquidated claims: *Nfld. v. Nfld. Ry. Co.*, [1888] 13 App. C. 199 (P.C.).

[265] The Ontario Court of Appeal expressed the legal assessment of the relative equities between the parties as follows in *PIA Investments Inc v Deerhurst Limited Partnership*, 2000 CanLII 16819 (ONCA) at paragraph 31:

[31] In determining whether equitable setoff should be allowed it is necessary to first look at the connection between the claims involved and to then consider the effect the setoff would have on the equities between the parties. Equitable setoff arises when there are cross obligations which are so closely connected or related that it would be unjust to permit one party to enforce its obligation without permitting a setoff to the other: *Telford v. Holt*, 1987 CanLII 18 (SCC), [1987] 2 S.C.R. 193; *Canada Trustco Mortgage Co. v. Sugarman* (1999), 1999 CanLII 9288 (ON CA), 179 D.L.R. (4th) 548 (Ont. C.A.).

[Emphasis added.]

[266] In *Canada Trustco Mortgage Co v Sugarman*, 1999 CanLII 9288 (ONCA), 179 DLR (4th) 548, the Ontario Court of Appeal stated:

[18] One of the main differences between legal set-off and equitable set-off is that, in the latter case, the claims between the parties do not need to be liquidated. Hence, claims for damages are available for equitable set-off. This difference does not matter in this case. Another important difference, and one that is of relevance here, lies in the fact that the requirement for mutuality is relaxed. Hence, equitable set-off may be available even though the situation is not strictly one where A seeks to set off his debt to B against the debt B owes to A. However, for equitable set-off to be available, the cross-claims must be closely connected. It is logical to conclude that this latter requirement arises because mutuality is not strictly insisted upon. After all, it is difficult to imagine why, in the interests of fairness, the courts would allow A to

reduce his debt to B by the amount A owes to C, unless it was because of the close connection between the claims. Finally, it is important to note that, just because cross-claims are closely connected to one another, it does not mean that set-off will necessarily follow. Not only must the connection be sufficiently close to warrant an exercise of the equitable jurisdiction of the court, the remedy must not result in any form of inequity.

[19] In order to determine whether equitable set-off should be allowed in this case, it is therefore necessary to look at the connection between the claims and also to consider the effect the remedy would have on the equities between the parties.

[Emphasis added.]

[267] The issue of set-off (statutory or equitable) often arises in this Court when considering questions of jurisdiction—in particular, whether the cross-claim asserted by way of set-off falls within this Court’s jurisdiction. As noted by Associate Judge Mireille Tabib in *Sanofi-Aventis*:

[36] The history of the development of the law of set-off, and particularly, of legal set-off, as set out in the leading Supreme Court decision of *Holt v. Telford* 1987 CanLII 18 (SCC), [1987] 2, S.C.R. 193, and as discussed in Kelly R. Palmer, *The Law of Set-Off in Canada*, (Aurora: Canada Law Books Inc., 1993 at pages 5 to 9), shows clearly that it was created and continued to evolve as a procedural means to allow the resolution in a single hearing and a single judgment of separate monetary claims mutually asserted between parties so as to prevent multiplicity of litigation, much like the procedural right to assert a cross-claim by way of counterclaim. Its procedural nature is confirmed by the fact that while it was originally promulgated by specific statute in England, it is now generally found, both in Canada and in England, in the applicable judicature acts or rules of Court, as it is indeed found in our *Federal Courts Rules* at Rule 186. As telling is the fact that statutes establishing the right to assert a monetary cross-claim as a “defence” of set-off generally allow the choice of asserting this claim as a defence or as a counterclaim, the main practical difference being that whereas a counterclaim will result in a separate judgment, with its own award of costs, a cross-claim asserted as a defence of set-off will result in a single judgment and cost award.

[37] That a procedural means is developed for a particular right to be determined does not elevate that procedural means into a substantive right or defence. The right to assert a monetary claim as set-off does

not detract from the fact that the debt so asserted remains to be heard and adjudicated by the Court, and that this debt, if found to be valid, is effectively enforced by reducing the amount of the judgment that would otherwise be pronounced in favour of the plaintiff. The provision of a procedural means to assert a right does not vest the Court with jurisdiction it would not otherwise have to hear, determine and enforce the substantive matter brought before it through that procedural means. To allow any monetary cross-claim to be asserted and determined in defence to an action before this Court when it could not be asserted and determined as a counterclaim, merely because the procedural vehicle is contemplated in Rule 186 of the *Federal Courts Rules*, would allow the Court to do indirectly what it cannot do directly and to accept that the Court can give itself jurisdiction not otherwise given to it by statute, through a simple rule of procedure.

[38] As mentioned above, it is at least arguable that a defence of set-off that meets the criteria for equitable set-off could be considered a substantive defence to a claim, and thus be amenable to be considered and determined by the Court even though it would not independently fall within its jurisdiction.

[268] A similar jurisdictional issue was raised in a maritime case called *Inuksuk I (Ship) v Sealand Marine Electronics Sales and Services Ltd*, 2023 FCA 170 [*Sealand*] where the Federal Court of Appeal stated at paragraph 63:

Thus, equitable set-off requires the cross-claim to go to the very root of the plaintiff's claim; only cross-claims that go directly to impeach the plaintiff's claim meet the test. It is because of the nature of this connection that equity cannot countenance separating them: to do so would be manifestly unjust.

[269] The Federal Court of Appeal in *Sealand* ultimately concluded that the appellant's cross-claim did not relate to maritime activities and was not found to directly impeach or go to the root of a claim whose character is integrally connected to navigation and shipping. It did not meet the criteria necessary to establish a defence based on an equitable set-off and thus this Court did not have the jurisdiction to examine the appellant's defence of equitable set-off.

[270] In this case, Access Copyright did, in fact, assert a counterclaim, which I considered and dismissed. Access Copyright now relies on the same conduct that underpinned its counterclaim to underpin its defence of equitable set-off. Put differently, Access Copyright's cross-claim for the purpose of set-off is its counterclaim. In such circumstances, its defence of equitable set-off must fail for the same reasons that its counterclaim failed (i.e. for the reasons that I stated in relation to issue number two). It is nonsensical to suggest that the cross-claim can now succeed because it is a defence as opposed to a standalone counterclaim.

[271] Even if Access Copyright were correct and a different test (that from *Telford*) applies to the defence of equitable set-off such that Access Copyright could succeed on issue number three despite failing on issue number two, I find that, having applied the test in *Telford*, Access Copyright's defence of equitable set-off must fail for two reasons:

1. The connection between the claims is not sufficiently close to meet the test for equitable set-off. Access Copyright grounds its set-off claim not in the unfairness to Access Copyright of the non-payment of royalties, but in the unfairness to the Affiliates of the Plaintiffs' failure to compensate them for the use of their works (which payment would have flowed through to them from the payment of royalties). The cross-obligations at issue are Access Copyright's obligation to refund the overpayment and the alleged obligation of the Plaintiffs to compensate the Affiliates for use of their works. The latter is not a licensing issue, but rather an infringement issue, which is not properly before this Court. I am not satisfied that the connection is sufficiently close to warrant the exercise of the Court's equitable jurisdiction. Moreover, for the reasons noted in relation

to issue number two, the exercise of the Court's equitable jurisdiction in the circumstances of this case would turn the copyright regime on its head.

2. Granting equitable set-off would lead to the same inequities noted above in relation to issue number two.

[272] Accordingly, Access Copyright's defence of equitable set-off must fail.

#### IV. Conclusion

[273] For the reasons stated above, my determination in relation to each of the issues is as follows:

1. Were the Plaintiffs licensees in 2013, 2014 and 2015? **No.**
2. If the Plaintiffs were not licensees from 2013 to 2015, are the Plaintiffs nevertheless liable in equity, or otherwise, to pay Access Copyright an amount equivalent to the tariffs royalties for 2013 to 2015? **No.**
3. If the Plaintiffs are not liable in equity, or otherwise, to pay Access Copyright an amount equivalent to the tariff royalties for 2013 to 2015, is Access Copyright entitled to retain the 2010 to 2012 overpayment in any event? **No.**

[274] The parties provided the Court with draft orders as part of their closing submissions. Access Copyright did not raise any concerns with the specific relief sought by the Plaintiffs in the event that the Plaintiffs were successful. Having reviewed the Plaintiffs' draft order, I am satisfied that the relief sought should be granted as proposed, with only minor variations.

## V. Costs

[275] At the hearing of the summary trial, I set a schedule for the delivery of costs submissions addressing both entitlement and quantum, to be delivered prior to my determination on the merits of the motion. The parties agree that the Court should make a determination of the issue of costs, both in relation to the motion for summary trial and the underlying proceeding.

[276] Pursuant to Rule 400(1) of the *Rules*, the Court has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. The overriding consideration in making an award of costs is fairness and reasonableness [see *Bristol-Myers Squibb Canada Co v Teva Canada Limited*, 2016 FC 991 at para 5]. An award of costs represents a compromise between compensating the successful party and not unduly burdening the unsuccessful party [see *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 842 at para 14].

[277] The general practice is that costs follow the event [see *Hussey v Bell Mobility Inc*, 2022 FCA 95 at para 103]. However, notwithstanding that the Plaintiffs were successful in relation to each of the issues determined on this motion, Access Copyright asserts that the Court should exercise its discretion to refuse to make any award of costs in favour of the Plaintiffs.

[278] Access Copyright asserts that special circumstances exist so as to engage this Court's discretion to deny costs to the Plaintiffs, as the "summary trial confirmed the unconscionable nature of their conduct over more than a decade". Access Copyright asserts that: (a) through no fault of its own, it has suffered considerable losses due to the Plaintiffs' failure to pay for their admittedly compensable copying, resulting in the need for Access Copyright to scale down its operations and restructure its organization; (b) the Plaintiffs admitted that Access Copyright was owed compensation and then refused to pay; (c) the Plaintiffs failed to track their copying activities and then took no steps to clear their compensable copying; and (d) the Affiliates have suffered financial losses from the Plaintiffs' failure to pay for what they took.

[279] I am not satisfied that Access Copyright has established that special circumstances exist so as to deprive the Plaintiffs of an award of costs. I have reviewed the case law cited by Access Copyright and I do not find that the circumstances in those cases are analogous to this one. I have made no finding of liability against the Plaintiffs and the conduct upon which Access Copyright relies to justify its asserted special circumstances is the same conduct that it unsuccessfully used to attempt to make out its defences and counterclaims.

[280] While Access Copyright also referred in its submissions to "tactical decisions at the outset of the litigation that vastly expanded the live issues and drove up litigation costs" as a further basis for denying the Plaintiffs an award of costs, Access Copyright has not particularized those assertions vis-à-vis how such conduct amounts to special circumstances (as opposed to a factor for the Court to consider in assessing the quantum of costs).



[281] As such, I find that the Plaintiffs are entitled to their costs of this motion and the underlying proceeding.

[282] I now turn to consider the quantum. In determining the appropriate quantum, the focus is on the specific facts and circumstances of the case in relation to the factors outlined in Rule 400(3) which factors include, among others, the result of the proceeding, the amounts claimed and the amounts recovered, the importance and complexity of the issues, the amount of work, any offer to settle, any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding, the failure by a party to admit anything that should have been admitted and whether any step in the proceeding was improper, vexatious or unnecessary. As noted by the Federal Court of Appeal in *Air Canada v. Thibodeau*, 2007 FCA 115 at paragraph 21 [*Thibodeau*], the purpose of awarding costs is limited to providing the party receiving them with partial compensation.

[283] Pursuant to Rule 407, the quantum of costs is to be assessed in accordance with Column III of Tariff B. Tariff B represents “a compromise between awarding full compensation to the successful party and imposing a crushing burden on the unsuccessful party” and Column III is intended to be applied to cases of average or usual complexity [see *Thibodeau, supra* at para 21].

[284] That said, pursuant to Rule 400(4), the Court does retain the discretion to assess or fix costs above or below Column III of Tariff B or by way of lump sum award.

[285] A lump sum award, based on a percentage of actual legal fees, may serve to promote the objective set out in Rule 3 of securing “the just, most expeditious and least expensive outcome” of

a proceeding and may be particularly appropriate in complex matters where a precise calculation of costs would be unnecessarily complicated and burdensome. The burden is on the party seeking increased costs to demonstrate why its particular circumstances warrant an increased award [see *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 13 [*Nova*]]. As noted by the Federal Court of Appeal in *Nova*, there is a trend in recent intellectual property decisions of favouring lump sum cost awards, especially in the case of sophisticated commercial litigants [see *Nova, supra* at para 16].

[286] However, contrary to Access Copyright's submissions, I do not accept that there are two mandatory pre-conditions that must be satisfied before a lump sum cost award will be made—namely (i) that the parties must be sophisticated, commercial litigants that have the means to pay for the legal choices that they make; and (ii) that the issues must involve greater than average complexity. Rather, these are relevant factors for the Court to consider in deciding whether to exercise its discretion to make a lump sum cost award.

[287] That said, I am not satisfied that, in all of the circumstances, a lump sum cost award is warranted. I agree with Access Copyright that the parties are not sophisticated commercial litigants. The Plaintiffs are publicly-funded Ministries of Education and school boards subject to the constraints of their government-imposed budgets and Access Copyright is a not-for-profit collective society. While Access Copyright raised a significant number of defences and counterclaims, I am satisfied that the issues raised on this motion were not overly complex and differed in nature significantly from other intellectual property disputes that turn on complex expert evidence.

[288] Moreover, I am not satisfied that the Plaintiffs have provided sufficient evidence of the nature and extent of the services provided. While I have a Bill of Costs in support of the claimed actual fees (which exceed \$1.8 million), I have no details of the docket entries or client invoices, nor any affidavit explaining the fees incurred [see *Nova, supra* at para 18; *Bristol-Myers Squibb Canada Co v Pharmascience Inc*, 2021 FC 354 at paras 18-33]. Moreover, the Plaintiffs do not even identify what percentage of their actual fees they are seeking by way of a lump sum award. As such, I agree with Access Copyright that any attempt to fix a lump sum based on the limited materials and submissions of the Plaintiffs would be akin to “plucking a number out of the air”, which is not an appropriate exercise of the Court’s discretion [see *Nova, supra* at para 19].

[289] As such, the quantum of costs will be determined based on Tariff B [the Tariff].

[290] Access Copyright asserts that the Court should use the mid-point of Column III. In support of this submission and in consideration of the factors detailed in Rule 400(3), Access Copyright asserts that: (a) the issues were straightforward and simple and the relevant facts were not disputed; (b) the Plaintiffs’ offer to settle did not meet the conditions to engage Rule 420 cost consequences because it lacked the requisite element of compromise; (c) the Plaintiffs refused to make reasonable admissions of compensable copying, which necessitated a substantial amount of work associated with document production; (d) the Plaintiffs filed an improper reply affidavit on the motion, which required the Court’s intervention and drove up the costs of the proceeding; (e) the Plaintiffs raised the parliamentary privilege issue the long-weekend before the summary trial, which increased costs and created a distraction on the eve of the hearing; and (f) the Plaintiffs used improper font size in their closing submissions and incorporated, by reference, earlier submissions contrary to

the Court's Direction, thereby placing a burden on and creating uncertainty for Access Copyright and the Court.

[291] The Plaintiffs assert that if the Tariff is to be used, they should be awarded fees based on Column III, with the exception of efforts related to record collection and production, which should be set using Column IV in light of the extensive effort required over a two-year period involving 791 entities that were subject to document collection and production. However, the Plaintiffs also rely on their offer to settle and assert that for any costs after September 14, 2022, the Court should give effect to the double-cost rule.

[292] The case law regarding the types of offers that fall within the ambit of Rule 420 of the *Rules* establishes that, for Rule 420 to be engaged and the Plaintiffs to be presumptively entitled to double costs from the date of service of the offer, the offer in question must, among other things, be clear and unequivocal and must contain an element of compromise [see *Venngo Inc v Concierge Connection Inc (Perkopolis)*, 2017 FCA 96 at para 87].

[293] Here, the Plaintiffs' offer provided:

1. Subject to paragraphs 2 and 3, [Access Copyright] shall pay to the Plaintiffs the \$25,493,109.36...that the Plaintiffs overpaid in 2010, 2011 and 2012 to Access Copyright pursuant to the tariffs at issue in this proceeding (the "principal amount"), plus 100% of the interest on the stated amount calculated in accordance with the law of the Federal Court, as settlement of the main action and the counterclaim.
2. If this offer is accepted on or before October 17, 2022, only the principal amount, but not interest, shall be paid to the Plaintiffs as settlement of the main action and the counterclaim. If this offer is accepted after October 17, 2022, but on or before December 31, 2022, the principal amount, together with 50% of the interest

accumulated to the date this offer is accepted, shall be paid as settlement of the main action and counterclaim.

3. If this offer is accepted on or before December 31, 2022, this offer shall be inclusive of legal costs; otherwise Access Copyright shall pay the Plaintiffs their legal costs with respect to the main action and the counterclaim as agreed upon or assessed.

4. The parties shall forthwith discontinue this proceeding and withdraw their respective claims and shall bear the costs, if any, of their respective discontinuance/withdrawal.

5. The parties shall execute a standard mutual full and final release from all claims against each other with respect to the main action and the counterclaim in a form satisfactory to the parties, which shall include a confidentiality and non-disparagement provision.

6. This Offer shall expire one (1) minute after the commencement of the summary trial, unless withdrawn by the Plaintiffs in writing prior to being accepted by Access Copyright.

[294] While the offer to settle remained open for acceptance at the time the summary trial commenced, the Plaintiffs' offer was that Access Copyright would pay the full amount of the overpayment (paragraph 1), all of the Plaintiffs' legal costs (paragraph 3) and 100% of the pre-judgment interest (paragraph 1). At the time that the summary trial commenced, there was no compromise at all in such an offer. Accordingly, I find that Rule 420 has no application.

[295] With respect to the fees related to documentary production, I agree with the Plaintiffs that Column IV is appropriate given the level of effort involved. As the Case Management Judge at the time, I worked closely with the parties on numerous document production issues and am satisfied that additional compensation is warranted for those efforts. I reject Access Copyright's assertion that these efforts were required as a result of the Plaintiffs' failure to admit to making "compensable copies", particularly given the state of Access Copyright's pleading that repeatedly

refers to infringement and the lack of clarity surrounding what Access Copyright was actually asserting against the Plaintiffs. In such circumstances, the Plaintiffs' refusal to make an admission was not surprising or unreasonable.

[296] Accordingly, I find that the Plaintiffs are entitled to their costs to be calculated in accordance with the mid-point of Column III of the Tariff for all steps in this proceeding, other than documentary production steps which shall be calculated in accordance with the mid-point of Column IV of the Tariff.

[297] I am also satisfied that the Plaintiffs are entitled to their reasonable disbursements. There are clearly disputes between the parties as to the reasonableness of certain of the Plaintiffs' disbursements (such as the fees of Ms. Strong). However, I do not have sufficient submissions before me on those issues. If the parties are unable to reach an agreement, the disbursements shall be assessed by an assessment officer.

## **VI. Pre-judgment and Post-judgment Interest**

[298] In their draft orders, both the Plaintiffs and Access Copyright requested pre-judgment and post-judgment interest in accordance with subsection 36(1) and 37(1) of the *Federal Courts Act*. I am satisfied that the Plaintiffs are entitled to both pre- and post-judgment interest and there has been no suggestion by Access Copyright as to any basis upon which such an award should be refused.

[299] In their closing submissions, neither party provided any submissions on the appropriate interest rates. Rather, it was only in their cost submissions that disputes regarding the interest rates emerged. The Plaintiffs raised the issue of whether pre-judgment interest should be calculated based on subsection 36(2), which applies in respect of “[a] person who is entitled to an order for the payment of money in respect of a cause of action arising outside a province or in respect of causes of action arising in more than one province”. This resulted in numerous submissions from Access Copyright on the applicability of subsection 36(2) and, if applicable, what rate of interest the Court should set.

[300] However, I am satisfied that that pre-judgment interest should be awarded pursuant to subsection 36(1) of the *Federal Courts Act*, as each Plaintiff’s cause of action arose in only one province. As such, the applicable pre-judgment interest rate is that set by the provincial legislation where each Plaintiff is located. Similarly, post-judgment interest shall be awarded pursuant to subsection 37(1) for the same reason.

[301] The cost submissions also raised, for the first time, an assertion that the Plaintiffs are improperly seeking compounded pre-judgment interest. I agree with Access Copyright that the Plaintiffs have not properly requested an award of compound interest, nor provided the Court with the evidence necessary to establish the basis for any such award [see *Apotex Inc v Eli Lilly*, 2018 FCA 217 at paras 157-159]. In fact, the Plaintiffs have made no submissions whatsoever in support of a request for compound interest. As such, none shall be awarded.

**THIS COURT ORDERS that:**

1. It is declared that the Plaintiffs overpaid Access Copyright for tariff royalties during the years 2010, 2011 and 2012 by an amount equal to \$2.35 per full-time equivalent student [Overpayment]. The total amount of the Overpayment as paid by each Plaintiff, exclusive of pre-judgment and post-judgment interest and inclusive of the Copyright Board-set interest factor and taxes, is as set out in Schedule B to the Statement of Claim.
2. It is declared that the Plaintiffs were not licensees of the Approved 2010-2015 Tariff from 2013 to 2015.
3. It is declared that the Plaintiffs are not liable to Access Copyright in equity, or otherwise, in relation to any of the claims advanced by Access Copyright in this proceeding.
4. It is declared that Access Copyright is not entitled to retain the Overpayment.
5. Access Copyright shall pay to each of the Plaintiffs a refund of the Overpayment, in the amounts as set out in Schedule B to the Statement of Claim.
6. Access Copyright shall pay to the Plaintiffs pre-judgment interest on the Overpayment, calculated pursuant to subsection 36(1) of the *Federal Courts Act*.



7. Access Copyright shall pay to the Plaintiffs post-judgment interest on the Overpayment, calculated pursuant to subsection 37(1) of the *Federal Courts Act*.
8. Access Copyright shall pay to the Plaintiffs their costs of this motion and the underlying proceeding calculated based on the mid-point of Column III of Tariff B [the Tariff], with the exception of the documentary production costs which shall be calculated based on the mid-point of Column IV of the Tariff.
9. Access Copyright shall pay to the Plaintiffs their reasonable disbursements of the motion and the underlying proceeding. In the event that the parties are unable to reach an agreement, the disbursements shall be assessed by an assessment officer.
10. Access Copyright's counterclaim is hereby dismissed.

“Mandy Aylen”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-326-18

**STYLE OF CAUSE:** THE PROVINCE OF ALBERTA AND ALL ENTITIES  
NAMED IN SCHEDULE “A” TO THE STATEMENT  
OF CLAIM v THE CANADIAN COPYRIGHT  
LICENSING AGENCY (COB ACCESS COPYRIGHT)

**PLACE OF HEARING:** OTTAWA AND TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 11, 12, 13 AND 16, 2023  
JANUARY 17-18, 2024

**ORDER AND REASONS:** AYLEN J.

**DATED:** FEBRUARY 22, 2024

**APPEARANCES:**

Wanda Noel  
J. Aidan O’Neill  
Alexandra Logvin  
Ariel Thomas

FOR THE PLAINTIFFS/DEFENDANTS BY  
COUNTERCLAIM

Sarit E. Batner  
Barry B. Bookman  
Daniel G.C. Glover  
Laura E. MacDonald  
Allison Spiegel

FOR THE DEFENDANT/PLAINTIFF BY  
COUNTERCLAIM

**SOLICITORS OF RECORD:**

Fasken Martineau DuMoulin LLP  
Ottawa, Ontario

FOR THE PLAINTIFFS/DEFENDANTS BY  
COUNTERCLAIM

McCarthy Tétrault LLP  
Toronto, Ontario

FOR THE DEFENDANT/PLAINTIFF BY  
COUNTERCLAIM