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ANOTHER RESOUNDING VICTORY FOR THE EDUCATIONAL SECTOR AGAINST ACCESS COPYRIGHT

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In another recent positive decision for the educational sector, *Alberta v. Canadian Copyright Licensing Agency (Access Copyright), 2024 FC 292*, the Federal Court of Canada (the "**Court**") delivered a significant judgment favouring various Ministries of Education across Canada, along with Ontario school boards, in a protracted copyright dispute with Access Copyright ("**AC**"). The Court not only granted these plaintiffs a full refund of tariff overpayments made to AC from 2010 to 2012 inclusive, but also emphatically rejected AC's contentions that the plaintiffs were licensees under the statutory tariff licensing regime from 2013 to 2015 or were liable to AC in equity during that period.

The legal battle commenced in 2018 when the plaintiffs initiated legal proceedings seeking a refund for tariff royalty overpayments made between 2010 and 2012. During this timeframe, the plaintiffs adhered to an interim tariff prescribed by the Copyright Board (the "**Board**"), and paid a rate of $4.81 per full-time equivalent student ("**FTE**") for the reproduction of published literary works that were in AC's repertoire. However, a final tariff (the "**Final Tariff**") for the years 2010 to 2015 was certified in 2016, reflecting a significantly lower rate of $2.46 per FTE. AC's challenge of the Final Tariff created a cloud of uncertainty until January 2018, when the Board upheld the rate under the Final Tariff. Subsequently, the plaintiffs pursued an aggregate refund in the amount of $25,493,109.36, for the years 2010 to 2012.

The summary trial revolved around three pivotal questions:

1. Were the plaintiffs considered licensees from 2013 to 2015?
2. If not, were they obligated in equity or otherwise to remunerate AC?
3. Could AC retain the overpayments?

The Court's verdict primarily rested on whether the plaintiffs willingly assumed the status of voluntary licensees during the disputed period. The Court determined that they did not meet the criteria for voluntary licensing, as they lacked actual knowledge of the tariff terms and royalty rates to enable a sufficiently informed and clear decision to pay the tariff. AC's contention that the plaintiffs' participation in the tariff-setting process constituted an implicit offer to pay was summarily dismissed, particularly in light of the precedent set by the Supreme Court of Canada's ruling in *York University v Canadian Copyright Licensing*

*Agency (Access Copyright), 2021 SCC 32 ("**York**").*

AC fervently pursued various equitable remedies, including unjust enrichment, abuse of process and estoppel by representation. Nevertheless, the Court maintained that its authority to grant such remedies must be considered within the framework of the *Copyright Act*. Given the Court's determination that the plaintiffs were not voluntary licensees, AC's equitable defenses and counterclaim were rejected.

The Court ruled in favour of the plaintiffs on all three issues following the summary trial, finding that the plaintiffs were not licensees from 2013 to 2015 and, therefore, AC was not entitled to retain the overpayments. The Court ordered AC to pay the plaintiffs $25,493,109.36 for the overpayments from 2010 to 2012, together with interest, costs, and reasonable disbursements.

This decision, following on the heels of *York*, offers more clarity on when an educational user of copyrighted materials will be considered to be a voluntary licensee, as well as the availability of equitable remedies in copyright disputes. A voluntary licensee is required to have the ability to know the terms and conditions of a tariff regime in order to make an informed decision whether or not to pay under a tariff. Further, equitable remedies should not be used as a means to seek monetary remedies that are not otherwise available under the *Copyright Act.*

This ruling stands as an important victory for the plaintiffs, vindicating their endeavours to recoup overpaid tariffs from AC and reaffirming the principle from the *York* decision that AC's tariffs should not be mandatory in nature. The Court was also critical of AC's aggressive pursuit of various equitable remedies under these circumstances, stating that allowing such remedies would be "incompatible with the object of the *Copyright Act* and result in absurdity (see para. 224 of decision)."

Beyond its immediate implications for the plaintiffs involved in the case, this decision provides greater confidence and assurance for educational institutions across Canada to opt out of statutory tariff regimes at their discretion, if they prefer to utilize and rely on other forms of copyright compliance that are more appropriate for each institution's specific needs rather than the "blanket licensing" approach under a statutory tariff licensing regime. For example, these may include transactional licensing with publishers, whether individually or as part of a collective licensing group that negotiates and enters into subscription-based licenses such as the Canadian Research Knowledge Network (CRKN), implementation and reliance on institutional fair dealing policies, and acquisitions of learning materials.

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