Copyright Board Canada

Commission du droit d'auteur Canada

Date	2012-01-05
Date	2012-03-15
Citation	File: Reprographic Reproduction, 2005 to 2014
Regime	Collective Administration in relation to rights under sections 3, 15, 18 and 21 *Copyright Act*, 70.15(1)
Members	Mr. Justice William J. Vancise Mr. Claude Majeau Mrs. Jacinthe Théberge
Proposed Tariff(s) Considered	(Provincial and Territorial Governments – 2005 to 2014)

Statement of Royalties to be collected by access copyright for the reprographic reproduction, in Canada, of works in its repertoire

Reasons for decision

I. INTRODUCTION

[1] The principal issue is whether the Crown can invoke Crown immunity as provided for in section 17 of the *Interpretation Act*,[1] and is therefore subject neither to the *Copyright Act*[2] (the "*Act*") nor to the tariffs filed by the Canadian Copyright Licensing Agency ("Access Copyright" or "Access").

[2] Access filed proposed tariffs for the years 2005 to 2009 and 2010 to 2014, claiming royalties for the reproduction of works in its repertoire by employees of provincial and territorial governments (except Quebec).

[3] The governments of Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Nunavut, Prince Edward Island and Saskatchewan (collectively the "Objectors")

[1] R.S.C. 1985, c. I-21.
[2] R.S.C. 1985, c. C-42.

challenge the legality of the proposed tariffs on the basis of Crown immunity. Access argues that the doctrine is not engaged, that even if engaged, the *Act* applies to the Crown by necessary implication, or that the Objectors have waived any immunity they may otherwise enjoy.

[4] The parties jointly requested that the Board decide the matter by way of a preliminary hearing based on an agreed statement of facts. The Board agreed. The matter was heard on September 27, 2011.

[5] On January 5, 2012, we dismissed the immunity claim of the Objectors on the ground that the *Act* binds the Crown by necessary implication. The following are the reasons for our decision.

II. ANALYSIS

[6] Before dealing with the substantive issue of whether the Objectors are immune from the provisions of the *Act*, it is necessary to decide whether the principle of Crown immunity is even engaged. Access contends that it is not because the *Act* does not operate to the prejudice of the Crown, and because the principle runs counter to the common-law presumption that there can be no expropriation without just compensation. In addition, it argues that the principle of Crown immunity is a rule of statutory construction and not a presumption which it must rebut. We will consider these issues in order.

A. IS THE PRINCIPLE OF CROWN IMMUNITY ENGAGED?

[7] The principle of Crown immunity, while historically rooted in the common law, is now codified in statute in section 17 of the *Interpretation Act*, which reads:

> 17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

[8] Access argues that the principle is not engaged. It relies on *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission*, where Dickson C.J.C. stated the following:

> The presumption of immunity only applies when the statutory provisions, if applied to the Crown, would operate to its prejudice.[3]

[9] Access submits that this is not so here. The *Act* has a broad public purpose to encourage the creation and dissemination of works for the benefit of Canadian society at large. Access draws our attention to the economic benefits that result from the generation and dissemination of these works, arguing that such wealth ultimately inures to the benefit of the public purse and the Crown. In addition, Access argues that there are provisions in the *Act* which grant the Crown

[3] [1989] 2 S.C.R. 225 at 284. [*AGT v. CRTC*]

copyright in its own works, thereby conferring a specific benefit to the Crown. Finally, it points to a number of provinces that have explicit policies recognizing the need to respect copyright law and which are set out in detail in the agreed statement of facts.

[10] For all of these reasons, Access contends that the *Act* promotes the Crown's interest rather than adversely affecting it. Thus, there is no prejudice to the Crown and immunity is not engaged in this case.

[11] The problem with this analysis is that it misreads *AGT v. CRTC*. First, the comments of Dickson C.J.C. are taken out of context. This is clear when one reads the preceding sentence which states: "[a]t common law it is well-established that, although not bound by a statute, the Crown may take advantage of its provisions unless there is an express or implied prohibition from doing so."[4] In other words, the purpose of requiring prejudice to the Crown is to ensure that Crown immunity only operates to the Crown's advantage. The principle cannot be used to prevent the Crown from asserting a statutory right or availing itself of a specific benefit, as long as it takes this benefit with all its attending conditions and limitations.

[12] Second, as the Objectors properly note, the prejudice to the Crown that engages Crown immunity must be specific to the provisions of the statute that are invoked in a particular case. For example, in *AGT v. CRTC*, the application of the *Railway Act*[5] to the Crown would have required the Crown to abide by CRTC regulations regarding the interconnection of telecommunication systems. In the matter before us, the specific provisions of the *Act* from which the Crown claims immunity relate to the certification by the Board of a tariff for the reproduction of literary works by provincial and territorial governments. Under the proposed tariff, the Crown would be required to pay royalties and to comply with the terms of the tariff for the reproductions they make of published works. The proposed tariffs are an example of clear and specific prejudice to the Crown that does engage Crown immunity.

[13] Access also argues that Crown immunity is not engaged because it conflicts with the principle that there can be no expropriation without just compensation. It contends that copyright constitutes an ownership right in works created by authors of all kinds and that under the common law, neither the provincial nor federal governments may expropriate property without just compensation absent a clear and unambiguous legislative intention to do so.

[14] The Objectors respond that the "no expropriation" principle has never been used to defeat a claim of Crown immunity. This is because expropriation is a concept that applies primarily to real property. By contrast, the *Act* does not provide rights in property. Copyright is a *sui generis*

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[4] *Ibid.* at 284.
[5] R.S.C. 1970, c. R-2., now the *Telecommunications Act*, S.C. 1993, c. 38.

statutory right which has many key differences from property law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute.

[15] Common law is the source of the "no expropriation" principle. Common law rules cannot overcome clear statutory language. As such, the unrelated and subordinate common law rule regarding expropriation of property that Access asserts simply cannot overcome the clear language and intent of section 17 of the *Interpretation Act.*

[16] The "no expropriation" principle applies to both real and intangible property. Indeed, the case law recognizes that the principle could be applied to such intangible property as veterans' pensions[6] and has applied it for loss of goodwill.[7] However, copyright is a *sui generis* statutory right which is not, properly speaking, a form of property. The Supreme Court of Canada in *Compo Co. Ltd. v. Blue Crest Music et al.*, in describing copyright, stated:

> [...] Mr. Hughes […] put it very well when he said that copyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute.[8]

[17] Moreover, there is no expropriation in this case because expropriation requires that the Crown's action have the effect of rendering the assets virtually useless. Thus, in *Manitoba Fisheries Ltd. v. The Queen*,[9] the Supreme Court of Canada held that the creation of a fisheries monopoly had the effect of depriving the appellant, a company engaged in the purchasing and processing of fish, of its goodwill as a going concern and consequently rendering its physical assets virtually useless. In the Court's opinion, the goodwill taken away constituted the appellant's property, which loss required compensation.

[18] In the case before us, the Objectors' actions do not deprive the rights holders of their rights under the *Act* rendering those rights virtually useless. Rather, the Objectors seek to reproduce, or make use of, literary works without having to compensate the rights holders of those works. We agree that there is certainly a potential lack of compensation. However, the rights conferred under the *Act* remain exercisable between private parties; authors continue to control the use of their works. As a result, the "no expropriation" principle is of no assistance to Access.

[19] Thus, the principle of Crown immunity is engaged.

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[6] *Authorson v. Canada (Attorney General),* 2003 SCC 39.
[7] *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101.
[8] *Compo Co. Ltd. v. Blue Crest Music et al.* [1980] 1 S.C.R. 357 at 372.
[9] *Supra* note 7.

B. IS CROWN IMMUNITY A GENERAL RULE OF STATUTORY INTERPRETATION OR A REBUTTABLE PRESUMPTION?

[20] Access submits that the principle of Crown immunity is better expressed as a rule of construction, rather than a presumption to be rebutted. As such, it contends that it is incorrect to speak of one party bearing the "onus" to shift the presumption. No one bears an onus to establish that a particular statute is applicable to the Crown – rather it is for the tribunal or court to determine whether, in accordance with the applicable principles of statutory interpretation, the statute in question is binding on the Crown. We do not agree.

[21] In *R v. Eldorado Nuclear,* Dickson J. described the principle of Crown immunity as a "premise":

> This Court is not, however, entitled to question the basic concept of Crown immunity, for Parliament has unequivocally adopted the premise that the Crown is *prima facie* immune.[10]

[22] In *R. v. Greening*, MacDonnell J. described the approach to the Ontario equivalent of section 17 in these terms:

> Different considerations apply to the defence of Crown immunity because, as will be seen, there is a statutory presumption that the Crown is not bound by statutes. That presumption must be overcome, and in my view, the party seeking to bind the Crown has that burden.[11]

[23] We agree with this characterization. Section 17 of the *Interpretation Act* provides that "no enactment is binding on Her Majesty […] except as mentioned or referred to in the enactment." This creates an overall presumption of immunity. That presumption can be rebutted where it can be demonstrated that there exists a contrary intention to otherwise bind the Crown. Access must therefore overcome this presumption and demonstrate that the *Act* does bind the Crown.

[24] We now turn to the principal issue of whether the principle of Crown immunity applies to the Objectors in the particulars of this tariff application.

C. CROWN IMMUNITY – GENERAL LEGAL PRINCIPLE

[25] This legal debate centres on the interpretation of section 17 of the *Interpretation Act* which to reiterate, codifies the common law principle of Crown immunity as follows:

> 17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

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[10] [1983] 2 S.C.R. 551 at 558. [*Eldorado Nuclear*]
[11] 1992 CarswellOnt 57 at para 39. (Prov. Ct.)

[26] As Dickson J. stated in *Eldorado Nuclear*, the principle of Crown immunity seems to run afoul of our general sense of equality before the law:

> Why that presumption should be made is not clear. It seems to conflict with basic notions of equality before the law. The more active government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject. This Court is not, however, entitled to question the basic concept of Crown immunity, for Parliament has unequivocally adopted the premise that the Crown is prima facie immune. The Court must give effect to the statutory direction that the Crown is not bound unless it is "mentioned or referred to" in the enactment.[12]

[27] We do not question the overall concept of Crown immunity, but note that Crown immunity is not absolute, as the Supreme Court made clear in *AGT v. CRTC*:

> […] the words "mentioned or referred to" in [section 17] must be given an interpretation independent of the supplanted common law with respect to Crown immunity. These words are capable of encompassing: (1) expressly binding words; (2) an intention revealed when provisions are read in the context of other textual provisions; and, (3) an intention to bind where an absurdity, as opposed to an undesirable result, were to occur if the government were not bound. Any exception to the normal Crown immunity rule based on a necessary implication should be narrowly confined.[13]

[28] All parties agree that there are no expressly binding words which establish that the Crown is bound by the *Act*. So do we. We must therefore decide whether the *Act* binds the Crown either because such an intention is revealed when provisions are read in the context of other textual provisions. Given that our answer to this question is "yes", it will not be necessary to decide whether there would be a resulting absurdity were the Crown not so bound.

D. IS THE CROWN BOUND BY NECESSARY IMPLICATION?

[29] We wish first to set out briefly how we understand the necessary implication rule within its historical context.

[30] As far back as 1947, the Privy Council agreed that Crown immunity admits of at least one exception, necessary implication:

> If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named.[14]

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[12] *Supra* note 10 at 558.
[13] *Supra* note 3 at 281.
[14] *Province of Bombay v. Municipal Corporation of Bombay* [1947] A.C. 58 at 61 (*per* Lord du Parcq).

[31] In Canada, the necessary implication test was explained by Beetz J. in *R. v. Ouellette* as follows:

> […] the various provisions of a statute are each interpreted in light of the others, and it is possible that Her Majesty be implicitly bound by legislation if that is the interpretation which the legislation must be given when it is placed in its context.[15]

[32] That statement was approved by Dickson C.J.C. in *AGT v. CRTC*.[16]

[33] Then in *Friends of the Oldman River Society v. Canada (Minister of Transport)*,[17] La Forest J., for the majority, found the necessary implication exception survived the 1967 revision of what is now s. 17 of the *Interpretation Act*. He went on to explain the necessary implication test as follows:

> […] a contextual analysis of a statute may reveal an intention to bind the Crown if one is irresistibly drawn to that conclusion through logical inference.
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> That analysis however cannot be made in a vacuum. Accordingly, the relevant "context" should not be too narrowly construed. Rather the context must include the circumstances which led to the enactment of the statute and the mischief to which it was directed. This view is consistent with the reasoning in *Bombay* as is evident from the passages quoted above where the test for necessary implication is expressed in terms of the time of enactment.[18]

[34] Some may read this last sentence as implying that Parliament's intention to bind the Crown, absent express words, must be assessed by looking at the statute at the time of its original enactment, in our case 1921. In our view, this would be illogical, absurd and contrary to a purposive interpretation of the *Act*. In 1921, the *Act* (without schedules) occupied 23 pages in the statute book; today, it is 109. A contextual analysis requires looking at the whole *Act*. We need to decide not whether Parliament wished to bind the Crown in 1921, but whether Parliament thought the Crown was so bound in 1987 (when an exception for the Archives came into force) and then, in 1997 (when further exceptions were introduced). As will be seen, we conclude that, clearly, it did.

[35] With this clarification, we can now proceed to apply the relevant principles to the matter at hand.

[36] Access argues that when examining the *Act* in its entirety there is, by necessary implication, a clear intention to bind the Crown. It points to a number of provisions that exempt the Crown from clearing the rights to use certain protected copyright subject-matters. It argues that these

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[15] [1980] 1 SCR 568 at 575.
[16] *Supra* note 3 at 279.
[17] [1992] 1 S.C.R. 3.
[18] *Ibid.* at 53.

exceptions raise a logical implication that the Crown is bound by those provisions from which it has not been exempted. If this were not the case, there would be no need for the exempting sections.

[37] The Objectors, for their part, contend that Access has not proven beyond doubt that the *Act* binds the Crown by necessary implication through a clear expression of legislative intent. Relying on section 12, they argue that the *Act* specifically provides that Crown immunity is maintained. This section confers certain rights "without prejudice to any rights or privileges of the Crown". This, in their submission, demonstrates Parliament's intent to maintain Crown immunity notwithstanding that the Crown may enjoy certain benefits pursuant to the *Act*.

[38] A contextual analysis of the *Act* requires us to engage in a two-part analysis. First, is section 12 of relevance when deciding whether *Act* binds the Crown? Second, do the specific exceptions that apply to the Crown demonstrate that the Crown is otherwise bound by the *Act*?

i. Is section 12 relevant when examining whether the *Act* binds the Crown?

[39] Section 12 of the *Act* states:

> 12. Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.

[40] The parties debated at length the meaning of the words "without prejudice to any rights or privileges of the Crown". If, as the Objectors argue, these rights and privileges are all the rights and privileges accorded to the Crown, including immunity, then the inference is that by adopting section 12, Parliament specifically allowed the Crown to maintain its overall immunity from the *Act* despite the Crown being granted certain rights pursuant to other provisions of the *Act*. On the other hand, if these words mean only those copyrights granted to the Crown under common law, then section 12 is limited to the grant of copyright and cannot be read to infer any Parliamentary intent regarding immunity.

[41] The Objectors rely on the decision of the Federal Court in *Eros - Équipe de Recherche Opérationnelle en Santé Inc. v. Conseillers en Gestion et Informatique C.G.I. Inc.*[19] to support their contention that they are not bound by the *Act*. In particular, they rely on Tremblay-Lamer J.'s statement that "[…] the Crown can exercise the rights conferred in section 12 of the Act

[19] 2004 F.C. 178. [*Eros-Équipe*]

without this eliminating its immunity."[20] This, according to the Objectors, shows that the Crown may enjoy the rights set out in section 12 without being bound to the entire *Act*.

[42] Section 12 of the *Act* finds its source in section 18 of the *Imperial Copyright Act of 1911*. This provision was significantly amended, especially with the passage of the *Copyright, Designs and Patents Act of 1988*, which simplified the regime of Crown copyright and abolished the perpetual Crown copyright in unpublished works of the Crown. By contrast, section 12 has been in place, unchanged, since the Canadian *Act* came into force in 1924, even though the *Act* has undergone a number of significant reviews, including in 1988 and 1997.

[43] During the course of these proceedings, the parties filed excerpts from a number of reports to assist the Board in its interpretation of section 12. These reports include: *Copyright in Canada: Proposals For a Revision of The Law*;[21] *From Gutenberg to Telidon, a White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act*;[22] the *Report of the Sub-Committee on the Revision of Copyright, a Charter of Rights for Creators*;[23] and the *Government Response to the Report of the Sub-Committee on the Revision of Copyright*.[24] Some, such as *Keyes-Brunet* and *Gutenberg*, comment and analyze the *Act*. Others, such as the Sub-Committee Report, are more prospective and recommend specific revisions.

[44] *Keyes-Brunet* takes issue with the drafting of section 12, pointing to a lack of clarity and specificity as to its intended meaning:

> The wording of this provision creates uncertainty. First the section provides a specific exercisable Crown prerogative, but its extent is undefined. The prerogative copyright is expressed in the terms "without prejudice to any rights or privileges of the Crown". These words imply an overall proprietary right exercisable at the Crown's discretion at any time and which could prevent use of material covered by the prerogative. In this instance, the term of protection appears to be either perpetual or at whim. A second uncertainty is that, while copyright is published works not covered by the apparent prerogative would have a limited term, copyright protection may well be perpetual where the work remains unpublished.[25]

[45] *Gutenberg* was issued to provide the public with an opportunity to comment on the proposals presented therein. Nothing in the Report seems to suggest that section 12 deals with anything other than Crown copyright. Rather, it seems to focus on the nature of copyright accorded to the Crown pursuant to section 12:

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[20] *Ibid.* at para. 60.
[21] Consumer and Corporate Affairs Canada (April 1977). ["*Keyes-Brunet*"]
[22] Consumer and Corporate Affairs Canada & Department of Communications (1984). ["*Gutenberg*"]
[23] House of Commons, Issue no. 27, First Session of the Thirty-third Parliament, 1984-85 (1985). [the "Sub-Committee Report"]
[24] February, 1986.
[25] *Supra* note 21 at 223.

> There presently exists in Canada a Crown prerogative right to authorize printing and publishing of works such as Acts of Parliament and judicial decisions. In view of the above proposals for the exercise of Crown Copyright, and in order to ensure the integrity of use of such works, this Crown prerogative will remain.[26]

[46] While *Gutenberg* recognises that there is ongoing debate as to whether or not the government is immune from the provisions of the *Act*, the debate is centered on the meaning of section 17 of the *Interpretation Act*, not section 12 of the *Act*. In this respect, the Report notes:

> It is debatable whether the Crown is currently bound by the *Copyright Act*. As nothing in the Act explicitly binds the Crown, it can presumably use the works of third parties with impunity. Section [17] of the *Interpretation Act* provides that the Crown is exempted from statutory provisions unless explicitly included within their ambit. Despite this immunity, the Crown now generally respects Copyright.[27]

[47] These reports seem to document an ongoing uncertainty regarding the true meaning of section 12. Since they are not unanimous in their findings, there is nothing in them that would provide us with a definitive and conclusive interpretation of section 12.

[48] In any event, even if the reports were unanimous, we could not place much weight on them as they can only serve to provide insight on their authors' understanding of section 12 of the *Act*. Furthermore, as the Supreme Court of Canada stated in *Morguard Properties Ltd. v. City of Winnipeg*:

> It has, of course, been long settled that, in the interpretation of a statute (and here I do not concern myself with the constitutional process as, for example, in the *Re Anti-Inflation Act* judgment ([1976] 2 S.C.R. 373)), the report of a commission of enquiry such as a Royal Commission may be used in order to expose and examine the mischief, evil or condition to which the Legislature was directing its attention. However, in the interpretation of a statute, the court, according to our judicial philosophy, may not draw upon such reports and commentaries, but must confine itself to an examination of the words employed by the Legislature in the statutory provision.[28]

[49] Section 12 has remained unchanged. Parliament has addressed no "mischief, evil or condition" inherent to this section that any report may have attempted to highlight. This can only confirm the need, consistent with *Morguard Properties*, to limit our inquiry to the words of section 12 and the context of that provision.

[50] When undertaking this inquiry, the following facts should be kept in mind. First, section 12 grants Her Majesty rights in works prepared or published by or under her direction or control.

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[26] *Supra* note 22 at 75-76.
[27] *Ibid.* at 76.
[28] [1983] 2 S.C.R. 493 at 499.

However, Crown copyright covers many works which are not prepared or published under the direction or control of Her Majesty, such as judicial decisions. Second, the rights granted in section 12 generally limit the protection to 50 years following the first publication of the work[29] whereas it is arguable that Crown copyright under the Crown prerogative is perpetual. Put another way, Crown copyright under the Crown prerogative is wider in scope and duration than what section 12 provides.

[51] In addition, section 12 must not be read in isolation. Rather, it must be interpreted within the overall context and scheme of the *Act* and, in particular, in relation to section 89 which states:

> 89. No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.

[52] Certain inferences can be drawn by reading section 12 together with section 89. As a result of section 89, all copyright is exclusively contained within the legal structure of the *Act*. Without the opening phrase of section 12, section 89 would operate to eliminate all remaining common law copyright held by the Crown. This seems to confirm that the terms "without prejudice to any rights or privileges of the Crown" are necessary to maintain the Crown prerogative in its copyright and that those words must be read to mean such a prerogative.

[53] Moreover, section 89 targets copyright exclusively. As a result, the opening words of section 12 fully serve their purpose by preserving the Crown's prerogatives relating to Crown copyright, not other forms of prerogatives such as Crown immunity. This is where section 17 of the *Interpretation Act* comes into play: it is under that provision that any claim of Crown immunity must be made. If section 12 also fulfills that purpose, as is argued by the Objectors, then the opening words of section 12 are largely redundant. This cannot be Parliament's intent.

[54] The Objectors' reliance on *Eros-Équipe* is unconvincing. There, Tremblay-Lamer J. simply commented that: "section 12 expressly mentions that it is applicable without prejudice to any rights or privileges of the Crown".[30] No explanation, context or analysis is provided for this comment. Moreover, the issue in *Eros-Équipe* was whether the Crown had waived its immunity; nothing turned on the meaning of section 12. As a result, the comments are *obiter dicta* and are of no help in determining the proper interpretation of section 12.

[55] Therefore, as a matter of statutory interpretation, when reading section 12 in the context of the *Act*, the terms "without prejudice to any rights or privileges of the Crown" must be read to mean those rights and prerogatives as they relate to Crown copyright. We therefore find that

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[29] A term shorter than "normal" copyright.
[30] *Supra* note 19 at para. 59.

section 12 relates exclusively to matters of copyright and cannot be read to infer any intent on behalf of Parliament to maintain Crown immunity.

E. DO THE SPECIFIC EXCEPTIONS THAT APPLY TO THE CROWN DEMONSTRATE THAT THE CROWN IS OTHERWISE BOUND BY THE *ACT*?

[56] We now turn to an examination of other provisions contained in the *Act* that appear to provide for exceptions to infringement when the Crown makes certain uses of copyright protected works and other subject-matters.

[57] Relying on the maxim *expressio unius est exclusio alterius,* Access argues that exceptions which specifically apply to the Crown in right of Canada or the provinces evidence a clear intention that the *Act* otherwise apply to the Crown. In other words, since the *Act* contains provisions exempting the Crown from some of its provisions and is silent as to whether the rest of the statute binds the Crown, the exempting sections raise a logical implication that the Crown is bound by those provisions from which it is not exempt. If this were not the case, there would be no need for the exempting provisions.

[58] The Objectors reply that *expressio unius* is a weak inference at best and cannot overcome the presumption that the Crown is immune. In matters of Crown immunity, *expressio unius* has generally not been applied by the Courts. For example, in *AGT v. CRTC,* the Court concluded that an exception existed either out of abundance of caution or as a matter of historical antecedent, and in any event did not provide a sufficiently clear reference to any Parliamentary intention to bind the Crown.[31]

[59] The *Act* contains a score or more exceptions that expressly benefit the provincial or federal Crown. They can be classified in three types.

[60] A first set of exceptions appear to benefit the Crown writ large. Paragraph 45(1)(*b*) has existed since the *Act* came into force in 1924. It makes lawful certain forms of parallel importation of a work or other subject-matter "for use by a department of the Government of Canada or a province". Since the Crown is an artificial person, and since it acts only through intermediaries, that provision makes sense only if Crown immunity is unavailable to shield these intermediaries (whether civil servants or others) from liability. Another such exception is subsection 32.1(1), which exempts from copyright infringement copies made to comply with federal or provincial access to information or privacy legislation. Such legislation largely concerns emanations of the Crown.

[61] A second group of exceptions benefits educational institutions, which section 2 of the *Act* defines as:

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[31] *Supra* note 3 at 282.

a. a non-profit institution licensed or recognized by or under an Act of Parliament or the legislature of a province to provide pre-school, elementary, secondary or post-secondary education,
b. a non-profit institution that is directed or controlled by a board of education regulated by or under an Act of the legislature of a province and that provides continuing, professional or vocational education or training,
c. a department or agency of any order of government, or any non-profit body, that controls or supervises education or training referred to in paragraph (*a*) or (*b*), or
d. any other non-profit institution prescribed by regulation;

[62] This definition is significant in three respects. First, paragraph (*c*) clearly describes some emanations of the Crown as educational institutions. Its opening words could not be more definitive: "a department or agency of any order of government". Second, since education is a subject that falls under provincial jurisdiction, the definition necessarily targets the provincial order of government. Third, all but three of the provisions of the *Act* that mention educational institutions are exceptions that benefit these institutions.[32]

[63] Some exceptions created for the benefit of educational institutions, such as those that allow a teacher to show a television program in the classroom or to reproduce a work onto a blackboard, are difficult to "link" to any agent of the Crown. Others clearly contemplate activities by the Crown or its agents. Subsection 29.4(2) allows the reproduction or translation as required for a test or examination; copies and translations of some provincial exams are made on departmental premises. Section 30.3, which sets out when a provincial department of education is not liable for copies made by others on departmental photocopiers, is clearly of benefit to the Crown; it prevents it from being liable for the acts of others who could not shield themselves behind Crown immunity to avoid infringing copyright. The same is true of provisions that apply to libraries, archives and museums, including those that form part of an educational institution.[33]

[64] The final set of exceptions is found in section 30.5 and concerns Library and Archives Canada, which section 4 of the constituent statute creates as "a branch of the federal public administration" and as such, part of the Crown.[34]

[65] All these exceptions but two came into force in 1997.[35] We asked the parties whether they had, through their respective research, uncovered any legislative history as it specifically relates

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[32] One provision is the definition of "premises". The other two are procedural in nature: they specify how educational institutions are to proceed in opposing tariffs that must be set as a result of the exceptions that benefit them: *Act*, *supra* note 2, ss. 72(1), 73(1).
[33] *Act*, *supra* note 2, ss. 29.4(2) and 30.3.
[34] Section 4 of the *Library and Archives Canada Act* states "There is hereby established a branch of the federal public administration to be known as the Library and Archives of Canada presided over by the Minister and under the direction of the Librarian and Archivist." The same is true of the provision as it existed before 2004, when the Library and Archives were merged.
[35] Paragraph 45(1)(*a*) has always been in the *Act*. Section 30.5 dates from 1987: S.C. 1987, c. 1, s. 13.

to the 1997 amendments. Such legislative history may have provided us with indicia of legislative intent. Parties indicated that they had found nothing in the debates before the House of Commons or that could have been of assistance to us.[36]

[66] Our analysis is therefore based on a contextual and contemporaneous reading of the *Act*. In 1987, Parliament introduced an exception targeting specifically one emanation of the federal Crown, the National Archives. Then in 1997, Parliament decided to add a large number of very specific exceptions benefiting both provincial and federal emanations of the Crown such as government departments and libraries. The number and detailed nature of these exceptions seem to indicate a purposeful, explicit intention on the part of Parliament to identify and circumscribe activities that do not infringe copyright. If the Crown benefited from an overall immunity from the *Act*, why would Parliament spend so much time and effort in crafting these exceptions?

[67] The explanation offered by the Objectors for the existence of these exceptions is perfunctory. To argue that they were added out of abundance of caution or constitute historical incidents is logically inconsistent: the time, effort and attention required are simply too vast. Resorting to *AGT v. CRTC*[37] does not help, because of the vastly different legislative context prevailing at that time. *AGT v. CRTC* involved a single, somewhat unclear reference to government railways[38] that could be explained away. One cannot "explain away" the exceptions contained in the *Act*. These are not vague references to "persons" or "government railways". Two refer to specific emanations of the Crown: Library and Archives Canada and provincial departments of education. The exceptions are detailed and clear, both in their nature and in the limitations attached to them. They are numerous. They cannot be described as historical "slip ups": all but two were deliberately introduced in 1997 as part of the overall copyright reform.

[68] Section 17 "does not exclude the rule by which the various provisions of a statute are each interpreted in light of the others, and it is possible that Her Majesty be implicitly bound by legislation if that is the interpretation which the legislation must be given when it is placed in its context."[39] When analyzing the whole of the *Act* contextually, we are irresistibly drawn to the logical conclusion that the *Act* generally binds the Crown. Certain exceptions were put in place to ensure that certain activities undertaken by the Crown – both federal and provincial – did not infringe copyright.

[69] The Objectors attempted to minimize the impact of a finding of immunity in this particular tariff proceeding. These efforts only serve to comfort us in our conclusion that the *Act* binds the Crown by necessary implication. On the one hand, they say they are not seeking a ruling of blanket immunity from the *Act*; they "assert the defence of Crown immunity only in terms of

[36] Transcripts at 173-4.
[37] *Supra* note 3.
[38] *Railway Act*, *supra* note 5, ss. 5, 320.
[39] *R. v. Ouellette*, *supra* note 15 at 575.

their respective liability in this tariff proceeding".[40] On the other hand, the Objectors also state that "[i]f the presumption of Crown immunity applies, Access Copyright's proposed tariff for each immune jurisdiction will be without legal foundation. As such, the Board would be without statutory jurisdiction under the *Act* to either consider, or certify, such a proposed tariff in respect of these immune jurisdictions."[41] In our opinion, the latter statement is a closer reflection of the implications of a successful claim of immunity. Such a claim is by its very nature a total and complete defence against the provisions of a statute.

[70] The implications of our decision are therefore greater than the Objectors contend. Crown immunity applies, if at all, to any and all tariff proceedings before the Board seeking to set royalties for the use of copyrighted works by the Crown. It applies not only to Objectors who have raised the issue, but to the federal and provincial Crowns and their agents. This would include Crown corporations that hold and use a significant amount of copyrighted material, such as the CBC, Telefilm, the National Film Board, provincial educational televisions stations, and scores of other similar provincial and federal agencies.

[71] Furthermore, Crown immunity is a jurisdictional issue. The Board is obliged to raise such issues *proprio motu*. Were the claim of Crown immunity to succeed in this case, the Board would be obliged to reject of its own motion any tariff filed in respect of any emanation of the Crown unless immunity had been waived.

[72] As a result, the impact of a finding of Crown immunity on our part would be both significant and broad. The Objectors' contention that "the system can function perfectly well amongst the private parties toward whom the Act is directed"[42] clearly downplays the potential consequence of a successful claim of Crown immunity in this instance.

[73] In our opinion, any application of Crown immunity would leave a significant gap in the enforcement of copyright by rights holders. While we do not believe that this gap would wholly frustrate the *Act*, as was the case in *Friends of the Oldman River*,[43] it does in our view, further support the logical implication that the Crown is bound by the *Act*.

[74] We find further comfort for this conclusion in the recent decision of the Supreme Court of Canada in *Quebec (Attorney General) v. Canada (Human Resources and Social Development).*[44] That decision reiterated the *dictum* of Dickson J., in *Eldorado Nuclear*,[45] that it is difficult to see why the Crown ought to be in a different position than a subject given the active role of

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[40] Consortium Members' Reply Argument, 14 September 2011 at para. 4.
[41] Consortium Members' Legal Argument, 15 June 2011 at para. 95.
[42] Consortium Members' Reply Argument, 14 September 2011 at para. 76.
[43] *Supra* note 17.
[44] 2011 SCC 60.
[45] *Supra* note 10.

government in activities once considered the preserve of the private sector. It also confirms that while Crown immunity must be applied, it ought to be so in a manner that is consistent with the modern approach to the role of governments.[46]

[75] Modern governments create, transact, monetise and use copyrighted material, not just in relation to section 12, but significantly as a result of the general copyright granted pursuant to sections 3, 15, 18 and 21 of the *Act*. Governments hold such copyright either as of right (as first owners of the copyright), as a matter of contract (when they acquire the rights of others) and even as a result of common or statutory law (*escheat*). Governments are unable to enforce any of those rights without the benefit of the *Act*. In other terms, given the ambit of government action in the copyright market and the extent to which governments must rely on the *Act* to enforce their copyrights, the *Act* makes no sense unless it binds the Crown.

[76] Finally, we note that the Objectors do not refer to any case law which supports the proposition that Crown immunity can be applied so as to infringe another person's copyright. Access drew our attention to the contrary conclusion reached in one British decision:

> In particular – and here we approach what I regard as the heart of the matter – never has the Crown claimed, nor until now has it ever been claimed in right of the Crown, that the prerogative can override private copyright. […]
>
> The royal prerogative does not, therefore, in my judgment, cover the right to print or to authorise others to print any material the printing of which would be a breach of copyright, and in these circumstances the plaintiffs are, in my judgment, entitled to succeed.[47]

[77] The extent to which this decision is valid law in Canada is open to argument, given the important differences that existed then and now between Canadian and British copyright legislation. Suffice it to say that it can only help support the conclusion we have reached without relying on this decision.

F. HAVE THE OBJECTORS WAIVED THEIR IMMUNITY?

[78] Having found that the Objectors are bound by the *Act* by necessary implication, no further analysis is required. However, in the event that we are wrong, given the importance of the legal issues involved, we consider it useful to comment on whether the Objectors have waived their immunity either in regard to the totality of the provisions contained in the *Act* or alternatively in regard to certain of its provisions.

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[46] *Supra* note 44 at para. 12.
[47] *Universities of Oxford and Cambridge v. Eyre & Spottiswoode Ltd*, [1963] 3 All E.R. 289; [1964] Ch. 736 at 750, 752.

[79] In *Sparling v. Québec (Caisse de dépôt et placement du Québec),*[48] the Supreme Court of Canada held that where the Crown benefits from immunity, it can nevertheless waive its immunity regarding certain or all of the provisions of a statute by reason of its conduct under the benefit/burden exception. The rationale for this exception is easy to understand: if the Crown intends to benefit from certain provisions contained in a statute, it must also be subject to the attendant burdens that limit that benefit.

[80] The Objectors attempted to limit the application of the benefit/burden exception to section 12 of the *Act*. They recognize that section 12 does indeed provide the Crown with a benefit, i.e. the grant of Crown copyright. However, they argue that their burdens are limited to the restrictions in the *Act* that limit the scope of Crown copyright. For example, they argue that while the Crown has copyright in its publications under section 12 of the *Act*, the Crown must assume the attendant burdens that provide for exceptions to that right such as fair dealing.

[81] According to the Objectors, the Crown's right to assert copyright under section 12 does not include the attendant burden to recognize the copyright of others. Indeed, infringing the copyright of others has no bearing whatsoever on one's own assertion of copyright. We disagree.

[82] First, the Objectors view the issue too narrowly and do not apply the benefits/burden exception to Crown immunity correctly. It is incorrect to limit the benefit conferred on the Crown to copyright granted pursuant to section 12. The benefits that the Crown enjoys under the *Act* go far beyond those copyrights granted to the Crown pursuant to section 12. The Crown has rights pursuant to sections 3, 15, 18 and 21 and it exercises those rights through a number of related provisions.

[83] In *Sparling*, the Supreme Court of Canada examined whether the Crown subjected itself to a statute in its entirety, by taking advantage of one provision of that statute. In this respect, the Court stated:

> A question which immediately comes to mind is whether by taking advantage of one right conferred by the Act (e.g., voting the shares) the Crown would subject itself to all or only some of the other provisions of the Act. If only some, it is difficult to conceive how it could be determined which provisions would apply – indeed it is hard to see how most provisions, including those relating to insider reports, would ever apply to the Crown. If, on the other hand, all of the Act would apply upon the Crown taking affirmative advantage of one provision, then it is difficult to see why this result should not follow from the purchase of the shares alone. Upon purchasing the shares certain rights, e.g., the right to vote the shares and the right to receive dividends, accrue immediately to the purchaser. As will be discussed, the aggregate of these rights and their attendant obligations are indeed definitive of the notion of

[48] [1988] 2 S.C.R. 1015. [*Sparling*]

> a share. With respect, I cannot see why some affirmative act with regard to one right acquired by the purchaser of a share changes the situation in any relevant way.[49] [our emphasis]

[84] Both notions of "share" and "copyright" comprise an aggregation of rights and attendant obligations. The *Act* confers copyright to rights holders. It enables them to control the use of copyrighted material. It generally requires that users who wish to use copyrighted material secure the necessary authorization. On the other hand, the *Act* limits the monopoly of rights holders in such respects as duration, extent (the taking must be substantial) and purpose (certain uses are allowed without authorization). The granting of copyright and the restrictions thereto are two sides of the same coin. They cannot be disassociated in the manner contemplated by the Objectors. Therefore, the benefits/burden analysis must start with sections 3, 15, 18 and 21, not with section 12.

[85] When viewed from this perspective, the Objectors' conduct speaks volumes. For years, they have applied comprehensive written policies to ensure that the Crown and its agents respect copyright. For years, they have sought out, sought authorization and compensated other rights holders for the use of their works. By such actions, on such a scale, the Objectors have waived their immunity and have chosen to bring themselves within the purview of the entire *Act*. That includes the attendant burden of compliance.

[86] The Objectors, relying on *AGT v. CRTC*, argue that waiver only occurs where the Crown "takes the benefit of a statute divorced from its enumerated restrictions."[50] In our opinion, this decision does not assist the Objectors, but rather supports the conclusion that they have waived their immunity. The Objectors routinely benefit from the *Act* as rights holders; they routinely present themselves as copyright friendly and behave accordingly. They no longer can claim that they are not required to obtain the necessary authorization from other rights holders. It may be possible for the Objectors to re-claim their immunity, in so far as it exists, through a significant change in their behaviour. Whether this can be done and if so, how, is for others to debate. Were we required to do so, we would find that all the Objectors, through their current and recent conduct, have waived their immunity in respect of all other copyright holders, including Access, at least in respect of the period for which the Board will certify the tariff in this instance.

[87] For all of the above reasons, we find that the principle of Crown immunity does not apply by necessary implication, and that even if it did, the Objectors have waived Crown immunity and the *Act* therefore applies to them.

[88] Access also presented certain arguments to the effect that Nunavut has no standing to assert Crown immunity in its own right. In light of the conclusions we have reached, it is not necessary to deal with this issue.

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[49] *Ibid.* at 1024.
[50] Supra note 3 at 289.

[89] We wish to thank counsel for their excellent memoranda and oral presentations.

Gilles McDougall
Secretary General