

Federal Court



Cour fédérale

**Date: 20150306**

**Docket: T-2046-12**

**Citation: 2015 FC 286**

**Ottawa, Ontario, March 6, 2015**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**ROGERS COMMUNICATIONS  
PARTNERSHIP, TELUS COMMUNICATIONS  
COMPANY, BELL MOBILITY INC. AND  
QUEBECOR MEDIA INC.**

**Plaintiffs / Defendants by Counterclaim**

**and**

**SOCIETY OF COMPOSERS, AUTHORS AND  
MUSIC PUBLISHERS OF CANADA  
(A.K.A. SOCAN)**

**Defendant / Plaintiff by Counterclaim**

**ORDER AND REASONS**

I. Overview

[1] The plaintiffs are well-known providers of mobile telecommunication services in Canada. Part of their business involves selling ringtones to subscribers.

[2] The defendant, SOCAN, collects, administers, and distributes royalties for public performances of musical works on behalf of composers, authors and publishers.

[3] The plaintiffs brought this motion to determine six legal issues relating to the validity of a tariff established by the Copyright Board of Canada that required the plaintiffs to pay royalties to SOCAN in respect of ringtones and ringbacks (Tariff 24). They seek an order declaring that Tariff 24 is invalid in respect of ringtones because the transmission of ringtones to their subscribers does not involve the communication of musical works to the public under s 3(1)(f) of the *Copyright Act*, RSC 1985, c C-42 (provisions cited are set out in an Annex). Alternatively, they ask me to conclude that the Board lacked jurisdiction to certify Tariff 24 in respect of ringtones. Further, they assert that SOCAN has been unjustly enriched by royalties already paid under the tariff, and want to know which SOCAN members have received them.

[4] SOCAN argues that Tariff 24 was validly enacted and seeks an order requiring the plaintiffs to continue to pay the required royalties (for reasons outlined below, the plaintiffs stopped paying ringtone royalties in 2012). SOCAN also submits that the plaintiffs cannot succeed because their claim is precluded by the doctrines of *res judicata* and estoppel.

[5] The parties have framed the following six issues:

- Does the Internet transmission to a customer's mobile device of an electronic ringtone file containing a musical work constitute a communication of that work to the public by telecommunication within the meaning of section 3(1)(f) of the *Copyright Act*?

- Were the decisions of the Copyright Board of Canada certifying SOCAN Tariff 24 (Ringtones) for the years 2003-2005 and 2006-2013 *intra vires* the Board?
- Is any part of the plaintiffs' entire claim barred under the doctrine of *res judicata*?
- Are the plaintiffs estopped from claiming part or all of the relief sought in this action by an agreement executed by the plaintiffs and filed with the Copyright Board of Canada on June 7, 2010?
- Did SOCAN's collection of SOCAN Tariff 24 royalties constitute an unjust enrichment?
- Are the plaintiffs entitled to an order tracing SOCAN Tariff 24 royalty monies?

[6] While I accept that these issues arise here, I propose to address them in a different order, and would restate them as follows:

1. Has the plaintiffs' claim already been finally decided against them?
2. Based on their 2010 agreement with SOCAN, are the plaintiffs precluded from claiming the relief they seek?
3. Is the Internet transmission of a ringtone file a communication of a musical work to the public?
4. Did the Board have jurisdiction to certify Tariff 24?
5. Was SOCAN unjustly enriched when it received Tariff 24 royalties?
6. Are the plaintiffs entitled to an order tracing the distribution of Tariff 24 royalties?

## II. Background

[7] The plaintiffs began an action against SOCAN for repayment of ringtone royalties based on two 2012 decisions of the Supreme Court of Canada, described below. Within the plaintiffs' action, they asked the Court to decide the six legal issues outlined above; SOCAN agreed, and Justice Anne Mactavish issued the corresponding order in 2014.

[8] The Board initially certified Tariff 24 in 2006. The tariff covered the period from 2003 to 2005. Numerous objectors had opposed the tariff, including the plaintiffs and, after the Board issued it, they challenged it in the Federal Court of Appeal. The Court dismissed the application for judicial review and upheld the tariff, finding that the transmission of ringtones to subscribers over the Internet amounted to a communication of musical works to the public (*Canadian Wireless Telecommunications Assn v Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6 [CWTA]). The Supreme Court of Canada denied leave to appeal.

[9] Subsequently, on agreement between SOCAN and the service providers, the Board extended Tariff 24 to cover the period from 2006 to 2013. The Board's decision was not challenged on judicial review.

[10] Separately, the Board dealt with other tariffs dealing with royalties for the transmission of musical works over the Internet and through digital mobile networks. Tariff 22.A dealt with downloads of musical works. Tariffs 22.B to 22.G set rates for other on-line uses – *eg*, commercial and non-commercial radio, and gaming sites.

[11] Tariff 22.A was challenged by telecommunication and Internet service providers, including the plaintiffs, who argued that downloads did not constitute communication of musical works to the public. Tariffs 22.B to 22.G were also challenged by others on the basis that downloads of video games containing musical works did not constitute communication of those works to the public. The Federal Court of Appeal dismissed both applications for judicial review (*Shaw Cablesystems GP v SOCAN*, 2010 FCA 220; *Entertainment Software Association and the Entertainment Software Association of Canada v CMRR/SODRAC Inc*, 2010 FCA 221).

[12] Appeals from both of these decisions, along with a trilogy of other related cases, were heard by the Supreme Court of Canada in 2011. The Supreme Court concluded that the Internet delivery of downloads of musical works did not constitute communication of those works to the public by telecommunication, although streaming them did (*Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 SCR 283 [Rogers]). Similarly, it found that downloads of video games containing musical works did not amount to communication of those works to the public by telecommunication (*Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 SCR 231 [ESA]).

[13] After these decisions were handed down, SOCAN returned the royalties it had previously collected under Tariff 22. However, the plaintiffs, believing that the Supreme Court's conclusions with respect to downloads applied equally to ringtones, took the position that Tariff 24 was no longer valid, and stopped paying royalties to SOCAN for ringtones.

[14] In light of *ESA* and *Rogers*, the plaintiffs applied to the Board to vary its Tariff 24 decisions. The Board declined. It ruled that the plaintiffs' application related to the enforcement of its earlier decisions, an issue it thought was best dealt with by this Court. Accordingly, the plaintiffs began this action against SOCAN.

[15] The plaintiffs' position is that they are owed about \$15 million in ringtone royalties that should never have been paid. SOCAN argues that its members are owed about \$12 million for royalties the plaintiffs refused to pay after the Supreme Court's rulings in *ESA* and *Rogers*.

III. Issue One – Has the plaintiffs' claim already been decided against them?

[16] SOCAN maintains that the Board already concluded that the transmission of ringtones amounts to a communication of musical works to the public by telecommunication. The plaintiffs unsuccessfully challenged the Board's first decision to certify Tariff 24 on that question (*CWTA*). They failed to persuade the Federal Court of Appeal that the Board erred. The Supreme Court of Canada denied leave to appeal the Federal Court of Appeal's decision. Therefore, according to SOCAN, the plaintiffs are bound by the Board's decision and cannot now claim that it is invalid.

[17] I disagree.

[18] Under the common law doctrine of *res judicata*, there are two bases on which a party can be precluded from re-litigating something that was, or could have been, raised in previous proceedings – issue estoppel, and cause of action estoppel. It is unnecessary here to distinguish

or elaborate on the two forms since they share the three criteria set out below. A party cannot re-litigate a matter where:

- (i) the same question was decided in the earlier proceeding;
- (ii) the parties to both proceedings are the same; and
- (iii) the earlier decision was final.

(*Angle v Minister of National Revenue*, [1975] 2 SCR 248; *Grandview v Doering*, [1976] 2 SCR 621).

[19] In my view, the first and second criteria are met here, but not the third.

[20] It is clear that the issues in *CWTA* were (1) whether the transmission of ringtones amounted to a communication of a musical work, and (2) whether the communication was to the public. In this action, the plaintiffs say that the issue is different; that is, the question is whether they are entitled to repayment of ringtone royalties. However, the plaintiffs would only be entitled to repayment if, in fact, the transmission of ringtone downloads does not constitute communication of musical works to the public. The repayment they seek is a potential remedy that might flow from that conclusion. But, as I see it, the issue at the heart of this action is the same as the one decided in *CWTA* – whether transmission of ringtone downloads amounts to the communication of musical works to the public.

[21] As for the second criterion, obviously the parties are the same.

[22] However, I find that the third criterion – whether the earlier decision was final – is not met. It is clear that the Board addressed the main question in this action, that is, whether the transmission of ringtone downloads constitutes a communication of musical works to the public by telecommunication. Its answer was yes, the Federal Court of Appeal agreed, and the Supreme Court of Canada declined to hear an appeal from that decision. On the surface, at least, it appears that the issue was decided, and that the decision was final.

[23] However, pursuant to the *Copyright Act*, the Board always has the power to vary its royalty decisions where there has been a subsequent material change in circumstances (s 66.52). In that sense, a decision of the Board is never really final. Similarly, refugee decisions rendered by the Immigration and Refugee Board, which has a comparable power to reconsider its own rulings, are not considered final for purposes of *res judicata* (*Adar v Canada (MCI)*, [1997] FCJ No 695 at paras 10-11).

[24] Therefore, for example, even after a Supreme Court of Canada ruling on a royalty decision of the Board, the Board could find that circumstances require that its decision be changed. Here, it is a decision of the Supreme Court of Canada itself that allegedly brought about a material change of circumstances. After *ESA* and *Rogers* were issued, the plaintiffs asked the Board to vary its Tariff 24 decision accordingly. It refused, and directed the plaintiffs to seek a remedy in this Court. Although the Board expressed reluctance to override the decision of the Federal Court of Appeal in *CWTA*, it did not regard it as final. Rather, it suggested that the plaintiffs should seek relief here.



[25] Under the circumstances, it appears to me that the plaintiffs have an opportunity to have their legal obligations determined according to the current state of the law by way of this action. There is no possibility of challenging the Federal Court of Appeal's decision in *CWTA*; nor can the plaintiffs now present a new request to the Supreme Court of Canada to grant them leave to appeal; nor can the plaintiffs go back to the Board, although they tried. Under these circumstances, I cannot conclude that the plaintiffs are precluded, based on the previous decisions of the Board and the Federal Court of Appeal, from pursuing this action. Whether they are actually entitled to the declaration they seek is, of course, another matter, addressed below.

[26] I would add that, even if I had found that the earlier decision on ringtone royalties was final, this is a case where it might have been unfair to stop the plaintiffs from seeking relief by way of this action. Where a judicial decision dictates, in effect, that an earlier ruling was clearly wrong, an aggrieved party may be entitled to seek the benefit of the later decision (*Sanofi-Aventis Canada Inc v Pharmascience Inc*, 2007 FC 1057 at para 60-61, aff'd 2008 FCA 213). As discussed below, the Supreme Court's decisions in *Rogers* and *ESA* effectively declared that the Board and the Federal Court of Appeal erred in finding that the transmission of ringtone downloads amounts to the communication of musical works to the public. The doctrine of *res judicata*, whose purpose is to advance the interests of justice, may admit exceptions in special circumstances such as these (see, *eg*, *Hockin v Bank of British Columbia*, [1995] BCJ No 688 (BCCA) at paras 34-36).

IV. Issue Two – Based on their 2010 agreement with SOCAN, are the plaintiffs precluded from claiming the relief they seek?

[27] SOCAN argues that the plaintiffs are precluded from denying their obligation to pay ringtone royalties given that they expressly agreed in 2010 to be bound by Tariff 24 until 2013.

[28] To succeed on this argument, SOCAN must show that the parties had a common understanding of the agreement, that it relied on that common understanding, and that its reliance on the agreement caused it prejudice (*Ryan v Moore*, 2005 SCC 38 at para 59). In my view, SOCAN cannot meet these criteria.

[29] First, the parties clearly did not have a common understanding of the significance of the agreement. SOCAN understood that the plaintiffs were agreeing that they were legally required to pay ringtone royalties and would not oppose those payments while the agreement was in force (until 2013). The plaintiffs understood that they were merely agreeing to the quantum of the royalties set out in the tariff. Having already challenged the Board's jurisdiction to impose ringtone royalties, the plaintiffs would not have agreed that the Board's decision to certify Tariff 24 was legally sound. In fact, they say no agreement could give the Board the power to issue a tariff that exceeded the terms of the *Copyright Act*; *Rogers* and *ESA* make clear, they say, that Tariff 24 went beyond the Act's provisions relating to the communication right.

[30] The agreement, dated January 31, 2010, states that the parties agreed to the terms and conditions of Tariff 24 for the period of 2006 to 2013. The agreement's main provisions state that the parties agreed:

- (i) to the tariff structure, royalty rates, terms and conditions of Tariff 24;
- (ii) that the objectors would withdraw their previous objections and would not file any new ones during the term of the agreement;
- (iii) that the agreement did not prejudice the parties' rights subsequent to the term of the agreement;
- (iv) that the agreement did not amount to an admission relating to royalties payable subsequent to the term of the agreement; and
- (v) that the parties were free, subsequent to the agreement, to take any position on royalties as they saw fit.

[31] SOCAN submits that these terms, in effect, prevent the plaintiffs from disputing their obligation to pay ringtone royalties under Tariff 24. In particular, it points to paragraph (v) above (clause 5(c) of the agreement) and maintains that this provision implies that, since the plaintiffs were free to change their position after the tariff expired, they could not dispute the payment of royalties under Tariff 24 while the tariff was in force.

[32] Suffice to say, the parties did not have a common understanding of the agreement. SOCAN believed that the plaintiffs agreed to be bound by the royalty provisions set out in Tariff 24 and, by implication, would not, for any reason, resist making those payments during the currency of the tariff. However, the plaintiffs, relying on the strict terms of the agreement, maintain that they agreed only to the quantum of the tariff, to refrain from filing further objections with the Board, and to preserve their right to take a different position once the tariff expired.

[33] The plaintiffs never agreed, they say, to relinquish their opportunity to bring an action for the recovery of ringtone royalties that should not have been paid. In other words, the plaintiffs believed that they had preserved their right to bring an action against SOCAN, notwithstanding the agreement, if the appropriate circumstances presented themselves.

[34] I see little common ground between the parties on this aspect of their agreement.

[35] Second, given that there was no common understanding of the meaning of the agreement, SOCAN cannot claim that it relied on that common understanding.

[36] Given my conclusions on the first two criteria, it is, strictly speaking, unnecessary to consider whether SOCAN was prejudiced by reliance on the agreement. In any event, given the absence of a common understanding, I cannot characterize the plaintiffs' position as amounting to a repudiation of a mutual assumption to SOCAN's detriment (*Ryan*, above, at para 74). The agreement between them did not specifically rule out the possibility of this form of action and cannot, in my view, be used to stop the plaintiffs from bringing it.

V. Issue Three - Is the Internet transmission of a ringtone file a communication of a musical work to the public?

[37] SOCAN argues that the Internet transmission of ringtone downloads constitutes a communication of musical works to the public by telecommunication.

[38] In my view, the Supreme Court of Canada has decided otherwise. Its decisions are binding on me.

[39] In *ESA*, the majority (per Justices Abella and Moldaver) noted that royalties for reproducing musical works contained in video games are worked out before the games hit the market. The question before it was whether copyright owners were also entitled to additional royalties for the communication of their musical works when video games containing these works were purchased and downloaded over the Internet instead of being purchased in a store. It was agreed that a store purchase would not engage the communication right.

[40] The majority found that there should be no difference between the two methods of selling the same works. It concluded that the *Copyright Act* imports a principle of technological neutrality, meaning that the Act should apply equally to diverse forms of media. Accordingly, downloading a digital file – in effect, creating a copy identical to versions available in stores – should be treated no differently than store purchases. In addition, downloads can be distinguished from streaming given that the latter amounts to listening to a musical work at the time of transmission, not reproducing it.

[41] Tracing the history of the word “communicate” in the Act, the majority in *ESA* concluded that communication of musical works has always been distinct from reproducing copies of those works. Communication was first meant to cover live performances, then radio broadcasts, then telecommunication. The communication right, which is illustrative of the performance right in

the introductory paragraph of s 3(1) of the Act, has always been separate from reproduction rights.

[42] Therefore, the majority in *ESA* concluded that the Internet delivery of a copy of a video game containing a musical work did not amount to a communication of that work. It follows that the transmission of a ringtone download containing a musical work does not constitute a communication of that work.

[43] SOCAN argues that ringtones are different from the kinds of downloads discussed in *ESA*. For example, ringtones are not sold in stores in a physical form the way video games or other media containing musical works are. Further, ringtones do not constitute a durable copy of the original musical work. A ringtone cannot be played by consumers in the same way that they can play CDs or traditional digital musical files. It is played only when the consumer's phone rings, and those within listening range typically hear only a snippet of the musical work.

[44] I agree with SOCAN that there are differences between downloads of ringtones and downloads of other forms of musical works. However, I fail to see how these differences make ringtones akin to performances of musical works, which would engage the communication right under the Act. In my view, the transmission of ringtone downloads, like the transmission of downloads of digital musical files considered in *Rogers* and *ESA*, represent reproductions of musical works, not public communications of them.

VI. Issue Four – Did the Board have jurisdiction to certify Tariff 24?

[45] The plaintiffs argue that the Supreme Court's jurisprudence relating to downloads of musical works make clear that the Board should never have certified Tariff 24. In fact, since it is now apparent that downloading ringtones does not amount to the communication of musical works, the plaintiffs say that certifying Tariff 24 was beyond the Board's jurisdiction.

[46] The plaintiffs point out that the effect of *ESA* and *Rogers* was to invalidate the respective tariffs in issue for the entire period they were in force. They argue that the same should be true here. They maintain that I should find that Tariff 24 is and always was invalid, and that the Board had no jurisdiction to certify it in the first place.

[47] I disagree. The case before me is different from *ESA* and *Rogers*.

[48] In those cases, the Board's decisions to certify tariffs relating to downloads was challenged directly and immediately and pursued all the way to the Supreme Court of Canada. The Supreme Court determined conclusively that the Board had wrongly certified the tariffs in issue and overturned them. The effect of the Court's decisions was to nullify the tariffs entirely.

[49] That is not the case before me. The plaintiffs unsuccessfully challenged the Board's decision to certify Tariff 24. Accordingly, the Tariff has been in force from the date of the Board's first decision relating to it. To date, there has been no decision overturning or varying it.

While the correctness of the Board's decision is an issue before me by way of this separate action, strictly speaking, the validity of Tariff 24 is not.

[50] Accordingly, I cannot conclude that the decision to certify Tariff 24 was beyond the Board's jurisdiction. However, as discussed below, Tariff 24, in effect, became unenforceable after *Rogers* and *ESA*.

VII. Issue Five - Was SOCAN unjustly enriched when it received Tariff 24 royalties?

[51] The plaintiffs argue that their payments of royalties for ringtone downloads unjustly enriched SOCAN because those payments were not legally required.

[52] I disagree.

[53] The doctrine of unjust enrichment comprises three elements. The enrichment must have been (1) to the defendant's benefit; (2) at the plaintiffs' expense; and (3) made in the absence of a juristic reason. Here, SOCAN was enriched by the payment of ringtone royalties at the expense of the plaintiffs. So, the first two elements are clearly present.

[54] The remaining issue is whether there was a juristic reason for those payments. In my view, there was – Tariff 24.



[55] However, I begin by noting that this aspect of the unjust enrichment analysis is meant to be applied flexibly, with discretion and with a view to achieving fairness between the parties (*Garland v Consumers' Gas Co*, 2004 SCC 25 at para 43-44).

[56] The plaintiffs have the burden of showing an absence of a juristic reason, on a *prima facie* basis. However, a disposition of law amounts to a juristic reason for enrichment, so long as it is legally valid (*Garland*, at para 49-50). As mentioned, Tariff 24 has never actually been overturned, varied, or found to be *ultra vires*. Accordingly, the payments originally made in respect of it were clearly made for a juristic reason – to comply with the terms of the tariff. However, in my view, one cannot overlook the fact that the Supreme Court of Canada, in effect, ruled that the *Copyright Act* does not authorize tariffs such as Tariff 24, *ie*, in respect of downloads of musical works that do not amount to the communication of those works to the public by telecommunication. In the circumstances, I am satisfied that this is sufficient to meet the plaintiffs' low, initial burden to show a *prima facie* absence of a juristic reason for the payment of ringtone royalties. It was clear in *Garland* that the disposition of law in issue was completely inoperative as it conflicted with the *Criminal Code* (at para 48). However, I do read *Garland* as requiring plaintiffs in unjust enrichment claims to establish that the disposition of law on which the defendant relies is clearly invalid. Such an approach would seem to be antithetical to the requirement to approach these claims flexibly and with discretion, with a view to achieving an equitable outcome. The next step in the unjust enrichment analysis involves consideration of the reasonable expectations of the parties, and public policy factors (*Garland*, at para 54). The fact that SOCAN relied on Tariff 24 and received royalties on behalf of its members is obviously a relevant factor. However, it is also relevant that SOCAN itself

recognized that Tariff 24 might be put in jeopardy by the Supreme Court's decisions in *Rogers* and *ESA*. SOCAN pointed out in its submissions to the Court that a conclusion that the transmission of downloads of musical works were not communications of those works could have an impact on Tariff 24. SOCAN was clearly aware that it might not be entitled to continue to collect ringtone royalties if the Supreme Court were to conclude, as it did, that the transmission of downloads of musical files did not amount to the communication of those works by telecommunication.

[57] Additionally, the fact that the plaintiffs ceased making royalty payments under Tariff 24 after *Rogers* and *ESA* is also relevant. It appears that both parties anticipated that *Rogers* and *ESA* could affect their positions in respect of Tariff 24.

[58] As a matter of public policy, it is obviously reasonable to expect parties to respect their obligations under a disposition of law, such as a tariff, and binding agreements. This factor supports the view that the plaintiffs were obliged to make payments for ringtone royalties at least until the legal foundation for Tariff 24 was put in doubt by *Rogers* and *ESA*.

[59] Therefore, in my view, Tariff 24 does not amount to a juristic reason for the payment of ringtone royalties beyond the point in time when SOCAN was put on notice of "a serious possibility" that the legal foundation on which Tariff 24 was based was faulty (*Garland*, at para 59). Accordingly, I cannot characterize SOCAN's receipt of ringtone royalties as an unjust enrichment prior to the Supreme Court's decisions in *ESA* and *Rogers*. During that time period, SOCAN would have been aware that the plaintiffs opposed Tariff 24, but the tariff had been

upheld by the Federal Court of Appeal, and the Supreme Court of Canada had denied leave to appeal. There would have been no basis for a reasonable belief that the tariff was legally suspect.

[60] However, once the Supreme Court of Canada decided *ESA* and *Rogers*, SOCAN was clearly put on notice that the legal basis for Tariff 24 was, at best, thin. In my view, any royalty payments made after the release of those decisions would have amounted to an unjust enrichment. As mentioned, the plaintiffs ceased making royalty payments at that point. So, as a matter of fact, there has been no unjust enrichment.

VIII. Issue Six - Are the plaintiffs entitled to an order tracing the distribution of Tariff 24 royalties?

[61] The plaintiffs maintain that, if it fails in its argument on unjust enrichment, then SOCAN must identify which of its members received ringtone royalties in order to enable the plaintiffs to recover from them directly. They ask me to order SOCAN to provide information about which of its members received those royalties.

[62] I concluded above that, under the circumstances, SOCAN was not unjustly enriched by its receipt of ringtone royalties pursuant to Tariff 24. Payments by the plaintiffs ceased once SOCAN was put on notice that the legal basis for Tariff 24 might be unsound. Had the plaintiffs continued to make royalty payments after the Supreme Court of Canada issued *ESA* and *Rogers*, a tracing order might have been justified in order to permit them to recover those payments.

[63] The evidence before me shows that SOCAN distributed, but did not collect, ringtone royalties after the Supreme Court issued its decisions in *Rogers* and *ESA*. Since SOCAN was not unjustly enriched by any royalty payments before or after those decisions were released (because the plaintiffs stopped making them), there is no basis for issuing a tracing order.

IX. Conclusion and Disposition

[64] For the foregoing reasons, I would answer the questions arising on this motion, as follows:

1. The plaintiffs' claim has not been finally decided against them.
2. The 2010 agreement between the plaintiffs and SOCAN does not prevent them from claiming the relief they seek.
3. The Internet transmission of a ringtone file does not constitute the communication of a musical work to the public.
4. The Board had jurisdiction to certify Tariff 24.
5. SOCAN has not been unjustly enriched by its receipt of Tariff 24 royalties.
6. The plaintiffs are not entitled to a tracing order.

[65] As success on this motion is mixed, I would make no order as to costs.

**ORDER**

**THIS COURT ORDERS that:**

1. The plaintiffs' claim has not been finally decided against them.
2. The 2010 agreement between the plaintiffs and SOCAN does not prevent them from claiming the relief they seek.
3. The Internet transmission of a ringtone file does not constitute the communication of a musical work to the public.
4. The Board had jurisdiction to certify Tariff 24.
5. SOCAN has not been unjustly enriched by its receipt of Tariff 24 royalties.
6. The plaintiffs are not entitled to a tracing order.
7. There is no order as to costs.

"James W. O'Reilly"

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Judge

## Annex

*Copyright Act, RSC 1985, c C-42*

*Loi sur le droit d'auteur, LRC (1985), ch C-42*

Copyright in works

Droit d'auteur sur l'œuvre

**3.** (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

**3.** (1) Le droit d'auteur sur l'œuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'œuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'œuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :

...

[...]

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

f) de communiquer au public, par télécommunication, une œuvre littéraire, dramatique, musicale ou artistique;

Variation of decisions

Modifications de décisions

**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 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.

**66.52** La Commission peut, sur demande, modifier toute décision concernant les redevances visées au paragraphe 68(3), aux articles 68.1 ou 70.15 ou aux paragraphes 70.2(2), 70.6(1), 73(1) ou 83(8), ainsi que les modalités y afférentes, en cas d'évolution importante, selon son appréciation, des circonstances depuis ces décisions.

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

**DOCKET:** T-2046-12

**STYLE OF CAUSE:** ROGERS COMMUNICATIONS PARTNERSHIP,  
TELUS COMMUNICATIONS COMPANY, BELL  
MOBILITY INC. AND QUEBECOR MEDIA INC. v  
SOCIETY OF COMPOSERS, AUTHORS AND MUSIC  
PUBLISHERS OF CANADA (A.K.A. SOCAN)

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** SEPTEMBER 3-4, 2014

**ORDER AND REASONS:** O'REILLY J.

**DATED:** MARCH 6, 2015

**APPEARANCES:**

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