

Federal Court



Cour fédérale

Date: 20231018

Docket: T-1380-22

Citation: 2023 FC 1385

Ottawa, Ontario, October 18, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

**SOCIETY OF COMPOSERS, AUTHORS
AND MUSIC PUBLISHERS OF CANADA**

Plaintiff

and

**VIDÉOTRON LTÉE AND
QUÉBECOR MÉDIA INC.**

Defendants

ORDER AND REASONS

I. Overview

[1] Québecor Média Inc and Vidéotron Ltée [Québecor] move to strike the Statement of Claim of the Society of Composers, Authors and Music Publishers of Canada [SOCAN] or, alternatively, to stay this action in favour of proceedings in the Superior Court of Quebec.

Québecor asserts it is plain and obvious that the Federal Court does not have jurisdiction over the

proceeding or, alternatively, that its jurisdiction is sufficiently uncertain that the matter should proceed in the Superior Court, which is admitted to have jurisdiction.

[2] SOCAN's claim arises from a dispute over royalties payable for Québecor's use of works in SOCAN's repertoire in 2018. Québecor accepts it owed royalties for that use. However, at the end of 2018, it deducted from its royalty payment amounts it claims it overpaid in 2014 to 2018. Québecor's position that there was an overpayment stems from a 2018 agreement between SOCAN, Québecor, and other broadcast distribution undertakings [BDUs], addressing certain obligations regarding copyright tariffs [2018 Agreement]. SOCAN agrees there was an overpayment beginning in April 2018, but disagrees there was an overpayment in 2014 to March 2018, and disagrees that Québecor had any right to unilaterally set off any such overpayment against amounts owing in 2018.

[3] Québecor's jurisdictional argument is based on its assertion that although the *Copyright Act*, RSC 1985, c C-42, forms the background to the matter, the only disputed issues pertain to the interpretation of the 2018 Agreement. It characterizes the matter as being essentially a claim in breach of contract that raises issues related to the doctrine of equitable set-off, and argues the Federal Court has no jurisdiction over a case based on such issues of provincial law.

[4] I conclude it is not plain and obvious this Court has no jurisdiction over SOCAN's claim. The claim seeks remedies pursuant to the *Copyright Act*, namely the payment of amounts due under copyright tariffs, or alternatively damages or statutory damages for infringement of copyright. Many of the requisite elements of SOCAN's claim may be conceded by Québecor,

and the determination of the claim, and in particular Québecor's primary defence to the claim, may require the interpretation of a contract. However, it is not plain and obvious that this changes the essential nature or character of the claim or otherwise takes it outside the jurisdiction conferred on this Court by the *Copyright Act*.

[5] Given the nature of Québecor's motion, the Court is not called upon to decide this jurisdictional issue as a final matter. However, in requesting a stay, Québecor contends there is at least uncertainty regarding the Court's jurisdiction, such that the interests of justice favour having the matter proceed in the Superior Court of Quebec. In my view, even assuming such jurisdictional uncertainty is an appropriate basis for a stay, there is insufficient uncertainty regarding the Court's jurisdiction, and insufficient evidence of prejudice to Québecor, to justify staying the proceeding in the forum chosen by SOCAN in favour of that chosen by Québecor.

[6] The motion is therefore dismissed. In accordance with the parties' agreement, SOCAN will have its costs in the amount of \$6,000.

[7] I conclude this overview by commending the parties and their counsel for the focused, co-operative, and skillful manner in which this motion was presented.

II. Issues

[8] Two issues are raised on this motion:

- A. Should SOCAN's Statement of Claim be struck for want of jurisdiction?
- B. If not, should the action be stayed in favour of litigation in the Superior Court of Quebec?

III. Analysis

A. *The Statement of Claim should not be struck*

(1) Principles on a motion to strike

[9] The principles applicable to a motion to strike a pleading under Rule 221 of the *Federal Courts Rules*, SOR/98-106, are well established. To strike a claim for lack of jurisdiction, it must be “plain and obvious” the Federal Court lacks jurisdiction: *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 [*Windsor Bridge*] at para 24, citing *Hodgson v Ermineskin Indian Band No 942*, 2000 CanLII 15066 (FC) at para 10; *Canada v Roitman*, 2006 FCA 266 at para 15; *Canada v Domtar Inc*, 2009 FCA 218 at para 21; *Berenguer v Sata Internacional – Azores Airlines, SA*, 2023 FCA 176 at paras 22–26. The converse of the “plain and obvious” standard is sometimes described as whether there is “some chance of success” or an “arguable case”: *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at pp 972, 974, 980, 989; *Bauer Hockey Corp v Sport Maska Inc (Reebok-CCM Hockey)*, 2014 FCA 158 at para 35; *Alberta v Canada*, 2018 FCA 83 at paras 15, 36, 62; *Berenguer* at para 47. For concision, I will use the term “arguable” to describe the situation where the “plain and obvious” standard is not met.

[10] When a motion to strike is brought on jurisdictional grounds, parties may file evidence going to the jurisdictional issue: *Berenguer* at para 26; *Hodgson* at para 9; both citing *MIL Davie Inc v Société d’Exploitation et de Développement d’Hibernia Ltée*, 1998 CanLII 7789 (FCA) at paras 7–8; but see *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 at paras 51–64 on limits to this principle, at least in the context of judicial review.

The parties did so in this case in the form of a thorough Agreed Statement of Facts that exhibited relevant underlying documents and set out the background to the claim, to which they agreed for the purposes of this motion only. Much of the Agreed Statement of Facts mirrors the allegations in the Statement of Claim, attaches documents referred to in it, or sets out the status of other proceedings: *JP Morgan* at para 54. In the circumstances, given the parties' agreement and the nature of the arguments raised, I am satisfied it is in the interests of justice to consider the Agreed Statement of Facts in assessing the motion to strike as well as the alternative relief of a stay: *JP Morgan* at para 53; *Berenguer* at para 26.

(2) Principles in assessing the jurisdiction of the Federal Court

[11] The Federal Court is a statutory court created pursuant to section 101 of the *Constitution Act, 1867*, as a court “for the better Administration of the Laws of Canada”: *744185 Ontario Inc v Canada*, 2020 FCA 1 [*Air Muskoka*] at para 29; *Windsor Bridge* at para 31. As a statutory court, it has only the jurisdiction conferred on it by statute: *Air Muskoka* at para 28; *Windsor Bridge* at para 33. The conferral of jurisdiction is itself constitutionally limited by section 101. Assessing whether the Federal Court has jurisdiction over a claim therefore involves a determination of whether the claim falls within the scope of a valid statutory grant of jurisdiction to this Court made for the administration of federal law: *Windsor Bridge* at paras 33–35.

[12] As the Federal Court of Appeal stated in *Roitman*, when assessing whether the Federal Court has jurisdiction over an action, a statement of claim is not “blindly read at its face meaning.” Rather, the Court looks at the nature of the claim itself to ensure the claim is not a

“disguised attempt” to create jurisdiction in the Federal Court: *Roitman* at para 16. The Court of Appeal later described this as involving a “first step” of characterizing the “essential nature of the claim,” an assessment that involves a “realistic appreciation of the practical result sought by the claimant” and consideration of their “principal objective”: *Domtar* at paras 26–30; *JP Morgan* at para 50.

[13] In the *Windsor Bridge* case, the majority of the Supreme Court adopted the language and approach from *Roitman*, *Domtar*, and *JP Morgan*, confirming the need for a preliminary determination of the “essential nature or character” of the claim based on an assessment of the practical result sought by the claimant: *Windsor Bridge* at paras 25–26. This assessment is not done in a “piecemeal or issue-by-issue fashion”: *Windsor Bridge* at para 25. Nonetheless, the Court may have jurisdiction over part of a claim but not other parts, and may have jurisdiction over the subject matter of a claim but not that of a particular defence or of a third party claim: see, e.g., *Pasqua First Nation v Canada (Attorney General)*, 2016 FCA 133 at para 8, leave to appeal ref’d 2016 CanLII 89832 (SCC); *Air Muskoka* at para 32; *McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 at paras 57–65, 90–95; *Inuksuk I (Ship) v Sealand Marine Electronics Sales and Services Ltd*, 2023 FCA 170 at paras 51–56.

[14] While the statement of claim is not read blindly, the determination of the essential nature of the claim is an assessment of the claim the plaintiff chose to bring, rather than a claim it might have brought: *Windsor Bridge* at para 27. The focus is on the plaintiff’s cause of action, the basis for it, and their right to seek the remedy sought: *Windsor Bridge* at paras 41–42; *McCain* at

para 59. In *Windsor Bridge*, this assessment was primarily undertaken through a review of the relief sought by the plaintiff: *Windsor Bridge* at paras 28–30.

[15] Once the essential nature or character of the claim is identified, the assessment of whether the Federal Court has jurisdiction over that claim follows the three-part analysis known as the *ITO* test, established by the Supreme Court in *ITO—International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 at p 766. The *ITO* test sets out three essential requirements to support a finding of jurisdiction in the Federal Court:

1. There must be a statutory grant of jurisdiction by the federal Parliament.
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
3. The law on which the case is based must be “a law of Canada” as the phrase is used in s. 101 of the Constitution Act, 1867.

[16] The parties agree that the *ITO* test governs the assessment of jurisdiction. However, they disagree on its application, and in particular on the nature of SOCAN’s claim.

[17] While *Windsor Bridge* confirms that the assessment of jurisdiction is done on the “plain and obvious” standard, it is less clear from the Supreme Court’s analysis that each step (the initial essential nature assessment and the three parts of the *ITO* test) is to be assessed on this standard: *Windsor Bridge* at paras 24, 28–30, 36–65. However, the Federal Court of Appeal has recently confirmed that the “plain and obvious” standard applies each step of the way: *Berenguer* at paras 41, 47, 57, 61–67.

(3) Background to SOCAN's claim

(a) *Statutory framework regarding copyright tariffs and collective societies*

[18] SOCAN is a collective society, authorized under what is now Part VII.1 of the *Copyright Act* to collect and distribute to its members royalties for the use of certain rights in its repertoire of musical works. Relevant to this action, SOCAN holds the exclusive right to authorize uses of performance and communication rights in Canada.

[19] Some of the royalties SOCAN collects are paid pursuant to tariffs approved by the Copyright Board. Subsection 67(1) of the *Copyright Act* provides that collective societies may file a proposed tariff for the purpose of establishing royalties with respect to rights it administers. The *Copyright Act* then sets out a process for the filing and publication of tariffs; the filing of objections; and the approval of tariffs: *Copyright Act*, ss 68–70.1. Where a tariff is approved, the collective society may collect the royalties specified in the tariff and, if they are not paid, recover them in a court of competent jurisdiction: *Copyright Act*, s 73. Conversely, a user of copyright cannot be sued for infringement where they have paid or offered to pay the royalties set out in the tariff applicable to the use: *Copyright Act*, s 73.3(a).

[20] The *Copyright Act* provides for the possibility that a proposed tariff may not be approved in advance of, or even during, the period to which it applies. Where there is a previous tariff in respect of the same act covered in a proposed tariff, then an authorized person may do the acts covered by the previous tariff, and the collective society may collect the royalties in accordance with the previous tariff: *Copyright Act*, ss 73.2, 73.3(b). Where there is no previous tariff, then a

person may not be sued if they pay or offer to pay the royalties set out in the proposed tariff that will apply to the act once approved: *Copyright Act*, s 73.3(c).

[21] Instead of collecting royalties pursuant to an approved tariff, subsection 67(3) of the *Copyright Act* provides that SOCAN can now, like other collective societies, enter into agreements for the purpose of establishing royalties. Approved tariffs do not apply in respect of the matters covered by an agreement referred to in subsection 67(3): *Copyright Act*, s 74.

[22] The sections of the *Copyright Act* referred to above were part of significant amendments to the provisions governing collective administration of copyright that came into force in April 2019: *Budget Implementation Act, 2018, No 2*, SC 2018, c 27, ss 296, 302. Some of the provisions had analogs in the prior version of the *Copyright Act*. However, under the former version of the *Copyright Act*, while many collective societies could enter agreements setting royalties for use of copyright works, the public performance and telecommunication to the public rights SOCAN administers had to be the subject of tariffs: *Copyright Act* (former version), ss 67–68.2, 70.12; *York University v Canadian Copyright Licensing Agency* (“Access Copyright”), 2020 FCA 77 at paras 177–178, aff’d 2021 SCC 32; *Re: Sound v Canadian Association of Broadcasters*, 2017 FCA 138 at paras 9–13, 82.

(b) *The tariffs relevant to this proceeding*

[23] Québecor and other BDUs transmit audiovisual programming to viewers in Canada in a number of ways. This includes traditional broadcast by commercial television stations, pay and speciality services, and newer online services. Different tariffs cover the use of SOCAN’s

repertoire by BDUs in their various operations, some of which uses may be covered by more than one tariff. Québecor makes periodic payments to SOCAN in respect of royalties owing pursuant to these tariffs. At issue in this proceeding are the following six tariffs:

- Tariff 16 – Background Music Suppliers
- Tariff 17 – Transmission of Pay, Specialty and Other Television Services by Distribution Undertakings
- Tariff 22.D.1 – Online Audiovisual Services
- Tariff 22.D.3 – Allied Audiovisual Services
- Tariff 26 – Pay Audio Services
- Tariff for the Retransmission of Distant Television Signals [Retransmission Tariff]

[24] The parties agree for the purposes of this motion that Québecor's use of the musical works in SOCAN's repertoire in the period from July to December 2018 resulted in royalties owing under the foregoing tariffs in the total amount of about \$1.5 million. Of this, the large part (almost \$1.3 million) relates to Tariff 17, with various amounts under \$90,000 attributable to each of the other tariffs.

[25] Of the above tariffs, only the Retransmission Tariff has been approved by the Copyright Board for 2018. Tariff 16 was most recently approved for the 2010–2011 period. Tariff 17 was most recently approved for 2009–2013. Tariffs 22.D.1 and 22.D.3 were most recently approved for 2007–2013. Tariff 26 was most recently approved for 2007–2016.

(c) *The 2018 Agreement*

[26] In the context of a number of pending proposed SOCAN tariffs that had not yet been considered by the Copyright Board, SOCAN, Québecor, and other BDUs entered into the 2018 Agreement, which is entitled “Experimental Audiovisual Broadcast, BDU and Online Agreement.” The 2018 Agreement addressed three tariffs in particular: Tariff 2.A, which covers broadcast by commercial television stations, Tariff 17, and Tariff 22.D.3.

[27] The 2018 Agreement refers to the tariffs previously approved by the Copyright Board in respect of Tariff 2.A, Tariff 17, and Tariffs 22.B-G, and to SOCAN’s proposed tariffs for various years in respect of Tariff 2.A, Tariff 17, and Tariffs 22.4, 22.D, and 22.D.1. At the time, the BDUs had filed objections to SOCAN’s proposed tariffs, which were pending before the Board.

[28] The 2018 Agreement states the parties had reached consensus on the royalties and other terms applicable to the proposed tariffs for the period from 2007 to 2020. The parties agreed that SOCAN would file, and ask the Board to approve, proposed “settlement tariffs” for Tariffs 2.A, 17, and a new 22.D.3. For Tariffs 2.A and 17, these settlement tariffs took the form of the last tariffs approved by the Board, which already applied by operation of then subsection 68.2(3) of the *Copyright Act*, a predecessor of the current section 73.2. For Tariff 22.D.3, the settlement tariff was in a form agreed by the parties and attached to the agreement. On this basis, the BDUs agreed to withdraw their objections to the proposed tariffs.

[29] The 2018 Agreement contains five further provisions relevant to this proceeding:

- in the event the Board failed to certify tariffs reflecting the terms of the agreement and the settlement tariffs, the settlement tariffs would remain in force as between the parties (Section 4);
- regardless of whether the Board certified the settlement tariffs, and notwithstanding their terms, the parties agreed the BDUs had “made all payments and satisfied all other obligations owing by them” under the certified and proposed tariffs, to the execution date of the agreement (Section 5);
- beginning with the first calendar month after the date of execution, the BDUs would abide by the settlement tariffs by paying the royalties and taking the other steps in them (Section 6);
- payments during the term of the agreement under the settlement tariffs were deemed to satisfy the BDUs’ obligations, even if the Board did not certify the settlement tariffs (Section 9); and
- as a recital to the agreement, SOCAN acknowledged that the BDUs may use SOCAN’s repertoire in ways that fall within more than one of the settlement tariffs, and the BDUs confirmed their intention to report and pay for these uses under a single one of the tariffs where practicable (Recital M).

[30] With respect to Recital M, the parties agree that their stated intention in establishing the new Tariff 22.D.3 was for the BDUs to report and pay for overlapping uses under a single tariff so as to provide a harmonized royalty rate.

(d) *The disputed payment and set-off*

[31] After signing the 2018 Agreement in early 2018, Québecor continued to make royalty payments to SOCAN in the manner it had done previously. This approach did not account for the proposed new Tariff 22.D.3 and the single-tariff approach for overlapping uses. In particular, with respect to one of its internet services, Club illico, Québecor continued to pay royalties under Tariff 22.D.1, instead of under Tariffs 17 and 22.D.3, which it could do under the 2018 Agreement. The latter approach would have resulted in lower royalties. Québecor continued to calculate and pay royalties under the former approach until October 2018.

[32] On October 31, 2018, Québecor advised SOCAN it would apply the terms of the 2018 Agreement retroactively to royalty payments it had made in respect of Club illico for the period from 2014 to 2018. On its calculations, the difference between the amount it paid using the old method (under Tariff 22.D.1) and the amount it would have paid using the new method (under Tariffs 17 and 22.D.3) was around \$1.435 million.

[33] In December 2018, Québecor made a royalty payment to SOCAN. By this time, Québecor had royalties due to SOCAN of about \$1.531 million under the six tariffs listed in paragraph [23], for the period from July to December 2018. Québecor deducted the \$1.435 million it considered it had overpaid in the 2014 to 2018 period in respect of Club illico, and paid SOCAN a little under \$100,000.

[34] As noted above, SOCAN agrees Québecor can use the royalty method set out in the 2018 Agreement for the period after April 2018. However, it contests Québecor’s ability to apply the new method retroactively to periods before April 2018, and its ability to apply any such claimed overpayment amounts as a set-off against amounts owing under other tariffs.

(e) *Current status of the tariffs*

[35] In accordance with the 2018 Agreement, SOCAN filed proposed “settlement tariffs” in respect of Tariffs 2.A, 17, and 22.D.3. To date, proposed Tariffs 2.A and 17 have not been approved by the Copyright Board. By operation of section 73.2 of the *Copyright Act*, the last approved tariffs from 2013 remain operative. The Board approved Tariff 22.D.3 for the 2007–2013 period on February 24, 2023, but has yet to approve it for the 2014–2018 period: *SOCAN Tariff 22.D.3 – Audiovisual Services Allied with Programming and Distribution Undertakings (2007–2013)*, 2023 CB 1. I note that while the parties refer to “Settlement Tariff 22.D.3,” the tariff approved and published by the Board is not referred to as a “settlement tariff” but simply as “SOCAN Tariff 22.D.3 – Audiovisual Services Allied with Programming and Distribution Undertakings (2007–2013).”

(4) SOCAN’s claim

[36] SOCAN started this action in July 2022. As its primary grounds of relief, SOCAN’s Statement of Claim claims the following:

- (a) pursuant to sections 73 and 73.1 of the [*Copyright Act*], without prejudice to any other remedies available to the Plaintiff, \$1,435,509.20 from the Defendants, which is the outstanding balance (inclusive of applicable taxes) of the

royalties due under SOCAN Tariffs 16, 17, 22.D.1, and 26, and the Tariff for the Retransmission of Distant Television Signals, for the Unpaid Periods (as defined below);

- (b) in the alternative to subparagraph (a) above, pursuant to section 35 of the *Copyright Act*, damages for copyright infringement arising out of the Defendants' unauthorized use of the Performing Rights in SOCAN's Musical Works during the Unpaid Periods (as those terms are defined below);
- (c) in the alternative to subparagraphs (a) and (b) above, and as the Plaintiff may elect, statutory damages pursuant to sections 38.1(4) and (4.1) of the *Copyright Act* from the Defendants, in a sum of no less than three and not more than ten times the amount of the outstanding balance of the royalties due to the Plaintiff under SOCAN Tariffs 16, 17, 22.D.1, and 26, and the Tariff for the Retransmission of Distant Television Signals, for the Unpaid Periods, plus applicable taxes;

[37] The Statement of Claim sets out SOCAN's rights and describes the relevant tariffs. It also recites the background to the dispute, including the 2018 Agreement and the disputed withholding of the amounts Québecor believed it overpaid for the 2014 to 2018 period. SOCAN alleges the withholding was improper and is not justified or authorized by anything in the 2018 Agreement or the various tariffs. SOCAN alleges that since Québecor has not paid the requisite royalties, its uses were unlicensed and constituted infringement.

[38] Québecor has not defended this action. Rather, it served this motion to strike or stay the action on August 23, 2022.

(5) Litigation in the Superior Court of Quebec

[39] On August 22, 2022, Québecor filed a proceeding in the Superior Court of Quebec, seeking a declaration that SOCAN's claim was time barred or, alternatively, that the 2018 Agreement did not prevent Québecor from setting off the asserted overpayment against other amounts due to SOCAN. SOCAN has defended that proceeding.

[40] In October 2022, SOCAN filed an originating application in the Superior Court of Quebec. Its application largely parallels the claims asserted in the Statement of Claim. According to SOCAN, it filed this claim essentially to preserve its rights in light of Québecor's motion and the possibility that this Court might find it does not have jurisdiction over the claim.

[41] The Superior Court of Quebec has joined the two proceedings. They are currently suspended, pending the determination of this motion. The joined proceeding remains at the pleadings stage and will not advance until this motion is determined.

[42] Although it has not defended this action, Québecor has unilaterally admitted that (a) SOCAN represents the owners of copyright in the works at issue; (b) it used copyrighted works in certain of its commercial activities during the relevant period; (c) subject to the defences raised in the Superior Court of Quebec, it is obliged to pay SOCAN the balance of \$1.435 million for the use of the works in the relevant periods; and (d) it undertakes to raise no defence arising solely under the *Copyright Act* (such as fair use) in opposition to SOCAN's claim, either before this Court or before the Superior Court of Quebec. In its oral submissions,

Québecor further confirmed that its defences to SOCAN's claim are limited to it having overpaid for royalties in the 2014 to 2018 period; its ability to set off that overpayment against the royalty payments to SOCAN in December 2018; and the application of provincial limitation periods.

(6) The essential nature of SOCAN's claim

[43] Québecor argues the essential nature or character of SOCAN's claim is a dispute over the interpretation of the 2018 Agreement, including its entitlement to apply the principle of set-off with respect to the overpayment it asserts arises from the agreement. It argues the other aspects of SOCAN's claim are not "worthwhile pursuing," to use the language in paragraph 29 of *Windsor Bridge*, since the contractual and set-off issues will determine the entirety of the claim. It argues there are no issues or concepts related to copyright in question; only contractual analysis. It further notes that the source of SOCAN's claim (the royalties payable) arises primarily from the 2018 Agreement, while its claimed set-off amount arises exclusively from the 2018 Agreement. It therefore asserts that it is plain and obvious that the essential character of SOCAN's claim relates to provincial law of contract and set-off, and not copyright.

[44] I am not persuaded. SOCAN's claim, both as drafted and in its essence, seeks to recover money payable as royalties for the use of copyright works. It asserts a right to collect such royalties on behalf of copyright owners as a collective society under the *Copyright Act*. It primarily claims the amounts owing to it as royalties payable pursuant to five tariffs, based on the Copyright Board's approval of those tariffs and SOCAN's ability to continue collecting royalties during the period between the expiry of approved tariffs and the approval of new proposed tariffs. Alternatively, SOCAN seeks damages or statutory damages for infringement of

copyright. The “practical result” sought by SOCAN is the payment of money for Québecor’s use of the copyright in works in its repertoire.

[45] In my view, it is not plain and obvious that the essential character of SOCAN’s claim is one of provincial contract law, rather than the enforcement of copyright and copyright tariffs.

[46] Contrary to Québecor’s argument, it is not plain and obvious that the essential character of SOCAN’s claim changes from one of copyright enforcement to one of contract simply because it admits that SOCAN is entitled to enforce copyright and copyright tariffs, but asserts that it has defences to SOCAN’s claim arising from an agreement. These defences do not turn SOCAN’s claim into, in effect, a request for a declaration regarding the interpretation of a contract. While Québecor seeks that remedy in the Superior Court of Quebec, the essential character determination assesses “the particular claim the claimant has chosen to bring, not a similar claim the respondent says the claimant really ought, for one reason or another, to have brought”: *Windsor Bridge* at para 27.

[47] In this regard, SOCAN argues the defences Québecor may raise are irrelevant, and the essential character of a claim should be addressed only by looking at the claim itself. There is some strength to this argument. The majority in *Windsor Bridge* stated that “[t]he conferral of jurisdiction depends on the nature of the claim or remedy sought” [emphasis added], without reference to the defences to that claim or remedy: *Windsor Bridge* at para 25. As SOCAN points out, the cases assessing the essential character of a claim for the purposes of assessing the Federal Court’s jurisdiction look at the claim or application in issue and not the available

defences or responses to it: see, *e.g.*, *Windsor Bridge* at paras 25–30; *Roitman* at paras 17–18, 24–28; *Domtar* at paras 26–30; *McCain* at paras 59, 65–67, 98; *JP Morgan* at paras 49–52, 63–64.

[48] In supplementary submissions on the Federal Court of Appeal’s recent decision in *Berenguer*, Québecor argued that the Court had looked at possible defences in assessing the jurisdiction question, namely whether the claim was barred by the *Montreal Convention*: *Berenguer* at para 65. However, Justice Woods’ observation was simply that the *Carriage by Air Act*, RSC 1985, c C-26, which incorporates the *Montreal Convention*, was essential to the disposition of the case and nourished the grant of jurisdiction. She separately assessed whether the action should be struck because it was plain and obvious that it was barred by the *Convention*, but this does not mean that all of the various defences a defendant might raise, whether factual or legal, are relevant to assessing the essential nature of a claim: *Berenguer* at paras 65, 69–78. Similarly, the appropriateness of considering the main claim in an action for the purposes of considering the essential nature of a third party claim does not mean that defences are equally relevant to the assessment of the claim: *Air Muskoka* at para 32.

[49] I also note that in this case, the matter of jurisdiction comes before the Court under Rule 221. That Rule is directed at striking out a particular pleading based on its contents. This again suggests that the focus should be on SOCAN’s claim and not Québecor’s defences.

[50] I need not decide this issue, as it is not plain and obvious that the defences Québecor raises, even if they are relevant to the essential nature analysis, change the nature of SOCAN's claim from that presented in its Statement of Claim.

[51] To establish its claim under the *Copyright Act*, SOCAN must establish its right to do so on behalf of copyright owners; Québecor's use of copyright works in its repertoire; and Québecor's resulting liability for either payment of royalties under a tariff or for infringement damages. Québecor may admit one, more, or all of these matters. However, such admissions, and the absence of any contentious "copyright issues," does not necessarily turn the case from a copyright case into a contract case, or one that is in essence about Québecor's asserted defences based on the 2018 Agreement. As the Federal Court of Appeal noted in *Salt Canada*, the Federal Courts may be called upon to interpret agreements in exercising their jurisdiction in areas of federal competence, including intellectual property: *Salt Canada Inc v Baker*, 2020 FCA 127 at paras 15–20, 26. Justice Stratas, for the Court of Appeal, rejected an approach of trying to determine just *how much* contractual interpretation is involved in a particular case for the purposes of determining jurisdiction: *Salt Canada* at para 31. It is not plain and obvious that Québecor's admissions and defences referring to the 2018 Agreement change the essential nature of the case from a copyright enforcement case to a contract case.

[52] Québecor's arguments rely heavily on its assertion that both the 2018 amounts it owed under Tariff 17 and the source of its asserted overpayment are contractual in nature, having arisen under the 2018 Agreement. It characterizes the 2018 Agreement as the parties' agreement to fix their royalties by contract, rather than relying on tariffs. SOCAN, on the other hand,

characterizes the royalties as owing under the Tariffs. As set out in paragraph [36], it claims the amount of \$ 1.435 million as the “outstanding balance [...] of the royalties due under SOCAN Tariffs [...].”

[53] It is at least arguable that the 2018 Agreement does not itself create an agreement between the parties on the royalties payable for use of copyright works. Rather, under the 2018 Agreement, the parties agreed on the terms of tariffs to be filed with the Board, and agreed to abide by the terms of those tariffs. Only if the Board fails to certify the settlement tariffs does the agreement say that the tariffs will nonetheless remain in force.

[54] Indeed, as the parties recognized, the 2018 Agreement was entered into before the 2019 amendment of the *Copyright Act* permitting SOCAN to enter agreements establishing royalties for public performance and telecommunication rights. Tariff 17 had been approved by the Copyright Board and was subsequently proposed by SOCAN on the same terms. Thus, while Québecor qualifies the amounts due in 2018 under Tariff 17 as “contractual” amounts under the 2018 Agreement, they remained, at least arguably, amounts payable under a statutory tariff. It is not plain and obvious that agreeing to abide by a statutory tariff turns a payment under the tariff into a contractual payment rather than a tariff payment.

[55] Québecor’s primary defence to SOCAN’s allegations of non-payment of royalties, unauthorized use and copyright infringement is that it effectively already paid the amounts owing under the various tariffs by virtue of the amounts it paid under another statutory tariff, namely Tariff 22.D.1. It claims an entitlement to offset the previously paid Tariff 22.D.1

amounts against the amounts owing under five different tariffs, including three tariffs not addressed at all under the agreement (Tariffs 16 and 26 and the Retransmission Tariff).

Considering the essential nature of the claim as a whole and not on a “piecemeal” basis, it is arguable that Québecor’s defence that it has effectively already paid is simply a defence to a copyright enforcement claim, and does not change the essential nature of the claim.

[56] Finally, Québecor argues SOCAN itself identified the central issues in its Statement of Claim. At paragraph 43 of the Statement of Claim, SOCAN states that Québecor’s withholding of the amounts otherwise owing in royalties was improper because (1) the 2018 Agreement prohibited adjusting royalty payments prior to March 2018; (2) neither the tariffs or the 2018 Agreement grants Québecor a right of set-off; and (3) Tariff 16 and the Retransmission Tariff, which are not part of the 2018 Agreement, do not permit Québecor to offset overpayments said to have been made under other tariffs. In my view, it is not plain and obvious that SOCAN’s allegation that Québecor was not entitled to make the deduction makes the essential nature of the claim one of contract. Again, there may be contractual issues that need to be decided. But the existence of contractual issues alone does not change the essential nature of the case.

(7) The *ITO* test

[57] Having addressed the essential nature of the claim, I turn to the *ITO* test. For the reasons below, I conclude it is at least arguable the Federal Court has jurisdiction over SOCAN’s claim. I further conclude that even on Québecor’s characterization of the claim as being an action in breach of contract, it remains at least arguable the Federal Court has jurisdiction over it.

(a) *Statutory grant of jurisdiction*

[58] Subsection 20(2) of the *Federal Courts Act*, RSC 1985, c F-7, grants the Federal Court concurrent jurisdiction in cases in which “a remedy is sought under the authority of an Act of Parliament or at law or in equity respecting any [...] copyright [...].” Section 26 of the *Federal Courts Act* further provides that the Federal Court has original jurisdiction in respect of any matter over which “jurisdiction has been conferred by an Act of Parliament on the [...] Federal Court.” The *Copyright Act* then contains a number of specific provisions granting jurisdiction to the Federal Court. Relevant in this case is section 41.24, which reads as follows:

Concurrent jurisdiction of Federal Court

41.24 The Federal Court has concurrent jurisdiction with provincial courts to hear and determine all proceedings, other than the prosecution of offences under sections 42 and 43, for the enforcement of a provision of this Act or of the civil remedies provided by this Act.

[Emphasis added.]

Jurisdiction concurrente de la Cour fédérale

41.24 La Cour fédérale, concurremment avec les tribunaux provinciaux, connaît de toute procédure liée à l'application de la présente loi, à l'exclusion des poursuites des infractions visées aux articles 42 et 43.

[Je souligne.]

[59] There are differences in the French and English versions of this provision. The English version refers to proceedings for the enforcement of (i) a provision of, or (ii) the civil remedies provided by, the *Copyright Act*. The French version refers to “*toute procédure liée à l'application de la présente loi*,” which might be literally translated as “all proceedings related to the application of this Act.” The French version is arguably somewhat broader, since it does not limit the proceedings described to those for “enforcement.” Québecor suggests that applying the

“shared meaning” rule, the Court should apply the English version, to the extent it is narrower: see *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para 203. I need not decide this issue, as even on the English version of the section, it is at least arguable that section 41.24 grants this Court jurisdiction over SOCAN’s claim.

[60] If the essential nature of SOCAN’s claim is one to enforce copyright or a copyright tariff, section 41.24 clearly grants this Court jurisdiction over such a claim. It seeks a civil remedy of damages to enforce the copyrights it administers and/or the tariffs approved or proposed under Part VII.1. In particular, it seeks to enforce provisions of the *Copyright Act*, namely sections 73 and 73.1. As I have concluded above, it is at least arguable this is the essential nature of SOCAN’s claim.

[61] However, even if characterized as a claim by a collective society for the enforcement of a contract pertaining to copyright royalties, as Québecor contends, it is not plain and obvious that such a claim falls beyond the statutory grant in section 41.24. Québecor argues that although Parliament has clearly granted the Federal Court jurisdiction in copyright matters, that grant does not extend to purely contractual matters between two private parties, citing *McCain* at para 63; *Hutchingame Growth Capital Corporation v Dayton Boot Co Enterprises Ltd*, 2019 FCA 152 at para 55; and *Alpha Marathon Technologies Inc v Dual Spiral Systems Inc*, 2017 FC 1119 at paras 63, 84–85.

[62] The Court of Appeal in *McCain* cited its decision in *Salt Canada*, noting that the issue in that case was the specific grant of jurisdiction contained in section 52 of the *Patent Act*,

RSC 1985, c P-4: *McCain* at para 63. Both *McCain* and *Salt Canada* make clear that the question is the scope of the statutory grant of jurisdiction, interpreted in accordance with the usual approach to statutory interpretation: *McCain* at paras 63–64; *Salt Canada* at paras 5, 7–12.

[63] Does section 41.24 of the *Copyright Act* grant jurisdiction to the Federal Court over a case that is in essence a claim by a collective society for the enforcement of a contract pertaining to copyright royalties? In deciding whether the answer to this question is plain and obvious, it is relevant to note that section 41.24 and its reference to the “civil remedies provided by this Act” is found in Part IV of the *Copyright Act*, entitled “Remedies,” and, in particular, in the section of Part IV entitled “Civil Remedies.” That section also includes subsection 34(4), which provides that certain proceedings for civil remedies may be commenced by way of application or action:

Summary proceedings

34(4) The following proceedings may be commenced or proceeded with by way of application or action and shall, in the case of an application, be heard and determined without delay and in a summary way:

(a) proceedings for infringement of copyright or moral rights;

[...]

Requête ou action

34(4) Les procédures suivantes peuvent être engagées ou continuées par une requête ou une action :

a) les procédures pour violation du droit d’auteur ou des droits moraux;

[...]

(c) proceedings taken in respect of

(i) a tariff approved by the Board under Part VII.1 or VIII, or

(ii) agreements referred to in subsection 67(3).

c) les procédures relatives aux tarifs homologués par la Commission en vertu des parties VII.1 ou VIII ou aux ententes visées au paragraphe 67(3).

Le tribunal statue sur les requêtes sans délai et suivant une procédure sommaire.

[Emphasis added.]

[Je souligne.]

[64] While subsection 34(4) is procedural in nature, it suggests that Parliament considered proceedings taken in respect of either an approved tariff *or* an agreement referred to in subsection 67(3)—*i.e.*, an agreement by a collective society for the purpose of establishing royalties with respect to rights administered by the collective society—to be proceedings in respect of civil remedies under the *Copyright Act*. Thus, contrary to Québecor’s arguments, the grant of jurisdiction in section 41.24 is not plainly and obviously limited to claims of copyright infringement, to the exclusion of contractual claims, at least as it relates to collective societies.

[65] Québecor argues the 2018 Agreement cannot be an “agreement referred to in subsection 67(3)” since it was entered into before that subsection came into force and thus before SOCAN could enter into such an agreement. This argument does not assist Québecor. It is also contrary to Québecor’s primary argument that the 2018 Agreement establishes royalties and that the royalties it owed in respect of Tariff 17 were therefore contractual. In other words, if the 2018 Agreement is *not* an agreement referred to in subsection 67(3), this simply reinforces that SOCAN’s claim is for the enforcement of a statutory copyright tariff approved and enforceable

under the *Copyright Act*. If it *is* an agreement “referred to” in subsection 67(3)—even if it was not entered into pursuant to that subsection—then enforcement of the agreement is referred to in subsection 34(4) and appears to be recognized as “enforcement of a provision of [,] or of the civil remedies provided by,” the *Copyright Act*.

[66] I open a parenthesis to note that even under the pre-2019 provisions of the *Copyright Act*, subsection 34(4) referred to proceedings taken in respect of certified tariffs and those taken in respect of “agreements referred to in section 70.12,” *i.e.*, agreements between collective societies and users setting out royalties by licence. Thus, since at least 1997, proceedings to enforce collective societies’ royalty agreements have been expressly referred to in the *Copyright Act*’s provisions on civil remedies.

[67] I therefore conclude it is not plain and obvious there is no statutory grant of jurisdiction to the Federal Court over SOCAN’s claim, regardless of how its essential nature is characterized.

- (b) *Existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant*

[68] Québecor recognizes that there is an existing body of federal copyright law. However, it argues that this body of law is not “essential to the disposition of the case,” given its concessions about SOCAN’s right to enforce its members’ copyright, and its obligation to pay subject to its set-off and limitation defences. It notes that the Supreme Court in *Windsor Bridge* underscored the importance of the “essential to the disposition” language in *ITO: Windsor Bridge* at paras 67–69. It argues that no question of copyright law is essential to the disposition of the case, since no

question of copyright law is in dispute between the parties. Rather, the doctrine of set-off is one of provincial contract law and does not engage either copyright or any other area of federal law: see 9034-1066 *Québec inc (Syndic de)*, 2011 QCCS 6562 at para 14, citing LW Houlden, GB Morawetz and JP Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Carswell: looseleaf) at p 4-154. Québecor also cites the Federal Court of Appeal's decision in *Hutchingame*, in which the Federal Court of Appeal stayed an application pertaining to the Trademarks Register on the basis that the underlying dispute regarding ownership of the trademark was "ultimately a contractual dispute between commercial parties": *Hutchingame* at para 55.

[69] For the reasons set out above, it is not plain and obvious in light of the 2018 Agreement that Québecor's obligation to pay royalties, the question of whether it overpaid royalties under a statutory tariff in 2014 to 2018, or its ability to use any such amounts as satisfying current royalty payments are simply "contractual" rather than invoking terms of applicable prior and proposed tariffs.

[70] In any event, as Chief Justice Laskin noted in *Rhine*, "'contract' or other legal institutions, such as 'tort' cannot be invariably attributed to sole provincial legislative regulation or be deemed to be, as common law, solely matters of provincial law": *Rhine v The Queen*, [1980] 2 SCR 442 at p 447; *Peter G White Management Ltd v Canada (Minister of Canadian Heritage)*, 2006 FCA 190 at para 59. In *Rhine*, the Supreme Court found the Federal Court had jurisdiction over two claims to recover funds that had been advanced under two federal statutes.

Although a contract had been entered into and an undertaking given, the Court found the federal statute was not “left behind once the undertaking or contract is made”: *Rhine* at pp 447, 449.

[71] In *Peter G White*, the Federal Court of Appeal similarly found this Court had jurisdiction over claims in contract and tort arising from a lease relationship, given the close connection between the federal statutory and regulatory scheme and the lease, even though the particular covenant at issue was not mandated by statute: *Peter G White* at paras 52–72. Conversely, in *Air Muskoka*, the Federal Court did not have jurisdiction over the Crown’s third party claim against a municipality in contract and negligence. Although the factual backdrop was the operation of an airport, the third party claim did not depend to any extent on a “detailed statutory framework” governing the parties’ rights: *Air Muskoka* at paras 57–61.

[72] The Federal Court of Appeal considered *Rhine*, *Peter G White* and *Air Muskoka* in its recent decision in *Berenguer*. Citing *Rhine* in particular, Justice Woods for the Court found that in applying the second step of the *ITO* test to a breach of contract claim, “the test may be satisfied if there is a sufficiently detailed federal regulatory scheme that applies to the contract”: *Berenguer* at para 31(c).

[73] In the present case, the *Copyright Act* creates the scheme for the collective administration of copyright through collective societies such as SOCAN; it allows SOCAN to file tariffs to establish royalties; it allows SOCAN to collect royalties specified in an approved tariff, or to recover them in court in case of a default of payment; it allows SOCAN to collect royalties in accordance with a previously approved tariff where a proposed tariff has been filed; it prevents

SOCAN from bringing proceedings in infringement where a person has paid or offered to pay royalties under an approved, prior, or proposed, tariff; it also (now) permits SOCAN to enter agreements establishing royalties with respect to rights it administers. In my view, it is arguable that this detailed federal regulatory scheme has sufficient application to the 2018 Agreement that, even if SOCAN's claim were characterized as one in contract, it would be sufficient to satisfy the second branch of the *ITO* test.

[74] With respect to Québecor's argument that the doctrine of set-off is one of provincial law, the Federal Court of Appeal's recent decision in *Inuksuk I* is instructive. There, the Court of Appeal concluded the Federal Court did not have jurisdiction to address the defendants' defence of equitable set-off. However, this conclusion was not based on the Federal Court's inability to deal with matters of set-off, but on its inability to deal with the subject matter of the defendants' claim on which the asserted set-off was based: *Inuksuk I* at paras 54–59.

[75] Without needing to address whether Québecor's defence is truly one in "set-off," it is clear that the source of the amounts it says it was entitled to deduct from the royalties payable in 2018 was amounts it had previously paid under a statutory tariff, Tariff 22.D.1. To the extent that Québecor is asserting a claim against SOCAN that it purports to apply as set-off against SOCAN's claim, it is a claim for reimbursement of amounts paid under a statutory copyright tariff, based on an agreement about how to calculate amounts payable under that and other tariffs. Again, although the nature of the agreement may need to be considered to determine that issue, it is not plain and obvious that such a claim goes beyond the jurisdiction of this Court in matters of copyright.

[76] I am therefore satisfied that it is not plain and obvious that the second branch of the *ITO* test is not met.

(c) *Law of Canada*

[77] As the Supreme Court recognized in *Windsor Bridge*, there is overlap between the second and third parts of the *ITO* test, which both address the need to stay within the constitutional limits of section 101 of the *Constitution Act, 1867*: *Windsor Bridge* at para 35. In *ITO* itself, the Court quickly found the third criterion met because “Canadian maritime law and other laws dealing with navigation and shipping come within s. 91(10) of the *Constitution Act, 1867*, thus confirming federal legislative competence”: *ITO* at p 777. Here, there is no question that the *Copyright Act* is a law of Canada within the meaning of section 101, given federal legislative competence over “Copyrights” in subsection 91(23) of the *Constitution Act, 1867*.

[78] Québecor argues that the relevant law is not the *Copyright Act* but the law of contractual obligations and set-off, which fall within provincial competence over property and civil rights. For the reasons addressed above, it is not plain and obvious that the matter is one of contract and set-off rather than of copyright.

[79] I therefore conclude it is not plain and obvious that this Court has no jurisdiction over SOCAN’s claim. Québecor’s motion to strike will therefore be dismissed.

B. *The action should not be stayed*

[80] In the alternative, Québecor asks that this action be stayed in favour of the ongoing, but currently suspended, litigation in the Superior Court of Quebec. For the following reasons, Québecor has not satisfied me that it is in the interests of justice to stay this proceeding.

(1) Principles on a motion to stay a proceeding in this Court

[81] Paragraph 50(1)(b) of the *Federal Courts Act* permits this Court to stay proceedings in any matter where it is “in the interest of justice” to do so. While paragraph 50(1)(a) also provides that a stay may be granted on the ground that the claim is being proceeded with in another court, given the circumstances surrounding this case, Québecor appropriately relies on paragraph 50(1)(b) in seeking a stay.

[82] Where the Federal Court is asked to stay one of its own proceedings, rather than a proceeding before another tribunal, the test it applies is “whether, in all the circumstances, the interests of justice support the [proceeding] being delayed”: *Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc*, 2011 FCA 312 at paras 5–6, 14; *Clayton v Canada (Attorney General)*, 2018 FCA 1 at paras 24–26; *Viterra Inc v Grain Workers’ Union (International Longshoreman’s Warehousemen’s Union, Local 333)*, 2021 FCA 41 at para 23. In assessing whether such a stay is in the interests of justice, the Court takes account of broad discretionary considerations, including the particular factual circumstances of the case, principles of litigation economy, and the general principle of Rule 3 of the *Federal Courts Rules*: *Mylan* at para 5; *Coote v Lawyers’ Professional Indemnity Company*, 2013 FCA 143 at paras 11–13.

[83] Québecor did not present its motion for a stay as one based on the doctrine of *forum non conveniens*, perhaps because that doctrine applies once jurisdiction in multiple forums is established, which Québecor contests: *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30 at paras 35, 51–55; *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at paras 101–102. Nonetheless, I consider it instructive that the test applied in *forum non conveniens* motions is that of a “clearly more appropriate forum”: *Lapointe* at para 52; *Van Breda* at paras 108–110.

(2) Québecor has not established that a stay is in the interests of justice

[84] Québecor’s argument in favour of a stay is essentially based on the Superior Court of Quebec having admitted jurisdiction over all aspects of SOCAN’s claim, while this Court’s jurisdiction over the contractual and set-off issues is uncertain. It argues that as a result, a stay would avoid the risk of wasted resources and prejudice to Québecor in the event that this Court ultimately determines it does not have jurisdiction. Conversely, it argues SOCAN would not suffer prejudice from proceeding in Quebec.

[85] I question whether mere “uncertainty” as to this Court’s jurisdiction ought to be a material factor for consideration on a stay request of this nature. Whether this Court has jurisdiction over the claim could be decided as a final matter in a number of ways, including a motion for a preliminary determination of a question of law under Rule 220; a motion for summary judgment or summary trial under Rules 213 or 216; or simply in defence to the action: *Alberta v Canada* at paras 20–21; *Mud Engineering Inc v Secure Energy Services Inc*, 2020 FC 1049 at paras 20–31; *Louis Dreyfus Commodities Canada Ltd v Canadian National*

Railway Company, 2017 FC 783 at paras 5, 22, 43–45. Québecor chose instead to raise its jurisdictional arguments in a motion to strike under Rule 221. It therefore had to establish it is “plain and obvious” this Court had no jurisdiction. Having failed to do so, I question whether Québecor can rely on the existence of a jurisdictional uncertainty that remains because of its chosen method of bringing the issue before the Court, in order to effectively get the same or similar relief, namely that the matter proceeds in another Court.

[86] In any event, even if it is appropriate to consider the residual uncertainty flowing from Québecor’s unsuccessful motion to strike, I am of the view that it is not a significant factor favouring a stay. Since I have not been asked to finally determine the jurisdictional issue, I will exercise caution in expressing any view on the matter beyond the conclusions above that it is not plain and obvious that this Court lacks jurisdiction over the claim. However, since Québecor relies heavily on the asserted uncertainty of this Court’s jurisdiction, I will say simply that I see considerably less uncertainty in the matter than Québecor contends.

[87] Québecor’s other arguments essentially flow from its arguments about uncertainty. It argues a stay would favour judicial economy, since there is a risk of wasted resources if the parties proceed with the action in the Federal Court only to have the matter ultimately dismissed for lack of jurisdiction. It cites, by way of example, *Toney v Canada*, in which a Rule 221 motion on jurisdiction was dismissed (2012 FCA 167), but the action was later dismissed for lack of jurisdiction (2013 FCA 217 [*Toney (2013)*]).

[88] The risk of wasted judicial and litigant resources is effectively proportional to the degree of uncertainty on the jurisdictional issue. For the reasons given above, I do not consider the risk of such wasted resources to be a significant consideration. In this regard, it is worth noting that the decision in *Toney (2013)* arose from a motion for a determination of an issue of law in advance of trial, underscoring the potential availability of that route for putting the issue before the Court: *Toney (2013)* at para 1.

[89] I also note that Québecor's arguments on the jurisdictional issue are premised on this being a narrow and streamlined case, limited in scope to a few issues regarding the existence of an overpayment on Tariff 22.D.1 and its ability to deduct any such overpayment to royalties owing on other Tariffs. This suggests that the risk of wasted resources, both for the Court and the litigants, is lower than it might be in a complex, factually-driven case with many live issues.

[90] Québecor's arguments about the prejudice it will face if a stay is not granted similarly assume a duplication based on this Court ultimately concluding it does not have jurisdiction. It argues that it is faced with having to defend this case and then, if it is correct on the jurisdictional issue, proceed in the Superior Court of Quebec. These arguments have limited weight, for the same reasons given above. Additionally, if this Court does ultimately dismiss SOCAN's case for want of jurisdiction, Québecor is likely to receive an award of costs, which will at least partially compensate it for the cost arising from duplication.

[91] Finally, Québecor argues that SOCAN will suffer no prejudice if the stay is granted and it is required to proceed in the Superior Court of Quebec. I agree with SOCAN that there is some

prejudice inherent in a plaintiff effectively losing its right to choose the forum in which it brings proceedings. As the Supreme Court noted in the *forum non conveniens* context, a moving party must show why “the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate”: *Van Breda* at para 109. SOCAN outlined a number of reasons why it chooses to bring its enforcement proceedings in this Court. They include SOCAN’s national scope and its choice of counsel, as well as this Court’s familiarity with both copyright matters generally and SOCAN and its tariffs in particular. As Québecor points out, the Superior Court of Quebec is perfectly able to address copyright matters, and has jurisdiction to do so. As the plaintiff, however, SOCAN has the right to choose the forum for its enforcement litigation, and faces some prejudice if it is not permitted to do so on grounds of an asserted uncertainty regarding jurisdiction that has yet to be determined.

[92] With respect to remaining relevant factors, the parties agree that both this proceeding and that in the Superior Court of Quebec are at the initial pleadings stage, such that there is no material advantage to either forum in terms of steps already taken.

[93] Considering the foregoing factors and the circumstances of the case as a whole, Québecor has not satisfied me that it is in the interests of justice to stay this proceeding in favour of proceedings in the Superior Court of Quebec.

IV. Conclusion

[94] As Québecor has not established that it is plain and obvious this Court has no jurisdiction, and has not established that a stay of proceedings would be in the interests of justice, the motion is dismissed.

[95] Consistent with the cooperative approach the parties took to the presentation of this motion, they are in agreement that the successful party should have their costs in the amount of \$6,000. SOCAN shall have its costs in this amount.

ORDER IN T-1380-22

THIS COURT ORDERS that

1. The motion is dismissed, with costs to the plaintiff in the amount of \$6,000.

“Nicholas McHaffie”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1380-22

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