

Writers' Rights Upheld: The Robertson Decision by Warren Sheffer, Hebb & Sheffer

On Thursday, October 12, 2006 the Supreme Court of Canada released its long-awaited decision in *Robertson v. Thomson Corp.* The decision concerned a class action brought by acclaimed Canadian writer Heather Robertson in the mid 1990s against the Thomson Corporation and related companies for unauthorized and unpaid digital reproduction of freelance writers' articles. Robertson herself had written two articles that were published by Thomson in The Globe and Mail newspaper in 1995 and then subsequently reproduced in Info Globe Online, in the electronic version of the Canadian Periodical Index and on CD-ROM.

In a narrow 5-4 split, the majority of the Court found that Thomson could not reproduce in electronic databases freelance articles that it had acquired for publication in its newspaper without paying compensation to the authors and without their consent. Specifically, the Court stated that the copyright that a publisher has in its newspaper, as a collective work, does not give the publisher the right to reproduce freelance articles otherwise than as part of that collective work. The Court found that the CD-ROMs in this case remained faithful to the essence of the original newspaper and consequently represented a valid exercise of The Globe and Mail's rights to reproduce its collective work.

The majority decision, written by Justices LeBel and Fish, stressed that the principle of media neutrality underlying the Canadian *Copyright Act*, which Thomson had, in part, put forth as justification to reproduce in databases articles from the print form of its newspaper, was "not a license to override the rights of authors" -- that instead the principle "exists to protect the rights of authors and others as technology evolves."

Importantly, however, the Court found that consent to such reproduction did not need to be in writing. Instead it could be granted through an implied licence. For articles written after 1996 this may often be a moot point, because in the mid 1990s The Globe began to make it a practice to enter into written agreements with authors expressly granting the company electronic rights in freelance works. Whether such consent was provided by freelancers in this particular class action will be up to a trial judge to determine.

Notably, the majority, which seems to have been ultimately determined by the swing vote of the Court's newest judge, Justice Rothstein, did not adopt a utilitarian perspective on Canadian copyright law that the Court had early expressed in its seminal 2002 decision *Théberge v. Galerie d'Art du Petit Champlain inc.* (In this case, artist Claude Théberge took exception to his art being chemically lifted off paper posters and transferred onto canvasses without permission, an act that the Court, by a slim 4-3 majority, found did not violate Théberge's copyright). Accordingly, it would appear that the Supreme Court is not prepared to embrace fully a utilitarian approach to copyright law, or put differently, it does not appear that the Court will abandon or ignore the author's right perspective on copyright espoused by the minority in *Théberge*. Where the latter perspective is generally more favourable to authors and artists and is rooted in the belief that copyright is granted to creators as a matter of natural justice, the former is largely premised on the view that copyright is granted to creators for the benefit of the public.

The divergent utilitarian and author's right perspectives on Canadian copyright law expressed at the Supreme Court seem to fall roughly along anglo/franco lines. Similar to the *Théberge* decision, in *Robertson*, the Quebec or New Brunswick based and

Francophone judges supported an author's right perspective, while justices based in the rest of Canada supported a utilitarian view, with Justice Rothstein providing the casting vote.

Those Supreme Court justices supporting an author's right perspective, like the majority of the Ontario Court of Appeal before it, seemed more concerned in the *Robertson* decision with, in the words of the lower appeal court, not "allowing powerful corporations to deprive authors of the fruits of their labour."

Such concern reflects an understanding of the difficulty associated with making a decent living from freelance writing and the low incomes of Canadian freelance writers. In 2005 the Professional Writers Association of Canada (PWAC) found that the average annual income of freelancers responding to its survey of members and non-members, including part-time freelancers who have other employment, was approximately \$21,000. For PWAC members the figure was \$24,035, a decrease from the \$26,500 reported in 1995.

By contrast, Justice Abella writing for the minority in the Supreme Court expressed a concern about the public being potentially deprived of access to the digitally archived works involved in this case. Citing the arguments and reactions of American publishers to the United States Supreme Court's 2001 decision, *New York Times Co. v. Tasini*, in which freelance authors successfully sued the New York Times for similar copyright infringement, Justice Abella curiously raised the possibility that Canadian publishers might simply choose to discontinue selling the impugned digital works. Such eventuality would indeed be unfortunate if it were in fact to materialize. However, presumably, reasonable negotiation between the parties for the rights needed to redress

the publisher's unauthorized reproduction would easily avoid the issue and would ensure the public's access to works. Furthermore, it would also be consistent with the public's interest in ensuring that the copyrights of independent Canadian freelance writers are fostered and respected in the face of ever-increasing corporate media concentration.