

**SUPREME COURT OF CANADA**

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| **Citation:** Re:Sound *v.* Motion Picture Theatre Associations of Canada, 2012 SCC 38, [2012] 2 S.C.R. 376 | **Date:** 20120712  **Docket:** 34210 |

**Between:**

**Re:Sound**

Appellant

and

**Motion Picture Theatre Associations of Canada, Rogers Communications Inc., Shaw Communications Inc., Bell ExpressVu LLP, Cogeco Cable Inc., Eastlink, Quebecor Media, TELUS Communications Company, Canadian Association of Broadcasters and Canadian Broadcasting Corporation**

Respondents

- and -

**Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic**

Intervener

**Coram:** McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 53) | LeBel J. (McLachlin C.J. and Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring) |

Re:Sound *v.* Motion Picture Theatre Associations of Canada, 2012 SCC 38, [2012] 2 S.C.R. 376

Re:Sound *Appellant*

v.

Motion Picture Theatre Associations of Canada,

Rogers Communications Inc., Shaw Communications Inc.,

Bell ExpressVu LLP, Cogeco Cable Inc., EastLink,

Quebecor Media, TELUS Communications Company,

Canadian Association of Broadcasters and

Canadian Broadcasting Corporation *Respondents*

and

Samuelson‑Glushko Canadian Internet Policy and

Public Interest Clinic *Intervener*

**Indexed as: Re:Sound *v.* Motion Picture Theatre Associations of Canada**

2012 SCC 38

File No.: 34210.

2011:  December 7; 2012:  July 12.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the federal court of appeal

*Intellectual Property — Copyright — Whether pre‑existing recording incorporated into soundtrack of cinematographic work constitutes a sound recording subject to payment of tariff — Whether soundtrack of cinematographic work consists of aggregate of sounds or component parts — Copyright Act, R.S.C. 1985, c. C‑42, ss. 2 “sound recording”, 19.*

The *Copyright Act* provides that performers and makers of sound recordings are entitled to remuneration for the performance in public or the communication to the public by telecommunication of their published sound recordings. The appellant filed two tariff proposals claiming royalties for the use of sound recordings embodied in a movie shown by motion picture theatres and other establishments exhibiting movies and in television programs broadcast by commercial over‑the‑air, pay, specialty and other television services. The respondents objected to the proposed tariffs on the ground that the definition of “sound recording” excludes soundtracks of cinematographic works. The Copyright Board refused to certify the tariffs and the Federal Court of Appeal upheld that decision on an application for judicial review.

*Held*: The appeal should be dismissed.

Irrespective of the standard of review, the Board was correct that “soundtrack” includes pre‑existing sound recordings and that such recordings are excluded from the definition of “sound recording” when they accompany a cinematographic work. This interpretation of “soundtrack” is consistent with the scheme of the Act, Parliament’s intention, and Canada’s international obligations. A pre‑existing sound recording that is part of a soundtrack cannot be the subject of a tariff under s. 19 of the Act when the soundtrack accompanies a cinematographic work.

The provisions in question must be read in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme and object of the Act, and consistently with the words chosen by Parliament. According to s. 2 of the Act, a “sound recording” is a recording consisting of sounds “but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work”. Therefore, a “soundtrack” is a “sound recording” except when it accompanies the motion picture. Otherwise, the exclusion would be superfluous. For a pre‑existing sound recording to be excluded from the interpretation of “soundtrack”, Parliament would have had to make that intention explicit in the Act. This could have been achieved by excluding, for example, only “the aggregate of sounds in a soundtrack”. Legislative history confirms this interpretation, notably comments made at the Standing Committee on Canadian Heritage hearing with respect to the provisions at issue.

The *Copyright Act* is not incompatible with the *Rome Convention*. Although the *Rome Convention* states that producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms, Article 3 defines “phonogram” as “any exclusively aural fixation of sounds of a performance or of other sounds”. A soundtrack that accompanies a cinematographic work is not for “exclusively aural fixations”. Furthermore, if a pre‑existing sound recording is extracted from a soundtrack accompanying a cinematographic work, it once again attracts the protection offered to sound recordings. The Board’s interpretation is consonant with Canada’s obligations under the *Rome Convention*.

**Cases Cited**

**Not followed:** *Phonographic Performance Co. of Australia Ltd. v. Federation of Australian Commercial Television Stations*, [1998] HCA 39, 195 C.L.R. 158; **referred to:** *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324.

**Statutes and Regulations Cited**

*Copyright Act*, R.S.C. 1985, c. C‑42, ss. 2 “sound recording” [ad. 1997, c. 24, s. 1(5)], 17 [ad. *idem*, s. 14], 19 [ad. *idem*], 67.1(1).

*Copyright Act, 1956* (U.K.), c. 74, s. 12(9) “sound recording”.

*Copyright Act 1968* (Aust.), No. 63, s. 10 “cinematograph film”, “sound recording”.

**International Documents**

*International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 496 U.N.T.S. 43, Arts. 3, 10, 12.

**Authors Cited**

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

APPEAL from a judgment of the Federal Court of Appeal (Noël, Trudel and Mainville JJ.A.), 2011 FCA 70, 415 N.R. 10, [2011] F.C.J. No. 292 (QL), 2011 CarswellNat 429, affirming a decision of the Copyright Board, www.cb-cda.gc.ca/decisions/2009/200916.pdf, (2009), 78 C.P.R. (4th) 64, [2009] C.B.D. No. 9 (QL), 2009 CarswellNat 2889. Appeal dismissed.

*Mahmud Jamal*, *Glen Bloom*, *Marcus Klee* and *Jason MacLean*, for the appellant.

*David W. Kent* and *Sarah Kilpatrick*, for the respondent the Motion Picture Theatre Associations of Canada.

*Gerald L. Kerr‑Wilson*, *Julia Kennedy* and *Marisa Victor*, for the respondents Rogers Communications Inc., Shaw Communications Inc., Bell ExpressVu LLP, Cogeco Cable Inc., EastLink, Quebecor Media and TELUS Communications Company.

*Mark Hayes* and *Debra L. Montgomery*, for the respondent the Canadian Association of Broadcasters.

*Marek Nitoslawski* and *Joanie Lapalme*, for the respondent the Canadian Broadcasting Corporation.

Written submissions only by *David Fewer* and *Jeremy de Beer*, for the intervener.

The judgment of the Court was delivered by

LeBel J. —

I. Introduction

1. This appeal concerns the interpretation of the definition of “sound recording” in s. 2 of the *Copyright Act*, R.S.C. 1985, c. C-42 (“Act”), and specifically, the interpretation of the undefined term “soundtrack” used in that definition. The Act provides that performers and makers of sound recordings are entitled to remuneration for the performance in public or the communication to the public by telecommunication of their published sound recordings, except for retransmissions. Ultimately, the question this Court must answer is whether the broadcasting of sound recordings incorporated into the soundtrack of a cinematographic work can be subject to a tariff under the Act or whether such broadcasts are excluded by virtue of the definition of “sound recording” in s. 2.
2. The appellant, Re:Sound, argues that the word “soundtrack” as used in s. 2 refers only to the aggregate of sounds accompanying a cinematographic work and not to the soundtrack’s constituent parts. In its view, since pre-existing sound recordings incorporated into a soundtrack are constituent parts of the soundtrack and not the aggregate of sounds accompanying the work, they do not fall within the scope of the word “soundtrack” as used in s. 2.
3. For the reasons that follow, the appeal must be dismissed. A proper application of the principles of statutory interpretation leads to the conclusion that the appellant’s argument is untenable.

II. Facts and Judicial History

A. *Background*

1. Re:Sound is a collective society authorized by the Copyright Board of Canada (“Board”) to collect equitable remuneration pursuant to s. 19(1) of the Act for the performance in public or communication to the public by telecommunication of published sound recordings of musical works.
2. On March 28, 2008, Re:Sound — formerly the Neighbouring Rights Collective of Canada — filed two tariff proposals (Tariffs 7 and 9), under s. 67.1(1) of the Act, for the performance in public or the communication to the public by telecommunication, in Canada, of published sound recordings embodying musical works and performers’ performances of such works. In Tariff 7, it claimed royalties for the use of sound recordings embodied in a movie by motion picture theatres and other establishments exhibiting movies. Tariff 9 targeted the use of sound recordings in programs broadcast by commercial over-the-air, pay, specialty and other television services.
3. The respondents objected to the proposed tariffs on the ground that the Act’s definition of “sound recording” excludes soundtracks of cinematographic works. The definition of “sound recording” in s. 2 reads as follows:

“sound recording” means a recording, fixed in any material form, consisting of sounds, whether or not of a performance of a work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work;

1. Re:Sound submitted that a proper interpretation of the definition of “sound recording” does not exclude a pre-existing sound recording that is incorporated into a soundtrack. Rather, it argued, the purpose of the exclusion was to combine rights in the visual features of a cinematographic production with rights in the audio features of the same cinematographic production, and to protect those rights in a new work defined as a “cinematographic work”.
2. According to the respondents, Re:Sound had no legal claim to equitable remuneration under the Act by virtue of the plain meaning of the word “soundtrack” used in the definition of “sound recording”. The respondents sought a determination of the following preliminary issue:

Is anyone entitled to equitable remuneration pursuant to section 19 of the *Copyright Act* when a published sound recording is part of the soundtrack that accompanies (a) a motion picture that is performed in public [or] (b) a television program that is communicated to the public by telecommunication?

The Board answered “no”, refused to certify the tariffs and ordered them struck from the proposed statement of royalties as published in the *Canada Gazette*, Part I, on May 31, 2008. On judicial review, the Federal Court of Appeal upheld that decision. Re:Sound now appeals to this Court.

B. *Decision of the Copyright Board ((2009), 78 C.P.R. (4th) 64)*

1. After setting out the relevant legislation and reviewing the principles of statutory interpretation, the Board framed the issue as follows: “. . . when is a pre-existing sound recording that is subsequently incorporated into a soundtrack no longer a sound recording?”. Since the definition of “sound recording” excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work, the decision turned on the construction of the defined term “sound recording” and of the undefined term “soundtrack” as it relates to pre-existing sound recordings.
2. The Board agreed that the exclusion could affect pre-existing sound recordings incorporated into a soundtrack in only one of three ways: (1) the recording would no longer be entitled to any protection as a sound recording; (2) the recording would remain a sound recording except where it formed part of a soundtrack that accompanied a cinematographic work; and (3) the recording would remain a sound recording even if it formed part of a soundtrack accompanying a cinematographic work. The Board noted that the appellant proposed the third of these interpretations, while the respondents supported the second interpretation and no one was supporting the first.
3. The appellant argued that what is excluded from the definition of “sound recording” is the soundtrack as a whole, that is, the aggregate of the sounds. It submitted that the purpose of the exclusion from the definition of “sound recording” is to consolidate all the audio and visual elements of a movie in a single copyright subject matter and to protect all these elements as a “cinematographic work”. This became necessary, it claimed, because copyright law had protected movies long before they had audio capability. As a result, sounds incorporated into movies were protected both as cinematographic works and as contrivances by means of which sounds could be mechanically reproduced. This double protection created problems. In the appellant’s view, the exclusion from the definition ensures that a soundtrack is treated as part of a cinematographic work and is not protected separately unless the soundtrack does not accompany the cinematographic work. Thus, the exclusion has no impact on a pre-existing sound recording that is subsequently incorporated into a movie soundtrack, which remains a sound recording even where the soundtrack accompanies the movie.
4. The respondents submitted that the exclusion in the definition of “sound recording” applies to the soundtrack and all its components, including any pre-existing sound recording. According to them, the recording remains a “sound recording” except where the soundtrack accompanies the movie. Copyright in the sound recording is not extinguished, since the soundtrack and any pre-existing sound recording embedded in the cinematographic work remain sound recordings when they do not accompany the movie.
5. The appellant’s submission that there is a distinction between the soundtrack and its component parts did not convince the Board. To accept this argument, the Board noted, would require adding the modifier “aggregate” or “any part of a” before the word “soundtrack”. It stated, at para. 28:

A sound recording consists of sounds. If the soundtrack is not a sound recording when it accompanies the movie, neither are the sounds of which it consists. There is no need to specify that “any part” of the soundtrack is not a sound recording if everything of which it consists is not a sound recording.

1. The Board concluded that the respondents’ interpretation was the only one that produced “consistent and logical results” (para. 29). The Board considered a similar provision of the Act, s. 17, according to which a performer who “authorizes the embodiment of the performer’s performance” in a movie may no longer exercise a copyright in relation to that performance. Although there is no equivalent to s. 17 for sound recordings, the result is the same. The Board stated the following, at para. 31:

The performer and maker, having authorized the inclusion of a performance or sound recording in a movie soundtrack, are precluded from exercising both their respective copyright (including the rental right) and their remuneration right, when the soundtrack accompanies the movie. When the soundtrack does not accompany the movie, all their rights continue to exist.

1. The Board mentioned that performers can “receive residuals for the broadcasting of a movie incorporating a performance pursuant to subsection 17(2)” and held that, however limited their ability to do so might be, it “is incompatible with the existence of a remuneration right for that same performance” (para. 32).
2. The Board referred to the discussions that had taken place during the Standing Committee on Canadian Heritage proceedings that preceded the amendment of the Act and found that if “the intention of Parliament had been to target television in section 19 of the *Act*, it would not have set up a preferential regime for radio” that did not apply to television (para. 34). Furthermore, the Committee had clearly indicated that there was no intention to have s. 19 include equitable remuneration for a sound recording that accompanies a movie or a television program. The soundtrack would be a sound recording and would attract equitable remuneration on being played separately from the movie or program.
3. The Board rejected the argument that this interpretation of the Act contravened the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 496 U.N.T.S. 43 (the “*Rome Convention*”). It found that s. 19 was introduced into the Act to bring Canada into compliance with the *Rome Convention*, which, among other things, guarantees performers and producers of “phonograms” the right to equitable remuneration when their phonograms are “used directly for broadcasting or for any communication to the public” (Article 12). The Board stated at para. 38 that “the *Convention* expressly provides that no protection is required in the case of the indirect use of a sound recording such as when it is incorporated into a soundtrack”. The Board also found that the appellant’s argument based on legislation and decisions from Australia, the United States and the United Kingdom was irrelevant.
4. Finally, the Board concluded that the proposed Tariffs 7 and 9 “are based on no valid legal foundations and as a result cannot be certified” (para. 44).

C. *Decision of the Federal Court of Appeal (2011 FCA 70, 415 N.R. 10)*

1. The Court of Appeal dealt briefly with the standard of review, stating, “There is no need to dwell on this issue as, in my view, the Board came to the correct conclusion essentially for the reasons that it gave” (para. 9).
2. Having endorsed the Board’s decision on this issue, the Court of Appeal commented on three points. First, it addressed the appellant’s claim that the effect of the Board’s decision was that sound recordings in soundtracks could (1) be published on the Internet or otherwise disseminated or (2) be extracted from a DVD and then published without any recourse or remedy being available to the performer or the maker. The court held that an unauthorized embodiment of a performance included in a cinematographic work would contravene the Act. It noted that once a pre‑existing sound recording was extracted from the soundtrack that accompanied the cinematographic work, it would again attract the protections offered to performers and makers under the Act for stand-alone sound recordings.
3. Second, the Court of Appeal addressed the appellant’s argument that the Act would be inconsistent with similar foreign law if it did not grant equitable remuneration to artists and recording companies. The court found the Australian and U.K. jurisprudence relied on by the appellant to be of no assistance, since the cases in question were based on fundamentally different legislation.
4. The appellant had also argued that the Act is incompatible with Article 10 of the *Rome Convention*, which provides that producers of phonograms enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. The Court of Appeal found that this argument failed on the basis that “the *Rome Convention* defines ‘phonograms’ as any exclusively aural fixation of sounds (Article 3, paragraph (b)), and that . . . a ‘fixation of images (e.g., cinema) or of images and sounds (e.g., television) [is] therefore excluded’” (para. 13).
5. Finally, the Court of Appeal considered the appellant’s argument that live-to-air broadcasts are not communications to the public of a “cinematographic work” as that term is defined in s. 2 of the Act and can therefore be the subject of a tariff, but declined to allow the application for judicial review on this “limited ground”, pointing out that this argument had neither been raised in the notice of application nor been brought to the Board’s attention. There were therefore no grounds for reviewing the Board’s decision on that basis.
6. The Court of Appeal accordingly dismissed the application for judicial review.

III. Analysis

A. *Issues*

1. The main issue in this appeal involves the application of well-known principles of statutory interpretation. The question this Court must resolve is the following: Do pre-existing sound recordings incorporated into a soundtrack fall within the meaning of the undefined term “soundtrack” used in the definition of “sound recording” in s. 2 of the Act? In other words, in view of the fact that only a “sound recording” can be the subject of a tariff under s. 19, can the reproduction of a pre-existing sound recording that is part of a soundtrack of a cinematographic work be the subject of a tariff when the soundtrack accompanies the cinematographic work?
2. For the reasons that follow, I conclude that, irrespective of the standard of review, the Board was correct in its interpretation of the word “soundtrack”. Consequently, a pre-existing sound recording that is part of a soundtrack cannot be the subject of a tariff when the soundtrack accompanies the cinematographic work.

B. *Standard of Review*

1. There is no need to discuss the standard of review. The result of this appeal does not depend on which of the two standards is applied, because, in any event, the Board’s decision was correct.

C. *Legislative Scheme*

1. Under s. 19 of the Act, the appellant is entitled to collect equitable remuneration on behalf of performers and makers of sound recordings when their recordings are performed in public or communicated to the public by telecommunication. The right to collect these royalties was added to the Act in 1997 as part of a package of “neighbouring rights” in sound recordings which can be distinguished from traditional copyrights held by creators of musical works such as composers and lyricists (S.C. 1997, c. 24). These new neighbouring rights were introduced by Parliament to comply with Canada’s obligations under the *Rome Convention*. In addition to Article 12 of the *Rome Convention*, which establishes the right to equitable remuneration where a published phonogram “is used directly for broadcasting or for any communication to the public”, Article 10 provides that “[p]roducers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms.”
2. As I mentioned above, the right to collect royalties on behalf of performers and makers of sound recordings, although provided for in s. 19, is dependent on the definition of “sound recording” in s. 2 of the Act. This definition has a bearing on the limits of the right. Unless what is being performed or communicated to the public by telecommunication is a “sound recording”, the right to collect royalties on that performance or communication will not be triggered.
3. The relevant sections of the Act read:

**2.** In this Act,

. . .

“sound recording” means a recording, fixed in any material form, consisting of sounds, whether or not of a performance of a work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work;

. . .

**19.** (1) Where a sound recording has been published, the performer and maker are entitled, subject to section 20, to be paid equitable remuneration for its performance in public or its communication to the public by telecommunication, except for any retransmission.

(2) For the purpose of providing the remuneration mentioned in subsection (1), a person who performs a published sound recording in public or communicates it to the public by telecommunication is liable to pay royalties

(*a*) in the case of a sound recording of a musical work, to the collective society authorized under Part VII to collect them; . . .

1. As I noted above, the word “soundtrack” used in the definition of “sound recording” is not defined.

D. *Statutory Interpretation*

1. This Court has reiterated on many occasions that the object of statutory interpretation is to establish Parliament’s intent by reading the words of the provisions in question in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).
2. Although statutes may be interpreted purposively, the interpretation must nevertheless be consistent with the words chosen by Parliament. Moreover, the legislative history can be of great assistance in discerning Parliament’s intent with respect to a particular wording in a statute.
3. In the instant case, the statutory interpretation process must begin with the words of s. 2.
4. According to s. 2, a “sound recording” is a recording consisting of sounds, “but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work”. Therefore, a “soundtrack” is a “sound recording” except where it accompanies the motion picture. Otherwise, the exclusion would be superfluous.
5. When it accompanies the motion picture, therefore, the recording of sounds that constitutes a soundtrack does not fall within the definition of “sound recording” and does not trigger the application of s. 19. A pre-existing sound recording is made up of recorded sounds. The Act does not specify that a pre-existing recording of “sounds” that accompanies a motion picture cannot be a “soundtrack” within the meaning of s. 2. In my view, a pre-existing sound recording cannot be excluded from the meaning of “soundtrack” unless Parliament expressed an intention to do so in the Act. It could have done this by, for example, excluding only “the aggregate of sounds in a soundtrack”.
6. The legislative history confirms this interpretation.
7. In its decision in the case at bar, the Board referred to some instructive comments made at the Standing Committee on Canadian Heritage hearing with respect to the provisions at issue. It quoted these comments and summarized their importance as follows (at para. 36):

. . . the definition of “sound recording” was amended at the Committee stage so as to ensure that while a soundtrack would not be a sound recording and therefore would not attract equitable remuneration when accompanying a movie or television program, the soundtrack would be a sound recording and would attract equitable remuneration when it was played separate from the movie or program. The following comments made at the Standing Committee on Canadian Heritage hearing are instructive:

Mr. Abbott [M.P.]: [. . .] As [the bill] stands at present, a soundtrack that is now available on a CD would not qualify for rights. Is that right?

Mr. Bouchard [Heritage]: As it is now.

Mr. Abbott: However, the addition of the words “where it accompanies” would then qualify it for neighbouring rights. Is that correct?

Ms. Katz: Yes, that’s correct.

[. . .]

Mr. Richstone [Justice]:

I’d just like to point out that, as you see in the bill, you have the words “integral part”. That raises a lot of concern on a technical level with a lot of people. What is the integral part? Is that integral part. . .? Are you going to apply a conceptual test, or are you going to apply a physical test?

Often the soundtrack of a film is not physically an integral part of the film if it’s played at the same time. So the word that is chosen is “accompanies”. You find that word in U.S. legislation and in other Commonwealth legislation.

When the soundtrack accompanies a cinematographic work, it is a part of the cinematographic work. When it doesn’t accompany a cinematographic work — i.e., it is separately marketed, sold, exploited, performed, whatever, as a sound recording — then it’s protected as a sound recording. [Emphasis deleted; text in brackets in original.]

1. These comments confirm that the word “accompanies” qualifies a soundtrack on a CD for remuneration under s. 19, whereas such a soundtrack would not otherwise attract remuneration under that section. It is difficult to imagine that the comment regarding “a soundtrack that is now available on a CD” might concern a CD containing “the entire collection of sounds accompanying the movie as a whole”, which is the interpretation of “soundtrack” the appellant urges this Court to adopt. If the appellant’s interpretation is correct, the CD in question would have to include not only the pre-existing recordings, but also all the dialogue, sound effects, ambient music and noises in the motion picture. It could not contain only the pre-existing sound recordings used in the movie.
2. The appellant’s interpretation must be rejected.

E. *Comparative Law and International Rules*

1. The appellant argues that support for its position can be found in foreign jurisprudence. In actual fact, the foreign jurisprudence makes it clear that significant differences exist between Canadian copyright legislation and the foreign legislation on which those decisions are based.
2. The U.K. *Copyright Act, 1956*, c. 74, contains a definition for “sound recording” that is fundamentally different from the definition in the Canadian Act. The relevant portion of s. 12(9) reads,

In this Act “sound recording” means the aggregate of the sounds embodied in, and capable of being reproduced by means of, a record of any description, other than a sound-track associated with a cinematograph film;

1. The Australian *Copyright Act* *1968*, No. 63, defines “sound recording” as “the aggregate of the sounds embodied in a record” (s. 10). “Cinematograph film” is defined as

the aggregate of the visual images embodied in an article or thing so as to be capable by the use of that article or thing . . . and includes the aggregate of the sounds embodied in a sound-track associated with such visual images; [s. 10]

1. These definitions — unlike the one in the Canadian Act — include the concept of an “aggregate” of sounds. The distinction between the Canadian and foreign legislation is clear enough to discount any persuasive value that the cases in which this concept was applied might otherwise have had.
2. The decision the appellant relies on most heavily is that of the High Court of Australia in *Phonographic Performance Co. of Australia Ltd. v. Federation of Australian Commercial Television Stations*, [1998] HCA 39, 195 C.L.R. 158. In that case, the court was faced with a similar issue. The court held, on the basis of the definitions in the Australian Act, that “[w]hat the Act deems not to be a sound recording is the aggregate of sounds that is recorded in a particular form: a sound-track” (para. 22 (emphasis added)). However, the legislation in question in that case was different and, what is more, the court was deeply divided on the issue, with two judges dissenting.
3. In the case at bar, the appellant’s arguments are substantially the same as the ones advanced in the Australian case, and it asks this Court to reach the same conclusion as the majority of the High Court of Australia. However, that case is not a precedent that this Court is required to follow, nor is it compelling here. As the Court of Appeal noted in the instant case, the foreign cases the appellant relies on are of no assistance and serve only to highlight the differences in the legislation.
4. The appellant also argues that the Act is incompatible with the *Rome Convention*.
5. As I mentioned above, the *Rome Convention* provides that “[p]roducers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms” (Article 10). The appellant submits that producers of soundtracks would be denied this right if a pre-existing sound recording is deemed to be a soundtrack and that the effect of the Court of Appeal’s interpretation is therefore that the Act is in breach of the *Rome Convention*.
6. The appellant is overlooking Article 3 of the *Rome Convention*, which defines a “phonogram” as “any exclusively aural fixation of sounds of a performance or of other sounds”. Thus, excluding a soundtrack from the definition of “sound recording” where the soundtrack accompanies the cinematographic work is consistent with the *Rome Convention*, since this exclusion is not for “exclusively aural fixation[s]”.
7. Contrary to the appellant’s assertion, a “ripped” (reproduced) recording of a pre-existing sound recording that accompanies a motion picture would be subject to copyright. As the Court of Appeal pointed out, once a pre-existing sound recording is extracted from a soundtrack accompanying a cinematographic work, it once again attracts the protection offered for sound recordings. There is therefore no violation of the *Rome Convention*.
8. As this Court noted in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324: “. . . where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations” (p. 1371). In the case at bar, the Board’s interpretation is consonant with Canada’s obligations under the *Rome Convention*.

IV. Conclusion

1. The Board made no error in finding that the word “soundtrack” includes pre-existing sound recordings and that such recordings are accordingly excluded from the definition of “sound recording” when they accompany a cinematographic work. This interpretation of the word “soundtrack” is consistent with the scheme of the Act, the intention of Parliament and Canada’s international obligations. Contrary to the appellant’s suggestion, it does not lead to absurd results.
2. For these reasons, the appeal is dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant:  Osler, Hoskin & Harcourt, Toronto.

Solicitors for the respondent the Motion Picture Theatre Associations of Canada:  McMillan, Toronto.

Solicitors for the respondents Rogers Communications Inc., Shaw Communications Inc., Bell ExpressVu LLP, Cogeco Cable Inc., EastLink, Quebecor Media and TELUS Communications Company:  Fasken Martineau DuMoulin, Ottawa.

Solicitors for the respondent the Canadian Association of Broadcasters:  Hayes eLaw, Toronto.

Solicitors for the respondent the Canadian Broadcasting Corporation:  Fasken Martineau DuMoulin, Montréal.

Solicitor for the intervener:  University of Ottawa, Ottawa.