File No. 39222

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

YORK UNIVERSITY

Appellant
(Appellant)

- and -

THE CANADIAN COPYRIGHT LICENSING AGENCY ("ACCESS COPYRIGHT")

Respondent
(Respondent)

FACTUM OF THE APPELLANT, YORK UNIVERSITY

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – CONCISE OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal concerns whether copying of course materials ***within*** the Guidelines that York University adopted for the benefit of its more than 50,000 students would constitute "fair dealing" for educational purposes under the *Copyright Act*.[1] That is the question posed by the declaration York sought by way of counterclaim in these proceedings. This appeal does ***not*** concern whether York would succeed in a defence to a copyright infringement action, nor whether all copying at York constitutes fair dealing.

2. While the courts below answered this question in the negative, they made a substantive legal error that reflects a deep misunderstanding of the fundamental principles of the law of fair dealing and failed to confine their analyses within the procedural context of York's declaratory counterclaim.

3. With respect to the substantive error, the courts below erroneously treated the educational context of the dealings as irrelevant to their assessment and weighing of the fairness factors. Having made this error, the courts below assessed the dealings from the University's perspective rather than, as they ought to have done, from the perspective of the ultimate user, the student. The Federal Court of Appeal failed to follow this Court's jurisprudence, dismissing portions of this Court's judgment in *SOCAN* as being *per incuriam* and rejecting this Court's instruction about the appropriate student-user perspective in *Alberta (Education)* as irrelevant.

4. The courts below characterized York's assertion of its students' fair dealing rights as simply an attempt to get for free that for which it has previously paid. However, this characterization is based on a fundamental error about the nature of users' rights. There is nothing wrong with obtaining "for free" something that never should have been paid for in the first place. The lower courts further erred by conflating the fairness factors.

5. With respect to the procedural context, the courts below focused on the extent to which copying at York was in fact compliant with its Fair Dealing Guidelines. But that was

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[1] *Copyright Act*, R.S.C., 1985, c. C-42, s. 29.

outside the scope of—and irrelevant to—the issue before the courts in this declaratory counterclaim. York sought a declaration that ***copying*** in accordance with the Guidelines ***would constitute fair dealing***. In that procedural context, the focus of the courts below on actual copying practices was erroneous.

6. Fair dealing is a user's right that seeks to strike a balance between the interests of copyright owners and users. This balance is essential to ensure that copyright law fulfills its main purpose: encouraging ***both*** the creation ***and*** the dissemination of knowledge. It is a balance that is especially important in the educational environment, and critically so at the university level where professors are charged with the mission of exposing thousands of students—the users—to myriad sources of knowledge and points of view.

7. An over-expansive view of copyright protection, as the courts below adopted, compromises the University's capacity to fulfil its purpose as set out in *The York University Act*,[2] and undermines the ability of copyright law to achieve its purpose to promote ***both*** the creation ***and*** dissemination of knowledge.

B. Background

8. York University ("**York**") is the third largest university in Canada. It consists of 11 faculties providing undergraduate, graduate, and professional programs and courses taught primarily at two campuses in Toronto. At the time of trial, York had over 3,000 full and part-time faculty and over 51,000 students per year (or over 45,000 full-time equivalent students, as not all students carry a full course load).[3]

9. The statutory objects and purposes of York are: (a) "the advancement of learning and the dissemination of knowledge"; and (b) "the intellectual, spiritual, social, moral and physical development of its members and the betterment of society."[4]

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2 *The York University Act, 1965*, 13-14 Eliz. II, 1965, s. 4.

3 *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669, [2018] 2 F.C.R. 43 ("**Trial Reasons**"), paras. 37-42: Appellant's Record ("**A.R.**"), Part I, Tab 2, pp. 18-19.

4 *The York University Act, 1965*, 13-14 Eliz. II, 1965, s. 4.

10. The Canadian Copyright Licensing Agency ("**Access Copyright**") is a collective society under the *Copyright Act*, which administers the reproduction rights of copyright owners in published literary works. Access Copyright does not provide access to content but merely offers licences to copy published works obtained from somewhere else.[5]

11. Access Copyright does not own the copyright to the works in its repertoire, nor does it possess exclusive rights to license the reproduction rights to those works. The actual copyright owners (*e.g.*, creators or publishers) may continue to grant permissions and licences to users without the involvement of Access Copyright. Those licences may overlap, as the same publications may be available from different content providers.[6]

C. Procedural Context

12. Access Copyright sued York in Federal Court to enforce an "interim tariff" of the Copyright Board of Canada for copying by post-secondary educational institutions. The Federal Court of Appeal dismissed Access Copyright's action. The Access Copyright tariffs are neither mandatory nor enforceable as against York.[7] That issue is raised in Access Copyright's appeal to this Court, which York will address in its factum in that appeal.

13. Access Copyright's action to enforce the interim tariff was ***not*** an action for copyright infringement. Access Copyright cannot sue for infringement under its agreements with its members.[8] However, Access Copyright pleaded in its tariff enforceability action that copying under York's "Fair Dealing Guidelines for York Faculty and Staff (11/13/12)" (the

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5 Trial Reasons, paras. 30, 33, 35, 180-182: A.R., Part I, Tab 2, pp. 16-17, 60.

6 Trial Transcript dated May 16, 2016, Cross-Examination of Roanie Levy at 132, lines 11-17; 136, lines 16-20: Federal Court of Appeal Record filed pursuant to Rule 38.1 of the *Rules of the Supreme Court of Canada* ("**FCA Record**"), Amended Appeal Book – Electronic Version ("**Elect. Vers.**"), Tab 221, pp. E-72640, E-72644; Trial Transcript dated May 27, 2016, Evidence of Catherine Davidson at 1223, lines 2-17: FCA Record, Elect. Vers., Tab 228, p. E-73730.

7 *York University v. Copyright Licensing Agency*, 2020 FCA 77, 448 D.L.R. (4th) 456 ("**FCA Decision**"), paras. 10, 206, 238: A.R., Part I, Tab 4, pp. 134-135, 203, 215.

8 FCA Decision, para. 205: A.R., Part I, Tab 4, p. 203.

"**Fair Dealing Guidelines**" or "**Guidelines**") did not constitute fair dealing and was thus not exempted from the application of the interim tariff.[9]

14. This appeal relates to York's counterclaim, in which York sought a declaration that "any reproductions made ***that fall within the guidelines*** set out in York's [Fair Dealing Guidelines] […] constitute fair dealing" under the *Copyright Act*.[10] The declaratory relief sought by York is not in relation to all of the copying activities at York, but rather only copying within the Guidelines.

15. The Federal Court bifurcated the issues in the action and counterclaim into two phases (Phases I and II). Both this appeal and Access Copyright's appeal arise from Phase I, which addressed essentially whether the interim tariff was enforceable or voluntary, and whether to declare that copying within the Fair Dealing Guidelines constitutes fair dealing. All other issues would be addressed (if necessary) at a Phase II trial, including amounts owing to the extent the interim tariff is enforceable.[11]

D. York's Fair Dealing Guidelines

16. York's Fair Dealing Guidelines provide direction to York's teaching and other staff on how fair dealing—an integral user's right under the *Copyright Act*—applies to the copying of short excerpts for students.[12]

17. The Fair Dealing Guidelines specify that only "**Short Excerpts**" may be copied, in paper or electronic form, for the purpose of education. The thresholds for a "Short Excerpt" are defined as: 10% or less of a copyright protected work, or no more than: (a) one chapter from a book; (b) a single article from a periodical; (c) an entire artistic work from a work containing other artistic works; (d) an entire newspaper article or page; (e) an entire single

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9 Amended Statement of Claim filed April 5, 2016, paras. 26-29: FCA Record, Amended Appeal Book – Book of Essential Documents ("**B.E.D.**"), Tab 6, p. 196.

10 Amended Statement of Defence and Counterclaim filed April 8, 2016, para. 25(a)(iii) (emphasis added): FCA Record, B.E.D., Tab 9, p. 280.

11 Order of Case Management Judge Aalto dated May 9, 2016: FCA Record, B.E.D., Tab 14, pp. 308-311.

12 "Fair Dealing Guidelines for York Faculty and Staff (11/13/12)" dated November 13, 2012, reproduced in the Trial Reasons, Schedule A: A.R., Part I, Tab 2, pp. 105-107.

poem or musical score from a work containing other poems or musical scores; or (f) an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work, whichever is greater. In addition, the Guidelines specify that a Short Excerpt "must contain no more of the Work than is required in order to achieve the fair dealing purpose."[13]

18. Only a single copy of a Short Excerpt may be provided or communicated to each student as a class handout, through a learning management system ("**LMS**"), or as part of a coursepack (defined below). Where the Fair Dealing Guidelines allow the copying of only a portion of a work, the instructor or other staff may not make copies of multiple Short Excerpts with the effect of exceeding the copying thresholds.[14]

E. The Fair Dealing Guidelines Were Designed to Assist Members of the University Community to Understand and Apply this Court's Jurisprudence

19. York's Fair Dealing Guidelines are based on the fair dealing policy of the Association of Universities and Colleges of Canada ("**AUCC**", now Universities Canada). AUCC adopted a fair dealing policy for university education in 2004 to give effect to this Court's decision in *CCH Canadian Ltd. v. Law Society of Upper Canada* ("***CCH***").[15] AUCC later revised its fair dealing policy in 2012 to reflect this Court's decision in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* ("***Alberta (Education)***")[16] and the passage of the *Copyright Modernization Act*, S.C. 2012, c. 20.[17]

20. York's Fair Dealing Guidelines are substantively identical to the 2012 version of the AUCC fair dealing policy, other than being tailored to the York community.[18]

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13 Trial Reasons, Schedule A, Background and paras. 1, 2-3: A.R., Part I, Tab 2, pp. 105-106.

14 Trial Reasons, Schedule A, paras. 4, 7: A.R., Part I, Tab 2, p. 106.

15 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339.

16 *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345.

17 FCA Decision, para. 12: A.R., Part I, Tab 4, p. 135; Trial Reasons, paras. 173, 175-176: A.R., Part I, Tab 2, pp. 58-59.

18 Trial Reasons, para. 178: A.R., Part I, Tab 2, pp. 59-60.

21. The AUCC developed its fair dealing policy through external legal counsel to be fair, balanced, and consistent with the policies being developed for community colleges and K-12 (primary and secondary) schools across the country. Balance was essential for the AUCC as the universities that make up the AUCC represent both creators and users of copyrighted materials.[19]

F. Modern Course Materials Are More than Just Textbooks

22. Students continue to purchase textbooks for their courses at York.[20] But as the trial judge found, "the days of one principal textbook used to teach a course are gone."[21] Particularly in advanced courses, instructors often provide students with copies of additional course material, which may include journal articles, newspaper articles, portions from collections of works, encyclopaedia, music, and other published materials.[22]

23. The additional course material is typically provided to students through printed compilations of course materials ("**coursepacks**") or online through an LMS.[23] An LMS is a software platform with various functions to facilitate learning, including an ability for the instructor to post digital copies of course materials.[24]

G. The Fair Dealing Guidelines Are Only One Aspect of Copyright Management in the Educational Context

24. Not everything distributed to students results from copying under the Fair Dealing Guidelines. York also pays for materials through various licences and other means to manage copyright. As the trial judge recognized, "much of the other material used for teaching is

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19 Trial Transcript dated May 30, 2016, Evidence of Christine Tausig-Ford at 1453, Line 16 to 1458, line 9: FCA Record, Elect. Vers., Tab 229, pp. E-73960 *et seq*. See also Trial Reasons, para. 187: A.R., Part I, Tab 2, p. 62.

20 See *e.g.*, Trial Transcript dated May 19, 2016, Evidence of Prof. Paul Delaney at 582, lines 4-28: FCA Record, Elect. Vers., Tab 224, p. E-73090; Trial Transcript dated May 25, 2016, Evidence of Prof. Marcel Martel at 853, line 9 to 855, line 27: FCA Record, Elect. Vers., Tab 226, pp. E-73360 *et seq*.; Trial Transcript dated May 30, 2016, Evidence of Prof. Ann Porter at 1348, line 22 to 1350, line 12: FCA Record, Elect. Vers., Tab 229, pp. E-73855 *et seq*.

21 Trial Reasons, paras. 46, 326: A.R., Part I, Tab 2, pp. 20, 96.

22 Trial Reasons, paras. 45, 326: A.R., Part I, Tab 2, pp. 19-20, 96.

23 Trial Reasons, para. 47: A.R., Part I, Tab 2, p. 20.

24 Trial Reasons, para. 54: A.R., Part I, Tab 2, pp. 21-22.

licensed to York's various libraries by authors, publishers, [performing rights societies], and other libraries."[25] "Access to electronic resources by York is generally by way of licences from publishers and subscriptions to databases. The licences and subscriptions may be indirectly acquired through library consortia or directly acquired by York."[26]

25. York spends approximately $11 million per year on physical and electronic acquisitions, including over $8 million for access to electronic resources. York's library licences provide access rights to a vast number of works—including more than 750,000 e-book and e-periodical titles in 2013—and rights to use those works in a variety of ways.[27]

26. For printed coursepacks, York's Copyright Clearance Centre (the "**Clearance Centre**") typically manages copyright. If the instructor went through the Clearance Centre, the process was for the instructor to provide details of the materials for the coursepack, and the Clearance Centre determined the licence status, obtained transactional licences where necessary, or contacted copyright owners or copyright licensing organizations to obtain any necessary permissions.[28]

27. Instructors may also order coursepacks from external print shops that are licensed by Access Copyright. Those authorized print shops pay Access Copyright where applicable or obtain transactional licences for works not in Access Copyright's repertoire. The print shops invoice York directly, and students pay for the coursepacks through the bookstore.[29]

28. In 2013, the total number of print and digital exposures (pages) received by individual students at York from coursepacks and LMS was on average 360 exposures

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25 Trial Reasons, para. 46: A.R., Part I, Tab 2, p. 20.

26 Trial Reasons, para. 182: A.R., Part I, Tab 2, p. 60.

27 Trial Transcript dated May 25, 2016, Evidence of Catherine Davidson at 919, lines 7-23; 942, line 1 to 943, line 21; 952, lines 9-20: FCA Record, Elect. Vers., Tab 226, pp. E-73426, E-73449 *et seq*., E-73459; Trial Transcript dated June 1, 2016, Evidence of Craig Olsvik at 1797, line 1 to 1814, line 18: FCA Record, Elect. Vers., Tab 231, pp. E-74304 *et seq*.; Trial Transcript dated May 31, 2016, Evidence of Louis Mirando at 1567, line 19 to 1574, line 11: FCA Record, Elect. Vers., Tab 230, pp. E- 74074 *et seq*.

28 Trial Reasons, paras. 51-52: A.R., Part I, Tab 2, p. 21.

29 Trial Reasons, paras. 49, 52: A.R., Part I, Tab 2, pp. 20-21. Trial Transcript dated May 17, 2016, Evidence of Patricia Lynch at 318, line 25 to 320, line 25: FCA Record, Elect. Vers., Tab 222, pp. E-72826 *et seq*.

(pages) of copied works.[30] This is the total per full-time equivalent student, which means that it includes licensed copying for which York pays or has a permission, and copies for which royalties were paid to Access Copyright by licensed copy shops. Although there were evidentiary issues at trial proving the extent of licensed copying at York, there was no dispute that Access Copyright was paid royalties for coursepacks produced for York by copy shops licensed by Access Copyright.[31]

H. The Federal Court Decision

29. The trial judge found that York's dealings met the first part of the test for fair dealing established by this Court in *CCH*. Under the first part of the test, there was no dispute that the copying was done for a statutorily allowable purpose, namely, education.[32] Under the second part of the test (the "**fairness analysis**"), the trial judge concluded that York's Fair Dealing Guidelines are "not fair in either their terms or their application."[33]

30. The trial judge rejected any consideration of the educational context as part of the fairness analysis, holding that this stage of the analysis "does not incorporate considerations of 'education' as being 'fair' or of education being part of the fairness factor assessment."[34]

31. The trial judge assessed the fairness analysis from the perspective of both the University (as the institutional copier) and also students (as the ultimate users of copies), but relied most heavily on the institution's perspective. According to the trial judge, "the copying and the Guidelines serve York's interests and the interests of its faculty and students," which factored against York because copying was not done "for others" like in the *CCH* case.[35]

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30 FCA Decision, paras. 248, 258: A.R., Part I, Tab 4, pp. 218-219, 221-222. Report of Benoit Gauthier dated April 3, 2016, Table 4.1, p. 43 (Exposures per FTE in 2013): FCA Record, Supplemental Appeal Book—Electronic Version ("**Supp. Elect. Vers.**"), Tab 100, p. E-51096B. See also Trial Reasons, para. 98: A.R., Part I, Tab 2, p. 35.

31 Trial Reasons, paras. 52, 91, 98, 287: A.R., Part I, Tab 2, pp. 21, 32, 35, 87-88. Report of Benoit Gauthier, *ibid*., para. 22: FCA Report, Supp. Elect. Vers., Tab 100, p. E-B51062.

32 Trial Reasons, paras. 15, 267: A.R., Part I, Tab 2, pp. 13, 83.

33 Trial Reasons, paras. 14, 356: A.R., Part I, Tab 2, pp. 11-12, 104.

34 Trial Reasons, para. 256: A.R., Part I, Tab 2, p. 80.

35 Trial Reasons, para. 260: A.R., Part I, Tab 2, p. 80.

32. Based on his analysis, the trial judge commented that it "is evident that York created the Guidelines and operated under them primarily to obtain for free that which they had previously paid for."[36] He also discounted the thresholds in the Guidelines as "arbitrary."[37]

33. Further, the trial judge relied extensively on certain evidence of non-compliance with the Guidelines, including the five professors identified specifically by Access Copyright in its claim, and faulted York for not having implemented specific safeguards to monitor compliance by faculty and staff.[38] This was notwithstanding that York was not sued for copyright infringement but rather sought a declaration that copying within its Guidelines would be fair dealing. The trial judge declined to grant such relief and dismissed York's counterclaim.[39]

I. The Federal Court of Appeal Decision

34. The Federal Court of Appeal upheld York's defence against Access Copyright's tariff enforceability action, but it dismissed York's appeal regarding the counterclaim.[40]

35. The Federal Court of Appeal reached the same conclusion as the trial judge on fair dealing, but for different reasons on certain fairness factors. Like the trial judge, the Federal Court of Appeal treated the educational context as irrelevant to the analysis of the fairness factors, but it went further holding that the "Federal Court fell into palpable and overriding error in importing education as an 'allowable purpose' into its analysis of the 'goal' of the dealing."[41]

36. Regarding the appropriate perspective, the Federal Court of Appeal held that "[i]n the case of an institutional claim of fair dealing based on general practice, it is the institution's perspective that matters."[42]

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36 Trial Reasons, para. 272: A.R., Part I, Tab 2, p. 85.
37 Trial Reasons, paras. 20-21, 309: A.R., Part I, Tab 2, pp. 14, 92.
38 Trial Reasons, paras. 48, 58, 77-78, 94, 116-118, 262, 266: A.R., Part I, Tab 2, pp. 20, 22, 28, 32, 43, 81-82.
39 Trial Reasons, paras. 264, 356: A.R., Part I, Tab 2, pp. 82, 104.
40 FCA Decision, paras. 206, 312: A.R., Part I, Tab 4, pp. 203, 237.
41 FCA Decision, para. 241: A.R., Part I, Tab 4, p. 216.
42 FCA Decision, para. 238: A.R., Part I, Tab 4, p. 215.

37. According to the Federal Court of Appeal, this Court's decisions regarding the appropriate perspective were "inconsistent."[43] The Federal Court of Appeal relied on *CCH* and held that this Court had "reviewed the question of fair dealing from the perspective of the Great Library" (*i.e.*, the institutional copier, not the user).[44] However, this Court said in *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* ("***SOCAN***") that "[t]he Court [in *CCH*] did not focus its inquiry on the library's perspective, but on that of the ultimate user, the lawyers, whose purpose was legal research."[45]

38. The Federal Court of Appeal purported to resolve the supposed inconsistency by discounting *SOCAN* as "*per incuriam.*" On that basis, the Federal Court of Appeal declined to follow it:

> [227] […] ***With respect, I am of the view that the Court's [i.e., the Supreme Court of Canada's] characterization of this element of the analysis in* CCH *was* per incuriam.**

39. Based on this understanding of the legal framework, the Federal Court of Appeal deferred to the trial judge's comment that York as an institution was attempting to obtain copying "for free," and that the thresholds in the Guidelines were unexplained other than York's emphasis on the purpose of education.[46]

40. The Federal Court of Appeal found errors in the Trial Reasons, such as taking into account aggregate copying again under the "amount of the dealing" factor (thus conflating fairness factors). But the Federal Court of Appeal categorized the errors as inconsequential and concluded there was no "palpable and overriding error in applying them to the facts."[47]

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43 FCA Decision, para. 225: A.R., Part I, Tab 4, p. 210.
44 FCA Decision, paras. 222, 225: A.R., Part I, Tab 4, pp. 209-210.
45 *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 29.
46 FCA Decision, paras. 240, 281: A.R., Part I, Tab 4, pp. 216, 228.
47 FCA Decision, paras. 259, 262, 279, 312: A.R., Part I, Tab 4, pp. 222-223, 227-228, 237.

41. The Federal Court of Appeal also held that the lack of "compliance monitoring" at York "tends to show unfairness" of the Fair Dealing Guidelines, and that it was incumbent on York to ensure that its Guidelines were implemented according to their intent.[48]

PART II – QUESTIONS IN ISSUE

42. ***Substantive Error*:** Did the courts below err by failing to apply the fairness factors from the student's perspective in light of the educational purpose of the dealings? **Yes.** The courts below erroneously applied the fairness factors from the institutional perspective through a commercial lens. As a result of this error, the courts below misconstrued the fairness factors and failed to apply this Court's jurisprudence:

(a) *"Purpose of the dealing"*: The courts below treated York as if it were a commercial enterprise trying to copy "for free" rather than applying this Court's jurisprudence and treating York as an educational institution asserting the users' rights of its students, taking into account the significant social, cultural and economic benefits of university education;

(b) *"Amount of the dealing"*: The courts below gave no weight to the importance and utility of clear thresholds in giving practical effect to the users' rights of students in the educational context; and,

(c) *"Character of the dealing"*: The courts below exaggerated the scale of the copying by assessing it in the aggregate rather than from the perspective of what each student-user received and by ignoring the social benefits of disseminating knowledge to students.

43. The trial judge compounded the above substantive error by reapplying the same concerns under multiple fairness factors, thereby conflating the factors.

44. ***Procedural Error*:** Did the courts below err by focusing on compliance and safeguards akin to an action for copyright infringement? **Yes.** These issues were legally

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[48] FCA Decision, para. 239: A.R., Part I, Tab 4, pp. 215-216.

irrelevant given the specific declaration sought in York's counterclaim, which sought guidance from the court as to whether copying within the Guidelines constitutes fair dealing.

PART III – STATEMENT OF ARGUMENT

A. The Standard of Review Is Correctness

45. Although "fairness" is a question of fact and impression,[49] the conclusions of the courts below were tainted by extricable legal errors reviewable on the standard of correctness.[50]

46. The substantive failure of the courts below to assess fairness from the student's perspective in light of the legally prescribed educational purpose reflects a legal error applying the fairness factors. The procedural error is also a legal error reviewable for correctness. This Court is entitled to conduct its own assessment of the evidence to correct findings of fact or mixed fact and law that are traceable to errors in the characterization of the legal standard.[51]

47. The sections that follow address the substantive and procedural errors, and then address how the courts should have analyzed the Guidelines under the appropriate legal framework.

B. *Substantive Error*: The Courts Below Failed to Apply the Fairness Factors from the Student's Perspective through the Proper Educational Lens

48. The courts below misconstrued the fair dealing analysis established by this Court. Fair dealing is a ***user's*** right granted by Parliament under ss. 29, 29.1 and 29.2 of the *Copyright Act* to counterbalance the exclusive rights of copyright owners.[52] The use of copyrighted works amounts to "fair dealing"—and not copyright infringement—where:

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49 *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345, para. 37.

50 *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, paras. 8, 31.

51 *Housen*, *ibid.*, paras. 33, 51; *R. v. Grant*, 2015 SCC 9, [2015] 1 S.C.R. 475, paras. 55-56.

52 *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 11.

Step 1: the dealing is for an allowable purpose under the *Copyright Act* (*e.g.*, education, research, or private study); and,

Step 2: the dealing is "fair" based on six non-exhaustive factors: (i) the purpose of the dealing; (ii) the character of the dealing; (iii) the amount of the dealing; (iv) alternatives to the dealing; (v) the nature of the work; and (vi) the effect of the dealing on the work. These factors are not necessarily of equal weight and do not necessarily arise in every fair dealing case.[53]

49. Fair dealing is more than an "exception" to copyright infringement. As a user's right, fair dealing is "properly understood as an integral part of the *Copyright Act*" and "must not be interpreted restrictively."[54]

50. Educational fair dealing maintains a balance between: (a) the student's right to access works and advance the public interest through education; and (b) the owner's interest in protecting their copyrighted works.[55] Access and protection "must be sensitively balanced in order to achieve th[e] goal" of a "robustly cultured and intellectual public domain."[56] As one author aptly puts it, "there is no separating the centrality of copyright from the essence of higher education."[57]

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53 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, paras. 50, 53-60; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345, para. 12.

54 *CCH*, *ibid.*, para. 48.

55 *CCH*, *ibid*, paras. 48, 70. See also *Canadian Copyright Licensing Agency (Access Copyright) v. British Columbia (Education)*, 2017 FCA 16, 148 C.P.R. (4th) 13, paras. 47-48; Myra Tawfik, "History in the Balance: Copyright and Access to Knowledge" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010), pp. 84-85 [Book of Authorities of the Appellant, York University ("**BOA**"), Tab 6].

56 *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, paras. 10-11. See also Myra J. Tawfik, "The Supreme Court of Canada and the 'Fair dealing Trilogy': Elaborating a Doctrine of User Rights under Canadian Copyright Law" (2013) 51 Alta. L. Rev. 191, p. 198.

57 Jacob H. Rooksby, "Copyright in Higher Education: A Review of Modern Scholarship" (2016) Duq. L. Rev. 197, p. 198 [BOA, Tab 5].

51. In *CCH*, this Court recognized that dealings even if for an allowable purpose may be more or less fair than others so that, for example, research done for a commercial purpose may not be as fair as research done for charitable purposes.[58] It follows from this that the fairness factors must be weighed and balanced in light of the particular allowable purpose of the dealing.

52. However, the courts below failed to follow this approach and in fact expressly rejected any consideration of York's educational purpose in their fairness analysis. The trial judge held: "Having established an allowable purpose [education], the Court must turn to the second step in the analysis, which ***does not*** incorporate considerations […] of education being part of the fairness factor assessment."[59] The Federal Court of Appeal affirmed this legal error in its own analysis of fair dealing.[60]

53. Moreover, educational fair dealing must be assessed from the *student's perspective.* Ignoring the educational context led the courts below to assess fair dealing from the incorrect institutional perspective through an incorrect commercial lens. To reach this conclusion, the Federal Court of Appeal dismissed this Court's direction to undertake the analysis from the user's perspective as *per incuriam*. The Federal Court of Appeal also dismissed the relevance of this Court's teachings in *Alberta (Education)* about the centrality of the student's perspective in assessing fair dealing on the basis that it was not a "guidelines case."[61]

54. This overriding error caused the courts below to misconstrue three fairness factors: (i) "purpose of the dealing"; (ii) "amount of the dealing"; and (iii) "character of the dealing."

(1) *Student's Perspective*: Fair Dealing Rights Belong to the Student

55. Fair dealing is a user's right possessed by the ultimate user—in this case, belonging to the students who use works to support their education.[62] As a user's right, fair dealing

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58 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, para. 54.
59 Trial Reasons, para. 256 (emphasis added). See para. 313: A.R., Part I, Tab 2, pp. 80, 93.
60 FCA Decision, para. 241: A.R., Part I, Tab 4, p. 216.
61 FCA Decision, paras. 232-233: A.R., Part I, Tab 4, pp. 213-214.
62 *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 29.

must be assessed from the perspective of the ultimate user.[63] This is particularly important in the educational context where students' fair dealing rights are typically realized with the support of their instructors who choose their course materials. Instructors and students share a "symbiotic purpose" in the educational context.[64]

56. Ignoring the context, the courts below assessed fairness predominately from the perspective of York as the institutional copier, as opposed to the perspective of the students who possess the right. The trial judge purported to address one of the fairness factors ("purpose of the dealing") from the dual perspective of the university and students, but primarily focused on the institution's perspective.[65] The Federal Court of Appeal went further, rejecting this Court's jurisprudence as *per incuriam* and holding that "it is the institution's perspective that matters" in cases involving fair dealing guidelines adopted by a university.[66]

57. This legal error is significant, as it caused the courts below to assess the dealings at York predominately in the aggregate at an institutional-level, as opposed to the individual student-level. This incorrect perspective caused the courts below to assess York's "purpose of the dealing" in commercial terms; to assess the "amount of the dealing" factor on a collective as opposed to individual basis; and to characterize the volume of the copying at York under the "character of the dealing" factor as "massive" and "unfair."[67]

58. This Court unanimously held in *SOCAN* that the "predominant perspective […] is that of the ultimate users."[68] *SOCAN* had similarities to this case, as a collective society had challenged the practices of persons who were facilitating the ultimate users to exercise their

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63 *SOCAN*, *ibid*., paras. 34, 41.

64 *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345, para. 23.

65 FCA Decision, paras. 238, 256: A.R., Part I, Tab 4, pp. 215, 221; Trial Reasons, paras. 17, 264, 296-298, 324: A.R., Part I, Tab 2, pp. 13, 82, 90, 96.

66 FCA Decision, para. 238: A.R., Part I, Tab 4, p. 215.

67 *E.g.*, FCA Decision, paras. 240, 256, 298: A.R., Part I, Tab 4, pp. 216, 221, 233; Trial Reasons, paras. 17, 272, 286, 296-298, 311, 324, 344, 352: A.R., Part I, Tab 2, pp. 13, 85, 87, 90, 93, 96, 100, 103.

68 *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 34.

fair dealing rights. In that case, commercial online music services (the facilitators) selling music downloads allowed consumers (the ultimate users) to listen to free "previews" of those works for research purposes. This Court held that fairness must be assessed from the perspective of the consumers who actually possessed the fair dealing rights, not from the perspective of the facilitator of those rights.[69]

59. *SOCAN* built on this Court's prior decision in *CCH*, which also approached fair dealing from the perspective of the ultimate user.[70] In that case, publishers challenged the policies of the Great Library, which offered not-for-profit photocopying services to lawyers and others conducting legal research, including as part of carrying on the business of law for profit. As stated in *SOCAN*, *CCH* "did not focus its inquiry on the library's perspective, but on that of the ultimate user, the lawyers, whose purpose was legal research."[71]

60. The Federal Court of Appeal declined to follow this jurisprudence, rejecting *SOCAN* as "***per incuriam***" on the basis that *CCH* actually "reviewed the question of fair dealing from the perspective of the Great Library."[72] *Per incuriam* means "through lack of care" or "in ignorance or forgetfulness of a statute or binding authority."[73] Other appellate courts have held that it is not open to them to characterize this Court's jurisprudence as *per incuriam*.[74]

61. *SOCAN* was not decided *per incuriam*. Although *CCH* was less express about perspective than *SOCAN*, the Court's analysis in *CCH* focused on whether the library's

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69 *SOCAN*, *ibid*., paras. 3, 28-29, 34, 41,

70 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, paras. 64-73.

71 *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 29.

72 FCA Decision, paras. 222, 225-227: A.R., Part I, Tab 4, pp. 209-211.

73 *R. v. Lee*, 2012 ABCA 17, 58 Alta. L.R. (5th) 30, para. 75; *R. v. Neves*, 2005 MBCA 112, [2005] M.J. No. 210, para. 77.

74 *Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 267, 436 D.L.R. (4th) 330, para. 28; *H.L. v. Canada (Attorney General)*, 2003 SKCA 78, 230 D.L.R. (4th) 735, para. 12. See *R. v. Caron*, 2014 ABCA 71, 92 Alta. L.R. (5th) 306, para. 83.

dealings were fair from the perspective of the ultimate users (lawyers) who had the allowable research purpose.[75] The library's dealings were in furtherance of the lawyer's user rights.[76]

62. More fundamentally, analytical coherence requires that users' rights be assessed from the perspective of the user who holds the right, as this Court confirmed in *SOCAN*.[77] Assessing fairness from any other perspective fails to respect that fair dealing rights belong to the user. Such a conceptual disconnect cannot be reconciled with the nature of the right.

63. There is one circumstance where the perspective of an institutional copier may be relevant within the fairness analysis, but this is more of a colourability analysis than an exception. As this Court held in *Alberta (Education)*, if "the copier hides behind the shield of the user's allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair, that separate purpose will also be relevant to the fairness analysis."[78] This may arise where a third-party commercial copier has a demonstrably ulterior motive.[79]

64. There is no colourability issue in this case, as both York and its students have the same purpose of education.[80] This is similar to *Alberta (Education)*, where Access Copyright challenged the fair dealing status of certain photocopying practices of teachers in primary and secondary schools. This Court held that "[t]eachers have no ulterior motive when providing copies to students" and the "teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study."[81]

65. Moreover, approaching educational fair dealing from the institution's perspective would not be fair to students at larger institutions. From an institutional perspective, the

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75 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, paras. 64-73.

76 *CCH*, *ibid*., para. 64.

77 *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 41. See also *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345, para. 22.

78 *Alberta (Education)*, *ibid.*, para. 22.

79 *Alberta (Education)*, *ibid.*, para. 20.

80 Trial Reasons, paras. 15, 267: A.R., Part I, Tab 2, pp. 13, 83.

81 *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345, para. 23.

aggregate number of all students' copies will be larger or smaller depending on the size of the institution. This means that the same use for students at a smaller school may be "fair," but at a larger school, it may be "unfair." This is contrary to institutional-neutrality, which this Court should recognize as central to copyright law similar to technological neutrality.[82]

66. The Federal Court of Appeal recognized this disparity but left it unaddressed, commenting that "York's argument that using aggregate numbers in this way invariably will work against larger institutions as compared to smaller institutions. There is something to this though the jurisprudence does not provide much guidance as to how to deal with it."[83]

67. With respect, that is incorrect: the clear solution is to approach fair dealing from the perspective of the ultimate user, as this Court directed in *CCH*, *SOCAN*, and *Alberta (Education)*. The student perspective is institution-neutral and ensures that the right is not unduly constrained.

(2) *Educational Context*: The Educational Context Must Be Considered throughout the Fair Dealing Analysis

68. The student perspective must be assessed through a proper educational lens. The courts below instead adopted an institutional perspective and assessed it through a commercial lens, essentially treating York as being motivated by commercial considerations.[84] This overlooks that the beneficiaries of the Guidelines are students, and that York is required to devote its resources to achieving its statutory objects: the advancement of learning, the dissemination of knowledge, the development of its members, and the betterment of society.[85]

69. Like fair dealing generally, educational fair dealing must be applied contextually to account for the purpose for which the right was granted. The allowable purpose of education at Step 1 of the analysis is not just a box to check and then ignore in the fairness assessment

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82 See *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, paras. 47, 51.
83 FCA Decision, para. 256: A.R., Part I, Tab 4, p. 221.
84 *E.g.*, Trial Reasons, paras. 24, 119, 272: A.R., Part I, Tab 2, pp. 15, 43, 85.
85 *The York University Act, 1965*, 13-14 Eliz. II, 1965, ss. 4, 21.

at Step 2. Using works for an allowable purpose may be more or less fair depending on the context.[86]

70. The university context is special, if not unique within the fairness analysis at Step 2, given that copyright law and higher education share the same objectives of both creating and disseminating knowledge.[87] The "educational context must enjoy a special place within the legal framework," as "[f]acilitating and encouraging education is a core value within the copyright paradigm."[88]

71. Learning and education have been integral to copyright since the first true copyright statute: the *Statute of Anne* of 1710, also known as *An Act for the Encouragement of Learning*, *etc.*[89] Copyright legislation "emerged out of Enlightenment ideas about the benefits of learning and the diffusion of knowledge."[90] This governing purpose of copyright has been recognized internationally for more than a century, as "the advancement of education was recognized as part of international [copyright] policy from the inception of the Berne Convention in 1886."[91]

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86 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, paras. 54, 56.

87 Jacob H. Rooksby, "Copyright in Higher Education: A Review of Modern Scholarship" (2016) Duq. L. Rev. 197, p. 198 [BOA, Tab 5]; *CCH*, *ibid.*, para. 23. See also *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, paras. 30-31.

88 Myra J. Tawfik, "The Supreme Court of Canada and the 'Fair dealing Trilogy': Elaborating a Doctrine of User Rights under Canadian Copyright Law" (2013) 51 Alta. L. Rev. 191, p. 199.

89 *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned*, 8 Anne c. 19. See Grégory Lancop, "L'utilisation équitable existe-t-elle toujours?" (2019) Université de Montréal (online), pp. 6-11.

90 Myra J. Tawfik, "History in the Balance: Copyright and Access to Knowledge" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010), p. 84. See also p. 86 [BOA, Tab 6].

91 Myra J. Tawfik, "The Supreme Court of Canada and the 'Fair Dealing Trilogy': Elaborating a Doctrine of User Rights under Canadian Copyright Law" (2013) 51 Alta. L. Rev. 191, p. 199. See also *Copyright Act 1911*, U.K. 1911 c. 46, s. 2(a)(iv).

72. This Court last addressed educational fair dealing before the *Copyright Modernization Act* came into force in 2012.[92] The *Modernization Act* added "education" as a distinct allowable purpose for fair dealing (adding to "private study," "research," *etc*.).[93] The goal was to amend the *Copyright Act* "to allow educators and students to make greater use of copyright material" and "to make greater use of copyright material in digital form."[94] Parliament also recognized that "limitations on [the exclusive rights of copyright owners] exist to further enhance users' access to copyright works or other subject-matter."[95]

73. The *Modernization Act* adjusted the balance between owners' and users' rights to better reflect modern education in the digital age. As expressed during the debates in the House of Commons, Parliament intended to "improve the educational environment, giving Canadians the opportunity to learn in innovative and dynamic environments" and to "reduce the costs for fair uses of copyrighted materials in a structured educational context."[96] Parliament recognized that "uses of copyrighted material by educational institutions serve the public good" and "could have important economic, societal and cultural benefits."[97]

74. The legislative history of the *Modernization Act* demonstrates that:

(a) The addition of "education" as an allowable purpose was intended to ***expand*** fair dealing rights to provide students with greater use of copyrighted materials. This is reflected throughout the Parliamentary debates[98] and in the *Modernization Act* itself (in the preliminary Summary);

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92 *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345.

93 S.C. 2012, c. 20, s. 21 (the "***Modernization Act***").

94 *Modernization Act*, Summary, paras. (c), (d).

95 *Modernization Act*, Preamble.

96 *House of Commons Debates*, vol. 146, No. 76, 1st Sess., 41st Parl., February 8, 2012, p. 5034 (Mike Lake, Parliamentary Secretary to the Minister of Industry).

97 *House of Commons Debates*, vol. 146, No. 76, 1st Sess., 41st Parl., February 8, 2012, p. 5034 (Mike Lake, Parliamentary Secretary to the Minister of Industry).

98 See *e.g.*, *House of Commons Debates*, vol. 146, No. 76, 1st Sess., 41st Parl., February 8, 2012, p. 5034 (Mike Lake, Parliamentary Secretary to the Minister of Industry); *House of Commons Debates*, vol. 146, no. 123, 1st Sess., 41st Parl., May 14, 2012, p. 7991 (Robert Goguen, Parliamentary Secretary to the Minister of Justice); *House of Commons*

(b) Parliament recognized that expanding fair dealing would reduce the costs for students and educators;[99] and,

(c) The underlying reason for expanding access by students, as part of the balance that Parliament struck, was to advance the significant social benefits of education, including by allowing educators and students to adopt new and emerging technologies for the public good.[100]

75. Combined with this Court's copyright pentalogy of 2012,[101] the *Modernization Act* sent the "unmistakeable and clear" message that users' rights in the educational context "are now firmly entrenched as core principles in Canadian copyright law, and the central policy tool to realize this principle is fair dealing."[102]

76. The fairness factors must therefore be weighed together in light of this historical and legislative context and the purposes underlying the statutory grant of fair dealing rights to students. The fairness analysis must reflect the economic, societal, and cultural benefits of

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Debates, vol. 146, No. 124, 1st Sess., 41st Parl., May 15, 2012, p. 8086 (Andrew Saxton, Parliamentary Secretary to the President of the Treasury Board and for Western Economic Diversification); *House of Commons Debates*, vol. 146, No. 76, 1st Sess., 41st Parl., February 8, 2012, p. 5036 (Parm Gill).

99 See *e.g.*, *House of Commons Debates*, vol. 146, No. 76, 1st Sess., 41st Parl., February 8, 2012, p. 5034 (Mike Lake, Parliamentary Secretary to the Minister of Industry); *House of Commons Debates*, vol. 146, No. 34, 1st Sess., 41st Parl., October 21, 2011, p. 2329 (John McCallum, Opposition).

100 See *e.g.*, *House of Commons Debates*, vol. 146, No. 76, 1st Sess., 41st Parl., February 8, 2012, p. 5034 (Mike Lake, Parliamentary Secretary to the Minister of Industry). See also *House of Commons Debates*, vol. 146, No. 124, 1st Sess., 41st Parl., May 15, 2012 (Part A), pp. 8099-8100 (Mike Lake); Debates of the Senate, vol. 148, No. 94, 1st Sess., 41st Parl., June 20, 2012, p. 2219 (Senator Stephen Greene).

101 *E.g.*, *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 29.

102 Samuel E. Trosow, "Fair Dealing Practices in the Post-Secondary Education Sector after the Pentalogy" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013), p. 213 [BOA, Tab 8].

disseminating knowledge through university education, which is reflected in this Court's jurisprudence:

(a) Justice La Forest wrote in *McKinney v. University of Guelph* that "[e]xcellence in our educational institutions, and specifically in our universities, is vital to our society and has important implications for all of us," including "our continuance as a lively democracy."[103]

(b) Justice Wilson added in *McKinney* that "[t]he promotion of higher learning and the provision of access to opportunities for study at this [university] level is clearly in the public interest" and "an important public function." Universities are essential "in the education of our young people" and "more generally in the advancement and free exchange of ideas in our society."[104]

77. The importance of education "is known and understood by all informed citizens."[105] This is reflected in the literature. For example, Justice Iacobucci wrote in *Taking Public Education Seriously* (with Professor Tuohy) that "Public Universities are central pillars of successful societies."[106] Post-secondary education in Canada has been linked to "the creation of a healthier population […], greater social involvement, citizen engagement, a better overall quality of life, and a larger tax base due to higher incomes."[107] Empirical studies also link education to reduced criminal activity, reduced reliance on social welfare programs, improved intergenerational outcomes, and improved civic participation and volunteerism.[108]

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[103] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, pp. 286-287. See also *R. v. Jones*, [1986] 2 S.C.R. 284, p. 299.

[104] *McKinney*, *ibid*., p. 379 (dissenting). See also *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, p. 612.

[105] *R. v. Jones*, [1986] 2 S.C.R. 284, p. 299.

[106] Frank Iacobucci & Carolyn Tuohy, "Introduction" in Frank Iacobucci & Carolyn Tuohy, eds., *Taking Public Universities Seriously* (Toronto: University of Toronto Press, 2005), p. xi [BOA, Tab 2].

[107] Andrea Rounce, "Investing in Manitoba's Future: Post-Secondary Education Between 1999 and 2013" (2013) 36:2 Manitoba L.J. 225, p. 227.

[108] W. Craig. Riddell, "The Social Benefits of Education: New Evidence on an Old Question" in Frank Iacobucci & Carolyn Tuohy, eds., *Taking Public Universities Seriously* (Toronto: University of Toronto Press, 2005), pp. 148-159 [BOA, Tab 4].

(3) Impact of the Error on the Fairness Factors

(i) *"Purpose of the Dealing":* The Courts Below Misconstrued York's Purpose in Commercial Terms

78. The failure to account for the university context caused the courts below to misconstrue York's "purpose of the dealing" as an institution in commercial terms. The trial judge stated that York was attempting to obtain "for free" what it had previously paid for under Access Copyright licences.[109] This was not a finding of fact entitled to deference.[110] The comment reflects that the trial judge misapplied the fair dealing jurisprudence and ignored the university context.

79. Legally, it was irrelevant that York could have paid for a licence. This Court held in *CCH* that the "availability of a licence is not relevant to deciding whether a dealing has been fair."[111] The irrelevance of this factor goes to the core of fair dealing: "If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the *Copyright Act*'s balance between owner's rights and user's interests."[112]

80. The trial judge's reasoning was circular, as he assumed that the copying that York "previously paid for" under Access Copyright licences was not fair dealing.[113] If the copying was fair dealing, then there was never an obligation to obtain a licence, and the decision not to continue paying is irrelevant to the fairness analysis. There is nothing inappropriate about obtaining "for free" something that never should have been paid for in the first place.

81. Contrary to the trial judge's approach, it is also legally irrelevant whether the AUCC consulted with publishers or Access Copyright when developing the AUCC's fair dealing

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109 Trial Reasons, paras. 24-25, 173, 272-273, 337: A.R., Part I, Tab 2, pp. 15, 58, 85, 99.
110 *Contra* FCA Decision, para. 240: A.R., Part I, Tab 4, p. 216.
111 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, para. 70.
112 *CCH*, *ibid*., para. 70.
113 Trial Reasons, para. 272: A.R., Part I, Tab 2, p. 85.

policy upon which York's Fair Dealing Guidelines are based.[114] The Court can draw no conclusions regarding fairness from the fact that the stakeholders have divergent interests.

82. The trial judge's characterization of York's purpose also ignored the broader context of university education. As Professors Lisa Macklem and Samuel Trosow have noted:

> [T]his characterization [of York's purpose to obtain copying "for free" which it had previously paid for] is flawed for a number of reasons. First, keeping costs down for students actually allows them to buy more materials for classes, including textbooks. Students' tuition also goes towards paying for library databases, library books, and journals. In addition, tuition also goes towards food, housing, and recreational facilities that ensure students' mental and physical wellness. All of these reasons factor into the university's primary public interest of providing educated citizens for a healthy, well-functioning democracy.[115]

83. It is important to be clear on why many universities paid for unnecessary or duplicative licences, particularly prior to the clarification and expansion of the law of fair dealing in 2012. This was in part the result of undue risk aversion, overreach by content owners, concerns about litigation costs if sued, and "a general deference to a permissions culture" (*i.e.*, seeking permissions that are not legally necessary to avoid a lawsuit for copyright infringement).[116]

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[114] Trial Reasons, paras. 177, 307: A.R., Part I, Tab 2, pp. 59, 92.

[115] Lisa Macklem & Samuel Trosow, "Fair Dealing, Online Teaching and Technological Neutrality: Lessons From the COVID-19 Crisis" (2020) 32 I.P.J. 215, p. 238 [BOA, Tab 3].

[116] Samuel E. Trosow, "Fair Dealing Practices in the Post-Secondary Education Sector after the Pentalogy" in Michael Geist, ed., *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013), p. 215 [BOA, Tab 8]; Samuel E. Trosow, "Bill C-32 and the Educational Sector: Overcoming Impediments to Fair Dealing" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010), pp. 542-549 [BOA, Tab 7]; Bita Amani, "Access Copyright and the Proposed Model Copyright License Agreement" (2012) 24 I.P.J. 221, pp. 232-233 [BOA, Tab 1]. See also Lisa Di Valentino, "Awareness and Perception of Copyright Among Teaching Faculty at Canadian Universities" (2015) 10(2) FIMS Publications 37, p. 4.

84. Canadian universities have in the past been more risk averse about invoking the fair dealing rights of their students than universities in the United States.[117] The evidence at trial was that many universities viewed their Access Copyright licence as an "insurance agreement" that they paid "to keep from being sued by Access Copyright."[118] But as Professor Trosow has commented, "[t]his situation is not conducive to achieving the fair dealing policies that are justified under the current state of Canadian law, and they present harmful barriers to teaching, learning and research."[119]

85. There is nothing inappropriate about Canadian universities advancing the fair dealing rights of their students through fair dealing guidelines. Underuse of fair dealing at universities "increases the direct financial costs to students" and "discourages the full and proper utilization of existing knowledge resources."[120] Universities must "focus their efforts and budgets on meeting their core goals of teaching, education, and research," and this includes fostering students' fair dealing rights "to provide as rich as possible an array of ideas and knowledge for their students, faculty, and researchers."[121]

86. In any event, York is not obtaining all copying "for free". In addition to relying on fair dealing, among other things, York spends over $8 million for access and usage rights for electronic resources.[122]

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[117] Lisa Di Valentino, "Comparison of Fair Dealing and Fair Use in Education Post-Pentalogy" (2013) FIMS Working Papers 3, pp. 26-32, 35-37.

[118] Trial Transcript dated May 31, 2016, Evidence of Christine Tausig-Ford at 1541, line 25 to 1542, line 2: FCA Record, Elect. Vers., Tab 230, pp. E-74048 *et seq*.

[119] Samuel E. Trosow, "Fair Dealing Practices in the Post-Secondary Education Sector after the Pentalogy" in Michael Geist, ed., *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013), p. 215 [BOA, Tab 8].

[120] Samuel E. Trosow, "Bill C-32 and the Educational Sector: Overcoming Impediments to Fair Dealing" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Irwin Law, 2010), p. 549 [BOA, Tab 7].

[121] Sarah Wilkinson, "Justifying the Unjustifiable: *Canadian Copyright Licensing Agency ("Access Copyright") v. York University*" (2019) 31 I.P.J. 187, pp. 215-216 [BOA, Tab 9].

[122] Trial Transcript dated May 25, 2016, Evidence of Catherine Davidson at 919, lines 7-23;942, line 1 to 943, line 21; 952, lines 9-20: FCA Record, Elect. Vers., Tab 226, pp.

(ii) *"Amount of the Dealing"*: Clear Thresholds Are Essential in the University Context

87. Again ignoring the educational context, the courts below considered the copying thresholds in York's Fair Dealing Guidelines to be "arbitrary" or not justified.[123] This misconstrued the "amount of the dealing" factor, which addresses "the proportion of the excerpt used in relation to the whole work."[124]

88. Clear thresholds are an appropriate, if not essential, tool to allow instructors to select short excerpts from copyrighted materials for each of the thousands of courses at a university. Instructors require workable thresholds to ensure that the users' rights of their students are actualized in a practical manner within a safe harbour consistent with the law of fair dealing.

89. It would be impractical for York's faculty and staff to ascertain on a case-by-case basis whether each selection made by each instructor for each course constituted fair dealing. The bright-line thresholds for Short Excerpts in the Guidelines provide a safe harbour for instructors without requiring them to, on their own, attempt to rebalance the *CCH* fairness factors each time they give effect to students' rights. As the Federal Court of Appeal held in another case, "[t]here is much to be said" for the "adoption of a bright-line rule" in the copyright context.[125] Lack of guidance creates barriers to exercising the right, which is inconsistent with its purpose.

90. The Fair Dealing Guidelines address the university context through the definition of Short Excerpt, which sets thresholds consistent with this Court's fair dealing jurisprudence:

E-73426, E-73449 *et seq*., E-73459; Trial Transcript dated June 1, 2016, Evidence of Craig Olsvik at 1797, line 1 to 1814, line 18: FCA Record, Elect. Vers., Tab 231, pp. E-74304 *et seq*.

123 Trial Reasons, paras. 20, 306-308: A.R., Part I, Tab 2, pp. 14, 92; FCA Decision, para. 281: A.R., Part I, Tab 4, p. 228.

124 *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 41. See also *Canadian Copyright Licensing Agency (Access Copyright) v. British Columbia (Education)*, 2017 FCA 16, 148 C.P.R. (4th) 13, paras. 81-83.

125 *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58, 422 D.L.R. (4th) 112, paras. 127-128.

(a) The threshold of 10% or less of a work is consistent with *SOCAN*, where this Court confirmed that 30 second previews of musical works constituted "modest dealing" where the full works were four minutes (this is 12.5%).[126]

(b) The other thresholds are consistent with *CCH*, where this Court held that it was fair dealing in the context of research and private study to routinely honour requests to copy "one case, one article or one statutory reference," and that it "may be possible to deal fairly with a whole work."[127] On this basis, the Fair Dealing Guidelines permit copying in the educational context of one component from a work—*e.g.*, no more than one article from a periodical, one chapter from a book, one poem from a book of poems, *etc.*[128]

91. The trial judge took issue with two specific examples of the application of the thresholds, which he considered arbitrary. First, he raised during closing arguments a hypothetical example of different professors copying different chapters from a book for different courses (the hypothetical example was *Paris 1919: Six Months That Changed the World* by Margaret MacMillan).[129] But this hypothetical does not demonstrate arbitrariness in the thresholds when the students' perspective is properly adopted. Each student only receives a single chapter from the book. Each student's right to deal fairly with the chapter for educational purposes should not be undermined because another student in another course may be learning from another chapter.

92. The trial judge also took issue with the application of the Guidelines to a short story, *The Hockey Sweater*. This work could be reproduced under the thresholds of the Guidelines if copied from an anthology, but not if copied from a standalone publication.[130] Again, this does not demonstrate arbitrariness in the thresholds in the university context. The value of

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[126] *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 39.
[127] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, paras. 56, 68.
[128] Trial Reasons, Schedule A, para. 2: A.R., Part I, Tab 2, pp. 105-106.
[129] See Trial Reasons, para. 311: A.R., Part I, Tab 2, p. 93.
[130] Trial Reasons, para. 311: A.R., Part I, Tab 2, p. 93.

the published anthology is in the collection of works,[131] and using a single part of that collection to learn from is fair dealing.

(iii) *"Character of the Dealing"*: The Volume of Copying is Fair from the Student's Perspective in the Educational Context

93. The "character of the dealing" addresses how the works are dealt with.[132] The courts below addressed the copying at York from an incorrect institutional perspective, resulting in their characterization of the dealing at York as "massive."[133] Focusing on aggregate copying at York would lead to disproportionate findings of unfairness when compared to a smaller institution.[134]

94. The Federal Court of Appeal commented on fairness "in the aggregate or from the point of view of an individual student receiving 360 copies."[135] The "aggregate" aspect of this comment adopts the incorrect institutional perspective, and the per-student aspect fails to account for the university context and appears to misinterpret the evidence.

95. The Federal Court of Appeal's reasons refer interchangeably to "360 exposures" and "360 copies" per student. But these are not equivalents.[136] The actual evidence led by Access Copyright was that students received on average 360 ***exposures*** per year, which means ***pages***—not copies.[137] If the Federal Court of Appeal believed that the evidence was 360 "copies" per student, that could have been a much more significant volume. A single copy of a journal article, for example, could be numerous pages.

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131 See Trial Reasons, para. 334: A.R., Part I, Tab 2, p. 98.

132 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, para. 55.

133 FCA Decision, paras. 256, 298: A.R., Part I, Tab 4, pp. 221, 233; Trial Reasons, paras. 17, 296-298, 324, 344, 352: A.R., Part I, Tab 2, pp. 13, 90, 96, 100, 103.

134 *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 43.

135 FCA Decision, para. 258: A.R., Part I, Tab 4, pp. 221-222.

136 Compare FCA Decision, para. 248, 258: A.R., Part I, Tab 4, pp. 218-219, 221-222.

137 See Report of Benoit Gauthier dated April 3, 2016, Table 4.1 p. 43 (Exposures per FTE in 2013): FCA Report, Supp. Elect. Vers., Tab 100, p. E-51096B. See also Trial Transcript dated May 26, 2016, Evidence of Benoit Gauthier at 1040, line 23 to 1041, line 10 (clarifying "an exposure is one copy of one page"): FCA Record, Elect. Vers., Tab 227, p. E-73547 *et seq*.

96. The 360 pages reflect all copies from all sources—including licensed copies—and are spread over the course load of a full year for a full-time undergraduate student. This is not a significant volume, particularly when viewed in light of the significant benefits of disseminating works for the education of university students. The trial judge described this volume during closing arguments as "just a bad afternoon" in law school.[138] The copying in question is less than the first volume of a Book of Authorities in this Court, spread out between a student's multiple courses during the academic year.[139]

(4) The Courts Below Erroneously Conflated Fairness Factors

97. Assessing factors through an incorrect perspective through a commercial lens led the courts below to find unfairness, and they then compounded that error by reapplying the same concerns multiple times under multiple factors. As this Court held in *Alberta (Education)*, reapplying the same factual concern under two (or more) of the fairness factors conflates those factors and is an error.[140]

98. The Federal Court of Appeal recognized that the trial judge erroneously double counted aggregate copying volume (at York as an institution) under the "character of the dealing" and "amount of the dealing" factors.[141] But the Federal Court of Appeal declined to address this error because it considered it to be "palpable" but "not overriding."[142] This is notwithstanding that the trial judge considered the "amount of the dealing" to be "critical."[143]

99. The approach of the Federal Court of Appeal was erroneous given that this Court has warned that conflating factors has "the effect of erasing proportionality from the fairness

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[138] Trial Transcript dated June 24, 2016, Closing Submissions at 313, lines 14-15: FCA Record, Elect. Vers., Tab 245, p. E-75769.

[139] *Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic)*, January 21, 2021.

[140] *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345, para. 30.

[141] FCA Decision, paras. 259, 262, 279: A.R., Part I, Tab 4, pp. 222-223, 227-228. See also Trial Reasons, paras. 83, 276-286, 296-304, 324, 352: A.R., Part I, Tab 2, pp. 29-30, 85-87, 90-91, 96, 103.

[142] FCA Decision, para. 279: A.R., Part I, Tab 4, pp. 227-228.

[143] Trial Reasons, para. 318: A.R., Part I, Tab 2, p. 94.

analysis."[144] Applying the same factual considerations multiple times skews the balance and overrides the assessment of fairness. *SOCAN* specifically admonished double counting aggregate volume, which is the exact error the trial judge committed in this case.[145]

100. Moreover, the Federal Court of Appeal only addressed one of the many instances where the trial judge conflated factors within the fairness analysis. The trial judge actually reapplied his concern about aggregate copying volume under four of the factors: "character of the dealing," "amount of the dealing," "alternatives to the dealing," and "effect of the dealing on the work."[146] Each of these instances conflated the legal tests for these fairness factors and overweighted aggregate copying within the analysis.

101. The Federal Court of Appeal also overlooked that the trial judge triple counted his concerns with York's safeguards or monitoring of compliance with the Guidelines. Even if safeguards or compliance monitoring were relevant to the fairness analysis in the procedural context of this case (discussed below), the trial judge erroneously reapplied this concern three times: twice within existing fairness factors ("purpose of the dealing" and "amount of the dealing") and another time within a new factor created to add further weight to this.[147]

C. *Procedural Error*: The Courts Below Erroneously Focused on Compliance and Safeguards Issues at York Akin to an Infringement Action

102. It was a procedural error for the courts below to focus on safeguards and compliance issues akin to an action for copyright infringement, which this case was not. Specifically, the courts below faulted York for not having "safeguards," which they considered synonymous with "compliance monitoring."[148] The trial judge also devoted considerable

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144 *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345, para. 30.

145 *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 42. See Trial Reasons, paras. 286, 296-297, 324, 352: A.R., Vol. I, pp. 85, 88, 96, 103.

146 Trial Reasons, paras. 83, 276-286, 296-304, 324, 352: A.R., Part I, Tab 2, pp. 29-30, 85-87, 90-91, 96, 103.

147 Trial Reasons, paras. 28, 266, 314: A.R., Part I, Tab 2, pp. 16, 82, 93-94.

148 *E.g.*, Trial Reasons, paras. 58, 77, 262, 266: A.R., Part I, Tab 1, pp. 22, 28, 81-82; FCA Decision, para. 239: A.R., Part I, Tab 4, pp. 215-216.

attention to the evidence that certain faculty at York may not have complied with the Fair Dealing Guidelines.[149]

103. These considerations are irrelevant to the fair dealing analysis in the procedural context of this case. Access Copyright sued York to enforce its interim tariff, not for copyright infringement. York counterclaimed seeking a declaration to confirm that "any reproductions made that fall within the [Fair Dealing Guidelines] constitute fair dealing pursuant to sections 29, 29.1 or 29.2 of the *Copyright Act*."[150] York sought this declaration to obtain workable guidance for instructors on how to realize students' fair dealing rights.

104. Significantly, the declaration York seeks would ***only apply*** to copying within the Guidelines. To the extent that non-compliant copying occurs at York, it may or may not be fair dealing and the declaration would not preclude a copyright owner from suing York for copyright infringement.

105. This Court granted a similar declaration in *CCH*, which confirmed that copying "in accordance with [the Great Library] 'Access to the Law Policy'" does not infringe copyright.[151] If the Great Library fails to comply with its Access to the Law Policy, it remains exposed to potential liability for infringement if the copying is not fair dealing—the same as York would be following this appeal.

106. It is also important to recognize that copying beyond the thresholds in the Guidelines does not necessarily constitute copyright infringement.[152] Such copying may still be fair dealing, or the copying may be permissible under another provision of the *Copyright Act*. That can be adjudicated and enforced in the ordinary way through an action for copyright infringement brought by the copyright owner.

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149 *E.g.*, Trial Reasons, paras. 78, 94, 116-118: A.R., Part I, Tab 2, pp. 28, 32, 43.

150 Amended Statement of Defence and Counterclaim filed April 8, 2016, para. 25(a)(iii): FCA Record, B.E.D., Tab 9, p. 280.

151 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, para. 90.

152 Trial Reasons, paras. 240, 245: A.R., Part I, Tab 2, pp. 76-77.

107. Safeguards and compliance issues may be relevant in a different type of proceeding: an action for copyright infringement where the defendant relies on a policy or practice to establish that ***all*** of its copying was fair dealing, as is a possible defence according to this Court's decision in *CCH*.[153] However, York never sought such a declaration nor asserted that all of the copying at the University constituted fair dealing.

D. The Fair Dealing Guidelines Are Fair Applying the Correct Framework

108. Given the legal errors identified above, this Court must reweigh the fairness factors to conclude that York's Fair Dealing Guidelines are fair.[154] There is no dispute that the dealing was for an allowable purpose (education) and thus the focus is on the fairness analysis at Step 2 of the fair dealing test.[155] This analysis must be conducted from the perspective of students, reflecting the symbiosis between copyright and higher education, contextually in light of the important economic, societal, and cultural benefits of education.

(1) Purpose of the Dealing

109. For students, the "'real purpose or motive' behind using the copyrighted works" is education.[156] As an educational institution, York has the same purpose.[157] This is not a case where the facilitator of students' user rights has an ulterior commercial purpose colouring the analysis.[158] York is a publicly-supported non-profit educational institution, not a commercial enterprise.

110. The educational purpose weighs heavily towards fairness given the public interests being advanced. Society at large benefits from the dissemination of works at a university.[159]

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153 *E.g.*, *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, paras. 63, 66.
154 *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, para. 33.
155 Trial Reasons, paras. 15, 267: A.R., Part I, Tab 2, pp. 13, 83.
156 *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 33.
157 Trial Reasons, paras. 267, 273, 326: A.R., Part I, Tab 2, pp. 83, 85, 96.
158 *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345, paras. 22-23.
159 *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, pp. 286-287; Frank Iacobucci & Carolyn Tuohy, "Introduction" in Frank Iacobucci & Carolyn Tuohy, eds., *Taking Public Universities Seriously* (Toronto: University of Toronto Press, 2005), p. xi [BOA,

As Professors Macklem and Trosow have observed, university fair dealing guidelines are designed for the "enhancement of student learning, scholarship and research"—all of which have important public policy implications.[160]

(2) Character of the Dealing

111. The character of the dealing under York's Fair Dealing Guidelines also supports an assessment of fairness. The volume set out in the Guidelines is the most critical consideration. The Guidelines permit a "single copy of a short excerpt" to be provided to "each student enrolled in a class or course," and prohibit making multiple Short Excerpts that together exceed the copying limits.[161] The result is one copy per student, exactly like this Court found fair in the educational context in *Alberta (Education)*.[162]

112. If volume beyond that set out in the Guidelines is considered, it must be from the perspective of the ultimate user: students. The fairness of any given volume depends on the context of the allowable purpose identified at Step 1 of the fair dealing analysis: education. Through an educational lens, approximately 360 pages per student spread over a full course load is not a significant volume (and at York, some of that volume is licensed and does not depend on fair dealing). The volume is not significant given the nature of university education and the significant social and cultural benefits of university education.

113. Further, access to digital copies distributed through an LMS terminates once a course is completed, at which time the course page on the LMS is no longer available.[163] This further supports an assessment that copying pursuant to the Fair Dealing Guidelines is fair.[164]

Tab 2]; W. Craig Riddell, "The Social Benefits of Education: New Evidence on an Old Question" in Iacobucci & Tuohy, *ibid.*, pp. 148-159 [BOA, Tab 4].

160 Lisa Macklem & Samuel Trosow, "Fair Dealing, Online Teaching and Technological Neutrality: Lessons From the COVID-19 Crisis" (2020) 32 I.P.J. 215, pp. 243-244 [BOA, Tab 3].

161 Trial Reasons, Schedule A, paras. 4, 7: A.R., Part I, Tab 2, p. 106.

162 *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345, para. 29.

163 Trial Transcript dated May 17, 2016, Evidence of Patricia Lynch at 301, lines 9-18: FCA Record, Elect. Vers., Tab 222, p. E-72809.

164 *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 38.

(3) Amount of the Dealing

114. The "amount of the dealing" measures "the proportion of the excerpt used in relation to the whole work" (not the overall volume, which is addressed under "character of the dealing").[165] The Fair Dealing Guidelines address this factor through the definition of Short Excerpt, which as discussed above is consistent with this Court's fair dealing jurisprudence.

115. For example, copying up to 10% of a work is modest dealing in the university context, given the significant social benefits of disseminating the work to post-secondary students. As this Court held in *CCH*, it "may be possible to deal fairly with a whole work" and "[t]he amount taken may also be more or less fair depending on the purpose."[166] Copying up to 10% or one component of a work for educational purposes advances the shared purposes of copyright and higher education, namely, the dissemination of knowledge and the betterment of Canadian society.

(4) Alternatives to the Dealing

116. There are no viable alternatives to copying within the thresholds of York's Fair Dealing Guidelines, and the availability of a licence from Access Copyright is not legally relevant to the fairness analysis.[167]

117. This factor again must be assessed through an educational lens. The trial judge referenced the purpose of education when addressing alternatives to the dealing, but he discounted the strength of this factor in York's favour because "[t]here is just no reasonable free alternative to the dealing," again reflecting his commercial lens.[168]

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[165] *SOCAN*, *ibid*., para. 41. See also *Canadian Copyright Licensing Agency (Access Copyright) v. British Columbia (Education)*, 2017 FCA 16, 148 C.P.R. (4th) 13, paras. 81-83.

[166] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, para. 56.

[167] *CCH*, *ibid.*, para. 70.

[168] Trial Reasons, para. 330 (emphasis in original). See paras. 326-328: A.R., Part I, Tab 2, pp. 96-97.

118. York professors testified that they would not require students to purchase multiple materials for a single course if copies could not be provided in a coursepack or on LMS.[169] The trial judge accepted the York professors' evidence that "the days of one principal textbook used to teach a course are gone."[170] Assuming the "availability of a core single resource for a course is to potentially limit the educational opportunities of students."[171]

119. As this Court held in *Alberta (Education)*, it is a "demonstrably unrealistic outcome" to require schools or students to buy sufficient copies of every text, magazine, and newspaper that is relied upon by an instructor to supplement the assigned textbook for their courses.[172]

(5) Nature of the Work

120. The nature of the works copied further supports fair dealing, as they necessarily have educational value as determined by the professor or other teaching staff. Wider public dissemination of such works within academia, with attribution, is in the public interest.[173]

(6) Effect of the Dealing on the Work

121. This factor addresses whether the reproduced work is likely to compete with the market for the original work.[174] Like in *Alberta (Education)*, if students could not rely on the Fair Dealing Guidelines for copies, they would simply go without or vie with others for physical access to library copies.[175] The trial judge accepted the York professors' evidence that it is impractical or undesirable to require students to purchase the source material or

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169 See *e.g.*, Trial Transcript dated May 25, 2016, Evidence of Prof. Marcel Martel at 862, lines 6-28: FCA Record, Elect. Vers., Tab 226, p. E-73369; Trial Transcript dated May 30, 2016, Evidence of Prof. Jonathan Warren at 1412, lines 20-28: FCA Record, Elect. Vers., Tab 229, p. E-73919.

170 Trial Reasons, paras. 326: A.R., Part I, Tab 2, p. 96.

171 Trial Reasons, paras. 327: A.R., Part I, Tab 2, p. 97.

172 *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345, para. 32.

173 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, para. 58; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 47.

174 *CCH*, *ibid*., para. 59.

175 *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345, para. 36.

depend on reserve copies in the library.[176] This would put Canadian students at a disadvantage but not affect the market for textbooks or other educational materials.

122. The trial judge stated that York's Fair Dealing Guidelines "caused" material negative impacts on the market, but also stated that the "[p]recise allocation of the amounts [of decreased sales of educational materials] attributable to the Guidelines is not possible."[177] This is similar to *Alberta (Education)*, where this Court held that "other than the bald fact of a decline in sales over 20 years, there is no evidence from Access Copyright demonstrating any link between photocopying short excerpts and the decline in textbook sales."[178] Evidence of correlation is not evidence of causation.

123. Further, the trial judge's "causation" finding was premised on the extricable legal errors discussed above. Specifically, the trial judge erroneously treated the loss of licensing revenue to Access Copyright as an "appropriate surrogate for the nature and quantity of copying and for the negative impacts."[179] As noted, "[t]he availability of a licence is not relevant to deciding whether a dealing has been fair."[180] The trial judge also ignored the educational context, including that Parliament specifically contemplated that expanding educational fair dealing rights would reduce the costs for students.[181]

124. Additionally, there are other explanations for declining revenues for Access Copyright, including the growth in competing library consortia licences for digital materials,

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176 Trial Reasons, para. 344: A.R., Part I, Tab 2, p. 100.
177 Trial Reasons, paras. 351, 353: A.R., Part I, Tab 2, pp. 102-103.
178 *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345, para. 35.
179 Trial Reasons, para. 350: A.R., Part I, Tab 2, p. 102.
180 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, para. 70.
181 *House of Commons Debates*, vol. 146, No. 76, 1st Sess., 41st Parl., February 8, 2012, p. 5034 (Mike Lake, Parliamentary Secretary to the Minister of Industry).

which by the time of trial compensated copyright owners more than $100 million per year.[182] This eclipses Access Copyright's distributions of licensing revenue to copyright owners.[183]

E. York's Fair Dealing Guidelines Provide Reasonable Safeguards

125. Based on the above six factors, copying within York's Fair Dealing Guidelines constitutes fair dealing. As noted, there is no additional requirement for safeguards given the procedural context of this case. In any event, the Guidelines contain reasonable safeguards consistent with this Court's jurisprudence, appropriately tailored for the university environment.

126. The specific safeguards in *CCH* and *SOCAN* addressed the fact that while the copiers/facilitators in those cases did not themselves have an allowable purpose for fair dealing, this Court was nonetheless satisfied that reasonable safeguards were in place to ensure that the dealing was for an allowable fair dealing purpose under the *Copyright Act*.[184] In *CCH*, for example, the Great Library did not itself have a research or private study purpose, but this Court was satisfied that the requirement for lawyers requesting copies to identify the purpose of their request provided reasonable safeguards that the materials would be used for an allowable purpose.[185]

127. These specific types of safeguards are inherent in the university context. The institutional copier (university) and the ultimate users (students) share the same allowable purpose under the *Copyright Act*: education. This is also explicitly part of the Guidelines, as they only permit giving copies to students "enrolled in a class or course."[186]

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[182] Trial Transcript dated June 1, 2016, Evidence of Craig Olsvik at 1797: FCA Record, Elect. Vers., Tab 231, p. E-74304.

[183] See Trial Reasons, para. 112: A.R., Part I, Tab 2, pp. 41-42. See also Jonathan Band & Brandon Butler, "Some Cautionary Tales about Collective Licensing" (2013) 21:3 Mich. St. U. Coll. L. Int'l. L. Rev. 687, p. 695.

[184] *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, para. 35; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, para. 66.

[185] *CCH*, *ibid*., para. 66.

[186] Trial Reasons, Schedule A, para. 4: A.R., Part I, Tab 2, p. 106.

128. Further, York's Fair Dealing Guidelines provide other reasonable safeguards. As noted, the Guidelines are directed to teaching and other staff to provide practical guidance regarding how to apply this Court's fair dealing jurisprudence in the classroom.[187] Providing this guidance is an essential safeguard because copyright literacy cannot be presumed.[188]

129. York also has specific safeguards in place to ensure that course materials on an LMS are only accessible by authorized users, which must agree to follow York's copyright policies before accessing their online course sites.[189] This is in addition to assistance that York provides through its Copyright Support Office to teaching and other staff, including information sessions and assistance with obtaining permissions that may be needed for copying outside of fair dealing or that is not already covered by a licence or permission.[190]

130. York recognizes that there was evidence at trial of copying beyond the thresholds in the Guidelines.[191] York takes this seriously, including because it may give rise to liability in the context of an action for copyright infringement to the extent that the copying is not otherwise permitted under the *Copyright Act*. Nonetheless, the fact remains that the evidence of copying outside the Guidelines is not relevant given the procedural context of this case.

131. Finally, it must be noted that any safeguards at a university must respect the genuine faculty concerns regarding academic freedom,[192] which this Court has recognized as an essential principle.[193] Given the nature and terms of the declaration sought, however, it is

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187 Trial Reasons, Schedule A: A.R., Part I, Tab 2, pp. 105-107.

188 See Lisa Di Valentino, "Awareness and Perception of Copyright Among Teaching Faculty at Canadian Universities" (2015) 10(2) FIMS Publications 37.

189 Trial Reasons, paras. 59-60: A.R., Part I, Tab 2, p. 23.

190 Trial Reasons, paras. 61-62, Schedule A, paras. 8-9: A.R., Part I, Tab 2, pp. 23-24, 106-107.

191 Trial Reasons, para. 48: A.R., Part I, Tab 2, p. 20.

192 See *e.g.*, Trial Transcript dated May 30, 2016, Evidence of Parissa Safai at 1323, line 21 to 1325, line 3: FCA Record, Elect. Vers., Tab 229, p. E-73830 *et seq.*; Trial Transcript dated May 27, 2016, Evidence of Alice Pitt at 1175, line 5 to 1181, line 11; 1178, line 6 to 1179, line 17: FCA Record, Elect. Vers., Tab 228, pp. E-73682 *et seq*.

193 *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, pp. 282, 286-287. See also *Pridgen v. University of Calgary*, 2012 ABCA 139, 350 D.L.R. (4th) 1, para. 113.

not necessary to expound precisely what safeguards or compliance monitoring would be required to establish fair dealing as a defence to an infringement action.[194]

F. Conclusion: Guidance is Needed

132. York seeks this Court's guidance as to the proper scope and nature of fair dealing for educational purposes and as to the role of fair dealing guidelines in the university context. Such guidance will be useful not only to York but to all of Canada's universities—and, more importantly, to their hundreds of thousands of students—who share, as this Court held in *Alberta (Education)*, a "symbiotic purpose" with their teachers.[195]

PART IV – COSTS

133. York seeks costs in this Court and the courts below.

PART V – ORDER SOUGHT

134. York respectfully requests an order:

(i) allowing this appeal with costs in this Court and the courts below;

(ii) setting aside the Federal Court of Appeal judgment in respect of the counterclaim; and,

(iii) granting the declaration sought by York in the counterclaim that "any reproductions made that fall within the guidelines set out in York's 'Fair Dealing Guidelines for York Faculty and Staff (11/13/12)' […] constitute fair dealing pursuant to sections 29, 29.1 or 29.2 of the *Copyright Act*."

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[194] *E.g.*, *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, paras. 63, 66.

[195] *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

135. There is a Confidentiality and Protective Order made in the Federal Court on August 31, 2015 (attached to Form 23A). Confidential information within the Appellant's Record is identified accordingly. However, nothing in this Factum is designated as confidential.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Toronto, February 5, 2021

per John C. Cotter / Barry Fong / W. David Rankin
OSLER, HOSKIN & HARCOURT LLP

per Guy J. Pratte / Nadia Effendi
BORDEN LADNER GERVAIS LLP

Counsel for the Appellant, York University

PART VII – TABLE OF AUTHORITIES

	Statutes	**Paragraph(s) referred to**
1.	*An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned*, 8 Anne c. 19	71
2.	*Copyright Act*, R.S.C., 1985, c. C-42, ss. 29, 29.1, 29.2 *Loi sur le droit d'auteur*, L.R.C. (1985), ch. C-42, art. 29, 29.1, 29.2	1, 10, 14, 16, 48, 49, 72, 79, 103, 106, 126, 127, 130, 134
3.	*Copyright Act 1911*, U.K. 1911 c. 46, s. 2(a)(iv)	71
4.	*Copyright Modernization Act*, S.C. 2012, c. 20, Summary, paras. (c), (d); Preamble; s. 21 *Loi sur la modernisation du droit d'auteur*, L.C. 2012, c. 20, Sommaire, par. (c), (d); Préambule; art. 21	19, 72, 73, 74, 75
5.	*The York University Act, 1965*, 13-14 Eliz. II, 1965, ss. 4, 21	7, 9, 68

	Cases	**Paragraph(s) referred to**
6.	*Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345	3, 19, 45, 48, 53, 55, 62, 63, 64, 67, 72, 75, 97, 99, 109, 111, 119, 121, 122, 132
7.	*Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615	65
8.	*Canadian Copyright Licensing Agency (Access Copyright) v. British Columbia (Education)*, 2017 FCA 16, 148 C.P.R. (4th) 13	50, 87, 114

	Cases	**Paragraph(s) referred to**
9.	*Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58, 422 D.L.R. (4th) 112	89
10.	*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339	19, 29, 31, 37, 38, 48, 49, 50, 51, 59, 60, 61, 67, 69, 79, 89, 90, 93, 105, 107, 115, 116, 120, 121, 123, 126, 131
11.	*Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570	76
12.	*H.L. v. Canada (Attorney General)*, 2003 SKCA 78, 230 D.L.R. (4th) 735	60
13.	*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235	45, 108
14.	*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229	76, 110, 131
15.	*Pridgen v. University of Calgary*, 2012 ABCA 139, 350 D.L.R. (4th) 1	131
16.	*R. v. Caron*, 2014 ABCA 71, 92 Alta. L.R. (5th) 306	60
17.	*R. v. Grant*, 2015 SCC 9, [2015] 1 S.C.R. 475	46
18.	*R. v. Jones*, [1986] 2 S.C.R. 284	76, 77
19.	*R. v. Lee*, 2012 ABCA 17, 58 Alta. L.R. (5th) 30	60
20.	*R. v. Neves*, 2005 MBCA 112, [2005] M.J. No. 210	60

	Cases	**Paragraph(s) referred to**
21.	*Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326	3, 37, 38, 48, 50, 55, 58, 59, 60, 61, 62, 67, 75, 87, 90, 93, 99, 109, 113, 114, 120, 126
22.	*Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336	70
23.	*Trans Mountain Pipeline ULC v. Mivasair*, 2019 BCCA 267, 436 D.L.R. (4th) 330	60

	Doctrine	**Paragraph(s) referred to**
24.	Bita Amani, "Access Copyright and the Proposed Model Copyright License Agreement" (2012) 24 I.P.J. 221	83
25.	Jonathan Band & Brandon Butler, "Some Cautionary Tales about Collective Licensing" (2013) 21:3 Mich. St. U. Coll. L. Int'l. L. Rev. 687	124
26.	Frank Iacobucci & Carolyn Tuohy, "Introduction" in Frank Iacobucci & Carolyn Tuohy, eds., *Taking Public Universities Seriously* (Toronto: University of Toronto Press, 2005)	77, 110
27.	Grégory Lancop, "L'utilisation équitable existe-t-elle toujours?" (2019) Université de Montréal (online)	71
28.	Lisa Macklem & Samuel Trosow, "Fair Dealing, Online Teaching and Technological Neutrality: Lessons From the COVID-19 Crisis" (2020) 32 I.P.J. 215	82, 110
29.	W. Craig Riddell, "The Social Benefits of Education: New Evidence on an Old Question" in Frank Iacobucci & Carolyn Tuohy, eds., *Taking Public Universities Seriously* (Toronto: University of Toronto Press, 2005)	77, 110

	Doctrine	**Paragraph(s) referred to**
30.	Jacob H. Rooksby, "Copyright in Higher Education: A Review of Modern Scholarship" (2016) Duq. L. Rev. 197	50, 70
31.	Andrea Rounce, "Investing in Manitoba's Future: Post-Secondary Education Between 1999 and 2013" (2013) 36:2 Manitoba L.J. 225	77
32.	Myra J. Tawfik, "History in the Balance: Copyright and Access to Knowledge" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010)	50, 71
33.	Myra J. Tawfik, "The Supreme Court of Canada and the 'Fair dealing Trilogy': Elaborating a Doctrine of User Rights under Canadian Copyright Law" (2013) 51 Alta. L. Rev. 191	50, 70, 71
34.	Samuel E. Trosow, "Bill C-32 and the Educational Sector: Overcoming Impediments to Fair Dealing" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010)	83, 85
35.	Samuel E. Trosow, "Fair Dealing Practices in the Post-Secondary Education Sector after the Pentalogy" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013)	75, 83, 84
36.	Lisa Di Valentino, "Awareness and Perception of Copyright Among Teaching Faculty at Canadian Universities" (2015) 10(2) FIMS Publications 37	83, 128
37.	Lisa Di Valentino, "Comparison of Fair Dealing and Fair Use in Education Post-Pentalogy" (2013) FIMS Working Papers 3	84
38.	Sarah Wilkinson, "Justifying the Unjustifiable: *Canadian Copyright Licensing Agency ("Access Copyright") v. York University*" (2019) 31 I.P.J. 187	85

	Hansard	**Paragraph(s) referred to**
39.	*House of Commons Debates*, vol. 146, No. 34, 1st Sess., 41st Parl., October 21, 2011, p. 2329 (John McCallum, Opposition)	74
40.	*House of Commons Debates*, vol. 146, No. 76, 1st Sess., 41st Parl., February 8, 2012, p. 5034 (Mike Lake, Parliamentary Secretary to the Minister of Industry)	73, 74, 123
41.	*House of Commons Debates*, vol. 146, No. 76, 1st Sess., 41st Parl., February 8, 2012, p. 5036 (Parm Gill)	74
42.	*House of Commons Debates*, vol. 146, no. 123, 1st Sess., 41st Parl., May 14, 2012, p. 7991 (Robert Goguen, Parliamentary Secretary to the Minister of Justice)	74
43.	*House of Commons Debates*, vol. 146, No. 124, 1st Sess., 41st Parl., May 15, 2012, p. 8086 (Andrew Saxton, Parliamentary Secretary to the President of the Treasury Board and for Western Economic Diversification)	74
44.	*House of Commons Debates*, vol. 146, No. 124, 1st Sess., 41st Parl., May 15, 2012 (Part A), pp. 8099-8100 (Mike Lake)	74
45.	Debates of the Senate, vol. 148, No. 94, 1st Sess., 41st Parl., June 20, 2012, p. 2219 (Senator Stephen Greene)	74