SCC No. 39222

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

B E T W E E N:

YORK UNIVERSITY

APPELLANT
(Appellant)

- and -

THE CANADIAN COPYRIGHT LICENSING AGENCY ("ACCESS COPYRIGHT")

RESPONDENT
(Respondent)

(Style of Cause continued on following page)

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SOCIÉTÉ QUÉBÉCOISE DE GESTION COLLECTIVE DU DROIT DE REPRODUCTION (COPIBEC); AUTHORS ALLIANCE AND ARIEL KATZ; CANADIAN ASSOCIATION OF LAW LIBRARIES; CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS AND CANADIAN FEDERATION OF STUDENTS; SAMUEL-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC; CENTRE DE DROIT DES AFFAIRES ET DU COMMERCE INTERNATIONAL ET CHAIRE L.R. WILSON SUR LE DROIT DES TECHNOLOGIES DE L'INFORMATION ET DU COMMERCE ÉLECTRONIQUE; SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA; COPYRIGHT COLLECTIVE CANADA; CANADIAN MUSICAL REPRODUCTION RIGHTS AGENTCY LTD., CANADIAN RETRANSMISSION COLLECTIVE, CONNECT MUSIC LICENSING SERVICE INC., AND SOCIÉTÉ COLLECTIVE DE GESTION DES DROITS DES PRODUCTEURS DE PHONOGRAMMES ET DE VIDÉOGRAMMES DU QUÉBEC; CANADIAN MEDIA PRODUCERS ASSOCIATION AND ASSOCIATION QUÉBÉCOISE DE LA PRODUCTION MÉDIATIQUE; INTERNATIONAL AUTHORS FORUM, INTERNATIONAL FEDERATION OF REPRODUCTION RIGHTS ORGANISATIONS, INTERNATIONAL PUBLISHERS ASSOCIATION; ASSOCIATION OF CANADIAN PUBLISHERS, CANADIAN PUBLISHERS' COUNCIL, AND WRITERS' UNION OF CANADA; CANADIAN ASSOCIATION OF RESEARCH LIBRARIES; COPYRIGHT CONSORTIUM OF THE COUNCIL OF MINISTERS OF EDUCATION, CANADA; MUSIC CANADA, CANADIAN MUSIC PUBLISHERS ASSOCIATION, ASSOCIATION QUÉBÉCOISE DE L'INDUSTTIE DU DISQUE, DU SPECTACLE ET DE LA VIDEO, PROFESSIONAL MUSIC PUBLISHERS ASSOCIATION, AND CANADIAN INDEPENDENT MUSIC ASSOCIATION; COLLEGES AND INSTITUTES CANADA; and, UNIVERSITIES CANADA

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PART I – FACTS

Overview

1. The heart of fair dealing is balancing the different objectives of the *Copyright Act*[1]. When evaluating fairness, the trier of fact must look at all the circumstances and ask whether permitting the dealing at issue serves to promote or undermine that balance. York's appeal is not about balance, but rather about serving the interests of a group of mass copiers – universities – at the expense of creators.

2. The courts below concluded that York's "Fair Dealing Guidelines" seriously undermine the balance created by the *Act*, and therefore cannot be fair. It was not a close case.

3. York's Guidelines – and this appeal – are largely directed to the creation of physical and digital "coursepacks," which are collections of excerpts copied from works distributed by York that constitute students' required reading for their courses. York encouraged its faculty to use coursepacks instead of textbooks so its students would not have to buy as many textbooks, and could get "a customized solution on a smaller budget."

4. The trial judge made many findings of fact that established why York's dealing is not fair. To facilitate the creation of coursepacks, the Guidelines permit "systematic and systemic mass copying" of works, often in permanent form. Large portions of works – and often entire works – are copied and incorporated into coursepacks. Most of the copied works come from books. Many of these books are created by professional authors and publishers, who rely on sales and royalties to earn a living. York's copying undermined both the incentive to create works and the creator's just reward, because of its negative effects on licensing income and sales, and, in the long run, the writing and publishing industry.

5. York does not claim any of these facts constitute palpable and overriding errors. Together they are more than enough to establish unfairness, because they show that York's Guidelines do not even attempt to find balance. Rather, as the trial judge found, they were created without consultation with creators and with a view to replacing a long-standing licensing arrangement between universities and Access Copyright. York implemented them expressly for the purpose of

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[1] *Copyright Act*, R.S.C., 1985, c. C-42 (*"Act"*).

saving the fees it paid to Access Copyright under that licensing arrangement, so it could divert the funds to other uses. After implementation, the Guidelines were often exceeded, because York did not try to monitor compliance.

6. Like its Guidelines, York's appeal is not about promoting balance or the purposes of the *Act*. Rather, it is seeking to skew the balance, in two ways. First, it seeks to distance itself from an enormous suite of facts by arguing they come from the "wrong perspective." It advances the legal fiction that York's mass systemic copying is, in fact, just individual students individually choosing what to copy on an *ad hoc* basis. Second, it seeks to magnify the one fact that points to fairness by reinforcing the importance of "education." While these arguments are couched in the language of errors of law, York is really asking this Court for a do-over, hoping it will reach a different result than the courts below.

7. This Court has repeatedly said that fairness is a question of fact, to be decided on the evidence. That includes both the analysis of each factor and how the factors balance against one another. York's arguments are about how much emphasis should be put on different facts. But its argument is inconsistent with the standard of review. What facts to emphasize is a question for the trier of fact.

8. York also alleges a "procedural error" because the trial judge considered York's failure to monitor compliance with its own Guidelines. Again, York simply seeks to distance itself from the trial judge's findings about its multiple failures. This argument lacks merit. Moreover, York cannot raise this point at this Court for the first time, particularly since it both led its own evidence about its compliance record and failed to object to Access Copyright's.

9. Even without evidence of non-compliance, this case is not close. The "student perspective" cannot save York when it copies over 360 pages per student per year. The "importance of education" cannot save York when the effect of its dealing on these educational works is so serious. Arguments about compliance cannot save York when its Guidelines – even if scrupulously complied with – are so unfair. This is not *Alberta*, which involved *ad hoc* copying of 4.5 pages per student per year. The Guidelines are a premeditated effort to engage in mass copying, while depriving creators and publishers of the "just reward" the *Act* is intended to provide. This appeal must therefore be dismissed.

Access Copyright represents creators under the *Copyright Act*

10. Access Copyright is a copyright collective. It administers the reproduction rights of authors, visual artists and publishers throughout Canada (except Quebec). Its role is to license the right to copy works from its repertoire, either through agreements with users or through tariffs set by the Copyright Board.[2]

11. Copyright collectives such as Access Copyright "reduce the transaction costs associated with administering copyright while ensuring that owners (creators) are remunerated for use of their works."[3] In an era of instant mass reproduction and use of copyright-protected works, collectives make licensing straightforward. Collectives therefore advance the public policy objectives of the *Act*: they facilitate the creation and dissemination of works, while seeking a just reward for creators.

12. York's appeal threatens to undermine both the incentive to create new works and the just reward the *Act* provides for creators. Many of the creators affiliated with Access Copyright are professional writers and publishers, who rely on sales of their works (and royalties when they are copied) to earn a livelihood. As the trial judge found, that livelihood is threatened by post-secondary institutions abandoning their copyright licences and implementing fair dealing guidelines that permit mass copying.[4]

York opts out of paying for the copies it is making

13. Access Copyright had a licence agreement with York and other universities from 1994 to 2010.[5] It negotiated that licence through the Association of Universities and Colleges of Canada (AUCC). York's licence permitted it to copy excerpts of Access Copyright's repertoire works. In

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[2] *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669, [2018] 2 F.C.R. 43 ("FC Decision"), paras. 30, 33; *York University v. Copyright Licensing Agency*, 2020 FCA 77, 448 D.L.R. (4th) 456 ("FCA Decision"), para. 5.
[3] FC Decision, para. 109.
[4] FC Decision, paras. 336, 351.
[5] It had similar arrangements with the Association of Canadian Community Colleges for public colleges.

exchange, it paid (in 2010), a fee of $3.38 per full time equivalent student (or "FTE") plus $0.10 per page copied in coursepacks. The effective average annual cost was $38 per FTE.[6]

14. Because it was paying for the right to make use of creators' works, York's licence permitted considerable copying. When preparing print coursepacks, teaching staff could copy the greater of : a) 15% of a published work; or b) an entire article from a newspaper or periodical, an entire story, play, poem or essay from an anthology, an entire entry from a reference work such as a dictionary or encyclopedia and an entire chapter from a book, provided the copied chapter did not exceed 20% of the book.[7]

15. York encouraged faculty and students to use coursepacks because they provide "easy, affordable access to current and classic works." It even advertised that using coursepacks "reduces the need to purchase several textbooks," providing students with a "customized solution on a smaller budget."[8] York's Copyright Clearance Centre ensured that coursepacks complied with the limits on copying provided in its Access Copyright licence.

16. ***The AUCC refuses to negotiate a licence extension.*** Access Copyright's licences with post-secondary institutions were set to expire at the end of 2010. Beginning in 2009, Access Copyright tried to negotiate new agreements with the AUCC. By this time, the practice of universities copying excerpts from published works was rapidly transitioning from paper to digital forms. Advances in technology enabled teachers to copy excerpts and upload or post the copies onto platforms called learning management systems ("LMS"). The teachers who embraced this technology were no longer required to submit their bundles of paper copies of excerpts for copyright clearance and assembly into coursepacks by centralized university clearance and printing facilities.

17. Digital LMS technology made per page charges impractical. Access Copyright's position was that a single per FTE royalty rate, covering copying and use of its repertoire in print and

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[6] FC Decision, paras. 153, 271; FCA Decision, para. 7.
[7] Trial Exhibit P-1, Tab 6, FCA Record, Amended Appeal Book-Electronic Version (**A.B.E.V.**), Tab 21, p. E-129.
[8] Trial Exhibit P-13, A.B.E.V., Tab 47, p. E-4072.

digital formats, would be more workable. However, the AUCC declined to participate in meaningful discussions with Access Copyright on a licence extension.[9]

18. Fearing that the parties would not be able to agree on licence terms, Access Copyright filed its first ever proposed tariff with the Copyright Board in March 2010. It asked the Board to fix the terms and conditions of the permitted copying of works in Access Copyright's repertoire in post-secondary educational institutions. The proposed tariff suggested a blanket $45 per FTE as the royalty rate, for both digital and print copies.[10]

19. By October 2010, it was evident that most, if not all, of the post-secondary institutions were going to let their licences lapse. Accordingly, Access Copyright asked the Copyright Board to set an Interim Tariff that would take effect on January 1, 2011.[11]

20. York initially complied with the Interim Tariff. But a few months later, it notified Access Copyright that, effective September 1, 2011, it would be "opting out." York claimed it no longer needed a licence from Access Copyright since it had either obtained permission to make copies from copyright holders or that the copies fell within the limits of its "Fair Dealing Guidelines."[12]

21. York decided that it neither wanted to pass the costs of the Access Copyright licence fee down to its students,[13] nor absorb those costs itself, in light of its "already tight budgets."[14] The trial judge found, and York does not contest, that its solution to this problem was to replace the Access Copyright licence with its Fair Dealing Guidelines, so it could save the money it had been paying in licence fees.[15]

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[9] Decision of the Copyright Board *Re: Reprographic Reproduction 2011-2013, Interim Statement of Royalties to be collected by Access Copyright (Post-Secondary Educational Institutions)*, 2011, 92 C.P.R. (4th) 434 at paras. 91-92; Evidence of R. Levy at 111 (line 19) to 114 (line 21), A.B.E.V., Tab 221, pp. E-72619 to E-72622.
[10] FC Decision, paras. 163-165, 221; FCA Decision, para. 8.
[11] FC Decision, paras. 221-222, 224; FCA Decision, para. 9.
[12] FC Decision, paras. 168-172; FCA Decision, paras. 10-11.
[13] Evidence of P. Lynch at 305 (line 22) to 306 (line 5), A.B.E.V., Tab 222, pp. E-72813 to E-72814.
[14] Trial Exhibit D-15, Vol. 4 (Tab 145), Amended Appeal Book-Electronic Version (Confidential), **(A.B.E.V.C.)**, Tab 048-40, p. E-7593.
[15] FC Decision, paras. 166-167.

York changes its copying policies to permit even more copying

22. In 2012, York introduced revised Fair Dealing Guidelines that allowed for even more copying. York's Copyright Officer testified that "we developed new fair dealing guidelines that expanded our definition of fair dealing substantially."[16] The new Guidelines – which are at issue in this appeal – closely mimic the terms of both York's former licence with Access Copyright and Access Copyright's proposed tariff.[17] The Guidelines permitted faculty and staff to assemble substantial copied excerpts from many works into print or digital coursepacks. In other words, York was telling its faculty and staff to make the same copies they had made under the licence. But instead of paying royalties to creators, York now claimed it was fair dealing.[18]

23. York's Guidelines were developed using guidance it received from the AUCC. The AUCC developed its model guidelines in collaboration with other educational organizations and after extensive consultations with the university community, but without any consultation with copyright owners, such as writers or publishers. As the trial judge noted "no explanation was ever given for this one-sided consultation process."[19]

24. According to the AUCC, the guidelines were inspired by two sources: the *Copyright Modernization Act*[20] that added "education" to the categories of permissible fair dealing purposes, and this Court's decision in *Alberta*.[21] But a close look at these legal developments shows that neither authorize the kind of copying that the AUCC recommended and York adopted.

25. ***CMA: The AUCC tells Parliament nothing will change.*** The AUCC guidelines were a 180 degree turn from what the AUCC had represented to a Parliamentary Committee about the effect of adding education as an allowable fair dealing purpose. The AUCC's representatives told the committee:

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[16] Evidence of P. Lynch at 367 (lines 22-27), A.B.E.V., Tab 223, p. E-72875.
[17] Expert Report of M. Dobner, para. 33, Trial Exhibit P-97, A.B.E.V., Tab 206, pp. E-71132-3.
[18] FC Decision, paras. 173-174, 272.
[19] FC Decision, paras. 69, 173, 175, 177.
[20] *Copyright Modernization Act*, S.C. 2012, c. 20 ("*CMA*").
[21] *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345 ("*Alberta*").

- it is "**unreasonable to suggest** that [the addition of "education" as an allowable fair dealing purpose] would permit multiple copying under fair dealing of complete journals and journal articles and chapters from books";
- "the proposed amendments to fair dealing would **not undermine the sale of books**, especially textbooks, or the revenue base of copyright collectives";
- adding education to fair dealing will **not "change the revenue going to collectives** such as Access Copyright"; and
- "**[i]t's not about saving money**. What it is about … is allowing certain educational opportunities that right now sometimes don't occur" because of delays in getting clearance that prevent spontaneous use of works.[22]

Shortly after the *CMA* was adopted, the AUCC substantially expanded their fair dealing guidelines, and many institutions abandoned their licences.[23]

26. ***Alberta related to ad hoc copying.*** Similarly, and as the trial judge noted, York's Guidelines were qualitatively and quantitatively different than the dealing this Court narrowly approved in *Alberta*. York's Guidelines encourage the systematic creation of many-hundred-page coursepacks and the equivalent posting of content on LMSs that substitute for textbooks. *Alberta* was about teachers copying a few pages on an *ad hoc* basis, to supplement the main textbook.[24]

27. In contrast, York's coursepacks and the published works posted on LMSs were often the primary or sole resource for the course. The physical or digital coursepacks were often required reading for students, and used in the same way as textbooks or other required books.[25]

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[22] House of Commons Legislative Committee on Bill C-32, 3rd Sess., 40th Parl., February 15, 2011, p. 2 (Paul Davidson, President, AUCC), p. 6 (Steve Wills, Manager, Government Relations and Legal Affairs, AUCC), see also pp. 1, 3-5, 9, 11, Respondent's Book of Authorities (R.B.O.A., Tab 1).
[23] FC Decision, paras. 175-179; FCA Decision, para. 12.
[24] FC Decision, paras. 324, 344; *Alberta*, paras. 7, 32, 36.
[25] Evidence of P. Safai at 1309 (line 15) to 1330 (line 5); and at 1329 (line 6) to 1330 (line 9), A.B.E.V., Tab 229, pp. E-73816-7 and E-73836-7; Evidence of M. Martel at 889 (line 26) to 890 (line 20), A.B.E.V., Tab 226, pp. E-73396-7; Evidence of A. Pitt at 1184 (line 21) to 1187 (line 1), A.B.E.V., Tab 228, pp. E-73691-4; Trial Exhibit P-103, A.B.E.V., Tab 218, E-72010, E-72023-4, E-72026, E-72038, E-72133, E-72139, E-72141; FC Decision, para. 23.

28. ***Why these Guidelines.*** Both courts below recognized why the AUCC recommended, and York adopted, guidelines that permitted so much copying. As the trial judge said, York sought to "obtain for free that which it has previously paid for" and "keep enrolment up by keeping student costs down and to use whatever savings there may be in other parts of the university's operation."[26] The Court of Appeal endorsed these findings as "unequivocal."[27]

York's "mass systemic and systematic copying"

29. While York was permitting and encouraging its faculty and staff to engage in "mass systemic and systematic copying," it kept almost no records of what works were being copied, how many copies were made, or for what students. As a result, the evidence about the scope of copying came from a jointly commissioned survey that quantified the scope of copying. Both parties had access to the results, and led expert evidence interpreting the survey.[28]

30. The study showed that the scale of copying was enormous. In the aggregate, York copied 360 pages from published works per student in 2013, totaling 17.6 million pages.[29] Excluding the copying volume that exceeded the Guidelines, York copied over 15.1 million pages (310 pages per student). Seventy four percent of that copying was from books. These volumes excluded any works that did not require permission or payment to copy.[30]

31. The copying was neither temporary nor *ad hoc*. York teachers often encouraged their students to keep and use their educational materials in the future, long after the course was over.[31] Similarly, York took no steps to prevent students from downloading, printing, and sharing the copied excerpts posted by York teachers on York's LMS.[32]

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[26] FC Decision, paras. 272-273.
[27] FCA Decision, para. 241.
[28] FC Decision, paras. 83-84, 87-89, 92, 96-102, 121-128.
[29] FC Decision, para. 303.
[30] Expert report of B. Gauthier, para. 69, Tables 2.13, 2.16, 3.6 and 4.1, Trial Exhibit P-33, A.B.E.V., Tab 100, pp. E-51080-1, E-51083, E-51095, Supplemental Appeal Book-Electronic Version, Tab 100, p. E-51096-B.
[31] Trial Exhibit P-104, A.B.E.V., Tab 219, pp. E-72490-72504.
[32] Evidence of R. Kagan at 1761 (lines 14-23), A.B.E.V., Tab 231, p. E-74268; FC Decision, paras. 58, 280.

32. The copying under the Guidelines was very significant. Under the "one chapter" threshold, York faculty sometimes copied 50-to-75-page chapters that exceeded 15% of the entire work, or entire works in compilations. In over one-third of the relevant copying events of books by York professors, the excerpts were copied from a compilation; and, in most of these events, the entirety of the work was copied.[33] Under the "10% or less" allowance, York faculty often copied multiple chapters from individual works or many entire works, such as essays, photographs and poems. The copied excerpts often stood alone as a complete representation of the author's expression on a topic. Not only were they quantitatively substantial, they were qualitatively important.[34]

33. ***No licences established.*** York unsuccessfully argued that it did not need to justify all its post-2011 copying under fair dealing. It claimed some of the works being copied were covered by "licensed electronic resources" and "transactional licences," for journal and other articles.[35] Ultimately, York conceded that it could not prove it had licences for any copied works.[36]

34. ***Guidelines replace copy shop licences.*** York also argued that some of the 360 pages per student per year were copied in Access Copyright licensed copy shops. But it conceded that, if its Guidelines are fair dealing, it will stop taking those licenses and rely exclusively on fair dealing rights.[37]

35. ***York's "autopilot" compliance efforts.*** As York had declined to take a licence from Access Copyright to reproduce copyrighted works, this Court might expect it took great care to ensure its faculty and staff were complying with the limits its Guidelines specified. But as the trial judge found, it did the opposite. York's Copyright Officer testified that there was "no organizational support for monitoring or enforcement of copyright obligations, including compliance with the Guidelines." The obligation to oversee compliance was deleted from her job

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[33] Expert Report of B. Gauthier, Tables 2.17 and 3.7, Trial Exhibit P-33, A.B.E.V., Tab 100, pp. E-51084, E-51096.
[34] FC Decision, paras. 310-312, 317; Evidence of J. Lamantia at 2467 (line 12) to 2470 (line 25), A.B.E.V., Tab 238, pp. E-75046-9; Trial Exhibit P-93, A.B.E.V., Tab 201, pp. E-70786-816; Trial Exhibit D-37 (Vol. 11), A.B.E.V., Tab 098-11, pp. E-41649-724; Trial Exhibit D-37 (Vol. 19), A.B.E.V., Tab 098-19, pp. E-47292-323.
[35] Trial Exhibit D-15, Vol. 4 (Tab 145), A.B.E.V.C., Tab 048-40, p. E-7593.
[36] FC Decision, paras. 78, 91, 93, 281, 287, 299.
[37] FC Decision, paras. 298-300.

description after the Guidelines took effect.[38] The trial judge described York's conduct as "a complete abrogation of any meaningful effort to ensure compliance with the Guidelines – as if the Guidelines put copyright compliance on autopilot."[39] He described York's approach to copyright compliance as "wilfully blind."[40]

York's Guidelines damage creators and publishers

36. York decided to stop paying for the Access Copyright licence and make the same copies under its Guidelines so it could save money. These savings came directly at the expense of creators and creative industries.

37. York's Guidelines had an adverse impact on creators and publishers. Both parties led expert evidence on this issue. The trial judge accepted Access Copyright's evidence and rejected York's.[41] He found that "[a]ny suggestion that the Guidelines have not and will not have negative impacts on copyright owners or publishers is not tenable" and that Access "has made out its thesis [that the Guidelines adversely affected creators] completely."[42]

38. The full adoption of guidelines by post-secondary institutions in Canada (outside of Quebec) would cost creators over $10,000,000 per year. The trial judge found that the guidelines have accelerated a decline in sales of works for the post-secondary market, resulting in a transfer of wealth from content producers to content users. These effects have reduced the publishing industry's ability and incentive to invest in content.[43] The trial judge concluded that some small and medium size educational publishers would go out of business, it would reduce the number of works created (and the time spent creating), and there would be an overall "deterioration in the quality, diversity and ingenuity of works in certain subjects."[44]

39. The serious and adverse effects of the guidelines are consistent with the type of works that York copies: poems, chapters from books, short stories from anthologies and other

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[38] FC Decision, paras. 74-79.
[39] FC Decision, para. 28.
[40] FC Decision, para. 245.
[41] FC Decision, paras. 25, 86, 106, 120, 125, 128, 134, 140, 142, 281.
[42] FC Decision, para. 143.
[43] FC Decision, paras. 108, 345-353.
[44] FC Decision, paras. 108, 345, 347.

compilations, learned journal articles, newspaper articles and cartoons. Creating these works requires significant financial investment, effort and skill by creators and publishers. Most are trying to earn a living from writing and publishing. Copying these works on a mass scale without compensation undermines their ability and incentive to invest in creating.[45]

Access Copyright seeks to enforce its creators' rights

40. York continued to copy works on a mass scale after it "opted out" of the Interim Tariff. But it stopped compensating creators for those copies. Access Copyright therefore sued York to enforce the Interim Tariff and sought a declaration that York "[has] … reproduced and authorized the reproduction of copyright-protected works."[46]

41. Access Copyright specifically pleaded, as part of its claim, that York's Guidelines are "incapable of any effective, reliable or consistent enforcement by the defendant" and that the Guidelines were regularly exceeded by York faculty, staff and students."[47] York never moved to strike any portion of this pleading, nor argued that the evidence at trial that supported these pleadings was inadmissible because it was irrelevant. In fact, some of this evidence was supplied by York's own expert witness.

42. York counterclaimed, seeking a declaration that the copying permitted under its Guidelines constituted fair dealing, and therefore created no liability under the Interim Tariff or otherwise. Access Copyright opposed York's claim for a declaration. Its reply and defence to counterclaim pleaded both that the fair dealing guidelines "permit and encourage acts of copying that are unfair" and that "the guidelines may not be relied upon to establish fair dealing or to exempt the acts of copying pleaded in the Claim."[48]

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[45] FC Decision, paras. 333-336.
[46] Amended Statement of Claim dated April 5, 2016, FCA Record, Book of Essential Documents (**B.E.D.**), Tab 6, p. 191.
[47] Amended Statement of Claim dated April 5, 2016, para. 28, FCA Record, B.E.D., Tab 6, p.196.
[48] Reply and Defence to Counterclaim dated October 4, 2013, para. 7, FCA Record, B.E.D., Tab 10, pp. 286-287.

43. Because of the sheer volume of copying, the case was bifurcated into two phases.[49] However, Access Copyright's argument that York's Guidelines cannot be fair dealing because compliance is not monitored or enforced was not affected by the bifurcation order. On the contrary, there was considerable evidence at trial about York's failure to comply with its Guidelines, without objection. In fact, York led its own evidence about its efforts to promote compliance through educational seminars chaired by the York Copyright Officer. The trial judge considered that evidence and concluded York's efforts were completely ineffective.[50]

44. York's witnesses attempted to justify its failure to monitor compliance with the Guidelines on the grounds of academic freedom. This is a red herring. Monitoring compliance with the Guidelines is easy, inexpensive [51] and has no effect on academic freedom.[52] York monitored the content of coursepacks for 16 years under its Access Copyright licence without affecting academic freedom.[53]

The Federal Court's decision: York's Guidelines are not fair

45. York failed to establish fairness at trial. The trial judge heard 27 witnesses over 19 days of evidence. He wrote a 357-paragraph decision, carefully weighing the evidence relevant to the fairness analysis. He concluded that the Guidelines "are not fair in either their terms or in their application." In particular, the definition of "Short Excerpts," a "core area of focus in this case," rendered York's Guidelines "arbitrary and…not soundly based in principle."[54]

46. The trial judge asked the right question in considering York's counterclaim, writing "York seeks a determination of whether copying within the Guidelines constitutes fair

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[49] Order dated July 30, 2014, FCA Record, B.E.D., Tab 12, pp. 296-303.
[50] FC Decision, paras. 28, 76-79, 266.
[51] Evidence of R. Kagan at 1745 (line 6) to 1748 (line 28), A.B.E.V., Tab 231, pp. E-74252-5.
[52] Evidence of P. Delaney at 601 (line 9) to 602 (line 5), A.B.E.V., Tab 224, pp. E-73109-10; Evidence of M. Martel at 865 (lines 18-27), A.B.E.V., Tab 226, p. E-73372.
[53] Evidence of A. Pitt at 1182 (line 18) to 1183 (line 16), A.B.E.V., Tab 228, pp. E-73689-90; Evidence of J. Warren at 1439 (lines 4-28), A.B.E.V., Tab 229, p. E-73946; Evidence of D. Mutimer at 2116 (line 25) to 2118 (line 15), A.B.E.V., Tab 234, pp. E-74654-6.
[54] FC Decision, paras. 14, 19, 20.

dealing."[55] To answer this question, he extracted the relevant principles from *CCH*[56], *SOCAN*[57] and *Alberta*, including the dual purposes of the *Act*, the importance of fair dealing as a user's right, and the need to interpret the *Act* to provide balance between users and creators. He then considered the six fairness factors.

47. In considering the **purpose or "goal" of the dealing**, the trial judge concluded that "York created the Guidelines and operated under them primarily to obtain for free that which they had previously paid for." While he recognized York's educational objectives, "the goal of the dealing was also, from York's perspective, to keep enrolment up by keeping student costs down and to use whatever savings there may be in other parts of the university's operation." He wondered "how such 'works for free' could be fair if fairness encompasses more than one person's unilateral benefit." He concluded that the purpose of the dealing is mixed and therefore concluded it was not a strong factor in the overall fairness analysis.[58]

48. In considering the **character of the dealing**, the trial judge was required to "examine how the work was dealt with, the number of copies made, and the extent of dissemination."[59] The answers to those questions pointed towards unfairness. York students received copies of multiple works in "textbook-like" print or digital collections year after year and were encouraged to keep these collections indefinitely; these collections were not merely supplemental in nature but often comprised the only required readings for a course; and the aggregate volume of the copying was large.[60]

49. The trial judge found serious deficiencies in York's evidence. Instead, he relied on Access Copyright's expert who concluded that, in 2013 alone, York had made 17.6 million

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[55] FC Decision, para. 258.
[56] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 ("*CCH*").
[57] *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326 ("*SOCAN*").
[58] FC Decision, paras. 272-273, 275.
[59] FC Decision, para. 276.
[60] FC Decision, paras. 18, 280-289.

exposures,[61] which translates to 360 exposures per FTE. Students could keep these copies permanently or, at a minimum, access them in the LMS throughout the course. [62] While York claims that the trial judge should have conducted this analysis from the "student perspective," it failed to disaggregate its own data to permit this analysis. The trial judge found that the character of the dealing pointed toward unfairness.[63]

50. The trial judge described the **amount of the dealing** – and the definition of "short excerpt" – as "a very problematic area for York and its attempt to cast the Guidelines as being fair."[64] He was particularly concerned about the definition of "short excerpt" in the Guidelines which allowed York to copy a substantial amount from a published work, such as one chapter or ten percent of the work. The trial judge concluded that York's definition of "short excerpt" was arbitrary and unsupported in law or in the evidence. York could not explain why it chose its "one chapter or ten percent" threshold, and could not explain why its Guidelines lacked a qualitative consideration about the importance of part of the work being copied.[65]

51. While York argued that copying large portions of published works for education makes the dealing fair, the trial judge rejected this argument as "circular reasoning amounting to nothing more than saying that copying for educational purposes is fair because it is copying for the purposes of education."[66] He concluded that York's failure to provide a meaningful justification for its definition of "short excerpt" "seriously undermines the overall fairness of the York Guidelines," and that "there is nothing fair about the amount of the dealing."[67]

52. The trial judge held that the **alternatives to the dealing** factor is concerned with whether "the dealing was reasonably necessary to achieve the ultimate purpose." He followed this Court's instruction that the availability of a licence is not a relevant alternative, lest fair dealing be

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[61] The parties' experts agreed to report the copying data captured in the sample survey using the number of "exposures." An exposure is the number of pages copied multiplied by the number of copies of that page that were disseminated; FC Decision, para. 303.

[62] FC Decision, paras. 279-280.
[63] FC Decision, paras. 17, 281-285.
[64] FC Decision, para. 294.
[65] FC Decision, paras. 305-312, 316.
[66] FC Decision, para. 313.
[67] FC Decision, paras. 305-310, 318.

unduly constrained.[68] While the trial judge concluded that this factor (alone) points towards fairness, he also concluded that "the level of fairness is diminished because York has not actively engaged in the consideration or use of alternatives which exist or are in development." He reminded York that "there are alternatives … there is just no reasonable free alternative to copying." As a result, this factor tended toward fairness, but only weakly.[69]

53. In considering the **nature of the work**, the trial judge concluded that the copied works were "developed through the use of creativity, complex analytical analysis, skill, perspective and judgment by authors." The trial judge also noted that many works are published by professional commercial publishers and authors trying to make a living from writing and publishing and "there is no evidence that these professional writers and publishers need the Guidelines to assist in the dissemination of their works." He therefore concluded that in light of the facts of this case, this factor "tends towards the negative end of the fairness spectrum."[70]

54. Finally, the trial judge made comprehensive findings about the **effect of the dealing**. He found that the evidence supporting the claim that the copying under York's Guidelines substituted for original works was "overwhelming." He concluded that copying under York's Guidelines made a "material contribution" to the drop in sales for published works, caused a loss of licensing income to creators and publishers amounting to between $800,000 and $1.2 million per year, and is likely to cause adverse long-term impacts on investment in new works and the content and quality of works.[71]

55. The trial judge concluded that, "the Guidelines have caused and will cause material negative impacts on the market for which Access Copyright would otherwise have been compensated." While he recognized that the effect of the dealing factor is "neither the only factor nor the most important factor to be considered," he concluded that this factor points towards unfairness.[72]

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[68] FC Decision, paras. 319-320.
[69] FC Decision, paras. 328-331.
[70] FC Decision, paras. 333-338.
[71] FC Decision, paras. 133, 140, 349, 351.
[72] FC Decision, paras. 340, 353-354.

56. After hearing all the evidence, and considering all six factors, the trial judge concluded that the guidelines are not fair in either their terms or in their application. The trial judge therefore dismissed York's request for declaratory relief.[73]

The Federal Court of Appeal affirms York's Guidelines are not fair

57. York's Notice of Appeal to the Federal Court of Appeal raised only a subset of the arguments it now advances before this Court. York never pleaded or argued that the trial judge made a "procedural error" or that he considered "irrelevant" evidence when assessing fair dealing. Rather, York argued that the trial judge had made substantive errors in applying the factors. The Court of Appeal disagreed and upheld his decision.

58. The Court of Appeal affirmed that the trial judge had made no error in analyzing the character of the dealing, alternatives to the dealing, effect of the dealing and nature of the work. It expressed some concern about the trial judge's re-use of the aggregate quantity of the dealing in considering the amount of the dealing.[74] However, in light of the trial judge's many findings as to why that factor otherwise pointed towards unfairness, it concluded that this digression might have led to an error that was "palpable" but it was "not overriding."[75]

59. The only other correction made by the Court of Appeal went against York. It argued that, in evaluating the **purpose of the dealing**, the trial judge had used the wrong perspective because he considered York's objectives as well as its students' objectives. The Court of Appeal disagreed. It held that since York was seeking to rely on its guidelines to establish fair dealing, it was "bound to justify its Guidelines." That meant that the Federal Court's inquiry [into York's purpose] "was legitimate, having regard to the Supreme Court's teaching in *CCH*."[76]

60. The Court of Appeal concluded that the trial judge made an error, but the error it made was by importing education as an "allowable purpose" (from the first part of the test) into its analysis of the goal of the dealing. In other words, the trial judge had erred when he concluded

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[73] FC Decision, paras. 14, 356.
[74] FC Decision, paras. 262, 280-289.
[75] FCA Decision, para. 279.
[76] FCA Decision, paras. 234-238.

the purpose of the dealing was mixed. It concluded that, when properly analyzed, the purpose of the dealing pointed to "a clear indication of unfairness."[77]

61. Like the trial judge, the Court of Appeal recognized that York sought "a declaration that any reproductions made that fall within the guidelines … constitute fair dealing." However, it concluded that the trial judge had been right to refuse it, and dismissed York's appeal.[78]

PART II – THE ISSUE

62. There is only one issue in York's appeal: did the courts below commit any reversible errors of law in refusing to grant the declaration York sought? Access Copyright respectfully submits there are no reversible errors.

PART III – LAW AND ARGUMENT

Fair dealing and the purpose of Copyright

63. The policy objectives of copyright are to encourage the creation and dissemination of works of the arts and intellect and obtaining a just reward for the creator.[79] The *Act* "seeks to ensure that an author will reap the benefits of his efforts, in order to incentivize the creation of new works."[80] In interpreting the *Act*, and applying its provisions, the Court must maintain an appropriate balance between these policy objectives.[81]

64. Fair dealing is an important way to encourage the dissemination of works. But a genuine balance means that fair dealing cannot be permitted to undermine the *Act*'s other objectives. This is consistent with Canada's international obligations. By signing the *Berne Convention for the Protection of Literary and Artistic Works*, Canada agreed that it would only permit exceptions to exclusive rights over the reproduction of literary or artistic works if the exceptions do "not

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[77] FCA Decision, para. 241.
[78] FCA Decision, paras. 309-312.
[79] *Théberge v. Galerie D'Art du Petit Champlain Inc.*, 2002 SCC 34, para. 30.
[80] *Cinar Corporation v. Robinson*, 2013 SCC 73, para. 23.
[81] *CCH*, para. 10; *SOCAN*, paras. 8-10.

conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."[82]

65. Even if the dealing is for an allowable purpose, such as research, private study, or education, it is only permitted if it is "fair." The fairness requirement is where the "analytical heavy hitting" occurs.[83] It must be used to ensure balance between the *Act*'s public policy objectives. As the Court said in *CCH*, "[b]oth owner rights and user rights" must be given a fair and balanced reading.[84]

66. Whether a course of dealing is fair "is a question of fact, and depends on the facts of each case."[85] The trier of fact must review the evidence that is relevant to each of the six specified factors, and may consider any additional facts relevant to the fairness analysis.[86] The factors are not stacked mathematically, but rather examined individually and holistically, with view to balancing the different objectives under the *Act*.

67. While York relies heavily on alleged parallels with the *Alberta* case, the nature and scope of the copying in that case was very modest. K-12 schools across the country copied a quarter billion textbook pages each year, and paid a tariff that covered approximately 93% of those copies. The only copies at issue in *Alberta* were short excerpts copied from complementary textbooks and on an *ad hoc* basis to supplement, but not substitute for, assigned textbooks and all other works were paid for under the tariff.[87] The effects of those copies on the statutory balance under the *Act* are vastly different from York's pre-planned, systematic, substituting copies.

68. York argues that this Court should interfere with the factual fairness inquiry conducted by the courts below, ignoring certain facts the trial judge relied on and emphasizing others. This is inconsistent with the concept of balance. It is also inconsistent with the standard of review, which requires York to show an extricable legal error, not simply ask this Court for a do-over.[88]

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[82] *Berne Convention for the Protection of Literary and Artistic Works*, Article 9(2).
[83] *SOCAN*, para. 27.
[84] *CCH*, para. 48.
[85] *CCH*, para. 52.
[86] *CCH*, paras. 53, 60.
[87] *Alberta*, paras. 7, 32, 36.
[88] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, paras. 10-11.

69. While Access Copyright deals with each of the alleged errors below, its primary submission is that York has identified neither errors of law nor palpable and overriding errors of fact, and its appeal must therefore be dismissed.

Educational uses are not a "get out of copyright free" card

70. Educational purposes do not mean the dealing is fair; that is what the fairness analysis is intended to determine. York's primary argument is that educational environments should get special status in the fairness analysis. But what it proposes would replace a multifactor factual balancing test with bright-line rules that create a "safe harbour" for educational copying. Parliament specifically declined to change the fairness test for education, and there is no policy reason why creators should not be compensated for their contribution.

Legislative history does not support blanket exceptions

71. Parliament has repeatedly refused to grant the education sector a blanket exemption for its copying. Rather, it has repeatedly emphasized the need for balance between the *Act*'s statutory objectives, one of which is a just reward for creators.

72. York argues that the *Copyright Modernization Act* lowered the fairness threshold for educational uses. Not only is this at odds with the representations made by the AUCC before Parliament (paragraph 25 above), but it is also misleading. The *CMA* expanded s. 29 to include "education" as an additional allowable purpose. But this relates only to the first part of the fair dealing analysis. It left fairness – the second part of the analysis – untouched.

73. Most of the Parliamentary debates cited by York have nothing to do with fair dealing. Instead they are directed to other aspects of the *CMA*, which provided new (unrelated) privileges for educational institutions, such as distance learning, classroom display and internet exceptions. When Parliament turned its mind to fair dealing (and overall purpose of the *CMA*), many legislators specifically said that they did not intend to upend the balance in the *Act*, saying things such as:

- "fair dealing permits individuals and business to make certain uses of copyrighted material **in ways that do not threaten the legitimate interests of copyright owners.**"[89]

- "The bill is all about finding the balance between the creators of copyright material and Canadian consumers. **We want to ensure that we have a regime that rewards creators for their work.**"[90]

- "Fair dealing ... permits certain uses of copyright material in ways that benefit society and **do not unduly threaten the interests of copyright owners. Nevertheless, fair dealing is not a blank cheque.**"[91]

- "[*CMA*] will help protect innovation and attract new investment, enabling Canadian consumers to make the most of new technologies, while **ensuring that creators are fairly compensated for their work.**"[92]

- "It is clear – and the principle is a fundamental one – that **all work deserves pay**. There will be no shows, no artistic events, nothing to post on the Web, nothing to share and nothing to exchange if we do not allow creators to live from their craft."[93]

74. Parliament did not intend to change the fairness analysis. However, it did intend educational institutions to pay for mass copying. The *CMA* also added s. 30.02[94], which specifically contemplates payments to rights holders when digital copies are made and shared by an educational institution, as York's Guidelines permit. Under s. 30.02, these payments are made either through an agreement with a collective society or an approved tariff. If adding "education" to fair dealing was intended to permit a broad swath of copying without compensation, this section would not be necessary.

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[89] 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), R.B.O.A., Tab 2.
[90] House of Commons Debates, vol. 146, No. 76, 1st Sess., 41st Parl., February 8, 2012, p. 5035 (Mike Lake, Parliamentary Secretary to the Minister of Industry), R.B.O.A., Tab 2.
[91] 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), R.B.O.A., Tab 3.
[92] House of Commons Debates, vol. 146, No. 76, 1st Sess., 41st Parl., February 8, 2012, p. 5035 (Mike Lake, Parliamentary Secretary to the Minister of Industry), R.B.O.A., Tab 2.
[93] House of Commons Debates, vol. 146, No. 76, 1st Sess., 41st Parl., February 8, 2012, p. 5033 (Robert Aubin, Member of Parliament), R.B.O.A., Tab 2.
[94] *CMA*, s. 30.02.

York pays for heat, hydro, faculty and food – why not for copying?

75. Inputs to education are not free. York pays for internet service, hydro to keep the lights on, paper and ink for its photocopiers, food to serve in its cafeteria, beds in its residences, salaries for its faculty and staff, "desks, chairs, brick and mortar"[95] and a thousand other expenses associated with running an enormous institution. There is no reason why creators and publishers of printed works should "make a voluntary subsidy to our educational system" and alone should be uncompensated for their inputs to the educational process.[96] There is a "need for all of society as users to pay for the creative efforts and works of our authors…just as we pay everybody else for their contributions to society."[97]

76. York argues that education is special because copyright is intended to support the "diffusion of knowledge."[98] This one-sided view of the *Act* fails to address what knowledge might be "diffused" if no one writes or publishes books because there is no incentive to create or a means of earning a just reward. It also fails to explain how the requirement to pay $14.31 per student per year for a broad licence to copy impedes the diffusion of knowledge.[99] York will make the copies. The question for this Court is whether it should be permitted to make them without compensating creators.

77. High-minded statements about the importance of education do not get at the real question in this case: is York's dealing fair –*i.e*., does it promote the balance under the *Act* – or unfair because it undermines it? The trial judge recognized and acknowledged York's educational purpose.[100] But he concluded York's Guidelines lacked the necessary balance to be fair, because other facts pointed so strongly to unfairness. There is no reason to reconsider this analysis.

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[95] Ysolde Gendreau, "Fair Dealing: Canada Holds to Its Position" (2013) 60 J. Copyright Soc'y U.S.A. 673, p. 680.
[96] Senate Debates, 2nd Sess., 34th Parliament, February 13, 1990, p. 1083 (Hon. Royce Frith, Deputy Leader of the Opposition).
[97] Senate Debates, 2nd Sess., 34th Parliament, November 29, 1990, p. 4737 (Hon. Royce Frith, Deputy Leader of the Opposition)
[98] York University Factum, para. 71.
[99] Access Copyright Post-Secondary Educational Institution Tariff, 2015-2017, s. 5(1)(a)
[100] FC Decision, paras. 267, 273, 326, 328.

York's "wrong perspective" argument is the wrong perspective

78. York is making multiple copies of all or parts of works, turning them into paper and digital coursepacks (to replace textbooks), and providing them to students, all in accordance with its Guidelines. But it demands that the fairness assessment be conducted as if something totally different is happening. It asks the Court to adopt a "perspective" that suggests each individual student is making *ad hoc* copies and just, by coincidence, ended up with the same coursepack. This is contrary to the law, the idea of fairness, and the evidence, which was silent on the "student's perspective."

No rule requiring York's perspective or dealings must be ignored

79. York argues that triers of fact must – as a matter of law – ignore anything related to what it does as an institution, and instead focus only on the student's perspective. This is both incorrect in law and inconsistent with the idea of fairness. No court has ever said that the ultimate end user is all that matters to the fairness analysis, or that a trier of fact must blind himself to institutional motives or purposes, actual dealings with the works, or the aggregate volume of copying that occurs in accordance with institutional guidelines.

80. York ignores the distinction between the two stages of fair dealing. The first stage asks a binary question: is the dealing for an allowable statutory purpose? In those circumstances, the Court has instructed that the ultimate user's perspective is most appropriate, to avoid unduly limiting users' rights.[101] But the second stage is a holistic analysis of all the facts. The copier's motive, purpose and dealings are all permissible (and often necessary) inquiries to determine whether the dealing is fair – i.e., does it advance or undermine the balance in the *Act*?

81. This Court confirmed the importance of the copier's perspective to the fairness analysis in all three of its leading fair dealing cases. In *CCH*, the Court evaluated fairness of the Great Library's institutional policies and practices.[102] This included both the Great Library's purpose (facilitating its patrons' research) and its safeguards to ensure the copied materials were being used fairly and for allowable purposes.[103]

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[101] *CCH*, para. 54.
[102] *CCH*, paras. 66-69, 71.
[103] *CCH*, paras. 63-64.

82. In *SOCAN*, the consumer was streaming music previews. It was therefore necessary to consider the consumer's perspective, when considering the "real purpose or motive"[104] of the dealing. However, the Court also looked at the safeguards put in place by the online music service providers to prevent the previews from substituting for the purchase of songs.[105]

83. The institution's perspective did not factor into this Court's analysis in *Alberta* because the institutions had no role in the dealing. The teachers who made the copies were not following any policy or guidelines. If they had, or if the copying was "systematic and systemic" rather than *ad hoc*, the Court would have been required to consider what copying that policy permitted (including character and amount of the dealing, and nature of the work), why it was permitted, and what effect it had on the original works.

84. There is no legal rule requiring or even permitting the trier of fact to ignore the copier's conduct or "perspective" in assessing fairness. *CCH*, *Alberta*, and *SOCAN* affirm that fairness is ultimately a factual inquiry. What weight to give to the motives and dealings of both the actual copier and the end user is a question for the trier of fact, who must assess the facts with a view to evaluating and promoting dealing that properly balances copyright's policy objectives.

85. Allowing a copier to hide behind the purposes of the ultimate consumer undermines that balance. The copies in this case are not the sum of thousands of students making spontaneous decisions about what to copy. The students are neither making the copies nor relying on the Guidelines to defend their conduct. York seeks to camouflage its own dealings by hiding behind the theoretical perspective of a single student user who receives a single copy of a work. This masks the aggregate, negative impact of what is in fact preplanned, mass and systematic copying that substitutes for the purchase of original works.

86. This Court warned against this type of "camouflage" in *Alberta*, and specifically identified "course pack" cases as problematic.[106] Although York attempts to distance itself from

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[104] *SOCAN*, para. 33.
[105] *SOCAN*, paras. 34-35.
[106] *Alberta*, paras. 20-22.

the "course pack" cases by casting them as limited to "third-party commercial copier[s]," at least one of the cases cited in *Alberta* involved university copiers.[107]

87. York claims that the copier's perspective is only relevant when there is "colourability."[108] This is incorrect as a matter of law, since the trier of fact can (and must) consider all the circumstances. But as a matter of fact, both courts below found that York's claim that it implemented the Guidelines merely to serve its students – rather than for its own financial purposes – was untrue.[109]

York was not facilitating students' fair dealing

88. York's position rests on characterizing itself as a mere "facilitator" of its students fair dealing rights. But that is not why it instituted the Guidelines – it was to save money because of "tight budgets."[110] It has a separate set of guidelines for its students.[111]

89. York says this Court needs to use only the "student's perspective," but led no evidence of what that is. York did not call any students, or provide any expert evidence about their perspective. The trial judge could not have considered fairness using exclusively the student perspective, even if he was required to.[112]

Education, perspective and the fairness factors

90. York has identified no errors of law, only differences of opinion on how to treat the facts. Its suggestion that the courts below misapplied the purpose, amount and character of the dealing is once again a suggestion that this Court substitute its opinions for the trier of fact's. There is no legal basis to do so. In fact, the standard of review requires the opposite.

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[107] *Copyright Licensing Ltd. v. University of Auckland* [2002] 3 N.Z.L.R. 76.
[108] York University Factum, para. 63.
[109] FC Decision, paras. 272-273; FCA Decision, paras. 240-241.
[110] FC Decision, para. 119; Trial Exhibit D-15, Vol. 4 (Tab 145), A.B.E.V.C., Tab 048-40, p. E-7593.
[111] Trial Exhibit D-15, Vol. 1 (Tab 30), A.B.E.V.C., Tab 048-37, pp. E-6508-10.
[112] FCA Decision, paras. 236-237, 280, 282.

Purpose of the dealing – no error in considering York's true purpose

91. The trial judge concluded that the purpose of the dealing was "multifaceted."[113] He expressly acknowledged that York's copying was for educational purposes.[114] But he also found as a fact that York's motives were to avoid paying Access Copyright's proposed fee, save money and keep costs down. The Court of Appeal endorsed these findings, holding that there was no reason to second-guess the trial judge's conclusion phrased in "exceptionally strong language,"[115] reflecting his concern about York's purposes in implementing the guidelines.

92. The Court of Appeal correctly applied the standard of review. There, as in this Court, findings of fact can only be reviewed for palpable and overriding error. Although York does not allege any such error, it has advanced a scattershot series of arguments, seeking to distance itself from the trial judge's findings of fact. Each is dealt with below.

93. ***No basis to depart from the standard of review.*** York argues that the trial judge's extensive findings against its purpose are not entitled to deference. This is contrary to settled law on the standard of appellate review. The trial judge's finding that York's goal was to "obtain for free that which it has previously paid for" was based on the evidence before him, including testimony of York's witnesses.

94. ***Trial judge made no error in considering York's purposes.*** York's relies on *dicta* from this Court's decision in *CCH* warning that the availability of a licence is irrelevant.[116] But that warning related specifically to the "alternatives to the dealing" factor. And the trial judge heeded that warning, specifically recognizing that he was not to consider the licence in considering the alternatives.[117]

95. But that does not mean all financial considerations are irrelevant or reflect an inappropriate "commercial lens" in evaluating the purpose of the dealing factor. The trial judge was not only entitled, but required to ask what York's goal was in engaging in the dealing so. Since York's goal was to undermine the balance under the *Act* and systematically deprive

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[113] FC Decision, para. 273.
[114] FC Decision, para. 267.
[115] FCA Decision, para. 240.
[116] *CCH*, para. 70.
[117] FC Decision, para. 320.

creators of their just reward, that counts against fairness. Ignoring these facts – as York asks – would distort the analysis.

96. Similarly, the trial judge's reasons were not "circular." He understood that the concept of fair dealing "embeds the ability of the user to access the content without compensating the creator" a feature that "would be present in all fair dealing situations."[118] He recognized that if York's dealing was fair, it would not require a licence. But this does not mean that he could not consider what motivated York's conduct, i.e., the purpose of the dealing.

97. York, on the other hand, makes the exact mistake it accuses the trial judge of making: its argument assumes that its dealing is fair, and therefore it requires no licence. This is reflected in its argument (made for the first time before this Court) that it only ever took a licence because of "risk aversion" or "overreach."[119] This can only be true if its dealing is fair, which is the very question the trial judge had to answer. Assuming the outcome can not assist the Court.

98. Even worse, York's argument that it only got a licence because it was "risk averse" is *ex post facto* speculation without a basis in the record. If York wants to argue that it abandoned its Access Copyright licence because it never needed one in the first place, it could have called a witness to give that evidence. But no witness did. York relies instead on academic papers that hypothesize that no licence was required. But these academics were not witnesses at trial, and have never been subject to cross-examination. Their untested hypotheses cannot replace actual evidence, and York cannot change the goal of its dealing ten years after it implemented its Guidelines.

99. ***Consulting the creator community would have reflected a desire for balance.*** York suggests the trial judge erred by considering the AUCC's non-consultation with creators in considering its Guidelines, arguing "the Court can draw no conclusions regarding fairness from the fact that the stakeholders have divergent interests."[120] But this entirely misses the point: fairness occurs when there is balance between user and creator rights in advancing the purposes

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[118] FC Decision, para. 270.
[119] York University Factum, paras. 83-84.
[120] York University Factum, para. 81

of the *Act*. Consulting the creator community would have reflected a desire for that balance, rather than simply a desire to stop paying.

100. ***York's licences were irrelevant.*** York again repeats its argument, rejected by the trial judge, that it already spends money on rights for electronic resources.[121] But it conceded at trial that it could not establish that any of the copying at issue in this case was covered by those rights, leading the trial judge to conclude that its licences were irrelevant to the fairness analysis.[122] Moreover, permissions licensing requests and associated revenues dropped significantly after the introduction of the Guidelines.[123] This shows that York was not getting its permissions somewhere else than Access Copyright. It was just relying on its Guidelines to copy works for free.

Correct conclusion on the amount of the dealing

101. Both courts below found that the amount of the dealing permitted by the Guidelines points towards unfairness. The problem was not, as York suggests, the *existence* of thresholds. Rather, the trial judge found the thresholds York selected to be arbitrary, unjustified and ultimately unfair, because of the amount of copying they permitted. These findings of fact were based on Access Copyright's evidence, and York's failure to justify its thresholds. There is no reason for this Court to overturn them.

102. York tendered no evidence explaining why or how its thresholds were fair or necessary for York, its teachers *or* its students to "achieve [their] fair dealing purpose." Instead, it presented its thresholds like they are self-evidently fair on their face, as if the multi-faceted, holistic fairness assessment can or should be reduced to simple math. In fact, these thresholds were selected for York's convenience – as it says, to provide a "safe harbour for instructors"[124] – not to further the balancing objectives of the *Act*.

103. Teachers at York regularly copied complete works, including journal articles, short stories, poems, and essays from compilations in which the copied works were published together

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[121] York University Factum, para. 86.
[122] FC Decision, paras. 78, 91, 93, 281, 287, 299.
[123] FC Decision, para. 112(c).
[124] York University Factum, para. 89.

with other works in the form of an anthology. Over 30% of the copying from books at York was from a compilation. In 90% of those transactions, the entire work was copied.[125] As the trial judge identified, Roch Carrier's classic story *The Hockey Sweater* was regularly copied, frequently from an anthology called *The Hockey Sweater and Other Stories*. The trial judge referred to the single work from a compilation threshold as "an arbitrary distinction for protection based on the format of publication." Section 2.1(2) of the *Act* prohibits this distinction, stating, "[t]he mere fact that a work is included in a compilation does not increase, decrease or otherwise affect the protection conferred by this Act in respect of the copyright in the work or the moral rights in respect of the work."[126]

104. York ignores s. 2.1(2) and tries to justify the coping of entire works, asserting that the "value" in an anthology is just the collection of works. But there is nothing in the record to support this. Mr. Carrier and other authors would undoubtedly disagree. So would York's faculty, who assigned these works *outside* their anthology. Publishers pay permission fees to other publishers to include individual works in an anthology.[127] Permitting universities to create their own anthologies (coursepacks) without paying royalties puts publishers in the untenable position of having to "compete with free." If York had evidence that copying an entire work from an anthology was fair, or any evidence showing its thresholds are appropriate, it should have led that evidence at trial.

105. York did not lead that evidence, and the trial judge found that the amount of copying permitted by York's thresholds pointed towards unfairness. York cannot ask this Court to reconsider that conclusion, absent palpable and overriding error, which it does not allege.

106. York suggests that mathematical thresholds are consistent with *CCH* and *SOCAN*, and provide certainty. But neither *CCH* nor *SOCAN* establish a "threshold" that could be applied to subsequent (and entirely different) facts. Librarians were required to use discretion regarding how much copying should be permitted for each different request, which was crucial to the

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[125] Expert Report of B. Gauthier, Tables 2.17 and 3.7, Trial Exhibit P-33, A.B.E.V., Tab 100, pp. E-51084 and E-51096.
[126] *Copyright Act*, s. 2.1(2).
[127] Evidence of M. Williams at 1971 (line 24) to 1972 (line 15), A.B.E.V., Tab 232, pp. E-74478-9.

finding of fair dealing in *CCH*.[128] Similarly, the Copyright Board's finding that streaming previews of 30 seconds of music was a "modest dealing" when compared to purchasing a four-minute full length song for repeated listening does not establish that copying 12.5% of a work is fair in different factual circumstances. On the need for "certainty," the facts of this case show that argument is false. York's Guidelines had clear thresholds, but it did not stop faculty and staff from regularly exceeding them.[129]

107. Finally, York asserts that the trial judge made the same error as the Copyright Board in *Alberta* by "erasing proportionality" from his assessment of the amount of the dealing factor by focusing only on the aggregate volume of the copying.[130] On the contrary, as noted above, the trial judge fully considered the proportions of the works that the Guideline definition of "short excerpt" allowed to be copied. He found that York had failed to justify those proportions. While it is true that the trial judge erroneously made a few references to aggregate copying, the Court of Appeal considered that error palpable, but not overriding.[131] The amount of the dealing points strongly to unfairness.

Character of the dealing is unfair regardless of perspective

108. ***No "perspective" error.*** As explained above, York asks the Court to adopt the fiction that each student decided to make the identical copies contained in coursepacks, so it can look at them exclusively through that student's perspective (even though it provided no evidence of that perspective).[132]

109. It was not necessary for the trial judge to ignore York's dealing in aggregate. Both *SOCAN* and *Alberta* permit aggregate dissemination to be considered under the character of the dealing.[133] However, focusing exclusively on the student's perspective could not have changed his conclusion. Even if he had ignored the 17.6 million aggregate exposures, he concluded that

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[128] *CCH*, para. 68.
[129] FC Decision, paras. 78, 94, 116.
[130] York University Factum, para. 99.
[131] FCA Decision, para. 279.
[132] FC Decision, paras. 17, 284-285, FCA Decision, para. 236.
[133] *SOCAN*, para. 42; *Alberta*, para. 29.

copying 360 pages per student per year, the lack of control over subsequent uses, and the permanence of the copies each pointed towards unfairness.

110. ***No "conflation" error.*** York argues that the courts below applied the same facts under multiple factors. This is permitted, assuming the facts considered are relevant to the analysis under that factor. York claims that the educational context – a single fact – is relevant to all six factors.

111. In both *SOCAN* and *Alberta*, this Court considered the relevance of the same facts under several of the fair dealing factors. In *Alberta*, the fact that the excerpts were "short" was critical to the Court's finding under the alternatives to the dealing and effect of the dealing.[134] In *SOCAN*, the brevity of music excerpts and their degraded quality were relevant to the Court's assessment of the purpose of the dealing, the alternatives to the dealing and the effect of the dealing.[135]

112. While the Court in *Alberta* warned not to "conflate" factors, that warning arose because the Copyright Board confused the concepts of aggregate use (which requires quantification of the total number of pages copied) and the "amount of the dealing" (which examines the proportion between the excerpted copy and the entire work). In this case, the Court of Appeal debunked the suggestion that drawing sharper lines between these factors would have changed the trial judge's conclusion.[136]

Remaining fairness factors confirm Guidelines are unfair

113. Although York claims the courts below made legal errors in three of the factors, it asks this Court to reconsider them all. This is consistent with its desire for a "do-over" but entirely inconsistent with fairness being a question "the tribunal of fact must decide." That "tribunal of fact" in this case is the trial judge.[137] In *Alberta*, the Court remanded the matter to the Copyright

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[134] *Alberta*, paras. 32, 36.
[135] *SOCAN*, paras. 35, 46, 48.
[136] FCA Decision, paras. 262, 279.
[137] *CCH*, para. 52.

Board.[138] If this Court concludes there were reversible errors, it should remit this matter back to the trial judge to decide fairness.

114. However, in case the Court decides to overrule its own guidance that fairness is a question of fact for the trial judge, a brief consideration of the other three factors are below. Both courts below found that the nature of the works and the effect of the dealings on the market for the works tended strongly toward unfairness.

115. ***Effect of the dealing on the work.*** The evidence was "overwhelming" that York's dealing substituted for the purchase of original works and had an adverse effect on creators and publishers.[139] This makes this case very different from *CCH*, *SOCAN* or *Alberta*, where no adverse effects were found.

116. While none of the fairness factors are more important than the rest, the effect of the dealing has a strong impact on the statutory balance, because it evaluates whether the dealing deprives copyright holders of a just reward. In this case, the facts showed that York's dealing undermines the statutory balance. This factor therefore pointed strongly away from fairness.

117. York's response is to contest these findings, suggesting that because the trial judge could not quantify the exact effect, there was "correlation" but not "causation," or that other factors were also responsible for the harms caused to the publishing industry from the Guidelines.[140] None of these arguments allege errors of law. York is simply re-arguing facts that were rejected by the trial judge, or that it failed to advance before him. There is no reason for the Court to reconsider these factual questions *de novo*, or to second-guess the trial judge's conclusion.

118. To escape these troubling facts, York insists that this factor be considered solely from the perspective of each individual student. The occasional copying of works for use by a single student or a group of students, as in *Alberta*, is unlikely to have any negative effects on the market for the works. However, as found by the trial judge, York's systematic massive copying for its 50,000 students has overwhelmingly negative effects on the markets for the works and on

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[138] *Alberta*, para. 38.
[139] FC Decision, paras. 133, 351-353.
[140] York University Factum, paras. 122, 124.

creators and publishers. To ignore these cumulative negative impacts completely, as York insists, would erase this factor entirely from the fairness assessment, permanently skewing the balance.

119. Finally, the trial judge's reference to the loss of licensing revenue was not (as York suggests) an extricable legal error.[141] When considering the effect of the dealing on the work (as opposed to the alternatives), the adverse effects on creators' revenue is a legitimate inquiry. More importantly, the loss of licensing revenue was one of many adverse effects the trial judge found arose from York's Guidelines. These adverse effects included entirely unrelated problems, such as direct substitution for the purchase of works, an accelerated drop in sales, and depressing the industry in the long term.[142] Even ignoring the impacts on licensing, this factor points strongly towards unfairness.

120. ***Nature of the work.*** The trial judge found that the nature of the works pointed towards unfairness. He found that the works copied required considerable skill, effort, judgment and investment from creators and publishers. He agreed with Access Copyright that many of these writers and publishers are trying to make a living from these efforts. Undermining these efforts – and the incentive to create – points away from fairness.[143]

121. While York focuses on dissemination, the trial judge concluded that this was not the purpose or the effect of the Guidelines, since professional authors and publishers do not need assistance disseminating their works.[144] There is no reason to second-guess his conclusion that this factor pointed "towards the negative end of the fairness spectrum."[145]

122. ***Alternatives to the dealing.*** The trial judge found that this factor (alone) favoured York, but only weakly. He found that York has not actually considered or tried any alternatives, and that such alternatives exist, just not for free.[146] There is no reason to disturb the trial judge's

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[141] York University Factum, para. 123.
[142] FC Decision, paras. 348-351.
[143] FC Decision, paras. 333-336, 338.
[144] FC Decision, para. 337.
[145] FC Decision, para. 338.
[146] FC Decision, paras. 329-331.

conclusion, which reflected the statutory balance: it reflected the public interest in dissemination, but also considered the impact on creation and a just reward.

Conclusion on Fair Dealing Factors

123. York's Guidelines seriously undermine the balance in the *Act*. But instead of changing its unfair Guidelines, York seeks to change the balance, by overemphasizing education and by imposing artificial rules about perspective in place of a context-specific analysis. This is inconsistent with the purpose of fair dealing and the conduct of the fairness analysis.[147] The trier of fact must determine whether the dealing promotes or undermines the balance between the creation and dissemination of works, and a just reward for the creators. The trier of fact in this case concluded that York's dealing did not seek or achieve balance. There is no reason for this Court to second-guess that conclusion.

124. While York claims to seek "guidance," what it seeks is Court approval of a practice of "mass systemic and systematic" copying instituted to deprive creators of their just reward, and that have the effect of undermining creation. Concluding that York's Guidelines are not fair does not mean that *ad hoc* copying cannot or will not constitute fair dealing. It means that creators must be fairly compensated for "mass systemic and systematic" copying that adversely affect the market for their original works.

125. York claims it needs "guidance" so it can know its rights.[148] But Parliament has already created a solution to York's problem: the Copyright Board.[149] The Board is an expert, quasi-judicial body that is fully equipped to deal with "mass systemic and systematic" uses. It has a mandate to set fair and equitable royalty rates in the public interest. When setting tariffs, the

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[147] Giuseppina D'Agostino, "The Arithmetic of Fair Dealing at the Supreme Court of Canada" 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), pp. 196-197.

[148] York University Factum, paras. 89, 103, 128, 132.

[149] In the case of digital copying and sharing by educational institutions, Parliament has also enacted s. 30.02; See also Senate Debates, 2nd Sess., 34th Parliament, November 29, 1990, p. 4738 (Hon. Royce Frith, Deputy Leader of the Opposition); Senate Debates, 2nd Sess., 34th Parliament, December 13, 1989, p. 840 (Hon. C. William Doody, Deputy Leader of the Government).

Board considers all statutory exceptions, including fair dealing, and has the power to adjust the rates based on the user's other rights and licences.[150] As the trial judge said, "a better system of protection and more certain criteria (such as a licence or in a tariff) would assist all parties interested in education and access to educational materials."[151] The current tariff rate for universities is $14.31 per FTE.

No procedural error, just a new argument

126. The courts below did not make a "procedural error" by considering safeguards and compliance when assessing fair dealing. There are many problems with this argument, both procedural and substantive: it is new, it is an appeal from the reasons not the judgment, and it is wrong.

127. ***This "procedural issue" is new.*** York did not complain in the courts below that they were considering its poor compliance history. On the contrary, York led evidence on its efforts to encourage compliance with the Guidelines, including the testimony of its Copyright Officer. But York's evidence was rejected. The trial judge described York's compliance efforts as "a complete abrogation", "autopilot" or "wilful blindness."[152]

128. In the Court of Appeal, York challenged the weight of this evidence in the trial judge's fairness assessment. But it never argued that allowing or considering the evidence was a "procedural error." It is trying to advance this argument for the first time in this Court.

129. This Court rarely hears issues not raised in the courts below. The test for whether new issues should be considered is "a stringent one." The Court's discretion to consider new issues "is not exercised routinely or lightly." It is only where the new issue can be raised "without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice."[153]

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[150] See, for example, Decision of the Copyright Board, *Collective Administration in Relation to Rights Under Sections 3, 15, 18 and 21 (Re)*, [2016] C.B.D. No. 1, Tables 32-33, p. 155.
[151] FC Decision, para. 187.
[152] FC Decision, paras. 28, 74-79, 245.
[153] *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, paras. 21-22.

130. Neither of these criteria are met. The bifurcation order was made expressly on terms to ensure that it would not prejudice Access Copyright,[154] not so York could separate itself from some highly problematic facts about its lack of compliance. Excluding these facts in an analysis that is supposed to be holistic would risk a serious injustice.

131. ***Appeal from the reasons.*** While York claims that the trial judge made a "procedural error," he knew both the right question and how to answer it. In the beginning of his analysis, he stated "York seeks a determination of whether copying within the Guidelines constitutes fair dealing."[155] At the end, he stated "the Court concludes that the York Fair Dealing Guidelines are not fair."[156] His judgment ordered that "the Defendant's counterclaim and claim for declaratory relief is dismissed."[157] York's procedural error is an attack on the reasons of the courts below, rather than their judgments. It is trite law that this is not the proper basis of an appeal.[158]

132. ***Enforcement of policies or practices must be considered.*** As the Court said in *CCH*, a defendant can rely on its "practices *and* policies" [159] to establish fair dealing. In this case, York seeks to rely on its policy, but asks the Court to ignore its practice of not monitoring or enforcing that policy. There is no support in the case law for this half-baked approach, which is why York never advanced this argument in either of the courts below.

133. Finally, none of this is even remotely instructive. In the end, the trial judge concluded that the Guidelines were not fair in their terms or their application.[160] This is a conclusive answer to this procedural argument.

PART IV – COSTS

134. Access Copyright seeks its costs in this Court and the courts below.

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[154] Order dated July 30, 2014, pp. 3-5, B.E.D., Tab 12, pp. 298-300.
[155] FC Decision, para. 258.
[156] FC Decision, para. 356.
[157] FC Decision, para. 6.
[158] *R. v. Sheppard*, 2002 SCC 26, [2002] 1 SCR 869, para. 5.
[159] *CCH*, para. 63.
[160] FC Decision, para. 14.

PART V – ORDER SOUGHT

135. Access Copyright respectfully requests that the appeal be dismissed.

PART VI - CONFIDENTIALITY

136. Footnotes 14, 35, 111 and 112 refer to documents that were filed by York under Rule 38.1(1) as part of the "Amended Appeal Book-Electronic Version (Confidential)". However, the documents referred to by Access Copyright in these footnotes are not confidential. Nothing in this factum is confidential.

April 6, 2021

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Sheila Block

Sheila R. Block

for:

Arthur Renaud

for:

Asma Faizi

PART VII – TABLE OF AUTHORITIES

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