

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

BETWEEN:

YORK UNIVERSITY

Appellant/Respondent
(Appellant/Appellant)

AND:

CANADIAN COPYRIGHT LICENSING AGENCY
(“ACCESS COPYRIGHT”)

Respondent/Appellant
(Respondent/Respondent)

THE SOCIÉTÉ QUÉBÉCOISE DE GESTION COLLECTIVE DU DROIT DE REPRODUCTION; THE AUTHORS ALLIANCE AND ARIEL KATZ; THE CANADIAN ASSOCIATION OF LAW LIBRARIES; THE CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS AND THE CANADIAN FEDERATION OF STUDENTS; THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC; LE 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; THE COPYRIGHT COLLECTIVE OF CANADA; THE CANADIAN MEDIA PRODUCERS ASSOCIATION AND ASSOCIATION QUÉBÉCOISE DE LA PRODUCTION MÉDIATIQUE; THE INTERNATIONAL FEDERATION OF REPRODUCTION RIGHTS ORGANISATIONS, THE INTERNATIONAL AUTHORS FORUM, AND THE INTERNATIONAL PUBLISHERS ASSOCIATION; THE CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD., THE CANADIAN RETRANSMISSION COLLECTIVE, CONNECT MUSIC LICENSING SERVICE INC. AND LA SOCIÉTÉ DE GESTION COLLECTIVE DES DROITS DES PRODUCTEURS DE PHONOGRAMMES ET DE VIDÉOGRAMMES DU QUÉBEC; THE ASSOCIATION OF CANADIAN PUBLISHERS, CANADIAN PUBLISHERS’ COUNCIL AND THE WRITERS’ UNION OF CANADA; CANADIAN ASSOCIATION OF RESEARCH LIBRARIES; THE COPYRIGHT CONSORTIUM OF THE COUNCIL OF MINISTERS OF EDUCATION, CANADA; MUSIC CANADA, CANADA MUSIC PUBLISHERS ASSOCIATION, ASSOCIATION QUÉBÉCOISE DE L’INDUSTRIE DU DISQUE, DU SPECTACLE ET DE LA VIDEO, PROFESSIONAL MUSIC PUBLISHERS ASSOCIATION AND CANADIAN INDEPENDENT MUSIC ASSOCIATION; THE COLLEGES AND INSTITUTES CANADA AND UNIVERSITIES CANADA

Interveners

**FACTUM OF THE INTERVENERS,
ASSOCIATION OF CANADIAN PUBLISHERS, CANADIAN PUBLISHERS’
COUNCIL, and THE WRITERS’ UNION OF CANADA**

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

<p>STOCKWOODS LLP Toronto-Dominion Centre TD North Tower, Box 140 77 King Street West, Suite 4130 Toronto, ON M5K 1H1</p> <p>Brendan van Niejenhuis (46752J) Tel.: 416-593-7200/Fax: 416-593-9345 Email: brendanvn@stockwoods.ca</p> <p>HEBB & SHEFFER (in association)</p> <p>1 Palace Pier Court, Suite 902 Toronto, ON M8V 3W9</p> <p>Warren Sheffer (46093F) Tel: 416-556-8187</p> <p>Solicitors for the interveners, Association of Canadian Publishers, Canadian Publishers' Council and The Writers' Union of Canada</p>	<p>MICHAEL SOBKIN Barrister and Solicitor 331 Somerset Street West Ottawa, Ontario K2P 0J8</p> <p>Tel.: 613-282-1712 Fax: 613-288-2896 Email: msobkin@sympatico.ca</p> <p>Ottawa Agent for the interveners, Association of Canadian Publishers, Canadian Publishers' Council and The Writers' Union of Canada</p>
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<p>COPIES TO:</p>	
<p>OSLER, HOSKIN & HARCOURT LLP P.O. Box 50, First Canadian Place Toronto, ON M5X 1B8</p> <p>John C. Cotter Barry Fong W. David Rankin</p> <p>Tel.: 416-862-5662 Fax: 416-862-6666 Email: jcotter@osler.com</p> <p>Solicitors for the Appellant, York University</p>	<p>OSLER, HOSKIN & HARCOURT LLP Suite 1900 340 Albert Street Ottawa, ON K1R 7Y6</p> <p>Geoffrey Langen Tel.: 613-787-1009 Fax: 613-235-2867 Email: glangen@osler.com</p> <p>Ottawa Agent for the Appellant, York University</p>

<p>THE CANADIAN COPYRIGHT LICENSING AGENCY 69 Yonge Street, Suite 1100 Toronto, ON M5E 1K3</p> <p>Arthur B Renaud Asma Faizi</p> <p>Tel.: 647-984-1049 Fax: 416-868-1621 Email: a.b.renaud@gmail.com</p> <p>Solicitors for the Respondent, Canadian Copyright Licensing Agency</p>	<p>GOWLING WLG (CANADA) LLP 160 Elgin Street, Suite 2600 Ottawa, ON K1P 1C3</p> <p>Guy Régimbald Tel.: 613-786-0197 Fax: 613-563-9869 Email: guy.regimbald@gowlingwlg.com</p> <p>Ottawa Agent for the Respondent, Canadian Copyright Licensing Agency</p>
<p>CABINET PAYETTE 47 rue Wolfe Lévis, QC G6V 3X6</p> <p>Daniel Payette Tel.: 514-623-4654</p>	<p>LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP 130 Adelaide Street West, Suite 2600 Toronto, ON M5H 3P5</p> <p>Sana Halwani Tel.: 416-865-3733 Fax: 416-865-9010 Email: shalwani@litigate.com</p>
<p>JFK LAW CORPORATION 340 -1122 Mainland Street Vancouver, BC V6B 5L1</p> <p>Robert Janes, Q.C Tel.: 250-405-3466 Fax: 250 381.8567 Email: rjanes@jfkclaw.ca</p>	<p>CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS 2705 Queensview Drive Ottawa, ON K2B 8K2</p> <p>Jeremy de Beer Tel.: 613-562-5800 ext. 3169 Fax: 613-562-5124 Email: jeremy.debeer@uottawa.ca</p>
<p>UNIVERSITE D'OTTAWA Common Law Section 57 Louis Pasteur Street Ottawa, ON KIN 6N5</p> <p>David Fewer Tel.: 613-562-5417 Fax: 613-562-5124 Email: David.Fewer@uOttawa.ca</p>	<p>UNIVERSITÉ DE MONTRÉAL Pavillon Maximilien Caron 3101, chemin de la Tour, local A-7426 Montreal, QC H3C 317</p> <p>Ysolde Gendreau Tel.: 514 343-6062 Fax: 514 343-2199 Email: ysolde.gendreau@umontreal.ca</p>

<p>GOWLING WLG (CANADA) LLP 160 Elgin Street, Suite 2600 Ottawa, ON KIP 1C3</p> <p>D. Lynne Watt Tel.: 1 613-786-8695 Fax: 613-788-3509 Email: lynne.watt@gowlingwlg.com</p>	<p>GOWLING WLG (CANADA) LLP First Canadian Place 100 King Street West, Suite 1600 Toronto, ON M5X 1G5</p> <p>John E. Callaghan Tel.: 416-369-6693 Fax: 416-862-7661 Email: john.callaghan@gowlingwlg.com</p>
<p>STOHN HAY CAFAZZO DEMBROSKI RICHMOND LLP 133 King Street East, 2nd Floor Toronto, ON MSC 1G6</p> <p>Erin Finlay Tel.: 416-961-2020 Ext. 242 Fax: 416-961-2021 Email: erin@stohnhay.com</p>	<p>GOWLING WLG (CANADA) LLP 160 Elgin Street, Suite 2600 Ottawa, ON KIP 1C3</p> <p>Stephane Caron Tel.: 613-786-0177 Fax: 613-788-3468 Email: stephane.caron@gowlingwlg.com</p>
<p>RIDOUT & MAYBEE LLP 11 Holland Avenue, Suite 601 Ottawa, ON K1Y 4S1</p> <p>Howard P. Knopf Tel.: 613-288-8008 Fax: 613-236-2485 Email: hknopf@ridoutmaybee.com</p>	<p>WANDA NOEL 5496 Whitewood Avenue Ottawa, ON K4M 1C7</p> <p>Tel.: (613) 794-1171 Fax: (613) 692-1735 Email: wanda.noel@bell.net</p>
<p>CASSELS BROCK & BLACKWELL LLP Scotia Plaza 2100 -40 King Street West Toronto, ON M5H 3C2</p> <p>Casey M. Chisick Tel.: 416 869 5403 Fax: 416 644 9326 Email: cchisick@cassels.com</p>	<p>FASKEN MARTINEAU DUMOULIN LLP 1300-55 Metcalfe Ottawa, ON K1P6L5</p> <p>James Aidan O'Neill Tel.: 613-696-6878 Fax: 613 230 6423 Email: aoneill@fasken.com</p>
<p>UNIVERSITIES CANADA COO 1710 -350 Albert Street Ottawa, ON K1R 1B1</p> <p>Philip Landon, VP Tel.: 613-563-1236 Fax: 613-563-9745 Email: info@univcan.ca</p>	

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I. INTRODUCTION

1. This intervener coalition (“CAP”) consists of the three major organizations that represent professional writers and the Canadian publishing industry. All are members of Access Copyright; while publishers hold exclusive copyrights in order to carry out their core publishing businesses, they grant non-exclusive rights to Access Copyright to collectively administer the right to reproduce their works. The groups comprising CAP are often at odds in their interests, but they are aligned in consensus on these appeals, and make submissions both on the Access “Tariff” appeal and York’s “Guidelines” appeal, which are, after all, simply two sides of the same coin.

II. THE TARIFF APPEAL

2. It is most unusual for this Court to be called on to directly determine the question of an administrative tribunal’s – here, the Copyright Board’s – powers and authority conferred by its enabling statute, without the Board itself being present as a party. It is stranger still to do so without the benefit of the reasons of the Board determining the question in issue. How, then, has this somewhat startling circumstance come to be?

3. **The Tariff Proceeding.** The Tariff Proceeding before the Copyright Board was initiated in 2010 and determined finally in 2019.

4. York was on notice of, and represented in, the Tariff proceeding. As a directly affected party intended to be specifically subject to the Tariff, it formally objected to the Tariff when it was filed, through the Association of Universities and Colleges of Canada. As the Board explained in its final decision, there were originally nearly 100 objectors besides:

About a hundred individuals and organizations objected to the 2011-2013 proposed tariff... The individuals and organizations objecting to one or both of the proposed tariffs included the Canadian Federation of Students (CFS), the Canadian Association of University Teachers (CAUT), Professor Ariel Katz of the University of Toronto, Sean Maguire, a student, AUCC, and ACCC.¹

¹ [Copyright Board Final Decision](#), December 16, 2019, *Post-Secondary Educational Institutions 2011-2017*, CB-CDA 2019-082 (“Board Final Decision”), at para. 16-17. The Board was comprised of R.A. Blair J.A., Claude Majeau, and J. Nelson Landry.

5. By September, 2011, York asserted that it was “opting out” of the Tariff, a position it has sought to justify by reference to its fair dealing Guidelines (then in an earlier form). This was very clear and was part of the context that was before the Board, as reflected in its Reasons:

A significant proportion of universities and colleges responded to this evolution by altering their previous practice, under which their use of works in Access’ repertoire was governed by model licences. Instead, they developed fair dealing guidelines (“Guidelines”) which, they say, identify uses that are now covered by the fair dealing exemption and therefore no longer require a licence. Not coincidentally, perhaps, the uses identified by the Guidelines as fair dealing closely parallel the uses covered by Access’ model licences and its proposed tariffs, which Access seeks to have in place because it fears that the educational institutions will decline to enter into further licences with it for the reproduction of its repertoire works.²

6. But York – and others represented by AUCC – then *walked out of* the proceedings – at least, temporarily (perhaps just long enough to act as though they had not participated). They effectively drew a line in the sand, declaring that they would not abide by any Tariff, and would instead defy the authority of the Board to impose one. This created difficulties for the Board in its effort to discharge its statutory function, as it saw it:

This background has led to a further complication for the Board in dealing with the proposed tariffs. Although initially filing objections, the post-secondary school institutions all withdrew from the proceedings. In particular, the Association of Universities and Colleges of Canada (AUCC), now Universities Canada, withdrew as an objector in April 2012, during the interrogatory process. The Association of Canadian Community Colleges (ACCC), now Colleges and Institutes Canada, withdrew in October 2013, after taking part in the interrogatory process but before filing its statement of case. These two associations represent the educational institutions subject to the proposed tariffs. Their withdrawal meant that the users most directly affected by the tariffs were no longer represented at the proceedings and did not provide any evidentiary record on which the Board can rely. We will return to the added complications this posed for the Board’s deliberations later.³

7. The Tariff proceeding was initiated in 2010, and the hearing proceeded in 2016, with the Board’s decision finally released in 2019. After the hearing, while this enforcement action was pending in the Federal Court – its initiation plainly having been provoked by York’s “Freeman on the Land” approach to the Interim Tariff – York and AUCC *reinserted themselves* by filing submissions pursuant to the Board’s “public comment” rules:

Further issues arose following the hearing [in 2016], however. A large number of post-secondary institutions – all of which had long before withdrawn as objectors or intervenors, and declined to participate – attempted to reinsert themselves into the process. Taking

² [Board Final Decision](#), at para. 7

³ [Board Final Decision](#), at para. 8

advantage of the Board’s Directive on Procedure that permits anyone to “comment” on proceedings, they wrote to the Board, reiterating previous submissions and raising new issues, on none of which they had provided any evidence for the record.⁴

8. York went out of its way to write separately to the Board on its own behalf. It asked for revisions to the Tariff and made factual claims, but also made clear to the Board it had no intention of abiding by the existing Interim Tariff:

On February 9, 2016, after the hearing had ended, York University (York) wrote to the Board to inform it that it had entered into numerous licences with third parties other than Access for the reproduction of copyrighted works, either individually or through a group of various university libraries. To avoid having to pay twice, it argued that the tariff to be certified by the Board should take these licences into account. ... York also noted that as of August 31, 2011, it had decided that, unlike other institutions, it would not operate on the basis of the Access Interim Tariff (2011-2013). It argued that it was not subject to the interim tariff because it had not done any copying that would have required a licence from Access. This led Access to commence proceedings against York in Federal Court claiming, among other relief sought, a declaration to the effect that York was required to pay Access the royalties set out in the interim tariff because it had reproduced copyrighted material from its repertoire that had not otherwise been cleared.⁵

9. The Board, confronting these difficulties, nevertheless rendered a decision. It explained the position it was left in this way:

Here, the lack of participation by institutional objectors has left us without the benefit of an opposing party’s evidence, analysis and arguments to counterbalance those of Access and its evidence. Because we are required to approve a tariff that is fair and equitable, and because we also considered the public interest, we were required to examine the record with utmost care, and even to ask questions to supplement it where appropriate. This we have done. However, that is where our role ends. From a procedural standpoint, Access should not have to bear a heavier burden than it normally would have, had the educational institutions decided to participate, nor should the Board have to assume the mantle of counsel for the educational institutions. In the end, it is the institutional users that chose not to take part.⁶

10. This circumstance was procedurally orchestrated by York, perhaps to avoid the inconvenience of the Board even being a party. Regardless, the position of York in the Tariff appeal, as it was in the courts below, is not merely a collateral attack on an individual decision – it is a *calculated ambush* that seeks to overend the heart of the Board’s jurisdiction.

11. If this Court’s administrative law jurisprudence is to be treated seriously, the Court must ensure the consistency of its approach here, where the significance of the Copyright Board process

⁴ [Board Final Decision](#), at para. 11

⁵ [Board Final Decision](#), at para. 41

⁶ [Board Final Decision](#), at para. 184

and Tariff decision,⁷ and the implications for its authority, are concerned.⁸ This Court has repeatedly and recently re-emphasized that a “breach first, challenge later” approach is an unacceptable means of challenging the legitimacy of administrative outcomes.⁹

12. **Jurisdiction and Tariff Enforceability.** Reasonableness review legitimately includes considering deferentially “the reasons offered or which could be offered” in support of a decision – a decision the Board implicitly makes every time it approves a Tariff.¹⁰ The reasonableness standard would surely have been applied had York directly challenged the Board’s authority (or “jurisdiction”) to establish a Tariff with legally binding effect, and the Board given the opportunity to expressly rule and explain its reasons.¹¹ Parliament’s conferral of legal and interpretive authority cannot simply be avoided by a party walking out of a hearing.

7 York’s argument that a tariff is not meant to bind users echoes the discredited approach of holding that a “decision” is “no decision at all” if made without jurisdiction, advanced by Lord Reid in *Anisminic v Foreign Compensation Commission*, [\[1969\] 2 A.C. 147 \(H.L.\)](#)

8 There was no divergence among this Court on at least this fundamental premise re-stated in *Vavilov v Canada (Minister of Citizenship and Immigration)*, [2019 SCC 65](#) at para. 24: “Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it.” This sound presumption requires the Court to refuse to entertain collateral attacks on the efficacy of an administrative determination, just as much as it warrants review on a “reasonableness” standard within the context of a properly-constituted challenge.

9 *R. v. Bird*, [2019 SCC 7](#), paras. 25-32, 38, 42. See *R. v. Consolidated Maybrun Mines*, [\[1998\] 1 S.C.R. 706](#) at para. 43 *per* L’Heureux-Dubé J.: “Nor should it be forgotten that the goal of many such administrative structures is to draw on expert knowledge by creating specialized tribunals. Permitting citizens to circumvent these tribunals and transfer the debate to the judicial arena could lead the courts to rule on matters that they are not best suited to decide.”

10 In that regard, this appeal is not dissimilar from the context of *Alberta Teachers Assn. v Alberta (Information & Privacy Commissioner)*, [2011 SCC 61](#), and the comments of Rothstein J. at para. 53 and 54 are apt: “[T]he direction that a reviewing court should give respectful attention to the reasons “which could be offered in support of a decision” is apposite when the decision concerns an issue that was not raised before the decision maker ... The point is that parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal[...].”

11 *Vavilov*, *supra* para. 30. To the extent that *Rogers v. Society of Composers, Authors and Music Publishers of Canada*, [2012 SCC 35](#), remains good law in light of *Vavilov* – which is doubtful, as Professor Daly has observed (Daly, Paul, *One Year of Vavilov* (November 30, 2020). [Ottawa Faculty of Law Working Paper No. 2020-34](#), Available at SSRN: <https://ssrn.com/abstract=3722312>, at p. 38) – the proposition that correctness review of the Board is appropriate on questions of law where the Court enjoys concurrent first-instance interpretive authority cannot logically extend to the Court’s assessment of the Board’s jurisdiction and

13. As it is, the Board’s reasons make clear that it saw York and other post-secondary institutions as the parties intended to be “subject to” and “directly affected” by the Tariff.¹² York, by all appearances, had the same understanding. Through AUCC, it challenged the Interim Tariff by way of an application for judicial review.¹³ In March, 2012, the Federal Court of Appeal dismissed the application, commenting: “*This is manifestly a case where the Copyright Board should be permitted to complete its work before the Court is called upon to consider administrative law remedies.*”¹⁴ The objecting universities and colleges withdrew from the process one month later, in April, 2012.

14. Somehow the Court must now determine the question of what legal force the Board’s decision has, despite being deprived of the Board’s expertise in the interpretation and application of its enabling statute. It should do so in a manner that, at least, takes account of the administrative law principles that govern the relationship between courts and tribunals.

15. Respect for legislative supremacy and the conferral of legal authority on tribunals to affect and modify the legal landscape is the keystone of the relationship between courts and administrative bodies.¹⁵ As such, the best place to look is always the statute, and to the provisions that speak

authority in a Tariff proceeding. The *Act* does not confer *any* authority on the Court to set a Tariff and section 66.7 (discussed below) is completely inconsistent with such a proposition.

¹² [Board Final Decision](#), para. 8

¹³ The application took issue with the Board’s decision not to vary the Interim Tariff to allow for transactional licenses. The Board faced numerous other interlocutory efforts to remove aspects of its hearing process into the courts, including an application by Professor Ariel Katz for the Board to state a question to the Federal Court of Appeal, an application by AUCC to the Federal Court of Appeal to intervene in the interrogatory process, and an application by the University of Toronto to the Ontario Superior Court of Justice for an interlocutory injunction prohibiting Access Copyright from filing certain evidence in the hearing. All of these were dismissed. See [Board Final Decision](#), paras. 9, 23-34.

¹⁴ *AUCC v. Access Copyright*, [2012 FCA 96](#) at para. 2. It appears that the Trial Judge was not aware of this proceeding, in light of his comment at paragraph 225 to the effect that no judicial review had been taken of the Interim Tariff.

¹⁵ *Vavilov*, *supra* para 30. See also *Ontario Harness Horse Assn. v Ontario (Racing Commission)*, [2002 CanLII 41981 \(Ont. C.A.\)](#) at para. 43, 54

directly to the effect of the Board’s decisions. Section 66.7 of the *Act* is exactly that¹⁶ – and it is a key provision supporting the action now before this Court.¹⁷ It provides:

General powers, etc.

66.7 (1) The Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its decisions and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

Enforcement of decisions

(2) Any decision of the Board may, for the purposes of its enforcement, be made an order of the Federal Court or of any superior court and is enforceable in the same manner as an order thereof.

Procedure

(3) To make a decision of the Board an order of a court, the usual practice and procedure of the court in such matters may be followed or a certified copy of the decision may be filed with the registrar of the court and thereupon the decision becomes an order of the court.

Effect of variation of decision

(4) Where a decision of the Board that has been made an order of a court is varied by a subsequent decision of the Board, the order of the court shall be deemed to have been varied accordingly and the subsequent decision may, in the same manner, be made an order of the court.¹⁸

16. The Federal Court of Appeal did not even refer to this provision, though it was deciding whether or not to overturn a trial decision that was *acting on this power*. It instead diverted into an academic meander, eventually pointing at the Board’s “regulation making” authority established in neighbouring section 66.6,¹⁹ but not in issue, and a truncated history that froze the legislative object

16 The Federal Court has expressly held this provision to encompass the enforcement of the Board’s Tariffs: *Canadian Private Copying Collective v. Computer Warehouse Outlet Inc.*, [2005 FC 770](#).

17 Trial Reasons, 2017 FC 669 at para. 6. It is evident that the Trial Judge did not consider it necessary to get into section 66.7 in his own analysis, given his conclusions as to the clear intention of section 68(2), set out in paras. 188 to 220 of his Reasons. That did not excuse the Court of Appeal, having taken the opposite view of section 68(2), from the need to consider the other provisions that were squarely in issue, which speak directly to the question of enforcement.

18 Emphasis added.

19 Appeal Decision, 2020 FCA 77, at para. 148.

in the 1930s.²⁰ This Court owes no deference to the Federal Court of Appeal’s effort to apply the principles of statutory interpretation. Here, those efforts failed at the most basic level of identifying, and then interpreting, the *directly applicable* statutory provisions.

17. The purpose and effect of section 66.7 is unambiguous:

- First, it gives the Board the same authority as a superior court with respect to “the enforcement of its decisions and other matters necessary or proper for the due exercise of its jurisdiction” (66.7(1)).
- Second, it authorizes “*any decision*” the Board makes to be made into an order of the Federal Court, or any superior court, and subject to judicial enforcement (66.7(2)). It is clear that the Court’s legislated role is purely ministerial, in this regard: “*a certified copy of the decision may be filed with the registrar of the court and thereupon the decision becomes an order of the court*” (66.7(3)).
- Third, emphasizing the exclusive jurisdiction of the Board on the substance of its decisions, it deems any amendment the Board may later make to also constitute a variation of the formal court order. This only emphasizes the ministerial nature of the role given the Court by Parliament.

18. It was not for the Court of Appeal to call in question the obvious intention of the Board in issuing a decision and approving a Tariff to bind those it considered “directly affected”, by reading down the concept of “tariff” as it did. That is an intrusion into the Board’s authority, in defiance of administrative law principles, and in defiance of the limited role conferred upon it expressly, in section 66.7. York invites this Court to do likewise, and not merely condone, but *participate in* a collateral attack on the entire jurisdiction of the Board.

19. **The Court of Appeal’s Reasoning.** The Court of Appeal’s interpretation of the statute is unreasonable. It could not rationally interpret the right conferred in section 68(2) to “recover [unpaid tariff amounts] in a court of competent jurisdiction” without any consideration of the recovery procedure established in section 66.7. Other submissions²¹ properly and accurately explain the Court of Appeal’s omission to account for the evolving market failures that led to the numerous, extensive amendments to the *Act* beginning in 1988. CAP adds simply that the failure to do so renders worthless the ongoing investment of effort, study, representations and debate both by

²⁰ Appeal Decision, 2020 FCA 77, at paras. 57 to 203 and, in particular, para. 202.

²¹ Access Copyright Factum, paras. 23-40

interested sector representatives and members of the public, and by Parliamentarians through the Standing Committee and otherwise. Surely it is patent that the structural amendments to the *Act* adopted in 1988, in 1997 and beyond were the product of careful consideration and intended to achieve *something*. The Court of Appeal’s decision suggests that legislative reform meant to remedy real-world market failures affecting the livelihoods of CAP’s membership should take a back seat to academic, ideological overlays in this area of law. With respect, intellectual property statutes should not be interpreted differently than other statutes, nor receive an exemption from the general principles of statutory interpretation or administrative law.

III. THE GUIDELINES APPEAL

20. York’s effort to secure the Court’s blessing for its “Guidelines” is simply the flip side of its approach to the Tariff. As well noted by the Board, “the uses identified by the Guidelines as fair dealing closely parallel the uses covered by Access’ model licences and its proposed tariffs”, which it commented was perhaps “not coincidental[.]”.²²

21. To simply state bright line measures (such as the quantitative “10 per cent” definition of what constitutes a “short excerpt”), as the Guidelines do, by definition cannot substitute for the determination of whether the statutory “fair dealing” exception has been established - whether through the usual “case-by-case” factual examination, or at least by reference to concrete evidence as to *actual practices*,²³ as opposed to merely offering up a piece of paper. The *Act* already defines “fair dealing”, and does not leave it open to the individual or institutional user to supplement or substitute its own definition.²⁴

22. On the other hand, the sort of approach shown in the Guidelines, while it can never displace the analysis imposed by ss. 29, 29.1 and 29.2 of the *Act*, is an approach that can – and often has been – taken by the Board in its Tariff-setting function. Because the Board, in establishing a Tariff, is empowered to establish a fair representation of value based upon evidence and analysis of aggregated behaviour, it is empowered to take an aggregated view as to “how much of the copying is likely to be fair dealing?” In this case, it did so, based not upon a direct analysis or acceptance of

²² [Board Final Decision](#) at para 7

²³ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004 SCC 13](#) at para. 63.

²⁴ That is not to say that clarifying legislation reform might not be helpful in the definition of some aspects of “fair dealing”, but the proper forum for such reform is Parliament, not user-crafted Guidelines.

the Guidelines (which were unsupported by evidence), but upon the existing model licences, which took into account the existence of some fair dealing, and of some uncertainty in the application of the evolving law to individual cases:

Our concern here is not to decide whether educational institutions went too far in their interpretations of the decisions. In any event, there is no evidence to explain how their policies are applied and implemented. Although it is not germane for our purposes, we observe that in [the Trial decision herein], the Federal Court raised many concerns in this regard.

We conclude that an analysis of the Guideline policies in the context of fair dealing is unnecessary here, because we agree with Access that the rates should be based on agreements entered into between Access and the educational institutions using the proxy approach. The proxy agreements themselves incorporate a discount for fair dealing and the existence of the Guidelines.²⁵

23. Employing a substitute, or proxy, for fair dealing on an aggregated basis lies within the exclusive jurisdiction created by the *Act* and conferred upon the Copyright Board to set Tariffs. Of course, such an approach may also be reflected in voluntary licenses. And – given sufficient compelling evidence as to actual practice – an institution may take its chances that it can prove its practices to a sufficient standard to satisfy a Court in defence of an enforcement action. But in no circumstance should it be considered appropriate for an institution such as York to simply write out a document and, in essence, ask the Court to declare it exempt from the requirements of the *Act*. Whether York’s practice and policy is fair is a question of fact and a matter of impression that turn on the evidentiary record of this case.²⁶

24. Professor David Vaver observes that when determining the consequences of holding for copyright or a user’s right, “[the Act] must be interpreted to achieve its apparent purposes, using common sense and not pushing its language into meanings and results that would puzzle a reasonable observer.”²⁷ Those purposes are (1) “...promoting the public interest in the encouragement and dissemination of works of the arts and intellect and...” (2) “...obtaining a just reward for the creator...”²⁸

²⁵ [Board Final Decision](#) at para. 217-218

²⁶ *CCH*, *supra* at para. 52.

²⁷ D. Vaver, *Intellectual Property Law: Copyright, Patent, Trade-marks*, 2d ed. (Toronto: Irwin Law, 2011) at p. 60.

²⁸ *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002 SCC 34](#) at para. 30.

25. Considering the language and purpose of the Act, the evidentiary record of this case, and York's collateral attack on the jurisdiction of the Board, it would perplex the reasonable observer if the presumptive rights York seeks in its declaration²⁹ were granted. As a longstanding licensee of Access Copyright from 1994 to the end of 2010,³⁰ York could not help but know (A) the highly specialized nature of the works³¹ it routinely copied under licence before crafting the Guidelines and (B) that its unlicensed dealings with those works would be an appropriation of the benefits intended for authors and publishers. This knowledge does not deprive York of its "user's right" to fair dealing, but the law requires due consideration to these contextual factors in shaping its practice and policy of copying works without permission or payment.

26. The evidentiary record in this case does not reflect due consideration by York as to the fairness of its dealing, but a singular concern with unilaterally fixing quantitative limits of how much copying it could make from copyright-protected works without payment (e.g. 10% or less of a textbook or one chapter from that textbook, whichever is greater). That singular purpose is reflected in its purported decision to "opt out" of the Board's decision and hearing process, where the Guidelines would need to be supported by concrete, if aggregated, evidence of York's practices if they were to be taken into account in discounting the Tariff.

27. To explain the absence of proper evidence to support its requested declaration, York asserts that "[i]t 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."³² Leaving aside the failed effort to meet the evidentiary standard of *CCH* with respect to actual enforcement practices, Parliament has provided, and repeatedly nurtured through legislative amendments, an alternative that is perfectly suited to – and indeed, was obviously designed to – resolve this challenge for large institutional users. That alternative³³ is through the adjudication and approval of a Tariff before an expert administrative tribunal. York's Declaration would effectively usurp the Board's function and place its powers in York's hands. Nothing in the Act can support such an outcome. That should be determinative in disposing of both appeals.

29 York University Factum, sub-para. 134(iii).

30 Trial Reasons, at para. 153.

31 Trial Reasons, at para. 333

32 York University Factum, para. 89.

33 There is of course the further alternative of a voluntary license.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of April, 2021



Brendan van Niejenhuis



Warren Sheffer

IV. TABLE OF AUTHORITIES

AUTHORITY	PARAGRAPH(S) FACTUM
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<u><i>Rogers v. Society of Composers, Authors and Music Publishers of Canada</i>, 2012 SCC 35</u>	12
<u><i>AUCC v. Access Copyright</i>, 2012 FCA 96</u>	13
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