

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)

**FACTUM OF THE INTERVENER,
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CANADA**

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

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PART I - OVERVIEW

1. Pursuant to an Order of this Honourable Court dated March 29, 2021, the Copyright Consortium of the Council of Ministers of Education Canada (herein collectively referred to as the “Ministers of Education”) was granted leave to intervene in this appeal, subject to the terms set out in the Court’s Order.

2. The Ministers of Education have responsibility for elementary and secondary education in all of the provinces and territories of Canada, with the exception of Quebec and, for the purposes of this intervention, British Columbia.

3. In the Court’s Order of March 29, 2021, the Ministers of Education were given the right to serve and file a factum and to present oral argument at the hearing of the appeal by York University.

4. In this factum, the Ministers of Education will provide an overview of the case law that forms the basis for the Fair Dealing Guidelines that were adopted by York University.

PART II - QUESTION

5. The question before this Honourable Court on which the Ministers of Education have intervened is whether it should issue an Order setting aside the judgment of the Federal Court of Appeal with respect to its findings on fair dealing.

PART III - STATEMENT OF SUBMISSIONS

I. Fair Dealing “Thresholds” for Education

6. In *York University v. Canadian Copyright Licensing Agency (Access Copyright)*¹ (the “*Appeal Decision*”), York’s Fair Dealing Guidelines were found to be unfair. This finding was based on the Federal Court of Appeal’s perceived absence of information about how to assess the fairness of York’s Fair Dealing Guidelines:

¹ 2020 FCA 77.

The objective of York’s counterclaim is to have the Court give its imprimatur to its Guidelines. If it hoped to succeed in that endeavour, York had to address the Guidelines themselves.²

7. In the Trial Decision in this case, the Federal Court found that York did not provide a meaningful response or any evidence with respect to the rationale or basis for the “thresholds”—the amounts permitted to be copied—in its Guidelines.³

8. However, the case law cited by the parties before the trial judge contains a detailed empirical and legal analysis of the fair dealing thresholds established by the Supreme Court of Canada and the Federal Court of Appeal in the following cases: *CCH Canadian Ltd. v. Law Society of Upper Canada* (“CCH”)⁴, *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* (“Alberta”)⁵ and *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* (“SOCAN v Bell”).⁶ Further, *Canadian Copyright Licensing Agency (Access Copyright) v. Canada* (“Access Copyright v. Canada”), affirms the use of fairness thresholds that are consistent with the above-noted case law.⁷ The purpose of these submissions is to describe these previously established thresholds, and their relevant contexts, for this Court. In the view of the Ministers of Education, the thresholds in York’s Fair Dealing Guidelines are in line with the thresholds that have been established in the case law.

9. These cases, decided between 2004 and 2018, establish fair dealing thresholds in three institutional settings—libraries, schools and government offices—and for the online sale of music. Together these cases develop “thresholds” as to what can be copied under fair dealing. The “thresholds” in these cases are consistent with the fair dealing “thresholds” set out in York’s Fair Dealing Guidelines.

² *Ibid*, at para. 280.

³ 2017 FC 669 [“*Trial Decision*”], at paras. 306-308.

⁴ [2004] 1 SCR 339, 2004 SCC 13.

⁵ [2012] 2 SCR 345, 2012 SCC 37.

⁶ [2012] 2 SCR 326, 2012 SCC 36.

⁷ 2018 FCA 58.

II. CCH: A Single Copy, or Five Per Cent, is Fair

10. The first fair dealing thresholds were established in 2004 by this Court in its landmark *CCH* decision.⁸ This case interpreted how fair dealing applies in a library.

11. In 1996, the Law Society implemented an “Access to the Law Policy” (“Access Policy”) which governed its custom photocopy service and set limits on the types of requests that would be honoured. A single copy of an article, reported decision, case summary, statute, or regulation, required for the purposes of research, review, private study and criticism, as well as use in court, tribunal and government proceedings, could be provided to users of the Great Library. Requests for substantial copying from secondary sources (e.g. in excess of 5 per cent of the volume or more than two citations from one volume) were referred to the Reference Librarian and could be refused.

12. This Court found that persons or institutions relying on fair dealing need only prove that their own dealings were for the purpose of research or private study and were fair. This could be done in two ways: by showing that their own *practices and policies* were research-based and fair, or by showing that all *individual dealings* with the materials were, in fact, research-based and fair.⁹ Based on its Access Policy, the Law Society’s dealings with the publishers’ works were found to be fair.

13. The *CCH* decision began the evolution of fair dealing thresholds. Specifically, *CCH* establishes that:

- (a) Fair dealing can be established in two ways: on the basis of a *policy or practice* or by showing that *individual dealings* are fair.¹⁰
- (b) It is possible to deal fairly with a whole work.¹¹ Making a single copy of one case, one article, one statutory reference or 5 per cent of a secondary

⁸ *CCH*, *supra* note 4.

⁹ *Ibid*, at paras. 61-65.

¹⁰ *Ibid*, at para. 63.

¹¹ *Ibid*. at para. 56.

source for a fair dealing purpose was fair under the Law Society's Access Policy.¹²

III. SOCAN v. Bell: 12.5 Per Cent is Fair

14. The next case to address fair dealing thresholds is *SOCAN v Bell*¹³ which was decided by this Court in 2012. This case applied fair dealing to the online sale of music. The interpretation of fair dealing involved the *practice* used by music sellers of streaming 30 to 90-second excerpts from musical works of approximately four minutes as free "previews" that prospective purchasers could listen to in order to decide whether to purchase the work.

15. SOCAN administers the performing and communication rights of composers, authors and music publishers. SOCAN filed tariffs with the Copyright Board (the "Board") proposing royalties to be paid when musical works were communicated to the public over the Internet.

16. The Board found that SOCAN was not entitled to royalties for previews because the activity was fair dealing for the purpose of research. The Federal Court of Appeal subsequently upheld the Board's decision.¹⁴

17. The Supreme Court of Canada found that the previews were fair. Although the aggregate amount of music heard through previews was significant, this Court affirmed its previous finding in *CCH* that "amount" means the "quantity of the work taken and not the aggregate amount used."¹⁵ Since fair dealing is a "user's" right, the amount of the dealing factor should be assessed based on the individual use, not the amount of the dealing in the aggregate. The appropriate measure under the amount of the dealing factor is the proportion of the excerpt used in relation to the whole work.

¹² *Ibid*, at para. 68.

¹³ *SOCAN v. Bell*, *supra* note 6.

¹⁴ *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2010 FCA 123 ["*SOCAN v. Bell*"].

¹⁵ *CCH*, *supra* note 4, at para. 56.

18. As was decided in *CCH*, fair dealing is assessed by looking at practices as they related to specific works requested by individual patrons, not the total number of patrons or pages requested.¹⁶ The amount of the dealing factor is assessed by looking at how each dealing occurs on an individual level, not on the aggregate use. In *SOCAN v. Bell*, this Court found the 12.5 per cent of the work that was used (30 seconds from a work of approximately four minutes) to be a “modest amount.”¹⁷

19. Thus, in the *SOCAN v. Bell* decision, this Court added the following important threshold:

- (a) copying 12.5 per cent of a work is a “modest dealing”.

IV. Alberta: Copying Short Excerpts is Fair

20. The next case on fair dealing thresholds is this Court’s 2012 decision in *Alberta*.¹⁸ This case applied fair dealing to the copying of short excerpts from copyright-protected works by teachers for students in their classes. Fairness was assessed based on *individual dealings* identified in a year-long study of copying behavior in elementary and secondary (“K-12”) schools.

21. Access Copyright, representing authors and publishers of printed literary and artistic works, filed a proposed tariff for 2005-2009 with the Board for the reproduction of works in its repertoire for use in elementary and secondary schools in Canada, except Quebec. In its decision setting the tariff, the Copyright Board found that copies made at the teachers’ initiative with instructions to students to read the material did not constitute fair dealing and were therefore subject to a royalty. The Board also found that teachers generally limit themselves to reproducing relatively “short excerpts” from a work to

¹⁶ *SOCAN v. Bell*, *supra* note 6, at para. 41.

¹⁷ *Ibid*, at para. 39.

¹⁸ *Alberta*, *supra* note 5.

complement the main textbook.¹⁹ The Board did not describe precisely what amount would be considered a “short excerpt”, but it did conclude that “nothing leads us to conclude that the copies at issue tend to approach the upper limit [10 per cent] imposed by the licence.”²⁰

22. On judicial review, the Federal Court of Appeal upheld the Copyright Board’s conclusion that the copies in issue did not constitute fair dealing.²¹

23. On appeal to this Court, the dispute centred on the second step of the *CCH* test, namely, whether the copies were “fair.” This Court relied on the Board’s finding that teachers generally only copied “short excerpts” to conclude that copying this amount by teachers for students was fair.

24. Fairness was assessed based on the proportion of each of the short excerpts in relation to the whole work. Unlike the library patrons in *CCH*, teachers do not make multiple copies for their own use, they make them for the use of their students. This Court consequently established student instruction as a form of research and private study.

25. The *Alberta* decision added another threshold to those established by this Court in *CCH*:

- (a) it is fair for a teacher to make copies of “short excerpts” of a work for his or her students.

¹⁹ Decision of the Board, *Statement of Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire, Elementary and Secondary Schools, 2005-2009*, (26 June 2009), at para. 104.

²⁰ *Ibid*, at para. 103.

²¹ *SOCAN v. Bell Canada*, *supra* note 13.

V. **BC (Education): Five to Ten Per Cent of a Book is Neutral; 100 Per Cent of an Article can be Fair**

26. The next case on fair dealing thresholds is the Copyright Board's 2016 decision in Access Copyright (*Elementary and Secondary Schools*) 2010-2015.²² In 2017, the Federal Court of Appeal upheld the Board's decision on judicial review in *Canadian Copyright Licensing Agency (Access Copyright) v. British Columbia (Education)*.²³

27. In this case there was not enough evidence submitted to the Board to allow it to conduct a fair-dealing analysis based on individual dealings because the data adduced by the parties was at the aggregate level. Instead, the Board approximated the amount of fair-dealing copying using aggregate data.²⁴

28. Access Copyright filed tariffs with the Board for the reproduction of works in its repertoire by elementary and secondary schools for 2010-2015. The Board applied the following fair dealing thresholds:

- (a) For books, if fewer than or equal to 5 per cent of the pages in the work were copied, the dealing tends to fairness. If more than 10 per cent of the pages in the work were copied, the dealing tends to unfairness. The intermediate interval has a neutral tendency.²⁵
- (b) Articles in periodicals, magazines and newspapers were treated as individual works. For example, if an entire article of one page was copied out of a 100-page newspaper, the article was considered to be the entire work. When the other fair dealing factors were applied, the Board found that

²² Decision of the Board, *Statement of Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire, Elementary and Secondary Schools, 2010-2015*, (19 February 2016) ["2010-2015 Decision"].

²³ 2017 FCA 16.

²⁴ 2010-2015 Decision, *supra* note 21, at paras. 339, 347.

²⁵ *Ibid*, at paras. 288, 426.

98.1 per cent of the dealings with newspapers and 98.5 per cent of the dealings with magazine and periodical articles tended toward fairness.²⁶ The Board, citing *CCH*, noted that for the purposes of research and private study it may be necessary to copy an entire academic article.²⁷

VI. Provincial and Territorial Governments: Up to Ten Per Cent of a Book or an Entire Article May be Fair

29. Finally, the Copyright Board's 2015 decision in *Access Copyright (Provincial and Territorial Governments) 2005-2014*²⁸ also addressed fair dealing thresholds. The Board decision was upheld by the Federal Court of Appeal in *Access Copyright v. Canada*.²⁹

30. This case applied fair dealing to copying by provincial and territorial government employees. The case assessed fair dealing based on *individual dealings* captured in a study of copying behavior in government offices. The Board used the data generated by this study to assess the fairness of the *individual dealings*.

31. The Board's decision describes the thresholds it used to decide whether particular dealings were fair or unfair:³⁰

- (a) Approximately 10 per cent of a book, in the context of research or private study, either makes a dealing tend towards fairness, or, at most, does not

²⁶ *Ibid*, at paras. 433-441.

²⁷ *Ibid*, at para. 279.

²⁸ Decision of the Board, *Statement of Royalties to Be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire*, Provincial and Territorial Governments, 2005-2014, (22 May 2015) ["Provincial and Territorial Governments, 2005-2014"].

²⁹ *Access Copyright v. Canada*, *supra* note 7.

³⁰ Provincial and Territorial Governments, 2005-2014, *supra* note 27, at paras. 330-337.

make it tend to either fairness or unfairness (i.e., this factor is neutral in such cases and favours neither finding).³¹

- (b) An entire newspaper, journal or magazine article may have to be copied for the purpose of research or private study. According to this Court's *CCH* decision, it will often be the case that the entirety of the work is necessary to effectively achieve that purpose.³²
- (c) Where an entire article was copied for the purpose of research or private study, while the amount of the dealing factor tends towards unfairness, it does not do so strongly.³³

32. It is worth noting that the Board's decision cites additional case law on thresholds. Aside from the decisions above, the Board noted that the Federal Court, in *Warman v. Fournier*,³⁴ had found that the reproduction of a heading and three and a half paragraphs from a newspaper article of eleven paragraphs (being approximately 32 per cent) was a "very limited" amount of dealing.³⁵ The Board also referred to *Century 21 v. Rogers*,³⁶ in which the British Columbia Supreme Court found that while repeatedly copying works in their entirety tends toward unfairness, copying a work in its entirety once may be fair.³⁷

³¹ *Ibid*, at paras. 78, 338.

³² *Ibid*, at para. 339.

³³ *Ibid*, at paras. 339-340.

³⁴ 2012 FC 803.

³⁵ Provincial and Territorial Governments, 2005-2014, at para. 331.

³⁶ *Century 21 Canada Limited Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196.

³⁷ Provincial and Territorial Governments, 2005-2014, at paras. 338-340.

33. The Federal Court of Appeal, on judicial review, found that the Board faithfully applied the teachings of the Supreme Court to reach conclusions regarding fairness that were acceptable and defensible.³⁸

VII. Educators Need Clear Rules

34. As a practical matter, educators are not lawyers, and cannot reasonably be expected to know and apply fair dealing case law themselves. Guidelines are therefore needed so that classroom educators can consistently and correctly apply fair dealing. Without guidelines individual teachers would reach widely varying conclusions as to what is, and is not, permitted under fair dealing. One teacher, for example, could consider 2 per cent of a work to be a fair dealing while another could set that threshold at 20 per cent. Guidelines that are supported by the case law are necessary to avoid different, and likely conflicting, interpretations as to what constitutes fair dealing. The Federal Court of Appeal approved the use of guidelines in such circumstances.³⁹

35. The case law on thresholds described above is clear and consistent, providing the basis for clear rules to be used by educators. The York Fair Dealing Guidelines are in line with the case law, and the Ministers of Education submit that this Court should find them to be fair.

36. **ALL OF WHICH** is respectfully submitted this 26th day of April 2021.



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³⁸ *Access Copyright v. Canada*, supra note 7, at para. 146.

³⁹ *Ibid*, at para. 128.

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PART IV - LIST OF AUTHORITIES

Case Law	Paragraph
1. <i>Canadian Copyright Licensing Agency (Access Copyright) v. York University</i> , 2017 FC 669	6
2. <i>CCH Canadian Ltd. v. Law Society of Upper Canada</i> , [2004] 1 SCR 339, 2004 SCC 13	7,9,11,12,16
3. <i>Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)</i> , [2012] 2 SCR 345 , 2012 SCC 37	7,19
4. <i>Society of Composers, Authors and Music Publishers of Canada v. Bell Canada</i> , [2012] 2 SCR 326 , 2012 SCC 36	7,13,17
5. <i>Canadian Copyright Licensing Agency (Access Copyright) v. Canada</i> , 2018 FCA 58	7, 28,32,33
6. <i>Society of Composers, Authors and Music Publishers of Canada v. Bell Canada</i> , 2010 FCA 123	15,21
7. Commission du droit d'auteur du Canada: Copyright Board of Canada, <i>Reprographic Reproduction</i> , 2005-2009	20
8. Commission du droit d'auteur du Canada: Copyright Board of Canada, <i>Reproduction of literary works</i> , 2010-2015	25,26,27
9. Commission du droit d'auteur du Canada: Copyright Board of Canada, <i>Reproduction of literary works</i> , 2005-2014	28,30,31
10. <i>Canadian Copyright Licensing Agency (Access Copyright) v. British Columbia (Education)</i> , 2017 FCA 16	25
11. <i>Warman v. Fournier</i> , 2012 FC 803	31
12. <i>Century 21 Canada Limited Partnership v. Rogers Communications Inc.</i> , 2011 BCSC 1196	31

PART V – STATUTORY PROVISIONS

STATUTORY PROVISIONS

1. *Copyright Act, [RSC 1985, c C-42](#)*