

**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)*

---

**FACTUM OF THE RESPONDENT, (REPLY TO INTERVENERS Re: Fair Dealings)**  
**THE CANADIAN COPYRIGHT LICENSING AGENCY**  
(“ACCESS COPYRIGHT”)

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

---

**TORYS LLP**

79 Wellington Street West  
Suite 3000, TD South Tower  
Toronto, Ontario M5K 1N2  
Fax: (416) 865-7380

**Sheila R. Block**

Tel: (416) 865.7319  
Email: [sblock@torys.com](mailto:sblock@torys.com)

**THE CANADIAN COPYRIGHT  
LICENSING AGENCY**

69 Yonge Street, Suite 1100  
Toronto, Ontario M5E 1K3

**Arthur B. Renaud**

Tel: (647) 984-1049  
Email: [a.b.renaud@gmail.com](mailto:a.b.renaud@gmail.com)

**Asma Faizi**

Tel: (416) 868-1620 ext. 255  
Email: [afaizi@accesscopyright.ca](mailto:afaizi@accesscopyright.ca)

Counsel for the Respondent,  
The Canadian Copyright Licensing Agency

**GOWLING WLG (CANADA) LLP**

160 Elgin Street, Suite 2600  
Ottawa, Ontario K1P 1C3  
Fax: (613) 788-3587

**Guy Régimbald**

Tel: (613) 786-0197  
Email: [guy.regimbald@gowlingwlg.com](mailto:guy.regimbald@gowlingwlg.com)

Ottawa Agent for the Respondent,  
The Canadian Copyright Licensing Agency

*(Style of Cause continued)*

- and -

**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 AGENCY 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'INDUSTRIE DU DISQUE, DU SPECTACLE ET DE LA VIDEO, PROFESSIONAL MUSIC PUBLISHERS ASSOCIATION, AND CANADIAN INDEPENDENT MUSIC ASSOCIATION; COLLEGES AND INSTITUTES CANADA; and, UNIVERSITIES CANADA**

**INTERVENERS**

---

**FACTUM OF THE RESPONDENT, (REPLY TO INTERVENERS Re: Fair Dealings)  
THE CANADIAN COPYRIGHT LICENSING AGENCY  
("ACCESS COPYRIGHT")**

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

---

**ORIGINAL TO:**

**THE OFFICE OF THE REGISTRAR**

Supreme Court of Canada

301 Wellington Street

Ottawa, Ontario K1A 0J1

Email: [registry-greffe@scc-csc.ca](mailto:registry-greffe@scc-csc.ca)

**COPIES TO:**

**OSLER, HOSKIN & HARCOURT LLP**

P.O. Box 50, 1 First Canadian Place  
Toronto, Ontario M5X 1B8  
Fax: (416) 862-6666

**John C. Cotter**

Tel: (416) 862-5662  
Email: [jcotter@osler.com](mailto:jcotter@osler.com)

**Barry Fong**

Tel: (613) 787-1097  
Email: [bfong@osler.com](mailto:bfong@osler.com)

**W. David Rankin**

Tel: (416) 862-5662  
Email: [drankin@osler.com](mailto:drankin@osler.com)

**BORDEN LADNER GERVAIS LLP**

World Exchange Plaza  
100 Queen Street, Suite 1300  
Ottawa, Ontario K1P 1J9  
Fax: (613) 230-8842

**Guy J. Pratte / Nadia Effendi**

Tel: (613) 787-3521

Email: [GPratte@blg.com](mailto:GPratte@blg.com)

Counsel for the Appellant, York University

**AND TO INTERVENERS:**

**CABINET PAYETTE**

47 rue Wolfe  
Lévis, QC G1V 3X6

Daniel Payette  
Tel: (418) 837-2521  
Fax: (418) 838-9475  
Email: [cabinetpayette@videotron.ca](mailto:cabinetpayette@videotron.ca)

Counsel for the Intervener,  
COPIBEC

**OSLER, HOSKIN & HARCOURT LLP**

1900 – 340 Albert Street  
Ottawa, Ontario K1R 7Y6  
Fax: 613.235.2867

**Geoff Langen**

Tel: (613) 787-1015  
Email: [glangen@osler.com](mailto:glangen@osler.com)

Ottawa Agent for the Appellant,  
York University

**DEVEAU AVOCATS**

867, boul. Saint-René Ouest, bureau 8  
Gatineau, QC J8T 7X6

Frédéric Langlois  
Tel: (819) 243-2616 Ext: 224  
Fax: (819) 243-2641  
Email: [flanglois@deveau.qc.ca](mailto:flanglois@deveau.qc.ca)

Ottawa Agent for Counsel for the Intervener,  
COPIBEC

**LENCZNER SLAGHT ROYCE SMITH  
GRIFFIN LLP**

130 Adelaide Street West  
Suite 2600  
Toronto, ON M5H 3P5

**Sana Halwani  
Paul-Erik Veel  
Jacqueline Chan**

Tel: (416) 865-3733  
Fax: (416) 865-2857  
Email: [shalwani@litigate.com](mailto:shalwani@litigate.com)

Counsel for the Interveners,  
Authors Alliance & Ariel Katz

**JFK LAW CORPORATION**

340 - 1122 Mainland Street  
Vancouver, BC V6B 5L1

**Robert Janes, Q.C**

Tel: (250) 405-3466  
Fax: (604) 687-2696  
Email: [rjanes@jfklaw.ca](mailto:rjanes@jfklaw.ca)

Counsel for the Intervener,  
CALL

**CANADIAN ASSOCIATION OF  
UNIVERSITY TEACHERS  
AND CANADIAN FEDERATION OF  
STUDENTS**

2705 Queensview Drive  
Ottawa, ON K2B 8K2

**Jeremy de Beer  
Immanuel Lanzaderas  
Sarah Godwin**

Tel: (613) 263-9155  
Email: [Jeremy@JeremydeBeer.ca](mailto:Jeremy@JeremydeBeer.ca)

Counsel for the Interveners,  
CAUT & CFS

**SUPREME ADVOCACY LLP**

100- 340 Gilmour Street  
Ottawa, ON K2P 0R3

**Marie-France Major**

Tel: (613) 695-8855 Ext: 102  
Fax: (613) 695-8580  
Email: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

Ottawa Agent for Counsel for the Intervener,  
CALL

**GOLDBLATT PARTNERS LLP**

500-30 Metcalfe St.  
Ottawa, ON K1P 5L4

**Colleen Bauman**

Tel: (613) 482-2463  
Fax: (613) 235-3041  
Email: [cbauman@goldblattpartners.com](mailto:cbauman@goldblattpartners.com)

Ottawa Agent for Counsel for the Interveners,  
CAUT & CFS

**UNIVERSITY OF OTTAWA**

Faculty of Law  
57 Louis Pasteur St.  
Ottawa, ON K1N 6N5

**David Fewer**

Tel: (613) 562-5800 Ext: 2558  
Fax: (613) 562-5417  
Email: [dfewer@uottawa.ca](mailto:dfewer@uottawa.ca)

Counsel for the Intervener,  
CIPPIC

**FACULTE DE DROIT, UNIVERSITE DE MONTREAL**

Pavillon Maximilien-Caron  
local A-7426  
3101, chemin de la Tour  
Montréal, QC H3C 3J7

**Prof. Dr. Me Ysolde Gendreau**

Tél.: (514) 343-6062  
Email: [ysolde.gendreau@umontreal.ca](mailto:ysolde.gendreau@umontreal.ca)

Counsel for the Interveners, CDACI & Chaire  
Wilson

**GOWLING WLG (CANADA) LLP**

Barristers and Solicitors  
160 Elgin Street, Suite 2600  
Ottawa ON K1P 1C3

**D. Lynne Watt**

**Matthew Estabrooks**

Tel: (613) 786-8695  
Fax: (613) 788-3509  
Email: [lynne.watt@gowlingwlg.com](mailto:lynne.watt@gowlingwlg.com)  
[matthew.estabrooks@gowlingwlg.com](mailto:matthew.estabrooks@gowlingwlg.com)

Counsel for the Intervener,  
SOCAN

**GOWLING WLG (CANADA) LLP**

160 Elgin Street, Suite 2600  
Ottawa, ON K1P 1C3

**Guy Régimbald**

Tel: (613) 786-0197  
Fax: (613) 563-9869  
Email: [guy.regimbald@gowlingwlg.com](mailto:guy.regimbald@gowlingwlg.com)

Ottawa Agent for Counsel for the Interveners,  
CDACI & Chaire Wilson

**GOWLING WLG (CANADA) LLP**  
100 King Street, W, Suite 1600  
Toronto, ON M5X 1G5

**John E. Callaghan**  
Tel: (416) 369-6693  
Fax: (416) 862-7661  
Email: [john.callaghan@gowlingwlg.com](mailto:john.callaghan@gowlingwlg.com)

**Laurent Massam**  
Tel: (416) 369-6674  
Fax: (416) 862-7661  
Email: [laurent.massam@gowlingwlg.com](mailto:laurent.massam@gowlingwlg.com)

**James Green**  
Tel: (416) 369-7102  
Fax : (416) 862-7661  
Email: [james.green@gowlingwlg.com](mailto:james.green@gowlingwlg.com)

Counsel for the Intervener,  
Copyright Collective of Canada

**STOHN HAY CAFAZZO DEMBROSKI  
RICHMOND LLP**  
133 King Street East, 2nd Floor  
Toronto, ON M5C 1G6  
Fax: 416-961-2021

**Erin Finlay**  
Tel: (416) 961-2020 ext. 242  
Email: [erin@stohnhay.com](mailto:erin@stohnhay.com)

**Max Rothschild**  
Tel: (416) 961-2020 ext. 255  
Email: [max@stohnhay.com](mailto:max@stohnhay.com)

Counsel for the Interveners,  
Collective Societies Coalition

**GOWLING WLG (CANADA) LLP**  
160 Elgin Street, Suite 2600  
Ottawa, ON K1P 1C3

**D. Lynne Watt**  
Tel: (613) 786-8695  
Fax: (613) 788-3509  
Email: [lynne.watt@gowlingwlg.com](mailto:lynne.watt@gowlingwlg.com)

Ottawa Agent for Counsel for the Intervener,  
Copyright Collective of Canada

**GOWLING WLG (CANADA) LLP**  
160 Elgin Street, Suite 2600  
Ottawa, Ontario K1P 1C3  
Fax: (613) 788-3587

**Jeff Beedell**  
Tel: (613) 786-0171  
Email: [jeff.beedell@gowlingwlg.com](mailto:jeff.beedell@gowlingwlg.com)

Ottawa Agent for Counsel for the Interveners,  
Collective Societies Coalition

**STOHN HAY CAFAZZO DEMBROSKI  
RICHMOND LLP**

133 King Street East, 2nd Floor  
Toronto, ON M5C 1G6  
Fax: (416) 961-2021

**Erin Finlay**

Tel: 416-961-2020 ext. 242  
Email: [erin@stohnhay.com](mailto:erin@stohnhay.com)

**Max Rothschild**

Tel: (416) 961-2020 ext. 255  
Email: [max@stohnhay.com](mailto:max@stohnhay.com)

Counsel for the Interveners,  
Producers Coalition

**GOWLING WLG (CANADA) LLP**

160 Elgin Street, Suite 2600  
Ottawa, ON K1P 1C3  
Fax: 613-563-9869

**Stéphane Caron**

Tel: (613) 786-0177  
Email: [stephane.caron@gowlingwlg.com](mailto:stephane.caron@gowlingwlg.com)

**Julia Werneburg**

Tel: 613-783-8841  
Email: [julia.werneburg@gowlingwlg.com](mailto:julia.werneburg@gowlingwlg.com)

**Ronald E. Dimock**

Tel: (416) 862-3580  
Email: [ron.dimock@gowlingwlg.com](mailto:ron.dimock@gowlingwlg.com)

Counsel for the Interveners,  
IAF, IFRRO and IPA

**GOWLING WLG (CANADA) LLP**

160 Elgin Street, Suite 2600  
Ottawa, Ontario K1P 1C3  
Fax: (613) 788-3587

**Jeff Beedell**

Tel: (613) 786-0171  
Email: [jeff.beedell@gowlingwlg.com](mailto:jeff.beedell@gowlingwlg.com)

Ottawa Agent for Counsel for the Interveners,  
Producers Coalition

**GOWLING WLG (CANADA) LLP**

160 Elgin Street, Suite 2600  
Ottawa, Ontario K1P 1C3  
Fax: (613) 788-3587

**Jeff Beedell**

Tel: (613) 786-0171  
Email: [jeff.beedell@gowlingwlg.com](mailto:jeff.beedell@gowlingwlg.com)

Ottawa Agent for Counsel for the Interveners,  
IAF, IFRRO and IPA

**STOCKWOODS LLP**  
Toronto-Dominion Centre  
TD North Tower, Box 140  
77 King Street West, Suite 4130  
Toronto ON M5K 1H1

**Brendan van Niejenhuis**  
Tel: (416) 593-7200  
Fax: (416) 593-9345

**Hebb & Sheffer (in association)**  
1 Palace Pier Court, Suite 902  
Toronto, ON M8V 3W9

**Warren Sheffer**  
Tel: (416) 556-8187

Counsel for the Interveners,  
Canadian Writers & Publishers

**RIDOUT & MAYBEE LLP**  
11 Holland Avenue Suite 601  
Ottawa, Ontario, Canada K1Y 4S1

**Howard P. Knopf**  
Tel: (613) 288-8008  
Fax: (613) 236-2485  
Email: [hknopf@ridoutmaybe.com](mailto:hknopf@ridoutmaybe.com)

Counsel for the Proposed Intervener,  
CARL

**COPYRIGHT CONSORTIUM OF THE  
COUNCIL OF MINISTERS OF  
EDUCATION, CANADA**  
5496 Whitewood Avenue  
Ottawa, ON K4M 1C7

**Wanda Noel**  
**Ariel Thomas**  
Tel: (613) 794-1171  
Fax: (613) 692-1735  
Email: [wanda.noel@bell.net](mailto:wanda.noel@bell.net)

Counsel for the Intervener,  
CMEC

**Michael Sobkin**  
Barrister and Solicitor  
331 Somerset Street West  
Ottawa, ON K2P 0J8

Telephone: (613) 282-1712  
Fax: (613) 288-2896  
Email: [msobkin@sympatico.ca](mailto:msobkin@sympatico.ca)

Ottawa Agent for the Interveners,  
Canadian Writers & Publishers

**FASKEN MARTINEAU DUMOULIN LLP**  
55 rue Metcalfe, Bureau 1300  
Ottawa, ON K1P 6L5

**Sophie Arseneault**  
Tel: (613) 696-6904  
Fax: (613) 230-6423  
Email: [sarseneault@fasken.com](mailto:sarseneault@fasken.com)

Ottawa Agent Counsel for the Intervener,  
CMEC



**CASSELS BROCK & BLACKWELL LLP**  
Scotia Plaza, 40 King St. W., Suite 2100,  
Toronto, ON M5H 3C2

**Casey M. Chisick**  
**Jessica A. Zagar**  
Tel: (416) 869-5403  
Fax: (416) 644-9326  
Email: [cchisick@cassels.com](mailto:cchisick@cassels.com)  
[jzagar@cassels.com](mailto:jzagar@cassels.com)

Counsel for the Interveners,  
Music Industry Associations

**FASKEN MARTINEAU DUMOULIN LLP**  
Barristers and Solicitors  
Suite 1300, 55 Metcalfe Street  
Ottawa, Ontario K1P 6L5

**J. Aidan O'Neill**  
**Stacey Smydo**  
Tel: (613) 236-3882  
Fax: (613) 230-6423  
Email: [aoneill@fasken.com](mailto:aoneill@fasken.com)

Counsel for the Intervener,  
CICan

**UNIVERSITIES CANADA**  
1710 - 350 Albert Street  
Ottawa, ON K1R 1B1

**Philip Landon, VP, COO**  
Tel: (613) 563-1236 Ext: 215  
Fax: (613) 563-9745  
Email: [plandon@univcan.ca](mailto:plandon@univcan.ca)

Counsel for the Intervener,  
Universities Canada

**GOWLING WLG (CANADA) LLP**  
160 Elgin Street, Suite 2600  
Ottawa, ON K1P 1C3

**D. Lynne Watt**  
Tel: (613) 786-8695  
Fax: (613) 788-3509  
Email: [lynne.watt@gowlingwlg.com](mailto:lynne.watt@gowlingwlg.com)

Ottawa Agent for Counsel for the Interveners,  
Music Industry Associations

**MCMILLAN LLP**  
2000 - 45 O'Connor Street  
Ottawa, ON K1P 1A4

**David Kent/Jonathan O'Hara**  
Tel: (613) 691-6176  
Fax: (613) 231-3191  
Email: [david.kent@mcmillan.ca](mailto:david.kent@mcmillan.ca)

Ottawa Agent for Counsel for the Intervener,  
Universities Canada

## TABLE OF CONTENTS

<b>Overview .....</b>	<b>1</b>
<b>Amount of the Dealing: Fair Dealing Cannot be Purely Quantitative.....</b>	<b>1</b>
<b>Amount of the Dealing: the Works Copied are Qualitatively Significant .....</b>	<b>3</b>
<b>Copied works are not licensed or public domain.....</b>	<b>4</b>
<b>Purpose of the Dealing: the trial judge did not only consider commercial purposes .....</b>	<b>5</b>
<b>Neither the <i>Charter</i> nor academic freedom are instructive in the fairness analysis .....</b>	<b>5</b>
<b>Effect of the Dealing on the Work: No New Arguments .....</b>	<b>6</b>
<b>CARL and Authors Alliance/Ariel Katz Facts should be approached with caution .....</b>	<b>6</b>
<i>The Standing Issue .....</i>	<i>7</i>
<i>Authors Alliance/Ariel Katz' Misunderstanding of the Repertoire Issue .....</i>	<i>8</i>
<i>Misrepresentation of the evidence .....</i>	<i>9</i>
<i>The effect of the dealing focusses on markets, not individual works .....</i>	<i>10</i>
<b>TABLE OF AUTHORITIES .....</b>	<b>12</b>

## **Overview**

1. The central question on York's appeal is whether its Fair Dealing Guidelines excuse its extensive copying activities from copyright obligations. This factum is Access Copyright's response to the seven interveners who support York's position on Fair Dealing.

2. Access Copyright submits all of these interveners have made the same mistake as York by urging a selective review of the facts instead of a holistic approach. Whether it is an artificially quantitative approach to fair dealing, relying on licences that York could not prove, misunderstanding the significance of academic freedom, misapplying *CCH*, or an uninformative discussion about *Charter* values, all seven have one thing in common: a failure to respect the idea of balance between equally important objectives that underlies the *Copyright Act*.

3. In addition to being incorrect, two interveners – the Authors Alliance/Ariel Katz and the Canadian Association of Research Libraries (CARL) – filed factums that are clearly improper. Both raise new issues, contrary to this Court's order. The Authors Alliance/Ariel Katz also stray from the evidentiary record, making some assertions that are not based in the evidence and others that are clearly contrary to the evidence. Access Copyright therefore respectfully asks the Court to treat those factums with particular caution.

### **Amount of the Dealing: Fair Dealing Cannot be Purely Quantitative**

4. It is trite law that fairness requires consideration of many different factors in order to find the balance between the rights of creators and the rights of users. Intervenors such as Colleges and Institutes of Canada (CICan) or the Council of Ministers of Education (CMEC) urge the Court to permanently change that balance, by adopting a purely quantitative analysis, arguing that educational institutions require a "fixed percentage" rule in the name of simplicity.

5. These intervenors are directing their argument to the wrong audience. The fairness factors were well-established when the *Copyright Modernization Act* was enacted. If Parliament wanted to change the fairness test into a percentage threshold (*e.g.*, copying 10% of a work is fair), it could have easily done so. But it retained the multi-factor test, in which fairness is assessed by considering all the facts before the court.

6. Assessing fairness using all the facts means that percentages from prior cases cannot be used as bright line tests or rules of law. CMEC cites a variety of different cases, but each has its own specific set of facts, with different factors pointing towards fairness or unfairness.

Temporary copies of degraded-quality music previews that enhances the market for the original work cannot be equated with permanent copies of perfect quality print that competes with, and harms, the original work.

7. While CMEC points to prior decisions in which the proportions of the works copied were used in the assessment of the amount of the dealing factor, it fails to appreciate the difference between this case and a tariff-setting process. When the Copyright Board sets tariffs, it sometimes considers what volume of the pages copied will be fair dealing, and applies a discount on the royalty payable. It does this by applying the six fair dealing factors to the evidence before it. In recent tariff proceedings involving Access Copyright, the Board lacked any qualitative evidence to allow it to assess the qualitative aspects of the “amount of the dealing”. As a result, it was reasonable in these circumstances for the Board to assess the amount of the dealing factor purely on the quantitative proportions that were copied.<sup>1</sup> But this is just one factor in a multi-factor test. It certainly does not mean that fair dealing can be assessed on that quantitative threshold alone.<sup>2</sup>

8. CMEC also tries to compensate for York’s failure to justify its own thresholds, by pointing to Copyright Board decisions. But it misconstrues what the Copyright Board actually did. It has never given a blanket stamp of approval to a 10% threshold. And, contrary to CMEC’s suggestion, it found that copying an entire article was *not* fair.<sup>3</sup> In any case, prior decisions, with different facts, will necessarily be of limited use in the assessment of whether York’s dealing is fair.

9. CMEC and CICA’s argument that educators need certainty does have one salutary effect: it exposes the myth of the “student’s perspective” upon which they and York base their argument. It is not the students who are asking for certainty because it is not the students who are doing the copying. Rather, it is the institutions who set the policy, and make the copies, and stand

---

<sup>1</sup> *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, [2018 FCA 58](#) (CanLII), para. 138. Unlike the Board, the trial judge had such evidence before him- see *Canadian Copyright Licensing Agency v. York University*, [2017 FC 669](#) (CanLII), paras. 310-311, 317 (“*FC Decision*”)

<sup>2</sup> [Copyright Board Decision \(Provincial and Territorial Governments 2005-2014 Tariff\) dated May 22, 2015](#), para. 337 (“*Governments Tariff Copyright Board Decision*”)

<sup>3</sup> [Copyright Board Decision \(Elementary and Secondary Schools – 2010-2015\) dated February 19, 2016](#), para. 287; [Governments Tariff Copyright Board Decision](#), para. 340

to benefit from the financial savings that come from implementing guidelines in place of a licence.

**Amount of the Dealing: the Works Copied are Qualitatively Significant**

10. In this case, a focus on quantity alone would be especially wrong, because the trial judge accepted that much of what was copied was qualitatively important. York does not challenge these findings, because they were based in the evidence. The interveners who argue the contrary – including both Canadian Association of University Teachers/Canadian Federation of Students (CAUT/CFS) and the Authors Alliance/Ariel Katz – are both incorrect and exceeding an intervener’s mandate.

11. Contrary to CAUT/CFS’ submission<sup>4</sup>, there was evidence about the qualitative importance of the work. York’s own teachers admitted that they selected excerpts from published works for copying and assembly into print coursepacks or for posting on a learning management system (LMS) because the works they copied reflected a great deal of research, pedagogical expertise, complex intellectual analysis, and original thought, or because the copied excerpts illustrated an important concept or idea.<sup>5</sup> The trial judge accepted this evidence. It is not appropriate for CAUT/CFS to challenge this finding when York has not done so.

12. The Authors Alliance/Ariel Katz and CICan make a similar factual mistake in discussing the *Hockey Sweater*.<sup>6</sup> It was not – as they suggest – an “abstract” example selected by Access Copyright for effect. Rather, the evidence before the trial judge showed that it was copied into coursepacks no fewer than 37 times from an anthology of short stories by Roch Carrier.<sup>7</sup> Another Carrier short story, *The Secret Lost in the Water*, was copied 95 times from the same anthology.<sup>8</sup>

13. There is no basis in the record to suggest these or other copies of entire works are apocryphal examples or a “highly unlikely scenario.” The record showed that when a York

---

<sup>4</sup> CAUT/CFS’ Factum, para. 32

<sup>5</sup> *FC Decision*, paras. 333-335; Evidence of M. Martel at 890 (line 2) to 891 (line 11), Appeal Book Electronic Version (“A.B.E.V.”) Tab 226, pp. E-73397-8; Evidence of A. Pitt at 1184 (line 21) to 1185 (line 21), 1186 (line 8) to 1187 (line 1), A.B.E.V., Tab 228, pp. E-73691-4; Evidence of P. Safai at 1332 (line 25) to 1333 (line 21), A.B.E.V., Tab 229, pp. E-73839-40; Evidence of J. Warren at 1431 (line 26) to 1432 (line 20), A.B.E.V., Tab 229, pp. E-73938-9.

<sup>6</sup> Authors Alliance/Ariel Katz’ Factum, para. 19; CICan’s Factum, paras. 24-26

<sup>7</sup> Evidence of J. Lamantia at 2493 (line 18) to 2495 (line 3), A.B.E.V., Tab 240, pp. E-75118-20

<sup>8</sup> Evidence of J. Lamantia at 2495 (lines 4-12), A.B.E.V., Tab 240, p. E-75120

teacher copied an excerpt from a book, *over one-third* of the time the books are anthologies containing multiple entire works. And over 90% of the time when that occurred, the coursepack contained an entire discrete work.<sup>9</sup>

14. CAUT/CFS also raises the strange suggestion that the dealing is more likely to be fair because the works are “curated” by York teachers.<sup>10</sup> But this argument is circular, since this “curating” is done without permission of the original authors, and is only permitted if it is fair dealing. Indeed, editors and publishers of anthologies or journals also “curate” discrete works for inclusion in these compilations but need permission from the creators of those discrete works to actually publish them in these compilations.

### **Copied works are not licensed or public domain**

15. CIGan claims (without evidence) that the education sector spends millions of dollars per year in licences to educational publishers.<sup>11</sup> While that may be true in abstract, it ignores the facts of this case. York abandoned its claim that some of the copies it made were licensed. It was unable to prove that those licences covered any of the works that York *actually copied*.<sup>12</sup> This is not a surprise. The majority of works in coursepacks are copied from books. By York’s own admission, over 99% of the books copied on its LMS are not covered by licences.<sup>13</sup> Its library licences covered primarily journal articles and a few e-books.<sup>14</sup>

16. Other interveners argue that “[p]ublic domain and open access materials are a major portion of the works teachers and students use.”<sup>15</sup> This is also incorrect. York itself only identified 10 items (out of 1812) in the entire coursepack and LMS study sample as open access or public domain material.<sup>16</sup>

---

<sup>9</sup> Expert report of B. Gauthier, Tables 2.17, 3.7, Trial Exhibit P-33, A.B.E.V., Tab 100, pp. E-51084, E-51096

<sup>10</sup> CAUT/CFS’ Factum, paras. 28-30

<sup>11</sup> CIGan’s Factum, para. 21

<sup>12</sup> [FC Decision](#), paras. 91, 281, 287

<sup>13</sup> Expert Report of P. Wilk, Table 3.4, Trial Exhibit D-51, A.B.E.V., Tab 165, p. E-53341 (66,065 claimed book exposures/8,140,565 total book exposures = 0.8 %)

<sup>14</sup> Evidence of P. Lynch at 825 (line 13) to 826 (line 4), A.B.E.V., Tab 225, p. E-73332-3; Evidence of C. Olsvik at 1797 (lines 1-7), A.B.E.V., Tab 231, p. E-74304

<sup>15</sup> CAUT/CFS’ Factum, para. 2

<sup>16</sup> Evidence of P. Lynch at 778 (lines 2-26), A.B.E.V., Tab 225, p. E-73285

17. The interveners seek to minimize York's copying under its guidelines, but the record is clear: York is engaging in mass reproduction of copyrighted works without a licence. The full scope of York's use of works therefore needs to be considered in the fair dealing analysis.

**Purpose of the Dealing: the trial judge did not only consider commercial purposes**

18. Some interveners have tried to characterize the trial judge's decision as being premised on York's commercial motivations for its dealings.<sup>17</sup> But that is incorrect. The trial judge understood the goal of the dealing was "multifaceted." He referenced York's educational purposes in several parts of his reasons, stating "there is no dispute that the copying by York was done for educational purposes generally,"<sup>18</sup> and that "[e]ducation was a principal goal, specifically education for the end user."<sup>19</sup> However, he also recognized that financial considerations played a role in York's dealing. Appreciating that the dealing had multiple purposes is not an error of law – it is essential to analyzing fair dealing on all the facts.

**Neither the *Charter* nor academic freedom are instructive in the fairness analysis**

19. Certain interveners, such as the Canadian Internet Policy and Public Interest Clinic (CIPPIC) and CAUT/CFS, try to import values that are external to the copyright regime into the fair dealing balance, such as the *Charter* value of freedom of expression or academic freedom. While Access Copyright does not deny the importance of either of these concepts in abstract, neither is relevant on the facts of this case.

20. CIPPIC cites "*Charter* values"<sup>20</sup> but they do not assist in this case. York's copying is not transformational, in which the user is advancing the purposes of copyright by creating their own work that does not compete with the main work (like parody or satire). York is simply photocopying or scanning works and compiling them into digital or physical coursepacks. As CIPPIC's own counsel wrote in an academic paper, when users are "motivated by economic considerations such as the desire to avoid royalty payments," their expressive interests are "marginal at best."<sup>21</sup> As he wrote in the same paper, "economic piracy cannot ride on the

---

<sup>17</sup> CIPPIC's Factum, paras. 30-31, 33; CAUT/CFS' Factum, para. 25

<sup>18</sup> [FC Decision](#), para. 267

<sup>19</sup> [FC Decision](#), para. 273

<sup>20</sup> CIPPIC's Factum, paras. 13-18

<sup>21</sup> David Fewer, "[Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada](#)" (1997) 55 University of Toronto Faculty of Law Review at pp. 196-7

coattails of *Charter* rights.”<sup>22</sup>

21. The principle of academic freedom raised by CAUT/CFS<sup>23</sup> is similarly very remote from the fairness assessment. Academic freedom encompasses the freedom of university instructors to teach controversial ideas and select their own materials to do so. It has nothing to do with the central question in this case, which is whether York can use copyrighted works without cost or consequence. The alleged conflict between academic freedom and enforcing compliance is a red herring. York instructors testified that monitoring would not offend their academic freedom. One said that such oversight would be “welcome.”<sup>24</sup>

### **Effect of the Dealing on the Work: No New Arguments**

22. Echoing York’s argument, one intervener argues that the lower courts should not have considered the “forgone licensing fees” in assessing the effect of the dealing.<sup>25</sup> But there is no legal basis for this assertion. There was a robust licensing market for the educational copying of works prior to the implementation of the guidelines. The loss of such revenues had a material negative impact on creators and publishers, and was appropriate to consider as part of the fair dealing analysis.

23. More importantly, the loss of licensing revenue was merely one of many adverse effects of York’s copying found by the trial judge. He also found that copying under the guidelines caused substitution for the purchase of works and an accelerated drop in sales of works.<sup>26</sup> This is more than sufficient to conclude that the effect of the dealing on the works points away from fair dealing.

### **CARL and Authors Alliance/Ariel Katz Factums should be approached with caution**

24. CARL argues that the courts below made palpable and overriding errors with respect to the issues of aggregate copying and the absence of safeguards.<sup>27</sup> York did not assert any palpable

---

<sup>22</sup> *Ibid*, p. 229

<sup>23</sup> CAUT/CFS’ Factum, paras. 11-12

<sup>24</sup> 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

<sup>25</sup> Canadian Association of Law Libraries’ Factum, paras. 17, 19

<sup>26</sup> Expert Report of M. Dobner, paras. 175-176, Trial Exhibit P-97, A.B.E.V., Tab 206, pp. E-71187-8; [FC Decision](#), paras. 108, 111-115, 133, 347-349, 351

<sup>27</sup> CARL’s Factum, para. 22



and overriding errors. An intervener is supposed to provide a different perspective on the issues raised by the parties, not raise new issues. Moreover, this Court does not require interveners to assist it with questions of fact. CARL has also improperly taken a position on the outcome of the case, and raises the issue of whether the Federal Court should have issued the declaration.<sup>28</sup> It is not entitled to do any of that.

25. While CARL's factum is problematic, it pales in comparison to the egregious overreach and misstatements contained in the factum of the Authors Alliance/Ariel Katz. Like CARL, the Authors Alliance/Ariel Katz also improperly raise the appropriateness of the declaration (although it phrases it as "standing"), and improperly take a position on the outcome of the case. But even worse, they both mis-state the evidence and make factual statements without any evidentiary basis.

### *The Standing Issue*

26. Neither York nor Access Copyright objected to the Courts below issuing declarations. The reason is simple: York's entire counterclaim was a request for a declaration. But both CARL and the Authors Alliance/Ariel Katz argue that since this is not an action for infringement, it is inappropriate to assess fair dealing.

27. They are wrong to even raise this issue. The Court's order granting these parties leave to intervene specifically says that the interveners may not raise any new issues not raised by the parties. While the Court welcomes interventions, it does so to ensure that it has all the appropriate perspectives, not to expand the issues in the case.

28. They are also wrong on the merits of this issue. Access Copyright brought an action to enforce non-payment of royalties set out in one of its approved tariffs, as s. 68.2(1) of the *Copyright Act*, permits it to do. York defended this tariff enforcement action, claiming that the copies of published works made by its teachers in accordance with York's Fair Dealing Guidelines constituted fair dealing and were thus exempt from any tariff obligations. York also brought an independent counterclaim seeking a declaration that any copies of published works made in accordance with these guidelines constituted fair dealing under section 29 of the *Act*.

---

<sup>28</sup> CARL's Factum, paras. 4, 20

While granting a declaration is a discretionary decision, Rule 64 of the *Federal Courts Rules* gives the Court jurisdiction to do so.<sup>29</sup>

29. There is no requirement that copyright owners be parties to a tariff enforcement action or otherwise be direct participants in the proceedings. In *Alberta*, the underlying copyright owners were not parties to the case: the case originated in the Copyright Board and made its way to this Court by way of an application for judicial review.<sup>30</sup> Even if this issue was properly before the Court (*i.e.*, raised by one of the parties), it has no basis in law.

***Authors Alliance/Ariel Katz' Misunderstanding of the Repertoire Issue***

30. The Authors Alliance/Ariel Katz also raise unwarranted challenges to the breadth of Access Copyright's repertoire and entitlement to royalties. But they either do not understand the procedural steps that underlie this appeal or do not care. The question of which works copied by York teachers fall within Access Copyright's repertoire was *deferred* to Phase II of the trial<sup>31</sup> and the declaratory relief sought by York was not limited to copies made of works within that repertoire.<sup>32</sup>

31. The Authors Alliance/Ariel Katz' submission that "Access Copyright implies that every copy relevant to York's fair dealing guidelines...originates from its repertoire..."<sup>33</sup> and that Access Copyright has suffered the loss of royalty payments "to which they have never been legally or even morally entitled"<sup>34</sup> are completely wrong, raise issues that York has not raised, and misunderstands the procedural steps. This is not the proper role of an intervener.

32. The Authors Alliance/Ariel Katz also ask the Court "to consider the interests of authors who want to serve the public good by sharing their creations broadly and who support copyright rules that prioritize dissemination of their works over excessive restrictions on their use."<sup>35</sup> But

---

<sup>29</sup> *Federal Courts Rules*, SOR/98-106, [Rule 64](#)

<sup>30</sup> *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012 SCC 37](#) (CanLII), [2012] 2 SCR 345, paras. 2, 4, 10-11

<sup>31</sup> Case Management Orders dated July 30, 2014 and May 9, 2016, FCA Record, Book of Essential Documents ("B.E.D."), Tab 12 (pp. 296-304) and Tab 14 (pp. 308-311)

<sup>32</sup> Consent filed April 4, 2016, B.E.D., Tab 13, pp. 305-307

<sup>33</sup> Authors Alliance/Ariel Katz' Factum, para. 12

<sup>34</sup> Authors Alliance/Ariel Katz' Factum, para. 13; It is notable that the "evidence" cited in support of this unfounded statement was the intervener here, Ariel Katz.

<sup>35</sup> Authors Alliance/Ariel Katz' Factum, para. 4

every author has a choice whether to enforce their copyright or not enforce it. If the Authors Alliance/Ariel Katz are content to allow their works to be freely copied and disseminated, they do not have to participate in collective administration. No one is forcing them. But the Court should not mistake them for the authors and publishers who make a living from selling and licensing their creations, who are (as the trial judge found) so deeply and adversely affected by York’s guidelines.<sup>36</sup>

***Misrepresentation of the evidence***

33. Finally, the most significant problem with the Authors Alliance/Ariel Katz’ submissions is that their factual assertions are based on academic articles and not the evidentiary record. Here are three important misstatements of the evidence:

<b>Paragraph</b>	<b>Misstatement</b>	<b>Evidence</b>
8	“Most works used for research and teaching in universities are academic works created by academic authors.”	Many of the works copied at York were those of professional authors and publishers, who rely on royalties to earn a living and invest in future works. <sup>37</sup>
11	“Even for non-academic authors (and even for small publishers), the benefits of wide readership and the signals they send often generate greater economic gains than the gains from royalties.”	Access Copyright royalties were very important to the livelihood of professional writers, and the viability of small and medium sized publishers. Neither of these groups need the “assistance” of any Guidelines to provide wider dissemination of their works. <sup>38</sup>
17, 18	“Coursepacks are not copies or excerpts from textbooks, and Access Copyright never argued otherwise.” “The trial judge’s finding of harm focus on the decrease in the sales of textbooks, which he attributed in part to an increase	Seventy four percent of copies were from books, including excerpts made of textbooks. <sup>39</sup> Access Copyright’s witnesses testified regarding examples of textbooks copied by York as revealed by the sample study

<sup>36</sup> [FC Decision](#), paras. 25, 108, 351-352

<sup>37</sup> Expert Report of M. Dobner, paras. 61-72, Trial Exhibit P-97, A.B.E.V., Tab 206, pp. E-71143-50; [FC Decision](#), para. 336

<sup>38</sup> Expert Report of M. Dobner, paras. 61-72, 154-164, Trial Exhibit P-97, A.B.E.V, Tab 206, pp. E-71143-50, E-71181-85; Evidence of J. Degen at 2425 (lines 14-25), A.B.E.V., Tab 238, p. E-75004; [FC Decision](#), para. 337

<sup>39</sup> 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 A.B.E.V., Tab 100, p. E-51096-B

	in the use of coursepacks. Even if that causality were correct, it is irrelevant because the textbooks are not the works that were copied.”	that was conducted as part of the York case. <sup>40</sup>
--	---	--

***The effect of the dealing focusses on markets, not individual works***

34. The Authors Alliance/Ariel Katz argue that the trial judge erred by considering the effects of the dealing under the guidelines on the market for the works and the content creators who supply that market. They argue that a trier of fact must restrict the assessment to the impacts on individual works.<sup>41</sup> This argument misunderstands *CCH* entirely.<sup>42</sup> This Court did not restrict its “effect of the dealing” analysis to the individual works that were copied. It considered whether the *markets* for the works had been negatively affected by the dealing. In that case, there was no evidence that the dealing depressed the publication of *new* works. Hence, the assessment of this factor pointed toward fairness.

35. The trial judge was therefore fully entitled to consider whether the dealings allowed for under the guidelines had any impacts on the market for the works, including whether the dealing negatively affected the ability of creators and publishers to create and publish new works. The evidence overwhelmingly established both that the copying substituted for the purchase of individual works and other negative economic impacts on content creators and the markets for their works. It also showed that this resulted in a reduction in the quantity, quality, diversity and indigeneity of future works, to the continuing economic detriment of content creators and the educational detriment of users.<sup>43</sup>

36. In short, the Authors Alliance/Ariel Katz’ factum is not only improper, it is unreliable. The Court should exercise extreme caution before relying on any statements contained in it – it is not a fair summary of the evidentiary record.

---

<sup>40</sup> Evidence of J. Lamantia at 2496 (line 14) to 2497 (line 15), A.B.E.V., Tab 240, p. E-75121-2; Evidence of M. Andrews at 2033 (line 20) to 2039 (line 17), A.B.E.V., Tab 234, p. E-74571-7

<sup>41</sup> Authors Alliance/Ariel Katz’ Factum, para. 16

<sup>42</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004 SCC 13](#) (CanLII), [2004] 1 SCR 339, para. 72

<sup>43</sup> [FC Decision](#), paras. 108, 133, 140, 143, 345-353

May 6, 2021

ALL OF WHICH IS RESPECTFULLY SUBMITTED

*Sheila Block*

---

Sheila R. Block

*[Handwritten signature]*

*for:*

---

Arthur Renaud

*[Handwritten signature]*

*for:*

---

Asma Faizi

**TABLE OF AUTHORITIES**

<b>CASES</b>	<b>Cited in paras.</b>
<i>Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)</i> , <a href="#">2012 SCC 37</a> , [2012] 2 SCR 345	29
<i>Canadian Copyright Licensing Agency (Access Copyright) v. Canada</i> , <a href="#">2018 FCA 58</a>	7
<i>Canadian Copyright Licensing Agency v. York University</i> , <a href="#">2017 FC 669</a>	7, 11, 15, 18, 23, 32, 33, 35
<i>CCH Canadian Ltd. V. Law Society of Upper Canada</i> , <a href="#">2004 SCC 13</a> , [2004] 1 SCR 339	34
<a href="#">Copyright Board Decision (Elementary and Secondary Schools – 2010-2015) dated February 19, 2016</a>	7
<a href="#">Copyright Board Decision (Provincial and Territorial Governments 2005-2014 Tariff) dated May 22, 2015</a>	7

<b>SECONDARY SOURCES</b>	<b>Cited in paras.</b>
David Fewer, “ <a href="#">Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada</a> ” (1997) 55 <i>University of Toronto Faculty of Law Review</i>	20

<b>STATUTORY PROVISIONS</b>	<b>Cited in paras.</b>
<i>Federal Courts Rules</i> , SOR/98-106, <a href="#">Rule 64</a> <i>Règles des Cours fédérales</i> , DORS/98-106, <a href="#">R. 64</a>	28